

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

17th SEPTEMBER 2020, 10.03-

1 JUDGE BARAITSER: Yes. Good morning. Please sit down. So, where have we got to?

2 Mr Fitzgerald?

3 MR FITZGERALD: Yes.

4 JUDGE BARAITSER: Who are you calling next?

5 MR FITZGERALD: We are reaching agreement on some matters and, madam, if after the
6 witness has been heard this morning you can give us 15 minutes we are making progress in
7 reaching agreement on witnesses who can be read.

8 JUDGE BARAITSER: Thank you. That is very helpful.

9 MR FITZGERALD: My learned friend and myself have been having discussions.

10 JUDGE BARAITSER: Thank you. Now, Professor Sloboda, does he appear in person or
11 over the link please?

12 MS IVESON: He appears over the link, madam. I believe he is in the waiting room.

13 JUDGE BARAITSER: Lovely. Yes, good.

14 COURT USHER: Good morning. Can you hear the sound of my voice?

15 WITNESS: I can, thank you.

16 COURT USHER: And you can see the court upon the monitor in front of you?

17 WITNESS: I can, yes.

18 COURT USHER: Lovely.

19 PROFESSOR JOHN SLOBODA, Affirmed

20 Examined-in-chief by MS IVESON

21 JUDGE BARAITSER: Thank you very much. Ms Iveson, your witness.

22 Q. Are you Professor John Sloboda?

23 A. I am.

24 MS IVESON: Madam, can I just confirm, have you had a three tab bundle from my learned
25 friend?

26 JUDGE BARAITSER: I have, yes, thank you.

27 MS IVESON: And a short CV ---

28 JUDGE BARAITSER: Yes.

29 MS IVESON: --- that should have reached you this morning?

30 JUDGE BARAITSER: I have, yes, thank you.

31 MS IVESON: I am grateful.

32 Q. Professor Sloboda, can you hear me OK?

33 A. I can hear you very well, thank you.

- 1 Q. Thank you. You have provided a joint statement in this case with Mr Hamit
2 Dardagan dated 17 July 2020, have you not?
- 3 A. Correct.
- 4 MS IVESON: And madam, Professor Sloboda's statement is at tab 63 of your bundle.
5 JUDGE BARAITSER: Thank you.
- 6 Q. It is a joint statement but are you happy to speak to the entire contents of that
7 statement today?
- 8 A. I am.
- 9 Q. And is the contents of the statement true?
- 10 A. It is true.
- 11 Q. And you are happy for it to stand as your evidence?
- 12 A. I would be very happy for it.
- 13 Q. And I am just going to briefly run through some of your qualifications. You have a
14 PhD from University College London from 1974, is that right?
- 15 A. Correct.
- 16 Q. You were a lecturer and professor of psychology at Keele University from 1974 to
17 2008?
- 18 A. Correct.
- 19 Q. You co-founded Iraq Body Count with Hamit Dardagan in 2003?
- 20 A. Correct.
- 21 Q. From 2007 to 2014 you were co-director with Mr Dardagan of recording casualties of
22 Armed Conflict programme through the Oxford Research Group, is that right?
- 23 A. That is right.
- 24 Q. You co-directed from 2014 to the present every casualty worldwide also with Mr
25 Dardagan?
- 26 A. Correct.
- 27 Q. You were awarded an OBE in 2018 for services to psychology and music?
- 28 A. Yes.
- 29 Q. And you published a number of papers on psychology, terrorism, and civilian
30 casualties in armed conflicts, is that right?
- 31 A. That is correct.
- 32 Q. Moving to your statement then, you and Mr Dardagan co-founded Iraq Body Count.
33 In a couple of sentences, can you just explain what the purpose of that website is?

1 A. Indeed. The Iraq Body Count is an independent review that carried out only
2 comprehensive monitoring, how did they report the casualties in Iraq from the 2003 invasion
3 and it is published on a continuously updated website through iraqbodycount.org.

4 Q. And in terms of how your data has been used you set out in your statement that Iraq
5 Body Count has been recognised as an authority on civilian deaths in Iraq both by the US and
6 UK governments, is that right?

7 A. That is correct.

8 Q. Also, the EU, the International Criminal Court, the World Bank and others.

9 A. Indeed. Including if I may add the report, the Chilcot inquiry report into the Iraq war
10 initiated by the UK Government in which Iraq Body Count advised the Government about
11 civilian casualties in that report.

12 Q. Yes.

13 MS IVESON: And madam, can I just clarify for the court, when we talk about the Iraq war
14 logs, which appears in this statement, I am sure you realise that those documents are referred
15 to as the Iraq significant activity reports in the various indictments?

16 Q. Professor Sloboda, at page 2 of your report you set out that the protection of civilians
17 is universally accepted as a pre-condition of lawful armed conflict and you set out there also
18 that the deliberate targeting of civilians is a war crime, is that right?

19 A. That is correct, yes.

20 Q. And you deal with more broadly why it is important that civilian deaths in armed
21 conflicts are carefully monitored. Can you just briefly summarise for the court the reasons
22 that monitoring of civilian deaths in conflicts is important?

23 A. Of course. Any information available about civilians who were not protected, which
24 was the primary view of the (inaudible) of a non-combatant, but instead met a violent death
25 was in relation of the utmost gravity and significance. It is (inaudible) to the memory of
26 those killed and it also contributes to the purposes of truth, justice and reconciliation. And
27 knowing how one's loved one died is a fundamental human need. And casualty recording
28 can also on a larger scale uncover patterns of harm and trends which would reveal, for
29 example, the vulnerability of particular sections of the population to armed violence on those
30 who are killing which disproportionately affects civilians.

31 MR SMITH: Forgive me for raising one brief matter, I can see that the witness is reading
32 from something perhaps to his bottom right. It may well be his witness statement ---

33 JUDGE BARAITSER: I think it probably is. Let me just check.

1 MR SMITH: I do not object necessarily to him having it as a memory refreshing document
2 but I am not sure that it is going to assist us in chief to have him simply read the statement
3 into the record. Apologies for interrupting my learned friend.

4 JUDGE BARAITSER: Well, he is welcome to read from his statement if he wishes to. Is
5 that what you are looking at, Professor? Your statement?

6 A. Indeed it is. It is my signed statement.

7 JUDGE BARAITSER: Yes, it is not a memory test, you are very welcome to use your
8 statement if it assists you. Yes.

9 MS IVESON: Thank you, madam.

10 A. Thank you.

11 Q. Professor Sloboda, you were saying that it is fundamental human need to know how
12 one's loved ones died and you have also talked about the information that recording civilian
13 deaths uncovers. Could you just finish what you were saying about that?

14 A. I think I had got to the end of that. It is in the statement. It is really recognised in a
15 lot of contexts that public (inaudible) name by name, person by person is what we would all
16 aspire to as a civilised planet.

17 Q. And before you worked with the Iraq war logs what were the sources of information
18 that you drew upon for your website?

19 A. These were mainly news-gathering organisations producing original material and
20 professional editorials and so on, so the global media. The reason that this was possible was
21 because from around 2000, the internet became so ubiquitous, search engines became so
22 powerful that all global media were publishing their articles not only in paper but in
23 electronic form, so it became very easy around that time to begin to harvest in a very, very
24 comprehensive way all public domain information about any subject, including civilian
25 deaths in the Iraq war and, as it were, archive them using the, you know, increasingly proven
26 storage capacity of the internet and computers for posterity.

27 Q. Can you briefly summarise what was the impact of the Iraq war logs in particular on
28 your ability to harvest information about civilian deaths in Iraq?

29 A. Well, this was the largest single contribution to knowledge about civilian casualties in
30 the Iraq war that has so far come to light as a single body of paper. So it actually contributed,
31 or potentially contributed, by a sampling of the log we were able to interrogate in detail about
32 15,000 hitherto unknown deaths.

1 Q. And the deaths that were revealed, those 15,000 previously unknown civilian deaths,
2 what types of incidents were reported in the war logs from which you derived those 15,000
3 unknown deaths?

4 A. The war logs were very meticulous, a daily record of US military on patrol, in the
5 streets, in every area of Iraq, noticing and documenting what they saw and a whole range of
6 security incidents, including any deaths and, indeed, injuries that came to their attention.
7 Sometimes gives names of victims translated from the Arabic into English and very precise
8 details of the time, the location in terms of co-ordinates. Very often far more detailed
9 information than was available in press and media reports that we had previously collected.
10 So that even when the deaths that we learnt about were not new, very often incredibly useful
11 and important additional detail was added through the Iraq war logs.

12 Q. I just want to talk now about your collaboration with WikiLeaks to work on the Iraq
13 war logs. It is right, is it not, that Iraq Body Count approached WikiLeaks when you became
14 aware of the possible publication of the Iraq war logs proposing to work together on those?

15 A. That is absolutely so because we believed that with the information that we already
16 had about Iraqi civilian deaths to date, we were in a unique position to be able to actually
17 assess what was new in these logs.

18 Q. And in terms of what you wanted to achieve from the war logs, is it right that you
19 wanted to ensure they were analysed with the appropriate rigour and the deaths and incidents
20 which were reported on had actually been confirmed to have happened?

21 A. That is the case because each of the incidents in our database was already date, time
22 and place and it was relatively straightforward, although indeed very laborious to cross check
23 with entries in the Iraq war logs and discover that there was a new incident in there because
24 there was nothing in that date, time or place in our database up to that point to which it could
25 be attached.

26 Q. And in terms of your wish to treat the war logs with a high level of rigour, what was
27 Mr Assange's attitude to your suggested approach?

28 A. He was absolutely welcoming of it and, indeed, after our first serious encounter with
29 him he immediately suggested that we join a consortium of media organisations, including
30 The Guardian, The New York Times and others, would have pre-publication access to the
31 logs so that we could do some preliminary analyses and have something serious and rigorous
32 to say about them before they were released in their highly redacted form in October 2010.

33 Q. And you were dealing, were you not, with 400,000 documents, which comprised the
34 Iraq war logs. Did those documents contain information which needed redacting?

1 A. Indeed they did, although of course we were not in a position to interrogate all
2 400,000, but we were aware, and indeed it was impressed upon us from very early in our
3 encounter with Mr Assange and WikiLeaks that the aim was the very, very stringent
4 redaction of the logs before publication.

5 Q. Sorry, just to be clear. The aim was a very stringent redaction. Whose aim was that?

6 A. That was the aim of Mr Assange and WikiLeaks.

7 Q. And the purpose of the redactions?

8 A. Was to ensure that no information which could be damaging to living individuals,
9 including those involved, or others, would be present in the version of the logs which was
10 made public.

11 Q. And was it realistic to do that by hand?

12 A. Absolutely not. It would have taken an army of people a very long time and so the
13 call was out, came a call which came from Mr Assange and WikiLeaks' organisation to try
14 and find a method which would be both protective but also would not take forever, and, in
15 fact, it was my colleague and co-witness, Hamit Dardagan, who came up with the idea which
16 found favour as both workable and something which could be done in a relatively short
17 period of time, but by "short period of time", we are talking weeks, not hours, and that
18 process was instigated and everyone was assigned to that process.

19 Q. And what was the process?

20 A. I have a broad layman's understanding of what that process was because I am not a
21 programmer or an IT person, but of course I was fully involved in the decision to try to do
22 that redaction. Basically, it was to take a relatively simple English language dictionary and
23 then automatically remove from every log any word which was not in that dictionary. That in
24 some ways over-redacted, for example, there were very useful acronyms in the log, such as
25 CIB, which were used whenever there was a civilian either injured or killed, so we then
26 needed to un-redact those kinds of acronyms and other words.

27 But also there was some further redaction that was needed, for example, of
28 occupations, like translator, driver, et cetera, because it would be conceivable in some cases
29 that the mere mention of the occupation of a particular person would be enough to identify
30 them. So occupations were one of the categories that were removed in addition to the others
31 that were redacted because they were not in the dictionary.

32 There are other details in the (inaudible) which I am afraid I am not privy to, but
33 colleagues would be, but I think the court gets the general gist of the principles which were
34 applied to the redactions.

1 Q. And you said that this was a process which took weeks. You have also described it as
2 a painstaking process. What was the approach of Mr Assange to this process?

3 A. There were considerable pressures on the co-founder of WikiLeaks to hurry up
4 because the partners wanted to publish and those pressures were consistently and clearly
5 rejected. They could not be published before a redaction had been agreed with which
6 everyone was satisfied, and that was stuck to completely consistently with no equivocation
7 throughout the time that we were dealing with Mr Assange and the WikiLeaks' organisation.

8 Q. And, so sorry, just for clarity, when you said that was stuck to completely, do you
9 mean by all of the media partners or were you talking about there Mr Assange, in particular?

10 A. I think everybody realised that anything published needed to be redacted. I think it
11 was the case that some of the media partners had examined and redacted a small sample of
12 the logs by hand and so were willing, or even wanted, to go ahead and publish those, but
13 Julian Assange and the WikiLeaks' position, as I understand it, is that they did not want
14 partial publication, they wanted the entire war logs published before any media source, as it
15 were, revealed any part of that, and that was what was stuck to throughout the process that we
16 worked with them.

17 Q. And when the documents were released in October 2010, what was the extent of
18 redaction?

19 A. They were I think, and many people who want to use them would agree, they were
20 over-redacted for caution. There was probably material in those perfectly harmless, but the
21 approach taken was to be over-cautious and then in certain circumstances possibly on closer
22 examination un-redact, but the first priority was to get all the logs out there in a very over-
23 redacted form.

24 Q. And you will be aware of criticism of Mr Assange for the release of other redacted
25 documents and the allegation that individuals may have been put in harm's way as a result.
26 Do you have any particular view on that?

27 A I can only speak to the Iraq war logs. We were not involved in any way with
28 Mr Assange's, or WikiLeaks', leaks of other data sets, particularly the Afghanistan and the
29 diplomatic cables. We had no involvement whatsoever in that, no knowledge of the
30 processes involved. So I can only attest here in this court that the Iraq war logs, which were
31 published in 2010, October, and were made accessible to us in the months leading to that,
32 were published in a wholly appropriate, highly redacted form.

33 Q. And finally, just going back a little bit, you say in your report that one way of
34 measuring perceived public importance of the 15,000 civilian deaths revealed by the Iraq war

1 logs is to analyse the number of press and media reports which specifically reported on those
2 15,000 civilian deaths. What conclusion do you draw about how the Iraq war logs affected
3 public awareness of civilian deaths in Iraq?

4 A. Well, we did a Google search using, “15,000 deaths - Iraq war logs” and we found
5 that there were 40,000 web URLs that (inaudible) from 2010 to 2020. That is a very, very
6 large number of – and these will mainly be press and media reports in the different
7 constituencies. As for Russia, in comparison, there are about the same number of URLs that
8 searched the Iraqi deaths. So, in other words, you could say in a way that the WikiLeaks’
9 release brought the issue of the very high number of civilian casualties in the war to the
10 largest global audience of any single release in any given war.

11 Q. And since they were released has any other official public information been released
12 by the US Government, or allies in Iraq, about the number of civilian deaths in the Iraq war?

13 A. In particular, with respect to the incidents that we have now added to the Iraq Body
14 Count database, all of them which were unique to the logs in 2010 are still unique with the
15 log. There was no other public domain force has come forward to corroborate or provide
16 independent evidence about those particular deaths, so the Iraq war logs remain the only
17 source of those deaths.

