

**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**

**18<sup>th</sup> SEPTEMBER 2020, 10.00-16.00**

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

2 MR FITZGERALD: My Lady, the witness today is the witness Nicolas Hager, the journalist  
3 from New Zealand. His statement is at volume 2, tab 71. And I think the court has already  
4 made contact with Mr Hager so the system should work.

5 MR LEWIS: And could I add, madam, I have revised my estimate, although I hope I do not  
6 need it, to one and a half hours with Mr Hager and speaking to my learned friend it does not  
7 appear to interfere with the timetable at all.

8 JUDGE BARAITSER: All right. Thank you very much, Mr Lewis. I assume you do not  
9 take issue with that? The reason I am asking for the defence's point of view is because if  
10 there is an issue, for example, if in your view that is an inappropriate period of time, no doubt  
11 you will make your views known to me and I will make a decision.

12 MR FITZGERALD: Yes. If we ---

13 JUDGE BARAITSER: If it is agreed then I will not delve into that territory.

14 MR FITZGERALD: Well, my Lady, let us see how we go. If obviously I think my learned  
15 friend is asking irrelevant or un ---

16 JUDGE BARAITSER: That is not the way I intend to do it.

17 MR FITZGERALD: No.

18 JUDGE BARAITSER: Mr Lewis is suggesting one and a half hours, ---

19 MR FITZGERALD: Yes.

20 JUDGE BARAITSER: --- that is a revised estimate up by half an hour.

21 MR FITZGERALD: Yes.

22 JUDGE BARAITSER: If you object to that from this outset let me know. If you do not I am  
23 going to ---

24 MR FITZGERALD: I do not object.

25 JUDGE BARAITSER: --- allow him that time. Thank you.

26 COURT USHER: OK. Can you hear us, Mr Hager?

27 WITNESS: Yes, Mr Hager, thank you.

28 COURT USHER: Mr Hager, I apologise.

29 NICOLAS HAGER, Affirmed

30 Examined-in-chief by MR FITZGERALD

31 Q. Is your name Nicolas Hager?

32 A. Yes.

33 Q. And is this right, that you have made a statement for this court dated 18 July 2020?

34 A. Correct.

- 1 Q. And do you adopt that statement as your evidence?
- 2 A. Yes, thank you.
- 3 Q. And are the contents true?
- 4 A. Yes.
- 5 Q. Now, if you have your statement with you, if you look at paragraph 2, you there set  
6 out the subject matter and you say that you have been invited to comment on the publications  
7 in 2010 and 2011 by WikiLeaks of material relating to the Guantanamo detainee files, the  
8 Collateral Murder video, the Afghan and Iraq war logs, and the US diplomatic cables. Is that  
9 right, that is what you were asked to comment on?
- 10 A. That is right. That is correct. And I see my role essentially as being – of speaking as  
11 a user from a faraway country, but a user of the 2,000 that was released.
- 12 Q. I am grateful. And you have set out from paragraphs 4 to 7 your own work as an  
13 investigate journalist and some of the subjects that you have written books about. Can I just  
14 invite you to help us summarise, your work includes the book, “Secret Power: New  
15 Zealand’s role in the international intelligence network”, is that right?
- 16 A. Yes.
- 17 Q. And at paragraph 5 you deal with your book, your fifth book, “Other People’s Wars”,  
18 is that right?
- 19 A. That is right. And if it is all right with you, can I take you to one piece of that  
20 evidence please?
- 21 Q. Yes, go ahead.
- 22 A. And I say this because I think it is relevant to the issue for Julian Assange. I will just  
23 read it to you if I may?
- 24 MR LEWIS: Sorry, madam, I just want to know what it is?
- 25 A. And it is entitled ---
- 26 JUDGE BARAITSER: Yes, just pause for one moment. Obviously, Mr Fitzgerald, the issue  
27 is whether or not it is in his statement already.
- 28 MR FITZGERALD: Yes.
- 29 JUDGE BARAITSER: If it is not, well then clearly it is going to be an issue.
- 30 MR FITZGERALD: Yes, is this something you refer to in your statement, Mr Hager?
- 31 A. Completely, yes.
- 32 Q. OK, fine. Yes. So, you are just summarising for the court. Yes. If it is something in  
33 your statement, then go ahead.