18 MS IVESON: Thank you. If you just wait there, my learned friend will have some questions
19 for you.

20 JUDGE BARAITSER: Thank you. Mr Smith.

21 Cross-examined by MR SMITH

22 MR SMITH: Thank you. My lady, I have just been looking at the Criminal Practice
23 Direction and we may have had it wrong all along. We are still sitting in this court and
24 technically it is “my Lady.” We will confirm that over the luncheon adjournment.

25 JUDGE BARAITSER: Well, it is only that I have convened as a magistrates’ court within
26 the Old Bailey.

27 MR SMITH: The Practice Direction says: “Any judge sitting at the Central Criminal Court
28 should be referred to as my Lord or my Lady.” There we are.

29 JUDGE BARAITSER: I bow to that. I am very happy to be promoted. Yes.

30 MR SMITH: Professor Sloboda, can you hear me?

31 A. I could not until just now. You have become much more distinct in the last seconds.

32 Q. Yes, we have just turned the microphone on so I want to make sure that you can hear
33 me.

34 A. Yes, absolutely clearly now. Thank you.

- 1 Q. I am going to be asking you some questions on behalf of the Government of the
2 United States of America. If the microphone stops working or you cannot hear me, please let
3 me know. If the question is unclear, that is my fault. Please let me know and I will make it
4 clear, alright?
- 5 A. Thank you.
- 6 Q. First of all your background. Your academic background is in psychology, correct?
- 7 A. Correct.
- 8 Q. And, in fact, I think the interplay between psychology and music is your particular
9 area of interest.
- 10 A. It has become my major specialism in that domain, yes.
- 11 Q. And you are based in England.
- 12 A. Yes, in London currently.
- 13 Q. And you started, I am going to refer to it as IBC, the Iraq Body Count, you started
14 IBC in 2003.
- 15 A. Yes, with Hamit Dardagan.
- 16 Q. And is it fair to say, as I think it was described in the article, the interview you gave
17 with Mother Jones, when you started off, it was a weekends and evenings project.
- 18 A. I had a full time job, so yes, I was doing it in the time after my job was done.
- 19 Q. And as you have described to the judge, it was an exercise in data collection, looking
20 for all the sources from which you could assess the level of civilian casualties in Iraq and
21 collated them in one place to be as accurate as possible.
- 22 A. That is the basic idea, yes.
- 23 Q. And it is fair to say, therefore, that you have no significant experience or expertise in
24 the classification or declassification of sensitive material.
- 25 A. No. No experience in that.
- 26 Q. And equally, no knowledge of or experience in the use or handling of co-operating
27 sources in oppressive regimes.
- 28 A. Could you elaborate on that question? I do not quite understand some of the terms
29 you have used.
- 30 Q. Have you any experience of handling a co-operating source, that is to say somebody
31 providing information to a foreign government in an oppressive regime?
- 32 A. No.

1 Q. Your expertise – this is not, I should make it clear, by any means a criticism,
2 professor, I just want to find the limits of your expertise. Your expertise was in the collation
3 of statistics and cross-checking those statistics against what was already known.

4 A. Collation of a document, not statistics. It was a document which contained
5 descriptions of events.

6 Q. So that is why you and Mr Dardagan approached Mr Assange concerning what had
7 been called the Iraq war logs or the significant activity reports.

8 A. Yes. We understood, and indeed, there is some evidence already from the previous
9 police in Afghanistan that such logs would contain these very documentary reports of
10 civilians being killed which were the basis of the documents that we had already collected
11 from the press and media and other public domain sources.

12 Q. So, we are clear, the Afghanistan war logs had already been released.

13 A. Yes.

14 Q. And there were rumours that you had picked up that there might be a similar release
15 in relation to Iraq. Yes.

16 A. Yes, there were indications that something was coming.

17 Q. And so, you approached Mr Assange and after your first meeting, he gave you or
18 decided you would be given access to the full cache of material.

19 A. That is correct. On exactly the same non-disclosure basis that all the media partners
20 in that consortium were given.

21 Q. So, that is the full 400,000 documents.

22 A. Yes.

23 Q. And what was the vetting process that you underwent before you were given access to
24 those documents?

25 A. My memory of it is that we paid a visit to the offices of the Bureau of Investigative
26 Journalism and were asked to sign a non-disclosure agreement after a discussion with the
27 then director, Iain Overton.

28 Q. Signed a non-disclosure agreement. What was the vetting procedure that you
29 underwent before you signed the agreement?

30 A. I do not remember a vetting procedure, I have to say.

31 Q. So, you were handed 400,000 classified documents without being vetted.

32 A. I am just wanting some clarification here. Who are you suggesting might have done
33 that vetting?

1 Q. Well, did WikiLeaks or Julian Assange undertake any vetting procedure in relation to
2 you, the person they were about to hand over 400,000 sensitive documents?

3 A. I do not know.

4 Q. What is your experience of source protection, Professor Sloboda?

5 A. I know it is important. It is not something that I have personally have to, in a specific
6 way in relation to a specific source, that I have to be involved.

7 Q. Are you aware of what is known by, or what is often referred to as jigsaw risk or
8 jigsaw identification?

9 A. I have not heard that term before, but I imagine it might be something to do with
10 piecing together from different bits of information something that might lead eventually to
11 the identity of an individual.

12 Q. I am just asking, if the name, for example, of an individual is not explicitly
13 mentioned, it could be pieced together from a number of other pieces of information which
14 are not so explicit. Was that a risk that you were aware of in 2010?

15 A. It was a risk that we certainly felt and it was one of the reasons why additional
16 information, although that information was the same initially, was redacted such as
17 occupation, which was the obvious category.

18 Q. When was it that you first spoke to Julian Assange?

19 A. From memory, it was in late July 2010. I cannot give a precise date I am afraid.

20 Q. Can you remember how long after the release of the Afghan war logs it was?

21 A. Some good while, I think.

22 Q. Those were released in late July 2010.

23 A. That is information that I am not able to verify from memory, but if you say so, then
24 very well.

25 Q. If I am wrong about that, I am going to be corrected very quickly to my left, so until I
26 am corrected, let us take that as red. If that is right, how long after did you meet Mr
27 Assange?

28 A. Well, it would have been weeks. I think it was July.

29 Q. So, mid-August?

30 A. Yes. Thereabouts.

31 Q. You have an initial meeting with Mr Assange and he decides you are going to be
32 welcomed into the fold, yes?

33 A. Yes.

34 Q. How long after that initial meeting did you get access to the full cache?

- 1 A. I cannot remember but it would probably be days.
- 2 Q. And how was that given to you?
- 3 A. I am afraid that is probably more detail that I do not have at my disposal and my
4 colleague, Hamit Dardagan, probably has a better perception of that.
- 5 Q. How did you keep the material?
- 6 A. Me personally?
- 7 Q. Yes.
- 8 A. I had access to it on the secure server that we all had access to at the time.
- 9 Q. When you say all, how many people had access to it?
- 10 A. The four people in the organisation who were tasked as working on the material.
- 11 Q. So, there are four people from IBC.
- 12 A. Yes.
- 13 Q. Are you aware if any of them were vetted?
- 14 A. No.
- 15 Q. How many people from other organisations had access to the material?
- 16 A. I do not know, but quite a considerable number if you include the newspapers that had
17 access and other independent organisations. I am not able to give detail on that. I do not
18 know how many people in the Guardian had that access to the bundle.
- 19 Q. If you cannot answer this question, professor, I understand entirely. Are you able to
20 give an approximate number? Hundreds? Thousands?
- 21 A. No. I am not able to even conjecture a guess as to how many people the editor of the
22 Guardian (inaudible).
- 23 Q. Do you know how many people in WikiLeaks had access to the material?
- 24 A. No. I do not know much about the staffing structure of WikiLeaks, how many people
25 even work for him. I personally had a contact with Kristinn Hrafnsonn, if that is the right
26 name. I think he was then the director of WikiLeaks or a director, but apart from that, I am
27 afraid I have really no knowledge of or have indeed had any direct contact with any other of
28 the people that work at WikiLeaks around this issue.
- 29 Q. In your witness statement, professor, because I am looking – forgive me because it is
30 not paginated, but I am looking at page 6 which is the page which should say, ‘Scrutiny,’ in
31 the very top left hand corner, if we have got the same copy.
- 32 A. I do not think we have the same copy. Which numbered point are we on?
- 33 Q. We are on number 4, observations on the steps taken in relation to publication.
- 34 A. Which paragraph is that of the report?

- 1 Q. There is a first paragraph which begins, “IBC approach.” Can you see that?
- 2 A. Yes. I can see that.
- 3 Q. If you turn over the page, there should be a larger paragraph beginning, “Much of
4 what we have stated further above.” I hope everybody else has got it.
- 5 A. I have the paragraph now, thank you.
- 6 Q. Well, let us just have a look at what you say in that paragraph, professor, and then I
7 am going to ask you some questions, but first, just so that you are orientated in that
8 paragraph. You said, “Much of what we have stated further above and our gratitude to Mr
9 Assange and WikiLeaks as well as Chelsea Manning we have already put on public record.
10 What we have not stated publicly before today concerns another crucial matter, the ways in
11 which complex and innovative steps were taken to publish the important content of the Iraq
12 war logs in the most responsible way.” Pausing there, responsible way, professor, that would
13 presumably include not naming people who had given information to the US Government.
- 14 A. Absolutely.
- 15 Q. I do not think this is going to prove controversial, professor, your website has been
16 collating data on civilian casualties in Iraq for some time now, is that correct?
- 17 A. We began in 2003.
- 18 Q. And it collates data on civilian casualties, not only caused by US sources but also by
19 other sources as well.
- 20 A. Absolutely, any civilian casualty from violence.
- 21 Q. And the vast majority, in fact, are, and this is not a criticism, but are down to
22 unknown sources according to your website’s statistics.
- 23 A. That is correct.
- 24 Q. But there are also statistics relating to civilian casualties caused by Iraqi Government
25 forces, correct?
- 26 A. Yes.
- 27 Q. Opposition or insurgent forces, correct?
- 28 A. Mmm.
- 29 Q. And more latterly by Islamic State.
- 30 A. Correct.
- 31 Q. And certainly, from 2006 onwards, there was a significant problem, for whatever
32 reason, with sectarian violence in Iraq.
- 33 A. There was. There was a huge increase in it.

1 Q. And that underlines, does it not, the danger that any individual who had co-operated
2 with the American authorities would be put in if they were named publicly as a co-operating
3 source.

4 A. Indeed.

5 Q. So, responsibility journalism would be not naming co-operating sources. We return to
6 your statement, professor. “We were aware,” it is the next sentence, I hope I have not taken
7 you away from it so we can see where they are from, “We were aware that the publication of
8 the Afghan war logs previously had constituted a very challenging exercise beyond any
9 previous experience and, as a result of the steep learning curve for all concerned, we knew
10 that ways should be found to prevent confusion and provide safeguards.” So, what was that
11 steep learning curve?

12 A. I think it must refer to the learning curve, it was realised that it was - there was some
13 information revealed in the Afghan war logs that a future leak should avoid.

14 Q. It was the names of individuals who had co-operated with the Americans, yes?

15 A. I am told so, yes.

16 Q. It is your statement, is that what you were referring to?

17 A. The allegation that that was the case, yes.

18 Q. And so, there was an awareness within WikiLeaks at that time that the previous
19 Afghan war logs had identified sources.

20 A. I cannot remember whether that was an issue that came up in the conversations we
21 had with Julian Assange, my memory is not clear on that particular point, whether it was that
22 specific.

23 Q. That is why I am asking you, Professor, what the very challenging exercise and steep
24 learning curve is that you are referring to in your statement.

25 A. I believe it was just a sense that there needs to be a better process for the next round.

26 Q. A better process of redaction?

27 A. Yes, redaction.

28 Q. Because the previous process of redaction was flawed?

29 A. Clearly it was what - as it should have been, yes.

30 Q. Continuing with your statement: “Although it is clear there was considerable pressure
31 on Julian Assange and WikiLeaks to publish as quickly as possible”, pausing there; pressure
32 from who?

33 A. Primarily media partners.

1 Q. What one might call “traditional media”; the Guardian, Der Spiegel, The New York
2 Times?

3 A. That was our understanding, but we were told that there was pressure.

4 Q. Who told you that?

5 A. I believe we learned that from WikiLeaks, but I also believe that we picked it up in
6 general in the consultations that were going on with the media partners about the fact that a
7 provisional date for the log had been agreed, and then it had to be delayed because it was not
8 ready.

9 Q. Forgive me, Professor, when you say, “told by WikiLeaks”, does that mean Mr
10 Assange or Mr Hrafnsson; who does that mean?

11 A. I am afraid I do not remember. There are quite a lot of emails and messages; I do not
12 know who the person was this came from.

13 Q. Returning to your witness statement, Professor: “None of WikiLeaks media partners
14 were able to suggest a means by which the logs could be redacted in circumstances where
15 there was a full tranche of 400,000 logs, of which only tiny samples could be redacted and
16 edited by hand.” By mid-August, when you are onboard, the logs are unredacted; correct?

17 A. Correct.

18 Q. It is IBC who come up with a solution, not WikiLeaks, not the traditional media;
19 correct?

20 A. Correct. Significantly it was (inaudible).

21 Q. That solution is to develop some software. Now long did that take to develop?

22 A. A number of weeks.

23 Q. I am so sorry, Professor, it is my fault, I did not hear that.

24 A. A number of weeks.

25 Q. A matter of weeks.

26 JUDGE BARAITSER: A number of weeks.

27 MR LEWIS: A number of weeks. I am so sorry, Professor. My fault entirely. So the
28 software is on board by when, early to mid-September?

29 A. I am again speaking with a general but not a deep held knowledge of the processes by
30 which the programming was done, but I understand and was told that it was a process of
31 writing some software; testing it on (inaudible); identifying bugs, fixing the bugs, running it
32 again and doing this until the process was perfectly completed.

33 Q. Yes. I am just trying to get an assessment from your perspective as to the time when
34 it was completed. Was the software ready by early to mid-September?

- 1 A. It was not ready by the originally planned publication date which is why the
2 publication date was put back.
- 3 Q. What was the originally planned publication date?
- 4 A. I cannot remember that I am afraid.
- 5 Q. I would like you to help us with how you say the software worked. As I
6 understanding your evidence, which has gone a little further than your witness statement, the
7 software assisted you by redacting any word it did not recognise as English basically?
- 8 A. Yes.
- 9 Q. What you would be left with, you would hope, is all the English words; yes?
- 10 A. All the English words excepting, of course, proper names that do not appear in
11 dictionaries.
- 12 Q. Although some proper names do. “Summers” is a surname, it is also the proper of
13 “summer” and would appear in the dictionary?
- 14 A. Correct.
- 15 Q. These logs were written in English, were they not?
- 16 A. The logs were written in English, yes, although there were Iraqi names in them. The
17 names of victims, the only names we were interested in, would have been translated into
18 perhaps their English equivalents from Arabic.
- 19 Q. So you have left in your documents the vast majority of the document itself because it
20 will have been written in English; yes?
- 21 A. Yes.
- 22 Q. You have any Iraqi names which have been Anglicised and written in some sort of
23 approximation if they appear in the English dictionary; yes?
- 24 A. I do not think any of the Iraqi names would be in an English dictionary. We are
25 talking about words like Ahmed.
- 26 Q. We have professions?
- 27 A. Yes.
- 28 Q. Buildings?
- 29 A. I believe, but I would have to consult further with one of my colleagues, that some
30 buildings were redacted, like mosques. All professions, I understand, were redacted.
- 31 Q. The software leaves the professions in, yes?
- 32 A. Yes.
- 33 Q. We are going to get to the next stage in a second, I wanted to concentrate on the
34 software for a moment. The software would leave in the professions; yes?

- 1 A. No, I do not think that is right. The software was being constantly modified into the
2 different categories as issues arose during the process.
- 3 Q. Buildings?
- 4 A. Like I said, I understand that the software removed certain buildings, like mosques.
- 5 Q. Vehicles?
- 6 A. I am afraid I do not know the answer to that.
- 7 Q. Streets?
- 8 A. I do not know the answer to that either.
- 9 Q. So is the reality not that if this software worked as you say it is a good start, but a
10 human has to go back over the redacted logs to make sure nothing slipped through the net to
11 make sure there is no jigsaw risk?
- 12 A. That is what you say. I am afraid I am not expert enough to comment on that.
- 13 Q. Did any humans go back through the logs to ensure that the software had removed the
14 risk to individuals co-operating with the American authorities?
- 15 A. Clearly there was a process of checking with a sample of logs, but no human checked
16 them all, no.
- 17 Q. Of the 400,000 documents, how many were checked by humans?
- 18 A. I do not know.
- 19 Q. What sort of percentage?
- 20 A. I do not know.
- 21 Q. How long had you had to look at the logs before they were published?
- 22 A. About two months.
- 23 Q. You said, and I can take you to it in a second, the press conference that you attended
24 upon publication, you had a number of weeks and that you had only been able to scratch the
25 surface of what they revealed; is that fair?
- 26 A. That is fair.
- 27 Q. You, with an expertise in your particular field collating casualty data, had not been
28 able to understand the full import of the logs by the time they had been published?
- 29 A. We still do not. We are still working through the logs that contains information about
30 civilian casualties.
- 31 Q. You have said that Mr Assange shared your view as to the responsible manner in
32 which these logs should be published; you said that earlier today when you gave your
33 evidence.
- 34 A. Yes.

1 Q. Are you aware of the comments that Mr Assange has made publicly - - and perhaps in
2 fairness to you we should go to Mr Dwyer's affidavit which should be in the bundle that was
3 delivered to you today, tab 1 - -

4 JUDGE BARAITSER: It is the additional bundle, is it not?

5 MR SMITH: Yes, it is the bundle from this morning, Madam. Paragraph 44, page 90.

6 A. Yes, I have it.

7 Q. "Your recorded interview given...Mr Assange was challenged about the Afghan war
8 logs"; this is not Iraq, this is pre-Iraq, August 2010. Mr Assange called it "regrettable" that
9 "sources disclosed by WikiLeaks may face some threat as a result. At the same time,
10 WikiLeaks were not obligated to protect other sources, military sources or spy organisation
11 sources, except for unjust retribution, adding there are numerous cases where people sell
12 information and frame others, that are engaged in generally traitorous behaviour, and that is
13 something for the public to know about." Is that consistent with your understanding of Mr
14 Assange's approach to the protection of those co-operating with the American Government?

15 A. Today is the first time I have read this transcript. I was not aware of Mr Assange
16 having said these things. I remember nothing like that in our conversations in relation to the
17 Iraq war.

18 Q. Did he ever say anything to you to the effect that he found the process of redaction a
19 disturbing one?

20 A. I have no memory of any such conversation. My conversation was on a complete of
21 minds, meeting online, between him, WikiLeaks staff and us about the absolute (inaudible).

22 Q. Moving on to a slightly different subject now, Professor, and it is a subject which I
23 would love to explore but it may be that I have got the wrong end of the stick, so if I have
24 you will have to tell me pretty quickly. The Iraq Significant Activity Reports, not all of those
25 will have concerned civilian casualties, correct?

26 A. Absolutely.

27 Q. Not all are in your area of interest?

28 A. We were only interested in something over 40,000 logs, we had in the summary field
29 an indication that there were civilian deaths or - there are four categories individuals entered
30 in these logs: civilians, post nation, which contains Iraqi military but also the Iraqi security
31 bodies, including police - and in our categorisation police are categorised as "civilians" so we
32 were interested in those logs as well. The two other categories of logs, one of which was
33 "friendly", which was the US Military and their allies and the other one was "enemy" or

1 “hostile”, which were the various insurgent groups. We were not interested, for our purposes,
2 in reports of deaths of those categories.

3 Q. I understand. In those reports or logs that did contain details of civilian casualties,
4 was your main area of interest or your main source “battle reports”?

5 A. Yes, but also reports where a patrol may not be involved in a battle, but there was
6 gaining military intelligence, for example like a body in a vehicle or we might come across
7 some information of security of relevance and indeed, very often, this security of relevance
8 was the discovery of a dead civilian. Not necessarily the causing of it or the, you know,
9 being engaged in a conflict which led to it, sometimes yes but not always.

10 Q. But not always. All right. Well, we will leave that area to one side then. Returning
11 finally then to the release of the significant activity reports themselves, are you aware that
12 those logs did actually contain unredacted names of co-operating individuals?

13 A. I am aware that well after our association when the firms and WikiLeaks had ceased
14 sometime in 2011 before unredacted logs came into the public domain ---

15 Q. Forgive me, Professor, we are talking at crossed-purposes here because you may well
16 have misunderstood the position, and I will be corrected if I am wrong, but you are referring
17 to the cables which were later revealed in 2011 unredacted. I am talking about the Iraq logs,
18 the significant activity reports? They were released in October 2010, they contained
19 unredacted co-operating source names, were you aware of that?

20 A. I was not aware of that, no.

21 Q. Well, I am going to take you in fairness to you then to Mr Dwyer’s affidavit. Can we
22 go to paragraph 38 which is at page 15?

23 A. Yes, I am there.

24 Q. OK. Paragraph 38 is a bit of a run up for you, Professor, just to give you the
25 background but it is not the focus of the question. What I am going to do is go through three
26 or four paragraphs so that you can read them, I can read them and then I will ask the question,
27 all right?

28 So, paragraph 38, “Also, following Manning’s arrest during 2010 and 2011, Assange
29 published via WikiLeaks’ website the documents classified up to secret level that he had
30 obtained from Manning including approximately 75,000 Afghan war-related significant
31 activity reports.” That is the Afghan logs, that is July 2010. “400,000 Iraq war-related
32 significant activity reports”, that is your documents if I can call them those, Professor, the
33 documents that you had access to, they were October 2010. “800 Guantanamo Bay detainee
34 assessment briefs and 250,000 US State Department cables.”. That is 2011.

1 Paragraph 39, “The significant activity reports from the Afghan and Iraq wars that
2 Assange published included the names of local Afghans and Iraqis who had provided
3 information to US and coalition forces.”. Skipping down that paragraph, “According to
4 information by people with expertise in military intelligence and diplomatic matters ...” –
5 pausing there, Professor, those are areas outside your area of expertise, correct?

6 A. Correct.

7 Q. “... as well as individuals with expert knowledge of the political conditions and
8 governing regimes of the countries in which some of these sources were located. By
9 publishing these documents without redacting human sources names or other identifying
10 information, Assange created a grave and imminent risk that the innocent people he named
11 would suffer serious physical harm and/or arbitrary detention.”.

12 And over the page, Professor, we have some examples. Paragraph 41 (c), “Classified
13 document D1 was a 2009 report discussing an improvised explosive device attacking Iraq.
14 Classified document D1 named local human sources who provided information on the attack.
15 Classified document D1 was classified at secret level.”. And (d), “Classified Document D2
16 was a 2008 report that named a local person in Iraq who had turned in weapons to coalition
17 forces and had been threatened afterwards. Classified document D2 was classified to secret
18 level.”. Any explanation how those names were published, Professor?

19 A. If they were in the heavily redacted files published in October 2010, this is again the
20 first obviously that this document has been referred to me, these items, this is the first I have
21 heard of it.

22 Q. I appreciate that, Professor, but any explanation how it was that the October 2010
23 publications contained those names?

24 A. I have no explanation for that and ---

25 Q. Might it be because Mr Assange took a cavalier attitude to the publication of these
26 logs and to the redaction of persons who were placed at risk by their publication?

27 A. No.

28 Q. Well, what is the alternative?

29 A. I imagine the alternative is that some element of the redaction for some unknown
30 reason - and without seeing the particular logs referred to, that I or my colleagues go further
31 than that - for some reason the redaction programme allowed those names to remain in the
32 document, but that is simply conjecture. One would need to see the logs to know.

33 MR SMITH: Madam, I have nothing further.

34 A. In their redacted form.

1 JUDGE BARAITSER: Thank you very much.

2 MR SMITH: Forgive me, madam, there is one matter I just need to. Nothing further, thank
3 you.

4 JUDGE BARAITSER: Thank you. Ms Iveson?

5 MS IVESON: Can I just ask for a short break to take instructions?

6 JUDGE BARAITSER: You can. It is five past 10, are you asking for 10 minutes?

7 MS IVESON: Thank you very much.

8 JUDGE BARAITSER: Professor, we are just going to give the defence an opportunity to
9 speak to their client in case there is anything else they wish to raise with you. It will take
10 about 10 minutes. I am going to come back into court at quarter past 11 if you can make
11 yourself available then please.

12 A. I will do so.

13 JUDGE BARAITSER: Thank you very much.

14 (Short adjournment)

15 JUDGE BARAITSER: Thank you. Ms Iveson.

16 MS IVESON: Madam, thank you for that time. I have got no further questions for Professor
17 Sloboda.

18 JUDGE BARAITSER: Thank you.

19 MS IVESON: I do not know if you do?

20 JUDGE BARAITSER: There are no questions from me. I do not know if you understood
21 that Professor? The defence are not going to ask any further questions of you and there are
22 no questions from me which means your involvement in this case has concluded. You might
23 be on mute? I do not think it matters as long as you can hear me since there is no more
24 evidence to be given by you, but I just wanted to confirm my thanks to you for your time in
25 appearing today and your involvement has concluded. We are going to sever this link now.
26 Thank you very much. Thank you.

27 A. Thank you, madam.

28 (Witness withdrew)

29 JUDGE BARAITSER: Thank you very much. All right.

30 MR FITZGERALD: Yes. My lady, ---

31 JUDGE BARAITSER: Well, apparently so.

32 MR FITZGERALD: I am sorry.

33 JUDGE BARAITSER: I have not checked that. I have not checked that.

34 MR FITZGERALD: I know apparently the practice direction is clear.

1 JUDGE BARAITSER: Ah. Well, there you go.

2 MR FITZGERALD: My lady, could we have some time? We are having discussions. It
3 may involve some editing in some cases, but we think we can make some progress. I am not
4 saying everything will be agreed, but we can make some progress with some of the witnesses,
5 but it does involve obviously in the light of the clear guidance on the *Eason* case, my learned
6 friend wishes to go through the documents.

7 JUDGE BARAITSER: What I am looking for is the witness list. We are rather behind in
8 terms of calling witnesses.

9 MR FITZGERALD: Yes.

10 JUDGE BARAITSER: And that does give me some concern.

11 MR FITZGERALD: Yes.

12 JUDGE BARAITSER: Of course, we have several hours this morning. I appreciate you
13 need time to agree things with your counterpart.

14 MR FITZGERALD: Yes.

15 JUDGE BARAITSER: But, of course, that can be done not during sitting time. Is there
16 another witness lined up for this morning? Is there any possibility of making contact with a
17 witness?

18 MR FITZGERALD: There was one possibility, but that then proved impossible. My Lady,
19 what we had hoped to do was to have some discussions with my learned friend to see which
20 witnesses have to be called, to see which witnesses can be read in edited form, and then to
21 inform you about the progress in the light of that. I apologise. We do not have a back-up
22 witness. We did explore various possibilities I assure you.

23 JUDGE BARAITSER: Right. I am very happy to use that time to carry out the tasks that
24 you describe now, but, going forward, can those tasks take place outside sitting hours so that
25 we can use all the court time available ---

26 MR FITZGERALD: Yes, I see, yes.

27 JUDGE BARAITSER: --- to hear evidence.

28 MR FITZGERALD: Yes.

29 JUDGE BARAITSER: I know that you are making your best efforts and I am genuinely ---

30 MR FITZGERALD: Well, we thought we had reached ---

31 JUDGE BARAITSER: --- grateful to you for it, but I think having one witness who we know
32 was not going to take much more than an hour, or an hour and a half, and no other witnesses
33 during the course of the morning is probably not a good use of the court's time. Can you

1 reassure me that in the days that are coming better use of court time can be made in relation
2 to calling witnesses?

3 MR FITZGERALD: What I can reassure you, my Lady, is that we will do everything we can
4 to ensure that there are back-up witnesses. Obviously we were thrown into confusion by the
5 fact that we lost two days and some of those witnesses who we had hoped we could call this
6 week just simply are not available.

7 JUDGE BARAITSER: I know that you are doing everything possible and your reassurance
8 is helpful, but, please, we do need to use the court time available to us ---

9 MR FITZGERALD: Of course, of course.

10 JUDGE BARAITSER: --- to hear evidence.

11 MR FITZGERALD: We appreciate that.

12 JUDGE BARAITSER: All right. How long are you asking for to have your discussions?

13 MR FITZGERALD: I think we may need until lunchtime to try and sort this out, and then
14 we could tell you. Well, we will not take the whole of the afternoon, I would have thought,
15 with the next witness, so that then we could tell you after that witness what the backing list is
16 hopefully going to be.

17 JUDGE BARAITSER: Thank you, that would be helpful. Obviously witnesses who are
18 going to be read can be slotted in as and when.

19 MR FITZGERALD: Yes, yes, absolutely.

20 JUDGE BARAITSER: I do not need to allocate particular court time for that to take place.

21 MR FITZGERALD: No. We may well be able to read some this afternoon, or at least one
22 this afternoon.

23 JUDGE BARAITSER: All right. So nothing else that can be done until 2 o'clock. That is
24 what you are telling me?

25 MR FITZGERALD: No, not until 2 o'clock, madam.

26 JUDGE BARAITSER: So be it. Thank you. I will adjourn then until that time.

27 (Luncheon adjournment)

28 JUDGE BARAITSER: How are we managing with our link to Mr Shenkman? There he is.

29 OK. We are just waiting, Mr Shenkman, for a moment, but can I just check that you can hear
30 the court?

31 MR SHENKMAN: Yes. Can you hear me?

32 JUDGE BARAITSER: Yes, we can hear you. Thank you very much. We will just wait
33 patiently for Mr Assange to come into the dock. Thank you. Please sit down.

34 CAREY SHENKMAN, Affirmed

1 JUDGE BARAITSER: Thank you very much, Mr Shenkman. I am going to hand you over
2 directly to Mr Summers for Mr Assange.

3 Examiné-in-chief by MR SUMMERS

4 Q. Mr Shenkman, are you a constitutional scholar and historian?

5 A. Yes, I am a constitutional and human rights lawyer with a practice in New York City.

6 Q. Thank you very much. And your current area and specialism is what, please?

7 A. Constitutional law on human rights, specifically First Amendment (inaudible) law.

8 Q. And do you have any particular expertise in relation to the Espionage Act, please?

9 A. Yes. I have actually spent the better part of the last years co-authoring the first
10 historical volume updated to the (inaudible) Espionage Act as (inaudible).