1 A. Thank you. I want to say this. I want to make the court aware of this. I will just read  
2 a small section of my statement that I was aware as I wrote a large book about the  
3 Afghanistan war, that my motivation was partly permissible. Like many people I am affected  
4 by my own country's terrible experiences of war. I have come to realise that many of my  
5 investigate journalism colleagues through the generations have had similar motivations. I see  
6 that ---

7 JUDGE BARAITSER: So, just pause for one moment. I know that you are reading from  
8 your statement. Can you just identify where?

9 A. The last part in paragraph 5.

10 JUDGE BARAITSER: Paragraph 5 ---

11 A. Thank you.

12 JUDGE BARAITSER: --- did you say?

13 A. They are in – the last points in paragraph 5.

14 Q. Yes, it is the last bullet point on page 4 of paragraph 5. Thank you very much.

15 JUDGE BARAITSER: Before you carry on, Mr Hager, many witnesses for understandable  
16 reasons have been under some misapprehension about their evidence. Can I reassure you that  
17 the content, all of the content of your statement is before the court and has already been read  
18 by me. There is little point, therefore, you reading out a section of your statement because I  
19 have it already. I just wanted to make that absolutely clear so you understood.

20 A. OK.

21 Q. Yes.

22 A. Now, my Lady I do understand that and I would ---

23 MR FITZGERALD: My Lady, he can just highlight that.

24 Q. Go ahead.

25 A. And let me explain that the reason I was reading it was to defend what I would say at  
26 the end of the statement, and that is when talking to my colleagues on a similar basis they see  
27 that work as trying to uphold the importance of human rights and to save succeeding  
28 generations from what the preamble of the United Nations Charter calls the scourge of war. I  
29 believe this is an essential and proper power of the work of journalists. And what I wanted to  
30 add there is that I believe when I meet my colleagues around the world and I see the ones  
31 who have a similar outlook to me and similar motivations, what I wanted to say was that  
32 when I met Julian Assange I felt very much that he was on that same wavelength and this is  
33 what was motivating them. That was I wanted to read to you.

1 Q. I am very grateful. In fact, you deal with that later on but it is very helpful to have it.  
2 And then you have dealt with the fact your seventh book deals with a particular Hit & Run  
3 action on behalf of the special forces of New Zealand and you have summarised that in your  
4 statement, is that right?

5 A. Yes, thanks.

6 Q. And then you deal at paragraphs 10 and 11 with the fact that journalists writing about  
7 war do have to draw on confidential sources and unauthorised leaks. Do you want to say  
8 something about that point?

9 A. Yes. My main point here is that some of the subjects that we work on there are some  
10 subjects which are so secret in their content that we cannot work on them until to an adequate  
11 standard for the public unless we have confidential sources. And so, in other words, we need  
12 classified information. It is essential if we are going to allow journalism to perform its role of  
13 informing the public, enabling democratic adequate decision making and deterring  
14 wrongdoing. And ---

15 Q. And you go on to deal with the fact that very often when revelations are classified ---

16 A. That is to summarise. And at some point ---

17 Q. Go on, yes. Go ahead please, Mr Hager.

18 A. I could say – I was just going to finish by saying that there are simply no realistic and  
19 effective alternatives.

20 Q. And I want to go on. You also mentioned that claims of harm are frequently made by  
21 governments when classified information is revealed. Is that right? You deal with that  
22 paragraph.

23 A. I see that as being – yes, that is the automatic stage of every publication I have done  
24 on a controversial subject, that someone will say that someone will be harmed or staff will be  
25 imperilled. I will just make this point that invariably, in my experience, the information quite  
26 quickly becomes accepted, an uncontroversial part of the great sum of public knowledge in  
27 democratic societies. The claims of harm are shown to be wildly exaggerated and results. I  
28 can tell you about a recurrent experience, which is that after these accusations some years  
29 will pass and I will learn that there secret military or intelligence agencies are using my books  
30 and articles as useful by reference for training their staff.

31 Q. I am grateful. Now, you then deal with at paragraphs 12 to 14 with the importance of  
32 the Afghan and Iraq war diary releases. Can you comment just briefly on their importance in  
33 giving the public an insight into the realities of those wars?

1 A. Yes, please. I was – those publications were released at the time when I was working  
 2 on my voluminous Afghanistan book. I spent a large amount of time digging through data  
 3 which probably not many people (inaudible). And what I saw was all the different levels of  
 4 the war which we were not being told about. I was reading about the aid and reconstruction  
 5 operations. I was reading about aid and reconstruction operations which were actually  
 6 psychological operations. I was reading about technical intelligence operations and special  
 7 operations, for example CIA paid local forces who were effectively running a separate war in  
 8 Afghanistan from the Pentagon. What I realised was that level by level, chapter by chapter, I  
 9 was looking at a multi-layered explanation of the Afghanistan war. So let me summarise  
 10 what I think about this. I will just read this, “It is generally impossible to assert you are right  
 11 about war to a useful standard without access to sources that the authorities concerned regard  
 12 as sensitive and out of bounds. Consequently, information like request (inaudible) is  
 13 essential to allow journalist to perform its role to inform the public about war, enable  
 14 democratic decision-making and deterring wrong-doing. The war logs are an outstanding  
 15 example of information that services public interest”.

16 Q. Right. I am very grateful. And now you then deal with a little bit more fully at  
 17 paragraphs 19 to 23 with the importance of the war logs and then, later, the video of the  
 18 Apache helicopter attack. Just pausing with the war logs, what was the importance, in  
 19 particular, of those revelations?

20 A. I have already said some of that. In my work I frequently receive these materials. I  
 21 am accustomed to making judgments about whether they meet the standard of a higher public  
 22 interest to justify using leaked, you know, whistleblower sourced information. In the case of  
 23 the war logs and the embassy cables, that was exactly the sort of information that citizens  
 24 need and news organisations willingly publish to inform citizens about what their  
 25 governments are doing. These are of the highest public interest, some of the most important  
 26 material I have ever used in my life.

27 Q. And then you deal at paragraph 22 onwards with the helicopter, Apache helicopter  
 28 attack and the supporting documentation, the Iraq rules of engagement. What was the  
 29 importance, in your view, of that revelation of the attack itself and the rules of engagement?

30 A. I assume that most people who are in the room there will be aware of the Collateral  
 31 Murder video.

32 Q. Yes.

33 A. But I will just briefly summarise - summarise that afterwards it was Apache helicopter  
 34 that fired ---

1 JUDGE BARAITSER: Sorry, just pausing a moment.

2 A. --- on a group of ---

3 JUDGE BARAITSER: Mr Fitzgerald, that was not the question that you asked. You asked  
4 how important the video was to him, not to describe the content of the video.

5 MR FITZGERALD: OK.

6 JUDGE BARAITSER: I am not sure it assists either way to hear again this content.

7 MR FITZGERALD: Yes, all right. Mr Hager, what the learned judge is inviting you to do is  
8 to focus on the importance of the revelation of the Apache helicopter attack on civilians for  
9 your work and for public enlightenment.

10 A. Yes, gladly, gladly, and I was just working my way towards that but I will do it  
11 quicker, I am happy to. What - the point that I was going to make was that, after the  
12 shooting, the pilot and the co-pilot were heard saying, "Look at those dead bastards" and  
13 another replied "Nice". Now, the point I want to make here is that my belief is, watching at  
14 the time, that the publication of that video and those words was the equivalent effect of the  
15 death of George Floyd and his words, "I cannot breathe". They had a profound effect on  
16 public opinion in the world. Whether they - they had a profound effect through the video,  
17 through the accompanying rules of engagement which showed what had gone on and what  
18 was wrong with it. And then they were followed, importantly, by the war logs coming out a  
19 few months later and the combined net effect of those was to electrify the world for the first  
20 time about the issue of civilian casualties in Afghanistan. Before that time there had been  
21 endless stories of Afghanistan and the president speaking up and the locals speaking up about  
22 the problem of so many civilian casualties and how it was undermining the efforts of peace in  
23 the country, but it was not getting any traction.