11 JUDGE BARAITSER: Now. Thank you. Is there anything we can do about the quality of
12 the audio?

13 (Discussion regarding technical issue)

14 JUDGE BARAITSER: Mr Shenkman, we can certainly hear you, but not with great clarity,
15 and what I am going to ask you to do is to disconnect and reconnect, I am told, using a lower
16 band width. I am told there are options on your screen when you reconnect. Are you able to
17 do that for us?

18 WITNESS: I will do that right now.

19 JUDGE BARAITSER: Thank you very much. He is back.

20 WITNESS: Would you like me to test me on air? There was a line defects for a few
21 moments.

22 JUDGE BARAITSER: Yes, well, we can certainly hear what you are saying. It comes and
23 goes. I think we are going to try and make some progress and we will keep an eye on the
24 audio. There are other options if we consider your clarity not good enough, but we will make
25 a start. Thank you for trying that, Mr Shenkman.

26 MR SUMMERS: Mr Shenkman, your expertise on the Espionage Act, has it involved
27 lecturing on the issue?

28 A. Yes. Primarily I spend my time working on the book and I imagine speaking on this
29 will increase after that. To give some background, I have been co-authoring a volume of
30 enactment (inaudible) for (inaudible) New York University at ---

31 JUDGE BARAITSER: Not good enough.

32 WITNESS: --- (inaudible)

33 JUDGE BARAITSER: OK. Thank you.

34 WITNESS: My co-author is ---

1 JUDGE BARAITSER: I am going to interrupt you again.

2 MR SUMMERS: Pause for a moment, Mr Shenkman.

3 JUDGE BARAITSER: Mr Shenkman, your audio is not good enough. There are other
4 options. I think the better option is to use the video/telephone combination. Are we able to
5 set that up easily?

6 UNIDENTIFIED SPEAKER: We have not tested it.

7 JUDGE BARAITSER: All right. Well, what other options? Do you think this is an issue
8 our end or at his end?

9 UNIDENTIFIED SPEAKER: I think it might be his end with a slow internet connection.

10 JUDGE BARAITSER: You think it is his internet connection. Can you get an engineer to
11 confirm that it is not our end and that there is nothing else we can do to assist? Can we do
12 that now, please?

13 UNIDENTIFIED SPEAKER: (Inaudible).

14 JUDGE BARAITSER: All right. OK. I am going to rise whilst you find out. We need to
15 make absolutely sure there is nothing at our end, that the problem is his end. If it is our end I
16 need to know so we can take some action to solve that problem.

17 All right, Mr Shenkman, we are going to just try and involve others to make sure that
18 there is no issue with the equipment at our end. If it is an issue with your equipment there is
19 little we can do about that, but I just want to get to the bottom of the problem.

20 WITNESS: I understand. Is the issue one of feedback or is it that I am difficult to
21 understand.

22 JUDGE BARAITSER: The difficulty is although we can hear you loud and clear, your voice
23 breaks up at crucial moments. All right. I am going to rise. Come and find me, please, as
24 soon as there is some progress. Simon, can you keep me updated, please. Come and talk to
25 me in about 10 minutes so I can find out what is going on. All right. Thank you.

26 (Short adjournment)

27 JUDGE BARAITSER: Thank you very much. So, do we have a solution to the problem?

28 MR SUMMERS: Yes. It is one that involves Mr Shenkman holding the phone to his ear for
29 the duration of his testimony.

30 JUDGE BARAITSER: Alright.

31 MR SUMMERS: Can I see how we do?

32 JUDGE BARAITSER: You can and the sound is coming through CVP or through a
33 telephone?

34 MR SUMMERS: Through the CVP I believe.

1 JUDGE BARAITSER: Are you comfortable in that position, using the telephone in that
2 way?

3 WITNESS: I would not say it is the most comfortable but I could certainly do it for the
4 duration of the hearing. It seems that is the best option.

5 JUDGE BARAITSER: Thank you. If you need a break, please let me know and we will try
6 and arrange that for you. I am going to hand you back to Mr Summers now for your
7 evidence.

8 WITNESS: Thank you so much.

9 MR SUMMERS: Mr Shenkman, you have provided a report to this court dated the 18th of
10 December 2019. Is that right? Madam, your tab 4.

11 A. That is correct.

12 Q. And just to begin, is that report an accurate report?

13 A. Yes.

14 Q. And do you adopt it as your evidence in this case?

15 A. Yes I do.

16 Q. Thank you. Now, I have got a short time to take you through it. Can I take you to
17 paragraphs 3 and 4 to begin with?

18 A. Sure. I wanted to go back to your question earlier about my experience and the
19 background of my study. I just wanted to make sure that I adequately answered your
20 question because we got cut off.

21 Q. Thank you very much. I am sure you might be given an opportunity to speak more
22 about that later if anybody wishes to ask you, but for my purposes I am content with the
23 answer you gave, thank you. Can I ask you, please, about the topic you address at paragraphs
24 3 and 4 and then at other paragraphs like 13 and 18 and that is the breadth of the Espionage
25 Act. In brief terms, Mr Shenkman, how broad is this Act in its drafting?

26 A. The subject of my research of my co-author and me as historian for the past six years
27 has been the scope of the Espionage Act and its attempted application to the media and the
28 free flow of information, so as a way of background and what my report goes into is
29 historical analysis of the Espionage Act and the political context in which it was passed. The
30 Espionage Act was born out of what is considered by any serious person and a scholar to be
31 one of the most oppressive periods in the history of the United States. During World War 1,
32 there was initially serious opposition to the US entering the war but that changed and
33 Woodrow Wilson was able to garner support for US entry into the war and part of that
34 garnering support was cultivating opposition to defend against that war. Eventually, the

1 Espionage Act was part of a fleet of legislation that also included the Extradition Act a year
 2 later. That became a principal tool of what Woodrow Wilson, in his words, called the firm
 3 hand of stern repression against opposition to US participation in the war. In fact, he used
 4 language such as, ‘The law was intended to prevent the injection of the pleading of disloyalty
 5 into our most critical areas.’”

6 The Wilson administration even sought censorship powers against the press but it was
 7 rejected by Congress. So, what the Espionage Act did was it imposed penalties for criticism
 8 of the war, it imposed penalties for communication of information around the war. In the
 9 first 2,000 prosecutions of nearly 2,500 individuals, four political prosecutions under the
 10 Espionage Act, they included prosecutions of labour leader, Big Bill Haywood who was the
 11 leader of the International Workers for the World or the IWW. He was tried (inaudible).
 12 Also Eugene Debs, who at the time was the leader of the Socialist Party in the United States,
 13 he was a presidential candidate and it was the third largest political party in the United States.
 14 Debs was in prison for ten years under the Espionage Act over a speech in Ohio which was
 15 called the most famous protest speech of its time.

16 Q. Alright, just ---

17 A. (Inaudible).

18 Q. I do not mean to interrupt you, Mr Shenkman, but there is a fair bit I need to get
 19 through in a fairly short period of time. The Act of which you are talking, is it tightly drafted
 20 or broad in scope?

21 A. It is extraordinarily broad and the reason for that history is to provide context as to
 22 why it is so broad and how it was used initially as a result of (inaudible).

23 Q. Now, at paragraph 13, you cite some academic writings on its breadth. Is Edgar and
 24 Schmidt the only criticism that exists of the incomprehensible and confusing nature of this
 25 Act?

26 A. No. I would safely say that the Espionage Act is one of the most contentious laws in
 27 the United States for any serious scholar of constitutional law, a person in international
 28 security law, and there are many historical academics, there have been historians and the part
 29 of my research and the claims that I am making are consistent with what any serious
 30 academic and any serious analysis of the Espionage Act has to say about the law. You know,
 31 the most authoritative analysis is the one that was conducted by two Columbia University law
 32 professors, Harold Edgar and Benno Schmidt Jr to conduct an independent analysis of the
 33 law. In 1973, this was in the wake of the Pentagon Papers case and they decided to do an
 34 undertaking of the implications of the law for the press because of all the attention that the

1 issue received as a result of that case. Their conclusion was that there was incredible
2 confusion surrounding the scope of the law and they believed that it was truly up to
3 prosecutorial discretion to ensure that the provisions would not be invoked against innocent
4 citizens. They also pointed out that there is no justification of proportionality.

5 Q. Right. Can I just take those two last comments in turn? Prosecutorial discretion as a
6 safeguard against misuse of this act, is that something that has proved a robust safeguard?

7 A. It has not because there is no legal limitation in respect of the Espionage Act against
8 its potential use against any individual disseminating national defence information or NDI to
9 one not authorised to receive it, which is a prohibition on its face because potentially it
10 applied to any person, whether it be a member of the media, whether it be an ordinary citizen
11 in the United Kingdom retweeting on social media, whether to this person or that person, and
12 this is one of the core issues that have been criticised. You asked about another scholar,
13 Steve Vladeck, who is a national security law professor who has written extensively on this.
14 You have (inaudible) at Harvard. There are numerous professors who have come to the exact
15 same conclusion about the problem with the questions about the scope of this law.

16 Q. Alright. At paragraphs 21 and 23, you give examples of how the Act has been used to
17 prosecute whistleblowers, government employees who disclose classified information. I
18 think you mentioned the absence of a public interest defence. Is that still the case?

19 A. It is still the case and I will also mention that the Espionage Act provision 793 is not
20 limited to classified information. It is limited to national defence information which is
21 actually a much broader category of information and it does not have to include classified
22 information.

23 Q. Now, what I would like to turn to if I may is precedent so far as prosecuting the press
24 is concerned, publishers, and I think you begin to deal with this at paragraphs 32 and 33 of
25 your report and you run through ---

26 A. Sorry, I think - I mean, the key response there is that there is no precedent in terms of
27 - it is that whole indictment for the central prosecution under the Espionage Act or disclosure
28 of secrets. (Inaudible).

29 Q. You have told us that over the years, there has been political attempts to go after the
30 press and you have given us, I think, 11 examples in paragraph 34. The first three involved
31 grand juries. Is that right?

32 A. When you say first three, you are referring to the Tribune, Amerasia and the Pentagon
33 Papers.

34 Q. We do, yes. Yes.

1 A. Those all involved grand juries, that is right.

2 Q. In all of those cases, grand juries were convened and in none of them were
3 indictments returned. Is that correct or have I got it wrong?

4 A. That is right. I mean, that is right. There were serious investigations and then, for the
5 record, the two cases we are talking about are the attempted prosecution of the Chicago
6 Tribune in 1942 for a publication regarding the US, a victory at the Battle of Midway, and
7 then the attempted prosecution of editor and government employees in Amerasia 1945. This
8 is actually very noteworthy for the proceedings here because that was an attempted
9 Espionage Act conspiracy prosecution, so it was not just for the publication. It was
10 attempting to prosecute the editors for engaging in a conspiracy overseas and assist ---

11 JUDGE BARAITSER: Mr Shenkman, I am just going to interrupt you for one second. You
12 might be working under a misapprehension that your statement is not already before the
13 court. I appreciate that you are trying to ensure that the information that you have written
14 down is before the court. I just wanted to reassure you that everything that you have written
15 down in that statement has already been admitted to this court and has been read by me.
16 Does that assist you in answering the questions Mr Summers is asking you.

17 WITNESS: I understand.

18 JUDGE BARAITSER: Okay, thank you. I will hand you back.

19 MR SUMMERS: Thank you, madam. So, you were telling us about Amerasia in 1945 and I
20 think then there was the Pentagon Papers case in the 1970s that also involved the convening
21 of a grand jury but no indictment.

22 A. That is right. There were no amendments issued in any decision and given the time
23 that has passed and the ability of historians to look at evidence that was not
24 contemporaneously, it is clear that these were very high level political decisions. In each of
25 these cases they involved the President of the United States and the Attorney General. In all
26 three is academic verification for all that.

27 Q. Thank you very much. Then just moving on through the history of the press in
28 relation to this Act and in particular, section 793, Beacon Press was an investigation that
29 resulted in charges or not?

30 A. There were - there was an ongoing investigation into Beacon that was dropped in
31 1974.

32 Q. Charges or indictment issued in that case?

33 A. There were no public charges issued in that case.

1 Q. Jack Anderson, this court has already heard a little about this case and the events
2 surrounding that. Was that ever the subject of an indictment or charges?

3 A. No. There were drafts to kill Anderson which I believe one of the other witnesses,
4 Professor Feldstein, wrote a book about. Yes.

5 Q. We have heard that, thank you. So, then just moving on from Seymour Hersh
6 onwards, you speak it seems about political threats to use the Act, but have any of them ever
7 come to fruition?

8 A. No, they have never come to fruition.

9 Q. Alright. At paragraph 19 of your report – well, just before I move on, why is it then
10 that despite the 11 cases that you are able to tell us about of the press publishing classified
11 information, there has never been an indictment issued against any member of the press for
12 that kind of activity. Why is that?

13 A. The reasons were ultimately First Amendment concerns because in each of these
14 cases there appeared to be opposition from the press when it came out that these
15 investigations were being undertaken and the internal deliberations that have come out
16 historically have shown that there was great ambivalence within the Justice Department about
17 the scope of the Espionage Act, the confusion about its potential limitation and that there is
18 no coherent way to draw a line between prosecuting the individuals that they wish to
19 prosecute in those cases or across the media outlets; there is no way to draw a line between
20 those media outlets and other media outlets. There is no limiting principle.

21 Q. Paragraph 19: “When the Espionage Act was itself amended in the 1950s, the
22 McCarran Act provided that nothing in the Act shall infringe upon the freedom of the press or
23 of speech.” Is that relevant to what you have just told us?

24 A. It is relevant but that language is upholding to the extent that it protects what many
25 scholars believe to be important values, but it does not bear legal effect on the actual test of
26 the Espionage Act. That was inserted by the American Newspaper Publishers Association
27 which lobbied for it, but that does not have bearing on the actual test of the Espionage Act.

28 Q. We have looked at practice over the last 50 years and we have looked at the McCarran
29 Act. Can I look at such authorities that there are on the propriety of prosecuting publishers
30 and the press under this Act. Can I start with the *Pentagon Papers* case, the third example
31 that you give in your paragraph 34? Did that case, so far as the New York Times was
32 concerned, end up in the Supreme Court?

33 A. That case ended up before the Supreme Court on the issue of prior restraint, not for
34 criminal liability for publication.

1 Q. Understood. In light of this, on prior restraint, the issue of whether the press could be
2 restrained from publishing classified information within their possession, the Supreme Court
3 ruled that it could or could not?

4 A. The court ruled that it could not.

5 Q. It could not be restrained.

6 A. Under those facts, yes, that the Government definitely asserted.

7 Q. What did various judges have to say in that case about the propriety of criminally
8 prosecuting the press for that conduct under the Espionage Act?

9 A. It was a deeply fractured opinion and the issue of criminal liability was not before the
10 court. There is actually much of the scholarship devoted to that case which was evidenced as
11 they reached their opinions because it was an urgent – it was injunctive relief that was sought,
12 so it was an urgent case. There certainly were a few justices that suggested that the option for
13 criminal liability may be open against the Times if the Government chose to pursue that, but
14 they did not provide any more detail to the levy or the legal framework for that. Most of the
15 scholarship that examined that case had viewed that language as if (inaudible) but it was not
16 used before the court.

17 Q. Insofar as judges in that decision touched on the issue of criminal liability, were they
18 saying that the Act was on its face broad enough to catch that kind of activity, or were they
19 saying that prosecutions would be permissible?

20 A. They said that the Act would be an option to bring, but there was not a detailed
21 discussion of the propriety of an actual prosecution or what the legal framework for that
22 standard would look like.