24 Q. All right.

25 A. And all of that changed at that time. It led from the - from the video to the rules of  
26 engagement, then to the war logs and then in August of that year the Chief of the US  
27 Commander in Afghanistan released a special tactical directive which changed all the rules  
28 on civilian casualty precautions in Afghanistan, I believe in part as a direct result of those  
29 different publications coming out.

30 Q. Right, I am going to stop you there, thank you very much.

31 A. So - OK.

32 Q. That is very helpful. You also deal at paragraphs 15 onwards under the heading "The  
33 WikiLeaks US Embassy Cables Release" with your involvement in the materials that were  
34 revealed by the US Embassy cables, can you just help us about that? You say that you ---

1 A. Yes.

2 Q. --- visited the United Kingdom in 2011 and you say that you met with Mr Assange  
3 and that you became involved in the process of looking at these cables, is that right?

4 A. Yes, well, it was 2010 ---

5 Q. I see.

6 A. But, yes, I was - one of the - one of the ---

7 Q. I see.

8 A. --- media people from different regions of the world.

9 Q. So this would be the end of 2010

10 A. That was in November 2010.

11 Q. Thank you very much. I am so sorry, madam. Go ahead.

12 A. So the idea that WikiLeaks had come up with to try to have a more rigorous process  
13 of publication, and simultaneously vetting their documents to make sure that there were no  
14 people who were harmed by the publication of them and that the right redactions were made,  
15 was, first of all, to bring in some very large media outlets, major world news media, but also  
16 for an area like Australasia and New Zealand and Australia to invite people like me, who  
17 knew the area and could write stories, come there, read the documents in their law firm or  
18 write stories about them, but also at the same time be the local eyes that would recognise  
19 where the risks were and what areas should be redacted. So I took on that role and flew to the  
20 United Kingdom and worked with a team of journalists and with the WikiLeaks staff so that  
21 my newspaper could get the scoop on what was in the cables.

22 Q. So you were involved in that process which began in November 2010 and I think went  
23 on until there was the publication in early September of 2011, is that right?

24 A. I do not know if it went for that long but there was a process that - the deliberate  
25 strategy was to not just have every country in the world that all the cables came out at once,  
26 but to go from region to region and countries that had the capability as WikiLeaks to hear - to  
27 hear what documents needed to be redacted, redact them and then move on to the next area.  
28 So it was a deliberately slowed down process.

29 Q. And that - that process, so far as you were involved in it, did it appear to you to be a  
30 careful and diligent process?

31 A. Yes, thoroughly. My experience of it was that they were very serious about what they  
32 were doing, that they were being careful and responsible. In fact, my - my main memory of  
33 my time with them working on the project, and this gives a picture of it, was just people  
34 working hour after hour in total silence because they were so concentrated on the work. I

1 was impressed with the efforts they were taking and I was - given that I could read the cables  
2 and see that they contained sensitive names and things, I was very pleased to see the level of  
3 care that was being taken.

4 Q. And you yourself were not involved in - at the stage when unredacted cables became  
5 available to the public and then they were eventually published by WikiLeaks also, you were  
6 not involved in that process, were you?

7 A. No, I was long gone by then.

8 Q. And I just then want you - finally, you deal at paragraphs 31 to 32 a comment on  
9 Julian Assange himself and on the principles which you see as animating him and his work.  
10 You deal with that in particular at paragraph 32, could you just tell the court what you ---

11 A. Yes, gladly.

12 Q. Go ahead.

13 A. Yes, gladly. In fact, I had wanted to include this in my statement because I have  
14 become so tired of the kind of news coverage which I have watched in the succeeding years  
15 since I met him at that time, 10 years ago. The person I got to know was completely different  
16 from the picture which my friends and others I knew were getting through the news media. I  
17 found him to be thoughtful and humorous and energetic. I saw nothing of the awful, difficult  
18 person that he is often portrayed as through the media. My view is, in a sense as a New  
19 Zealander, that he is an Aussie guy who is very principled and has been trying to find a way  
20 to build his - you know, to make a difference in the world. He has devoted himself to trying  
21 to make the world a better place and in the particular context of the world as it appears after  
22 the September '11 attacks when there was decline in freedom of information in most parts of  
23 the world.

24 Q. And so in terms of ---

25 A. (Inaudible).

26 Q. --- dealing with that decline of information available, what principle do you see  
27 animating his work from what you know of him?

28 A. I see a principle. I also see really an inspired idea, and what I think the idea was or his  
29 vision was that every era where secrecy was overtaking publics, that the digital age might  
30 allow a new kind of whistleblower and a new kind of leaking of information that could  
31 redress some of the growing imbalance between citizens and governments. At the same time,  
32 in those same years, there were also a lot of very dark things happening which were the  
33 revelations about war crimes and torture and secret prisons and my idea was, my view is, that  
34 the war logs and the embassy cables, much like the Pentagon Papers 40 years earlier, provide

1 exactly the type of leaked information to the public that that that era required.

2 MR FITZGERALD: Thank you very much. Mr Hager, thank you very much. I have no  
3 further questions. My learned friend, Mr Lewis, may wish to ask you some questions in  
4 cross-examination.

5 Cross-examined by MR LEWIS

6 Q. Well, I would say good morning but it may be you are evening, is that right, Mr  
7 Hager?

8 A. Good morning to you. Yes, it is night-time here, thank you.

9 Q. Well, thank you for speaking to us outside of ordinary working hours. I am going to  
10 ask you a few questions on behalf of the Government. Firstly, Mr Hager, have you read the  
11 indictment?

12 A. I have read most of the indictment is the honest answer, yes. I think I have read all  
13 that you could possibly ask me about.

14 Q. Have you read the extradition request?

15 A. Yes.

16 Q. Could you just tell us in a few, and I put the emphasis on “few”, Mr Hager, in a few  
17 words, what you understand the essence of the offence Mr Assange has been charged with?

18 A. If I am perfectly honest, what I see seems to be a mishmash of charges. I see there is  
19 the charges about publication of classified information but then it feels to me, not as a lawyer,  
20 that there are various things that have been appended to it to try to strengthen the charges but  
21 I am very happy to be taken through the detail ---

22 Q. Well, OK.

23 A. --- about them.

24 Q. Well, I will just ask sort of individual questions then. Do you understand, for  
25 instance, that Mr Assange has been charged with publishing on the internet the Collateral  
26 Murder video?

27 A. I know that he has not been.

28 Q. He has not been, thank you.

29 A. That is my understanding.

30 Q. I am sorry, I missed that.

31 A. Please correct me if I am wrong.

32 MR LEWIS: I could not hear you, Mr Hager.

33 MR FITZGERALD: That is his understanding.

34 MR LEWIS: You are correct, you are correct, he has not been charged.

- 1 A. I said correct me if I am wrong.
- 2 Q. No, you are correct, he has not been.
- 3 A. Yes.
- 4 Q. But you spend a lot of time in your witness statement describing the Collateral Murder  
5 video when Mr Assange has not been charged with it, I wonder why you do that?
- 6 A. Can I explain why?
- 7 Q. Certainly. But, again, Mr Hager ---
- 8 A. Because ---
- 9 Q. --- I would ask you to keep your answer fairly short and succinct.
- 10 A. Certainly. The reason why I explained it is that the way that information has an effect  
11 on the world through the news media and public debate is not in the neat, segmented way like  
12 might happen in a courtroom. It happens as impressions and as a wave of ideas go together  
13 and so the war diaries and the embassy cables and the Guantanamo material and the video,  
14 the Apache video, affect the world as a whole video, not as divisible parts. That is why I was  
15 emphasising it because it is part of the way the risks had been taken.
- 16 Q. And do you further understand Mr Assange has not been charged with the publication  
17 on the internet of any material that you relied on in your work?
- 18 A. You would have to explain that to me.
- 19 Q. Well, the documents you relied upon, we will go through them in a moment. I will  
20 put it the other way round. Can you point to any document that you have relied upon for  
21 which Mr Assange has been charged with publishing on the internet?
- 22 A. I must say that I would need to leave the table and go and do some preparation to be  
23 able to give you a sensible answer on that. I am sorry. I did not come prepared to talk about  
24 that.
- 25 Q. Well, let us just ask a different line of questioning, Mr Hager. Have you ever paid a  
26 government official to steal government secrets?
- 27 A. No.
- 28 Q. Have you ever conspired with a government official to hack into a government  
29 computer?
- 30 A. It depends what you mean by that actually. This is probably a good place for us to  
31 bore down.
- 32 Q. Well, let me be a bit more specific than use the word "hack",
- 33 A. Yes please.