23 Q. This court has also heard about the *Morrison* case, which was a prosecution of a
24 whistleblower. Did that court have anything to say about the propriety of prosecuting the
25 press under this provision?

26 A. I believe the primary opinion suggested that that avenue could be open, but there was
27 disagreement on the court on that point, so it was a contentious issue, and also again before
28 the court.

29 Q. What did Judges Wilkinson and Phillips have to say about that?

30 A. I do not have that right in front of me.

31 Q. I am looking at paragraphs 21 and 22 of your report. The Fourth Circuit, Court of
32 Appeals, Judge Harvey Wilkinson: “Press organisations are not being, and probably could not
33 be, prosecuted under the Espionage Statute”.

34 A. Right.

1 Q. Is that accurate?

2 A. Yes.

3 Q. You told us about practice. You told us about the McCarran Act. You told us about
4 obiter, observations to be found within the case law. Was there anything that goes the other
5 way?

6 A. Can you rephrase that?

7 Q. Let us catapult ourselves back to 2010 and try and work out, leaving aside the
8 possibility of a political prosecution, what the position of the press would have been under
9 the legal situation that you are telling us about. You told us about the practice. You told us
10 about the McCarran Act. You told us about the *Pentagon Papers* case and *Morrison*. Would
11 there be anything to indicate to me, as a member of the press in 2010, that publishing
12 classified information would be liable to end up in an indictment against me under the
13 Espionage Act?

14 A. I think the media climate in 2010, and you have had many other witnesses to testify to
15 this as well, is that this type of publication is routine in the US media. In fact, it is something
16 that encouraged by many government officials for their own gain, or for advancing various
17 policies. Generally speaking, members of the media would not fear an indictment for that. I
18 think scholars have always wondered what these laws are, but especially in the 21st century,
19 given the amount of time that has passed since cases like the *Pentagon Papers* and cases like
20 *Morrison*, there is a customary practice that the Justice Department would not use the
21 Espionage Act to indict the press or publication or for activities (inaudible) sources.

22 Q. Would my position have been different if I asked the same question in 2013?

23 A. I think it certainly would be given the escalation in prosecution of government
24 sources. I think many members of the media were more nervous about prosecution, but I
25 think part of that was dialled back by Eric Holder, and certainly President Obama, Holder and
26 I believe he had other testimony to this effect but Eric Holder's regrets ---

27 Q. I appreciate that. I want to get in context with this: you have told us the position in
28 2010. Fast forward three years to after the events that we are concerned with (your report
29 paragraph 25 and 26). Was there a prosecution that would have caused the press some reason
30 to doubt the position that had appeared clear until then?

31 A. Yes. As I mentioned just now, the press was very nervous because of the actions of
32 the Obama administration. You had the Stephen King case and particularly there was a
33 search warrant that mentioned – there was an affidavit that suggested that a reporter allegedly
34 committed a violation in 1973 as an even better and/or scope for evidence. There was a huge,

1 huge response from the press against this, there was a lot of criticism for Eric Holder and Mr
2 Obama. Talking about Attorney General Holder's regrets is one of the things that
3 (inaudible).

4 Q. Again, just so I am clear, James Rosen was treated as an unindicted accomplice in that
5 case and he was a news reporter; is that right?

6 A. That is right. That type of language leaves open a very serious possibility for future
7 criminal prosecution.

8 Q. I think you have used the word "fire storm"; that is the reference to paragraph 26 and
9 the Holder resignation, is it?

10 A. Yes, this was very instrumental to a lot of his regrets and it did generate a fire storm.

11 Q. Paragraph 27, after that it seems like the Washington Post announced what it did in
12 relation to this case, is that right?

13 A. That is right.

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

16 Cross-examined by MS DOBBIN

17 Q. Mr Shenkman, I am going to ask some questions on behalf of the Government. I hope
18 that you can hear me?

19 A. Yes, I can. If you have any trouble hearing me, I am happy to repeat anything.

20 Q. Thank you. Mr Shenkman, I am going to ask you about five different topics, and I am
21 going to take you to the bundle you should have had for the purposes of your cross-
22 examination. Do you have that?

23 A. I have that, yes.

24 Q. You should also have the electronic bundle with the declarations of Gordon Kromberg
25 in it as well; do you have access to that?

26 A. I do.

27 Q. Thank you. Mr Shenkman, at the very end of your report, you refer to working for the
28 offices of Michael Ratner, whose firm you say provided advice in the case of Mr Assange. Is
29 that right?

30 A. That is right.

31 Q. You go on to say: "Mr Shenkman does not presently represent Mr Assange and writes
32 this in his individual capacity as an independent commentator on the Espionage Act 1917,
33 correct?"

1 A. Mr Ratner, he actually passed away tragically in 2016 and I was a junior associate to
2 him, so after he passed away, he of course lost his firm and I set up my own practice and it is
3 about four years or so since I have engaged with Mr Assange and moved on with my career.

4 Q. Coming back to that, Mr Shenkman, and to be absolutely accurate, you did not just
5 work at a firm which represented Mr Assange, you represented Mr Assange. Correct?

6 A. I worked with Mr Ratner on that case as one of many cases that we worked on
7 together, but there was limited representation, and it is my opinion that the style of
8 representation that would bear on the historical and academic analysis that I am now
9 presenting to the court is is certainly something I have reflected on, but the research that I
10 have been doing is certainly detached from this case. It has not involved this case or these his
11 extradition proceedings. It has been independent of my entire work.

12 Q. Mr Shenkman, a simple question: were you on the legal team which represented Mr
13 Assange?

14 A. I was in a limited capacity.

15 Q. Right. Can you look at the bundle that you have been provided with which has an
16 article at the start saying, "It has been two weeks since a UN panel declared that Julian
17 Assange should be freed. Why is he still detained?". Do you have that?

18 A. Can you direct me to what page you are on?

19 Q. It is the first page of it.

20 A. Then perhaps I was provided a different version but ---

21 Q. You should have an electronic bundle consisting of 138 pages which begins with an
22 article that you wrote.

23 JUDGE BARAITSER: Miss Dobbin, when do you think this was sent and how?

24 MS DOBBIN: It was provided to him by the defence.

25 JUDGE BARAITSER: When was that?

26 MR SUMMERS: 9 o'clock this morning, which is the middle of the night. There may be
27 issues about providing bundles like this for our American witnesses at 9 o'clock in the
28 morning or the day they give evidence.

29 JUDGE BARAITSER: Right. I just want to make sure that you do have the information
30 being referred to. I am told it was sent by email to you in the middle of the night, 9 o'clock
31 your time yesterday evening. Do you have a bundle that was sent to you last night?

32 A. Yes, I have a, I have a 358 page bundle that contains that brief and also Mr
33 Kromberg's ---

34 JUDGE BARAITSER: Not that bundle.

- 1 A. --- and ---
- 2 JUDGE BARAITSER: Not that bundle, Mr Shenkman. Do you have another one that was
3 sent last night?
- 4 MR SUMMERS: No, this morning.
- 5 MS DOBBIN: This morning.
- 6 JUDGE BARAITSER: This morning.
- 7 A. I did not get any emails last night.
- 8 JUDGE BARAITSER: And this morning?
- 9 A. I think I literally - I was probably asleep. I care about my research but generally
10 spend my nights sleeping rather than reading bundles. I used to do that.
- 11 JUDGE BARAITSER: What time would it have arrived, Mr Summers, this morning?
- 12 MR SUMMERS: 9 o'clock this morning our time ---
- 13 JUDGE BARAITSER: And his time?
- 14 MR SUMMERS: --- but that is about 3 am his time.
- 15 A. I mean, I do know, if you are referencing an article, there is an article in Nation, I
16 mean I can speak about that, I was a co-author of that piece.
- 17 Q. Yes, Mr Shenkman ---
- 18 A. So, you might have some questions I hope?
- 19 Q. No, Mr Shenkman, there is a bundle of papers that you will be taken through in the
20 course of this examination which you need to have access to. Do you have access to your
21 email now?
- 22 A. I can get access. Should I access my email?
- 23 JUDGE BARAITSER: Was it sent by Ms Iveson? Who should he look for?
- 24 MR SUMMERS: I do not know who forwarded it. It came from Ms Dobbin to us at 9
25 o'clock this morning and somebody would have forwarded it quickly to the witness.
- 26 JUDGE BARAITSER: We do not know who?
- 27 A. Should I try the, try my email now?
- 28 JUDGE BARAITSER: Yes, please.
- 29 A. I am sorry. I could not hear.
- 30 JUDGE BARAITSER: Yes, please. Can you access your email now.
- 31 A. OK. When would it have been sent?
- 32 JUDGE BARAITSER: We think it would have arrived, your time, 3 o'clock in the morning.
- 33 MR SUMMERS: Madam, I am sure we can sort this out if we can ---
- 34 A. Yes, I do not see any, I do not see any email.

1 MR SUMMERS: Madam, if you would like to raise just for two minutes ---
2 A. I do not have any record of it being sent to me.
3 MR SUMMERS: --- I am sure we can make sure he has a copy?
4 JUDGE BARAITSER: All right. All right. We are just going to make sure you have the
5 relevant documents. Five minutes just to make sure that happens. Back at 20 past 3 please.
6 (Short adjournment)
7 JUDGE BARAITSER: Thank you. So, does Mr Shenkman have the relevant documents?
8 Has that been resolved? Yes?
9 MS DOBBIN: It is.
10 JUDGE BARAITSER: Good.
11 MS DOBBIN: Madam, can I make clear, most of what is in this bundle is material to which
12 this witness has referred.
13 JUDGE BARAITSER: I see.
14 MS DOBBIN: It is put here for ease so that it can be read.
15 JUDGE BARAITSER: Did you hear that, Mr Shenkman?
16 A. Again, I have not – it is a 138 page document that I have not had much time to go
17 through all the – I mean, I
18 JUDGE BARAITSER: That is true but did you hear what has just been said?
19 A. --- might reference a couple, maybe one or two from what I have seen. I mean, I
20 referenced, so I do not reference the first article, I do not reference the second piece, I do not
21 reference the third as a case. I do not reference - I do not believe I referenced Barneki
22 actually. I would need to do a quick search but, again, what I provided was a historical
23 analysis, I am not providing a law review article that is going into comprehensive case law
24 and I want to be clear before the court that I am not, you know, this is a, you know, this is a
25 historical analysis of political context of this law. And the circumstances of these cases, I
26 mean, I have written these opinions but I am not recording a view what Edgar Schmidt did.
27 JUDGE BARAITSER: Well, Mr Shenkman, out of fairness to you then, what we will do is
28 we will proceed and if there comes a point where you need to pause to read what is being put
29 to you then of course you can be provided with that opportunity. We will carry on for the
30 time being. Ms Dobbin.
31 MS DOBBIN: Yes. Thank you.
32 A. OK.

- 1 Q. Yes, Mr Shenkman, let me be clear, I am going to ask you questions about things
2 which are either within your knowledge or which I expect are within your knowledge given
3 that you are giving an expert report about the Espionage Act. Are you clear about that?
- 4 A. I understand. I just hope you do not overestimate my ability. I certainly cannot read
5 this much information in less than 12 hours. I wish I could.
- 6 Q. Right.
- 7 A. So, being prepared to speak to someone who is capable of that, you might be
8 disappointed.
- 9 Q. Right. Article 1, you wrote it, Mr Shenkman. So, if we go to page 6 of the bundle, it
10 is paginated, middle bottom.
- 11 A. The article, is it the one in, what is the publication?
- 12 Q. It is the first article. The one that starts ---
- 13 A. No, what publication does this appear in?
- 14 Q. "It has been two weeks since a UN panel declared" ---
- 15 A. No, what is the publication?
- 16 Q. If you look, Mr Shenkman ---
- 17 A. Where is this article?
- 18 Q. If you look at this and if you look, it says by Melinda Taylor, Carey Shenkman and
19 Michael Ratner. So, this is an article that you wrote.
- 20 A. No, I understand that but I have written many articles on many different topics. I am
21 asking what the, where is this article from?
- 22 Q. I think this is from the Atlantic, I can check ---
- 23 A. Is NewsLeaf? I just want to be clear so I can ---
- 24 Q. Well, I can check it, Mr Shenkman, but are you suggesting that this is not an article
25 that you wrote?
- 26 A. Yes. It's The Nation. I thought it was The Nation. Yes. It was The Nation.
- 27 Q. Right.
- 28 A. I could not see the media on there. I just want to be clear that we are referring to the
29 same piece because I write a lot of different articles and I write them on the topic due so I do
30 not necessarily remember everything off the top of my head that I have a by-line on.
- 31 Q. Right. Can we go to page 6 please?
- 32 A. Yes. I am on page 6. Another thing too, you mentioned that I wrote this article. I do
33 not believe I actually – I have a by-line on it but Melinda Taylor is the first title so it is most
34 likely that she wrote it. But yes, go ahead.

1 Q. If we look at the last page, “Carey Shenkman is a first amendment and human rights
2 lawyer and member of Julian Assange’s legal team.” Correct?

3 A. That is what that by-line says.

4 Q. Are you suggesting that you did not write that, or you did not authorise that?

5 A. I mean, I think often times my by-lines are described in ways that I would want more
6 editorial control over. I think anybody who has published pieces - and I was referring to titles
7 or how they are described - certainly knows that there is, I would not say it is false but I think
8 it is certainly something can be qualified because I was working for Michael Ratner in a
9 limited capacity.

10 Q. I am interested in that, Mr Shenkman, how does one qualify whether or not one is or
11 is not someone’s legal representative. You either are or you are not.

12 A. Well, there are many different types of representation and I certainly have many
13 different clients who have engaged for different reasons, so I think the first question would
14 be, when you are asking that, what is the truth of that? In any question of representation the
15 scope is the key question.

16 Q. OK. So what were you representing Mr Assange in respect of at this time?

17 A. So I worked with Michael Ratner, who was serving as attorney, not in a criminal law
18 capacity, (inaudible) Mr Assange’s criminal lawyer, Michael Ratner was involved with
19 questions of international law.

20 Q. International law to do with what, Mr Shenkman?

21 A. To do with Mr Assange’s case and cases before bodies such as the UN. So the reason
22 that I have a by-line on the piece was that I provided research on the submissions to the
23 United Nations working group on arbitrary detention. Similarly, (inaudible) international law
24 and they provided (inaudible) the question of detention in the European Court of Human
25 Rights.

26 Q. All right. So if we look at this article and if we go back to page 1, it states, “It’s time
27 to end Julian Assange’s arbitrary detention at the hands of Sweden and the United Kingdom.”
28 Correct?

29 A. And I think that that reflects your opinion that when Mr Assange was in the embassy,
30 the United Kingdom was arbitrarily detaining him. Correct?

31 A. That was my position as a matter of case law of the European Court of Human Rights.
32 I know that that was certainly contentious, but the UN working group agreed with that legal
33 analysis and argument that had been provided.

1 Q. So if we look over the page, and this is page 2, and you are referring I think to the
2 decision of the working group on arbitrary detention, is that right?

3 A. That is right.

4 Q. And you refer to him in the first paragraph at the end as being a victim of the United
5 Kingdom's refusal to honour the very human rights machinery that it had helped to create. Is
6 that right?

7 A. That is right, and as a human rights lawyer I believe that all states have obligations
8 under human rights law and states can violate that. I mean the United Kingdom has and the
9 United States has and there are many countries around the world that have. I do not think it is
10 controversial to argue that particular state is not acting in line with their human rights
11 obligations.

12 Q. And when we look at the next paragraph, you regarded the UK as having
13 demonstrated blatant noncompliance with the process with which they participated and that it
14 highlighted the lengths that states go to to shut down Assange and WikiLeaks. Correct?

15 A. That is what is written there.

16 Q. Yes. That represents your view. Is that right, Mr Shenkman?

17 A. That would be argument in that piece. I mean circumstances have changed since then,
18 but at the time.

19 Q. Was that your opinion at the time?

20 A. Yes. I mean I certainly believed that. You know, I do not want to waste your time or
21 the court's time. I certainly took these positions and I believed them but whether they are
22 relevant to historical research as cited public record I am conducting with a respected
23 academic - I mean the (inaudible) and research I am providing, they are not just things that I
24 have made up, they are reflections and correlated from leading academic experts as well as
25 my co-author, who has been the chair of journalism studies at Long Island University in
26 respect of media historians. I mean this is an academic analysis that has been peer reviewed
27 and that is the nature of the submission that I made to the court. I mean it has really been a
28 matter of going to our book proposal, again which was peer reviewed, our manuscript, and
29 providing that for the court. I certainly understand my role as one to aid the court and I am
30 also printing my research as a historian. I have an interest in providing an accurate and
31 combined analysis because I am seeking to publish (inaudible) so, yes, I certainly, you know,
32 I certainly stand by that piece. We can talk about it but, again, you know, I do not want to
33 waste your time. You know, I want to (inaudible) where your thinking is to the press on that.

34 Q. I think it will become clear.

1 A. I am not disputing that.

2 Q. I think it will become clear, Mr Shenkman, but you understand how important it is
3 that when someone offers expert opinion to this court that it can test whether or not that
4 opinion, notwithstanding that it is said to be academic, is nonetheless objective and balanced
5 in what it says. Do you understand that?

6 A. Certainly, but the piece I wrote had nothing to do with an historical analysis of the
7 Espionage Act that I am providing to the court. I mean, it is a very different thing. I do not
8 talk about the working group on arbitrary detention. I do not talk about the UK's human
9 rights obligations in my submission to the court. This is a completely separate issue. I mean
10 I could similarly say there are many cases, at least in the United States where prosecutors
11 regularly become judges, but we do not say that judges are not able to be unbiased in the
12 United States just because he is representing the government. I think there is an extent to
13 which our clients are our clients, and this I am transparent about which is why I added the
14 footnote for the court about my past work. I mean I am completely open about it.

15 Q. Yes. Mr Shenkman, I am going to test in your evidence how objective and balanced
16 you have been about the Espionage Act. I just want to make that clear and I want to start by
17 testing what some of your view are about Mr Assange's extradition. Do you understand? I
18 am going to move on. What you have gone on to say in this article is this: "If he left", this is
19 a reference to Mr Assange in the embassy, "he would be arrested and almost certainly
20 extradited to the United States where he would face persecution and inhuman treatment."
21 First question, Mr Shenkman, why was it almost certain that Mr Assange would be
22 extradited?

23 A. I think at the time there was anxiety about – I think among prominent commentators
24 that there was US interest in Assange not necessarily back to his publications in 2010. I
25 honestly do not believe after the article in The Washington Post in 2013, I personally actually
26 – I was very surprised his being indicted honestly because I the piece in 2013 at face value
27 and believed it to be consistent with what I thought (inaudible) talking about the case that,
28 you know, that the investigation into Mr Assange had been dialled back and a decision was
29 made not to prosecute because of what was called The New York Times problem. That was
30 consistent with what (inaudible), so I believed that. At the same time there was certainly a
31 sense of perhaps there are other charges, such as the US might wish to pursue, but I mean I
32 cannot cite to you to specific cases that the US charged or (inaudible). I think that was owing
33 to the ongoing situation and part of the anxiety around the working group decision.

1 Q. So I just want to stop you there, Mr Shenkman. You said you were surprised, but if
 2 you read on in that article it goes on to say, “As confirmed by the Justice Department in
 3 federal court in December the United States has been pursuing an unprecedented
 4 investigation of WikiLeaks – one that press freedom organisations have warned could gut the
 5 core of the First Amendment. American civil liberties union executive director Anthony
 6 Romero has said it has already had a profoundly chilling effect”, and it goes on to talk about
 7 the investigation involving invasive searches and surveillance of affiliates and supporters. So
 8 it is clear what you were referring to, is it not? It was the unprecedented ongoing criminal
 9 investigation into WikiLeaks and Mr Assange.

10 A. The understanding of that was never monolithic though. It was not like there was one
 11 set of alleged conduct (inaudible) in relation to the 2010 publications. I was sceptical that
 12 there would be ever be charges related to the publication or (inaudible) related to the 2010
 13 publications because of the 2013 piece. Because there were the citations to ongoing
 14 investigations, I mean it is the general MO of the Justice Department to leave these cases
 15 open, so I think short of that confirmation of absolute closure of everything, not just 2010. I
 16 mean I think there is reasonably confidence on the 2010 stuff, but anything else ---

17 Q. OK. Well, I am going to go on and explore that a bit further, but before I do, I just
 18 want to ask a couple of more questions. First of all, Mr Shenkman, did you qualify as a
 19 lawyer in 2013?

20 A. In 2013 I had graduated from law school and I was working – I worked for Michael
 21 Ratner. Under US law you go and work for an attorney while you are in the process of
 22 receiving your bar membership.

23 Q. OK. So what ---

24 A. So I was barred in June of 2014.

25 Q. So you have been a lawyer for six years. Is that right?

26 A. A little over six, yes.

27 Q. OK.

28 A. But I have been practising for seven for (inaudible).

29 Q. You worked for Mr Ratner from 2013. Yes? I think that is what you just said.

30 A. I was there 2013 to 2015 when he passed away.

31 Q. And just to be clear, have you ever acted for WikiLeaks?

32 A. Our representation was for Mr Assange.

33 Q. OK. So you have never acted for WikiLeaks?

34 A. Not generally on back of WikiLeaks.

1 Q. Sorry. What do you mean, “Not generally”? I am not sure I follow.

2 A. I mean generally in terms of general, such as general counsel.

3 Q. Have you ---

4 A. Yes, I mean my work at Michael Ratner was directed – I just want to clarify. Michael
5 Ratner was president of an organisation called the Center for Constitutional Rights in New
6 York City.

7 Q. Yes.

8 A. And (inaudible) CCR. CCR at the time and Michael were engaged with Mr Assange.

9 Q. OK. I am just trying to be quite clear, Mr Shenkman, have you ever acted for
10 WikiLeaks, or have you only represented Mr Assange?

11 A. I have represented Mr Assange but there have not been any legal proceedings
12 certainly on behalf of WikiLeaks. Certainly there might be a lot of times (inaudible) blend
13 the two attributions together.

14 Q. Right. So there is no distinction. Is that what you are saying or there is overlap
15 between WikiLeaks and Mr Assange in terms of legal representation?

16 A. I would not, I would not make that claim but I would also note that, I mean, I want to
17 help the court but I also, I want to provide sufficient information but at the same time there is
18 a certain amount of my practice and also Mr Ratner’s practice that is privileged and spoken
19 representation that is privileged. So, I mean, I have a professional obligation under the US
20 law for myself but also Mr Ratner. I cannot go into detailed stuff or even in some cases about
21 the fact of representation, but the point that is relevant for these proceedings I have disclosed
22 my work for Mr Ratner.

23 Q. Mr Shenkman, I am just going to try again. I think the correct position is, privilege is
24 a matter for Mr Assange. It is his privilege as opposed to yours, correct?

25 A. I have a professional obligation.

26 Q. I understand that. Are you saying you cannot even say if you have represented
27 WikiLeaks?

28 A. I have never (inaudible). I mean, and I am not entirely sure how to answer that
29 question because of the nature of WikiLeaks and how it is characterised.

30 Q. Right.

31 A. I mean, are you taking the position that WikiLeaks is an incorporated entity and there
32 is an engagement with an incorporated entity somewhere?

33 Q. Mr Shenkman, I thought it was quite a straightforward question to ask whether or not
34 you had ever represented or do represent WikiLeaks in a separate capacity from Mr Assange?

- 1 A. No, I mean, the separate work that I did was on Mr Assange's proceedings and that
2 was ---
- 3 Q. Right. So, are you saying then you have only acted for Mr Assange?
- 4 A. I mean, I believe there was one instance in 2015 when our office responded to Google
5 regarding search warrants. I would need to check how Michael signs those letters.
- 6 Q. Were you involved in that?
- 7 A. I would have to, I would have to check and see.
- 8 Q. Right. Did your representation of Mr Assange and/or WikiLeaks end when you left
9 the offices of Mr Ratner?
- 10 A. Absolutely, yes.
- 11 Q. OK. So ---
- 12 A. I went on to set up my own practice. Yes. And that was 2015.
- 13 Q. OK.
- 14 A. I can say that much.
- 15 Q. All right. So, we can be clear enough about that.
- 16 A. Yes. I just want to get a sense of what you want to know. Again, to both you and the
17 court, I am not trying to be difficult here, I want to help, but I really hope you understand my
18 own constraints too? It would be helpful to know a sense of what information you need to
19 know and then I can help you get there, but the point is it has been four, it has been four years
20 since I have had any, you know, any involvement in that case. Again, Mr Ratner passed
21 away.
- 22 Q. OK. Before I leave this, I just want to check again about some of your other
23 qualifications if I may?
- 24 A. Sure.
- 25 Q. Do you have an academic position? At a university at the moment?
- 26 A. I do not at the moment, I have been busy writing, but my career has been quite
27 academic for a while. I served on Law Review and I have been invited to a number of
28 lectures at different law schools and journalism schools (inaudible) topics. I go out there, like
29 I said, as a respected academic so it has certainly been a trajectory. I would say that my
30 career is moving.
- 31 Q. When you describe yourself as a constitutional historian, what is the basis of that, Mr
32 Shenkman?

1 A. I mean, the last decade, reading a lot of books and giving a lot of talks and writing a
2 lot of papers that folks are hopefully reading about constitutional issues and also my
3 experience as a constitutional litigator that has happened (inaudible).

4 Q. So, that is your experience as a lawyer over the past six years? Is what you are
5 relying on?

6 A. No, no. I mean, I have been - I have a manuscript of the most comprehensive
7 historical treatment of the Espionage Act ever written. I think the reason, to be clear, why I
8 am here is because I am the only person that – my co-author and I are the only two that have
9 conducted this historical analysis. I mean, there is not, (inaudible) Espionage Act and
10 individual stories of its history but this is the first undertaking of its kind and there is no one
11 else who has done that.

12 Q. Mr Shenkman, I want to move on from this but before I do, can I just ask, I have
13 assumed that you have offered this opinion on a pro bono basis, is that right?

14 A. A what? Why do you assume that? I am just curious.

15 Q. I ask the questions, Mr Shenkman. I have just assumed because of your interest that
16 this is work that you have done on a pro bono basis, but if I am wrong please tell me.

17 A. No, no, that is incorrect and I am being taken, I mean, I have taken, had to take time
18 out of my work and clients and my book to be here.

19 Q. I am going to go back then, Mr Shenkman, to the criminal investigation into Mr
20 Assange and I would like to take you to the next article in the bundle please. That is the
21 Guardian article and it is at page 9 of the bundle. Have you got that?

22 A. Yes.

23 Q. And this is ---

24 A. Yes. I have not had a chance to read through it since I got the account but ---

25 Q. OK.

26 A. --- I will do my best.

27 Q. OK. Well, I will help you. It was an article written in March 2015, so whilst you
28 were working with Mr Ratner, correct?

29 A. March 2015, that is right.

30 Q. And the article starts, “The US Government is conducting an active long-term
31 criminal investigation into WikiLeaks, a federal judge has confirmed in court documents.”.
32 Do you see that?

33 A. Yes.

1 Q. And if you look at the paragraphs that follow, you can see that this article is about a
2 judgment that was given by Judge Barbara Rothstein.

3 A. Sure. But I mean, like, what I was saying earlier was referring to what is particularly
4 recorded in the following paragraph, which is that the federal agency told the court that their
5 inquiry into WikiLeaks is separate and distinct from the prosecution of Chelsea Manning.
6 And that is consistent with the statements in 2013 that the 2010 stuff and anything concerning
7 Chelsea Manning was put off the table.

8 Q. OK. Well, if we go over the page, page 10, have you got that? And you can see the
9 second paragraph, “Rothstein added that federal agencies had told the court that their inquiry
10 into WikiLeaks was separate and distinct from the prosecution of the Army soldier who
11 leaked the vast database of secrets, Chelsea Manning.”. Yes?

12 A. Yes.

13 Q. And then it goes on, “WikiLeaks’ lawyer, Michael Ratner, said the disclosure was
14 significant because coming from such a high court, it left no doubt about the US
15 Government’s intentions. We are talking about a serious multi-subject long-term
16 investigation of WikiLeaks and its people, Ratner said. This confirms in spades that the US
17 authorities are coming after WikiLeaks and want to close it down.”. The question, Mr
18 Shenkman, why at that time was it thought that the American Government was coming after
19 WikiLeaks in spades?

20 A. Again, I cannot speak for Mr Ratner and unfortunately he cannot be available so I
21 cannot, you know, I cannot speak on his behalf. He spoke a lot to the media and I was not
22 involved in that regarding this case. There were a few times in 2015 when he was sick, but
23 statements this I did not have a part of so I cannot tell you.

24 Q. Were you familiar with Judge Rothstein’s judgment?

25 A. I mentioned the – my interpretation. Again, you know, my interpretation looking at it
26 now is likely distinct with what Mr Ratner believed five years ago. I am not going to
27 speculate and I think that there would be no value for me to speculate but my read of it was
28 that this was separate and distinct from the allegations concerning Chelsea Manning and that
29 is consistent with the piece that came out in 2013.

30 Q. So, you are saying from this position that is your view. I am interested in what your
31 opinion was at the time, Mr Shenkman, about Judge Rothstein’s judgment. Were you
32 familiar with it at the time?

33 A. I would be, I would be speculating if – to tell you what I, you know, what I knew,
34 what I knew in March 2015. That was over five years ago regarding one court opinion when

1 I was working on many cases. I mean, I see it before me now but I hesitate to go on back
2 there to say what I was familiar with and that, it is just of a date, so much time has passed
3 since then.

4 Q. Yes, and ---

5 A. Again, I am not trying to be difficult; I am just being honest with you.

6 Q. No, but, Mr Shenkman, you were Mr Assange's lawyer with Mr Ratner at this time.
7 You must have been ---

8 A. I was, but I mean it, but I mean you also work for a chambers. Are you appraised of
9 every single matter and case and interview and statement that all your colleagues make at any
10 given moment, especially if they are far your superior? I mean, he was at the very end of his
11 career. I was in a food chain of lawyers, I was plankton, and Michael Ratner was one of the
12 most respected constitutional lawyers in the United States. So, I mean, I think it is just
13 important to understand the dynamics there.

14 Q. OK. So, what we can be clear about is that someone as distinguished as Mr Ratner
15 thought that Judge Rothstein's judgment demonstrated that that US administration, that is the
16 Obama administration, was coming after WikiLeaks in spades, correct?

17 JUDGE BARAITSER: Just pause, Ms Dobbins, Mr Summers wants to interrupt.

18 MR SUMMERS: How can this witness answer that kind of question about what Mr Ratner
19 might have thought?

20 JUDGE BARAITSER: Well, he was working for the same firm and he describes himself as
21 acting in some capacity for Mr Assange. He cannot talk about what Mr Ratner thought but
22 perhaps he can talk about what he thought at the time.

23 MS DOBBIN: Well, the question that I was putting to him, he had described how
24 distinguished Mr Ratner was.

25 JUDGE BARAITSER: Yes.

26 MS DOBBIN: Obviously, the Guardian speaks for itself in terms of quoting precisely what
27 he said.

28 JUDGE BARAITSER: What Mr Ratner said, but I have that in black and white. It is really
29 what this witness believed at the time.

30 Q. So, Mr Shenkman, can we go please to Judge Rothstein's judgment. Have you read it
31 before?

32 A. I do not know if I have ever actually read the full opinion.

33 Q. So ---

1 A. I might have – at the time, I might have seen excerpts from it. I know that – I do
2 recall that at the time EPIC was involved in litigation.

3 Q. So, if we go to page 13 of the bundle, you are quite right, the plaintiff is I think called
4 Electric Privacy Information Centre – EPIC. It is an action against the Department of Justice.

5 Correct?

6 A. Can you refer me to what page you are looking at?

7 Q. Yes, of course. It is page 1, the name of the plaintiff is set out in the first paragraph.

8 A. Sure.

9 Q. Yes? And if we go over the page, the court sets out some of the history and we see
10 the first paragraph, “On November 28, 2010, WikiLeaks published numerous classified
11 United States Government documents that had been provided to it by Private Bradley
12 Manning. The Department of Justice immediately initiated an investigation into the possible
13 unauthorised release of classified information.” It goes on in the second paragraph to
14 describe the investigation that took place.” Do you see that at the second paragraph? I am
15 not going to read all of it out. It just describes some of the things that happened in the
16 ensuing investigation. Then at the third paragraph it describes “EPIC filing Freedom of
17 Information requests with each of the defendants seeking certain records.” Yes?

18 A. Sure.

19 Q. This judgment is about the Freedom of Information Act requests, correct?

20 A. Yes, the Freedom of Information is classified as a third-party organisation. I am just
21 wondering what you want to know about it?

22 Q. I am interested in exploring your understanding about what criminal investigations
23 were going on at this time, Mr Shenkman. If we look at page 18, it is right, is it not, that
24 under this legislation “investigating authorities are allowed to withhold information that is
25 asked for in the Freedom of Information requests if there are enforcement proceedings in
26 prospect, or if there is an investigation going on.” Is that right?

27 A. I had not had time to read that, so you are asking me to skim that. I am flattered that
28 you think that I am smart enough to do this, but I am incapable of reading two bits of opinion
29 this quickly and ascertaining what I did or did not know five years ago.

30 Q. That is fine. It is page 18.

31 A. Where am I reading?

32 Q. B at the very bottom: “FBI and CRM properly withheld responsive documents
33 pursuant to the Freedom of Information Act exemption 7A.” I am putting a general question
34 to you, Mr Shenkman, and asking whether or not it is right that it is a defence to a Freedom of

1 Information Act application to say that you cannot disclose the documents because there are
2 prospective enforcement proceedings or a criminal investigation going on; is that right?

3 JUDGE BARAITSER: You are asking him in what capacity? Why are you asking him
4 about this particular law? He is a Constitutional academic lawyer; why are you asking him
5 about this case?

6 MS DOBBIN: It is a case that has taken place at the time that he was acting for Mr Assange.
7 He has offered an opinion about criminal investigations that were going on at that time and I
8 am taking him to this case, which explains what investigations were going on at that time.

9 JUDGE BARAITSER: What is your question of him: did he know about the case; was he
10 aware of the criminal investigation? Was that the question?

11 MS DOBBIN: I would like to take him to what the judge found and ask him about that with
12 regard to his knowledge.

13 JUDGE BARAITSER: You began by saying “is it a defence to say” which is a legal
14 question which you are not presumably interested in the answer from this witness to; is that
15 correct?

16 MS DOBBIN: As an American lawyer, he may well know about the generality of the
17 Freedom of Information Act.

18 JUDGE BARAITSER: He may or he may not; it depends how specialist an area it is. I am
19 not sure that he is going to assist me, or I am going to be assisted by the answer to that
20 question from this particular witness.

21 MS DOBBIN: Mr Shenkman, I will go on and not get bogged down with how a Freedom of
22 Information Act request works.

23 A. I am happy to tell you. I do think this is outside of the scope of what I presented to
24 the court. I will say this is based on some of my own practice dealing with Freedom of
25 Information requests but the 7A exemption is extraordinarily broad and cited extensively for
26 the most minor types of law enforcement activities. Because this is a 7A exemption it does
27 not give much information and that is one of the reasons that it is used. Actually, one of the
28 criticisms of Freedom of Information laws is the extent to which journalists are faced with the
29 exemptions being cited. I think any national security journalist would say it is their bread and
30 butter. You really have to really litigate it here and now over how many exemptions because
31 they are (inaudible).

32 Q. Mr Shenkman, we will not get bogged down in that. I will move on and ask you, and
33 if we move over the page, and this is to put the judgment in context, we see at the second
34 paragraph: “The documents generated in the course of investigating the unauthorised use of

1 classified material on the WikiLeaks website were quite obviously related to the FBI and
2 CRM's law enforcement duties to enforce criminal laws and to protect against national
3 security threats." The court is referring there to the 2010 publication of the leaks, OK?

4 A. Can you direct me to where that is again?

5 Q. When we started out, I looked at the start of the judgment. We can see that the judge
6 is talking about the 2010 leaks. We have moved on here at page 20. If we pick up the
7 judgment, we can see that it says: "The documents generated in investigating the
8 unauthorised release of classified material on the WikiLeaks website were quite obviously
9 related to the FBI and CRM's law enforcement duties." Do you see that?

10 A. OK. I mean, I see that on the page right now.

11 Q. We can touch on this briefly again. To put things in context, in the final paragraph of
12 that page: "the FBI specifically states that it is not investigating individuals who simply
13 support or have an interest in WikiLeaks." The FBI was making clear there what it was
14 investigating. If we go to the top of the next page, it says: "To make a successful exemption
15 7A claim, the Government must further demonstrate that disclosure could reasonably be
16 expected to interfere with enforcement proceedings that are pending or reasonably
17 anticipated."

18 A. I think this is going down a rabbit hole that I thought you just said we were not going
19 to go down, but I refer to what I just said about 7A: notwithstanding that, in practice I can tell
20 you what I have observed and what national security journalists write when it comes to the
21 exemptions. They are incredibly broad.

22 Q. I am not asking you about it, Mr Shenkman, I am just describing the test that the
23 judge was considering in this judgment. Do you understand?

24 A. I do, but again I just want to be clear what the question is because this feels like
25 something that (inaudible). I do not see why you need to read these statements to me and
26 have me confirm what is written on a page; it does not seem to like a great use of my time or
27 the court's time, or anyone's really. You have shown me a history of the Espionage Act, it
28 was a historical analysis and I am curious and eager to answer your questions about that, but I
29 am not sure what this particular line of questions is getting at or what you need from me.

30 JUDGE BARAITSER: Ms Dobbin, I do think you need to ask a question, Ms Dobbin. So
31 far you have been trying to set the scene, but what is your question for the witness, please?

32 MS DOBBIN: I am going to come to that, thank you. What the judgment goes on to say, Mr
33 Shenkman, is: "The defendants, FBI and CRM, have filed seven declarations in this case,
34 three of which were filed *ex parte* and *in camera*. David Hardy, from the FBI, states that

1 responsive records are contained in filed pertaining to the FBI's investigation of the
2 disclosure of classified information that was published on the WikiLeaks website. Similarly,
3 John Cunningham, from CRM, states that the responsive records in the possession of the
4 Criminal Division, are all part of the Department of Justice investigation into the
5 unauthorised disclosure of classified information that resulted in the publication of the
6 materials on the WikiLeaks website." The judgment goes on to say, referring to a decision
7 called "Crew Panel": "This court is persuaded that there is an ongoing criminal investigation,
8 unlike the...characterisation of the investigation in Crew, the defendants have provided
9 sufficient specificity as to the status of the investigation and sufficient explanation as to why
10 the investigation is of long term duration." Mr Shenkman, what this judgment establishes is
11 that there was a long term, ongoing criminal investigation into the publication of the
12 WikiLeaks documents in 2010.

13 JUDGE BARAITSER: Your question is, please?

14 MS DOBBIN: When you described earlier there being different investigations that were
15 going on at this time, what are you referring to?

16 A. There are different elements specifically, so what about the US Government and the
17 charges in the current indictment? Something like that was never available and that was
18 never done; this opinion does not provide that. It does not provide clarity as to particularity
19 of specific offences are charges. I see where you are going with this line of questioning. I
20 think your attempt is to suggest that the 2013 Washington Post article was not indicative of
21 any rollback of their investigation, but I can tell you, and I am being completely honest, that
22 was how I read that piece then, that is how I read that piece in 2015 and how I read that piece
23 now to describe a political policy decision on the part of the Justice Department and the
24 Obama administration to walk back a prosecution on Mr Assange because of the problems
25 they would pose and the First Amendment concern that it would impose, and because of the
26 fact that the Espionage Act, the inability to find any limiting principle that would allow a
27 prosecution of Mr Assange (inaudible) or alleged aiding of Ms Manning and not, at the same
28 time, open up the floodgates to all the other media outlets, present and future. I see where
29 you are going with this questioning, again I do not want to waste your time; we can just get to
30 the punchline with it. There were these court decisions that indicated an ongoing
31 investigation. As a matter of practice, often times these things might be (inaudible).
32 I cannot testify on behalf of the Justice Department why that would have been the case. The
33 bottom line is that an indictment was not brought and I can tell you, as a matter of policy and
34 historically, if President Obama and Eric Holder truly believed that it was the right course of

1 action to go ahead with this prosecution, why did they not bring charges and have that be part
2 of their legacy? You would like that this is something that President Obama would have been
3 thrilled to write about in his memoirs: “I was the president that finally brought this case” but
4 they did not. Instead you had officials speaking to the Washington Post saying that they were
5 rolling back this investigation.

6 Q. Mr Shenkman, three questions that follow out of that. First of all, do you disagree
7 then with what Mr Ratner said under the Obama administration that “it was coming after
8 WikiLeaks in spades”?

9 A. Again, I cannot qualify what he meant by that and what it meant to come after him.
10 There certainly were political statements.

11 Q. The second question: you referred to there being different decisions talking about
12 ongoing investigations, so you are in fact aware of a number of judgments that talked about
13 ongoing investigations at this time under the Obama administration?

14 A. No, I mean, I am referring to this and anything else that you might cite. I am not
15 purporting to say how many pieces there were, or were not.

16 Q. And third point, help me with this. If there was no ongoing investigations, if you
17 were confident that Mr Assange was not going to be prosecuted under the Obama
18 administration, why was Mr Assange in the Embassy then, fearing for his extradition as you
19 referred to in 2015, in the first article that we went to?

20 A. Again, I think questions Mr Assange’s state of mind are within the scope of Mr
21 Assange and his attorneys, that is not the capacity in which I am testifying now. I mean I
22 can only speak to my personal opinions.

23 Q. No, Mr Shenkman, you can speak to what you wrote in the first article we went to
24 which said it was because he feared he was going to be extradited to the United States,
25 correct.

26 A. I did not mention in that article that I had an apprehension that he was going to be
27 charged under Espionage Act section 793(e) for the act of publication.

28 Q. So, what, you thought in 2015, he might be prosecuted for something but you were
29 not clear what it was.

30 A. I think, I mean, if I am trying to recall back to then, there was not specificity in
31 anything in the public record about what the charges were or could be, but certainly after the
32 2013 case, that took the publications area off the table. I think the point I want to emphasise
33 is that the prosecution under the Act for the 2010 disclosures in (inaudible) publication and
34 also for aiding, this is a highly contentious issue among legal scholars in the US. Like, this is

1 the perfect case for students to write their first year final exam in constitutional law. I am
 2 like this is the case to do it. I mean this has been one of the most contentious legal issues in
 3 the US for at least the past 50 years, probably the last 100. I cite 150 footnotes in my
 4 submission about the history. I mean, that is really the bottom line. We are talking – I just
 5 want to make sure we are talking about the same thing. Are we talking about investigations?
 6 Are we talking about investigations and the effect of charges in this indictment and did I
 7 anticipate ever that there would be an indictment that looked like this? No. I never thought
 8 based on history we would see something like this. I think a lot of scholars absolutely
 9 surprised. It is truly extraordinary, I mean this extent of the use of the Espionage Act. There
 10 are other components too but I think the character of the indictment is framed, the timing of it
 11 is framed in ways that really suggest political motivation and (inaudible). I can get into that
 12 too. There are elements in the 793(e) charge, the stuff about the informants that actually do
 13 not speak to any specific elements of the Espionage Act and there are some smaller and
 14 separate (inaudible) as well.

15 Q. Mr Shenkman, we will go through the indictment and you can point that out to me. I
 16 am going to move on to the area that you say you are an expert in. I just wonder if we could
 17 start by establishing some things that are not controversial as a matter of United States law,
 18 okay? The first thing ---

19 A. What do I think ---

20 Q. I am not going to ask you to just tell me. I am going to put some things to you, Mr
 21 Shenkman, and you can tell me if you agree. These are not controversial propositions. Do
 22 you understand?

23 A. I do but I also, I am not – I believe that the questions before the court are the nature of
 24 the political case against Mr Assange and the protections you have under human rights law
 25 and also under UK foreign extradition. I do not know that this is the forum to have a tried US
 26 case in a different jurisdiction. I just do not think that that is a productive use of our time and
 27 it is a lot of speculation. I mean, I am happy to engage but I am sure there will then be a lot
 28 of (inaudible) and there are going to be a lot of qualifications.

29 Q. So, Mr Shenkman, what I think you are saying is that there are a lot of issues raised in
 30 Mr Assange's extradition that actually should really just be decided by the United States
 31 courts, is that right?

32 A. No, no, that is not what I am saying at all. I am saying that the issues that you are
 33 raising right now are hypothetical questions of the US law and it is not, it is not clear to me
 34 how you need my responses to answer these rather than your submitting your positions to the

1 court. Rather, the scope of my testimony is the history of the Espionage Act, specifically
2 how it relates to the Espionage Act as a political offence and I understand a political offence
3 is a bar to extradition under UK law and this is a question of UK law.

4 Q. Right.

5 A. That has an application of historical analysis of public law. It is not a question of US
6 law.

7 Q. Mr Shenkman, I am going to put some questions to you. Because you have offered an
8 opinion about the operation of the Espionage Act, ie, American law, I am going to ask you
9 some questions about American law and if these questions are too difficult or you cannot
10 answer them or you are not qualified to answer them, you can tell me. Agreed?

11 A. We will take the questions one by one.

12 Q. Okay. One of the holdings in the *United States v. Morrison*, my Lady, for your
13 record, it is at page 94 of this bundle, “It seems beyond controversy that a recreant intelligent
14 department employee, who had abstracted from the government files, secret intelligence
15 information and had wilfully transmitted it or given it to a media organisation is not entitled
16 to invoke the First Amendment as a shield to immunise his act of thievery. To permit the
17 thief to misuse the Amendment would be to prostitute the salutary purposes of the First
18 Amendment.”

19 MR SUMMERS: Just so I can follow, what paragraph number for *Morrison*, please?

20 MS DOBBIN: I am so sorry. It is page 94 of the little bundle.

21 MR LEWIS: It is the middle, between the two perforations.

22 MR SUMMERS: Sorry, I am ...

23 JUDGE BARAITSER: Do you have it now, Mr Summers?

24 MR SUMMERS: No I do not. I just wanted the paragraph number. I do not – I am afraid
25 we do not have printing facilities at court and so, I have not been able to provide them to ---

26 MS DOBBIN: I can give it to you.

27 JUDGE BARAITSER: Well, they do not have paragraph numbers in this document, sadly,
28 but did you say it was between the two perforations?

29 MR SUMMERS: The judgment does have paragraph numbers. Thank you very much.

30 JUDGE BARAITSER: So there is the proposition, what is the question, please?

31 MS DOBBIN: Do you agree, Mr Shenkman, that that is not a controversial proposition of
32 law in the United States.

33 A. Actually, I mean, it is controversial. I mean, that language, even the use of the term
34 prosecutors is (inaudible), but I think there are certainly many aspects of that statement that

1 are controversial on different levels. I know that this is language that the Justice Department
2 has cited in some of its prosecutions.

3 Q. Okay, Mr Shenkman, let us denude it of any such language. Do you agree that a
4 government employee who steals classified information or national defence information is
5 not entitled to use the First Amendment as a shield?

6 A. I mean, I think that it depends on (inaudible) inquiry and it depends on what you
7 mean by steal because steal can mean many different things. I mean, that is why I said in
8 terms of some of these hypotheticals it is going to be difficult to say if X, Y or Z is a
9 completely settled or non-controversial question because there is not – I mean, there really is
10 not a lot of guidance on the topic and these issues have not been briefed generally. They
11 have not been brought, so, again, I would need more particularity as to what you mean by
12 these different terms.

13 Q. Okay. It is not hypothetical. It is a finding by the Fourth Court of Appeals. Are you
14 saying that you disagree with it?

15 A. Well, no, your question was about stealing.

16 Q. That is just the language that the court used for people who are employed by the
17 government who take national defence information who are not entitled to take it.

18 A. I mean, I think that that is one opinion and just like with any judicial opinions in the
19 common law, you can have disagreements. I do not have the opinion in front of me but I am
20 aware that just some weeks ago, I believe it was in the Ninth Circuit, there was a case
21 involving the disclosure of (inaudible) regarding the National Security Agency and that
22 probably (inaudible) United States and they actually accredited Mr Snowden with those
23 disclosures, even though he was a government employee, a keeper of these things. That is
24 very different judicial characterisation and language. I mean, if the proposition is whether
25 there is criminal liability for a government insider who discloses secrets, there would have to
26 be again more and more gloss on that and it is very highly fact specific, but I think there is
27 general support in the court and the Obama administrative prosecutions that there would be
28 criminal liability for a government insider in those cases.

29 Q. Right. Moving on, in terms of what was decided in *Bartnicki v. Vopper*, this time it is
30 a Supreme Court case. If you need to turn it up, Mr Shenkman, it is at page 48 of this little
31 bundle. It is footnote 19. The Supreme Court said, “It would be frivolous to assert and no
32 one does in these cases, that the First Amendment in the interest of securing news or
33 otherwise, does not confer licence on either the reporter or his news sources to violate valid

1 criminal laws.” Presumably, Mr Shenkman, you accept that as a binding statement of
2 American law.

3 A. I mean, it would – I would say one of the issues, fact specific, but I mean, I am
4 looking at, actually it is the next sentence. I think the important thing to keep in mind about
5 *Bartnicki* and I think it is quite relevant here, is whether or not the alleged criminal conduct is
6 linked to the act of news gathering and a part of that process and part of effectively
7 (inaudible) protection, obtaining of information etcetera, so I think it is really important that
8 there is really a spectrum when we are talking about the potential for a relationship between
9 someone in the media and the court that on the one hand, you have criminal conduct. Say
10 you had a reporter that was accused of, I do not know right now, they (inaudible) and they are
11 prosecuted for that. Well, that does not have anything to do with news gathering. We can
12 see that, okay, that is completely distinct from news gathering activity. On the other hand,
13 there are certain allegations that are inextricably tied to the news gathering process and some
14 of them entail things like (inaudible) protection. I think this is particularly meaningful to me
15 in some of my practice. I can talk to NGOs around the world and often times on laws in
16 countries and even cyber crime laws, they have states ---

17 Q. Mr Shenkman, can ---

18 A. --- like Bahrain or ---

19 Q. I really do not want to speak over you, but I think we are travelling very far from the
20 question that was asked, which was quite simply whether or not you accept what the Supreme
21 Court said at footnote 19 as a binding statement or a clear statement of United States law.
22 Are you saying you do not?

23 A. No. I mean, I do not think that – I think that question kind of over-simplifies how
24 precedents work in common law and I mean, I think (inaudible) people – and there are
25 (inaudible) towards me. I think we can be on agreement on that. I mean, certainly I agree
26 that that is what the court has written but I think that you know, that is a statement that the
27 court has made and if there is a bigger case that is made there is attorneys that could
28 distinguish that language and make statements to distinguish that language and argue that it
29 was not based on issues that were before the court. And you have to look at the history of the
30 proceedings, you have to look at the briefing, the entire history, you have to look at the whole
31 opinion and I have had not had a chance to (inaudible) on all of it, so again my answer is
32 going to be of limited use to you. But the bottom line is how a particular line in a precedent
33 is used is like, it is what lawyers get paid to do, like that is our job. If everything was just
34 clear cut we would not have work.

1 Q. I am going to try you with another ---

2 A. And it gave me a lot of hope – yes?

3 Q. --- broad principle of law set down by the Supreme Court. Again, it is cited in the
4 same footnote. “Although stealing documents or private wiretapping can provide
5 newsworthy information, neither reporter nor source is immune from conviction for such
6 conduct whatever the impact on the flow of news, *Branzburg v Hayes*.”. Again, Mr
7 Shenkman, a simple yes or no will do, do you agree that that is a broad statement of principle
8 that the US Supreme Court has set down?

9 A. They make that statement but then again I do not know, I would have to refer to
10 *Branzburg v Hayes*. I think the allegations in *Hayes* were very different than anything here.
11 I think that was a case that actually entailed, I think that entailed reporters’ privilege? I, once
12 again, I have not, I would have to go back to read the facts of *Branzburg*. It has been, it has
13 been a while since I written all this up but.

14 Q. So ---

15 A. I want to say (inaudible) that case.

16 Q. So, in terms of applying those principles, and again, I just want to understand exactly
17 what it is you are saying, Mr Shenkman, are you saying that for example hacking government
18 databases is protected activity under the first amendment? Is that your evidence?

19 A. Well, I do not think, I would want you to explain what you mean by hacking, because
20 even the – I do not believe the US, I do not believe that computer filing of these acts uses that
21 term, uses unauthorised access, so the term hacking, I do not know what you mean as a term
22 of legal significance? What concept you are referring to?

23 Q. OK. I was using it as a everyday speech, Mr Shenkman, but if you want to ---

24 A. Right. So, we are in court proceedings, we are not using every day speech, we are
25 using precise definitions. I mean, the whole point of your line of questioning is simply on
26 precision so I ask that if you are asking me questions you use precise terms, not every day
27 speech, because I am not expected to be held to every day speech standard so it would be nice
28 if we can be held to the same standards in this line of questioning.

29 Q. All right. So, Mr Shenkman, are you saying that obtaining unauthorised access to
30 government databases is or is not protected under the first amendment?

31 A. I am saying that it is actually a contentious issue and I think that unauthorised access
32 is dependent on the nature of that, how authorised is the find? What is authorised or
33 unauthorised access is actually a highly contentious issue and (inaudible) split among the
34 appellate circuit because of whether authorisation extended to access, what are called access

1 restrictions or news restriction, so basically if one is receiving authorised access by using the
2 information in a way that either an employer or whether the government does not like it. The
3 tricky thing about the PFA's, it is both a civil and a criminal statute ---

4 Q. Mr Shenkman ---

5 A. --- and they make it valid ---

6 Q. --- I am going to come to your evidence on the ---

7 A. The act.

8 Q. --- on that act. I am going to stop you there. I thought that I was asking you quite a
9 straightforward question but it seems I am not. Let me just put it this way then, what about
10 someone trying to crack an encrypted password hash in order to access a government
11 database? Is that protected by the first amendment?

12 A. I mean, I think that, I mean, I have the full indictment, but I think it is not just about
13 accessing government database, I believe that it should obtain information determined by the
14 US Government pursuant to executive order and statutes require protection against
15 unauthorised disclosure. So, it is not just cracking a password, it is cracking a password to
16 obtain information from which there is a political determination made by the executive branch
17 that should be classified.

18 So, I mean, there is another element to that and as far as I know, there is certainly big
19 scholarship events, first amendment arguments for these cases. I think these issues have been
20 affected but I do not think they are the, I mean, I think the first amendment argument could
21 certainly be raised depending on the circumstances and again that depends on the other
22 elements as well because on its own when you say crack a password hash, well, that sounds
23 really scary, does it not? I mean, and when we use the word hacking that sounds very scary,
24 but I think there are certainly many other elements and some of those have components that
25 are on the exercise of freedom of speech and the first amendment.

26 Q. OK.

27 A. So, yes, there are ways I think in which the first amendment could be, could be
28 relevant in these cases with these elements.

29 Q. All right. So, notwithstanding all of those statements by the Supreme Court or Court
30 of Appeals, Mr Shenkman, you are going to maintain that if a journalist gets involved in
31 criminal activity, they may be able to use the first amendment as a shield? Is that what you
32 are actually saying?

33 A. I said that it depends. I mean, that is the whole point of everything I have been
34 saying. I am saying that if – these are issues that books are written about.

1 Q. Right. I am going to ---

2 A. And they are highly contentious and I think that there are new things that you have
3 read from the courts that are subject to great interpretation and there is going to be a body of
4 case law that applies in the circumstance. I cannot tell you an absolute because you have to
5 know the specific circumstances and there really different answers depending on different
6 situation.

7 Q. Right. And again, Mr Shenkman, is not all of that working out something that ought
8 to be done in the United States' court seized of all of the facts ---

9 A. No, I ---

10 Q. --- and able to go into all of the ins and outs of what is alleged in order to judge it
11 against First Amendment standards?

12 A. No, because my testimony is only based on the nature and application of these laws
13 and the way that this indictment is framed, which is a political question for the here and now,
14 and that is actually one of the issues that I have with the line of questioning because I actually
15 think that, you know, maybe some of these points, you know, are not addressing the
16 questions that are really before us, and also the nature of my testimony.

17 Q. Mr Shenkman, I had understood that you were giving evidence as an expert on the
18 Espionage Act and on the press.

19 A. As a historian.

20 Q. And the extent to which the First Amendment impacts upon those.

21 A. That is right, but again is there is a difference between litigating a hypothetical and
22 presenting. The nature of my testimony is about the circumstances (inaudible) and use of the
23 Act and about the political circumstances of how these cases are brought and the prosecution.

24 MS DOBBIN: Would you wait there, please, Mr Shenkman? My Lady, I note the time. I
25 have said that I would be two hours with this witness and I still have some time to go. I do
26 not know, in fact, if there is another witness lined up for tomorrow afternoon?

27 JUDGE BARAITSER: Well, before we start talking about adjournments, you began at 20
28 past three and it is now 20 past four, so you have an hour left.

29 MS DOBBIN: Yes.

30 JUDGE BARAITSER: So I would rather you finished your hour and then we can review the
31 position then. I am assuming there are witnesses for the morning and afternoon tomorrow. Is
32 that right?

33 MR SUMMERS: There were, but tomorrow afternoons were consigned, I understand, has
34 now been agreed.

1 JUDGE BARAITSER: Has now been agreed?

2 MR SUMMERS: Yes, but we obviously, madam, have been working hard to obtain other
3 witnesses.

4 JUDGE BARAITSER: Well, if there are other witnesses, then I think they should be heard
5 and we should try and pursue what ---

6 MR SUMMERS: I cannot promise that there will be, but that is our ---

7 JUDGE BARAITSER: I think we should carry on, subject to the witness. Mr Shenkman,
8 you have been giving evidence for quite some time. Do you need a break?

9 WITNESS: It might be nice to put down the phone.

10 JUDGE BARAITSER: All right. Would you like to take 10 minutes?

11 WITNESS: Sure, that would be great.

12 JUDGE BARAITSER: Thank you very much. I am just going to discuss the rest of the
13 afternoon. If we do sit for another hour, that takes us to quarter to six. In terms of re-
14 examination, Mr Summers, do you have significant amount as far as you can work out?

15 MR SUMMERS: So far I suspect something in the region of 20 to 30 minutes.

16 JUDGE BARAITSER: Well, then we are sitting very late.

17 MS DOBBIN: Can I also say I have tried to ask this witness questions that invite quite short
18 answers.

19 JUDGE BARAITSER: No, I am not going to hear this. You have approached this in a
20 relatively – I am trying to pick my words carefully, but you have developed your topics
21 slowly and you have used the time available to you to do that, and therefore you take the
22 consequences of that approach. I do not think this witness has been other than as helpful as
23 he can in answer to the questions that you have asked. So I will not hear you on that. The
24 only question really is this afternoon and whether or not we should push on or stop now. I do
25 not think it is appropriate to sit after six and I think if you have got re-examination that is
26 what is going to happen and therefore it is probably not a good idea to push on. You are
27 asking to stop now. Is that right? Or would you like to finish before we stop?

28 MS DOBBIN: No, I am happy to stop now.

29 JUDGE BARAITSER: All right. Mr Shenkman, having said I will give you 10 minutes.
30 Are you still there? Can you still hear me? Ah, he has put his phone down, of course. All
31 right. Perhaps he can be communicated with by email. All right. I think I will simply rise.
32 Just tell me what is happening tomorrow morning.

33 MR SUMMERS: Mr Hager for sure. I think Mr Shenkman will be back at 2 pm with,
34 madam, your leave. I hesitate to say there will be more, madam, because the efforts to line

1 up witnesses as others fall away is not a straightforward one. I have names before me, but
2 not with any certainty, madam, that they will be able to attend tomorrow, so Mr Hager and
3 Mr Shenkman and we will notify you as soon as I can provide further details.

4 JUDGE BARAITSER: Mr Hager is an hour and a half witness. If we begin at 10 his
5 testimony will be concluded by 11.30.

6 MR SUMMERS: Understood, madam.

7 JUDGE BARAITSER: I appreciate you are doing everything you can and things change
8 every day. I cannot impress upon you hard enough how important it is for the court to ---

9 MR SUMMERS: Madam, we hear it.

10 JUDGE BARAITSER: Good. All right. We will leave it at that. Now, Mr Shenkman does
11 not have his phone to his ear. I wonder if you can communicate by email to explain to him
12 that the case has now been adjourned and his testimony will resume tomorrow at 2 o'clock,
13 but this court will sit at 10 o'clock in the usual way. Mr Assange will remain in custody as
14 before. He is now back.

15 WITNESS: Can you hear me, ma'am?

16 JUDGE BARAITSER: Just pause. I think somebody can explain that to him in a moment.

17 MR SUMMERS: Yes.

18 JUDGE BARAITSER: Mr Assange, you remain in custody as before overnight, back in the
19 morning at 10 o'clock. Thank you very much everybody.

20

21 ADJOURNED AT 16.37 UNTIL FRIDAY, 18th SEPTEMBER 2020

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