1 Q. Have you ever conspired with a government official to crack a user's password, a  
2 government user's password, so they could hide their tracks when stealing classified  
3 information?

4 A. No. But are we getting closer to the things where I start saying yes?

5 Q. Well, let us draw the line then, shall we, Mr Hager? So where you may have  
6 passively received classified information and published it, can we take it you would not,  
7 yourself, commit a serious criminal offence to obtain such classified material?

8 A. Now this is what I was waiting for. I think that what you are asking here is based on a  
9 fundamental misunderstanding of the work that someone like me does, and I will try and  
10 explain this to you briefly.

11 Q. Well, I am happy, but do briefly, Mr Hager, briefly, because we have limited time,  
12 because the question I asked is fairly limited and I will repeat it for you, if you like.

13 A. No, no, do not repeat it, because the part which I am picking up is the word  
14 "passively" because you might imagine that investigative journalists protect themselves from  
15 criticisms of breaking the law by only receiving information passively with no input of  
16 ourselves into it, and I have to tell you after (inaudible) this morning that that is not the way  
17 that it works. In fact, it is a regular business of me and my colleagues around the world as we  
18 fulfil out the role of society that we not only actively work with our sources, we go out and  
19 find our sources. We encourage our sources to produce evidence that will back up the things  
20 that they are telling us and sometimes that evidence might be a page of paper and sometimes  
21 it might be a memory stick, a USB drive. What it means to have sources; sources are not  
22 anonymous who have brought us information where we have clean hands of it, sources are  
23 whistleblowers who actually produce the important information which helps to change the  
24 world and play our role in maintaining democratic societies as stuff where we work with  
25 people who in most cases are breaking the law when they help us and we have to talk through  
26 with them how can they look after themselves. They have probably never leaked before and  
27 so we actually have pastoral responsibilities to talk through with them what they are doing. If  
28 somebody told you that is ---

29 MR LEWIS: Mr Hager, I am going to stop you there because it is getting well, well away  
30 from the question I asked. Let me just try and re-focus the position. Let me ask it in this  
31 way. In the Government inquiry into the Operation Burnham, you gave evidence and dealt  
32 with specific sources, did you not?

33 A. Yes.

34 Q. And did you not go to comprehensive lengths to protect the identity of those sources?

1 A. Yes.

2 Q. So let me ask you a hypothetical question. Would a journalist publish the name of a  
3 third party where it was unnecessary as part of a publication to publish that name while  
4 knowing to publish the unredacted story would put that person's life and the lives of their  
5 families in danger, even mortal danger?

6 A. Well, you know the answer, of course we would not do that.

7 Q. Thank you. And ---

8 A. However, ---

9 Q. No ---

10 A. --- you are ---

11 MR FITZGERALD: No, let ---

12 A. Could I speak please?

13 MR LEWIS: Well, no, because we have answered the question. I am going to ask the next  
14 question. If there are other questions, you can deal with it in re-examination. You have  
15 given the answer, "Of course not."

16 A. All right.

17 JUDGE BARAITSER: He said, "Of course not." He then had an afterthought. You can re-  
18 examine it, Mr Fitzgerald, and no harm will be done on fairness.

19 MR LEWIS: And, of course, you agree that the mainstream media had said they would never  
20 do that. Can I just take you to the bundle you have. I think you have now looked at it. It is  
21 bundle page 349, it is an extract from the Guardian published on 2 September 2011. Have  
22 you seen that?

23 A. No, I have not got that in front of me, sorry.

24 Q. All right. Have you got access to it? If not, I will just read it to you.

25 A. Can you read it to me, please?

26 Q. Sure. 2 September 2011, "WikiLeaks has published its full archive of 251,000 secret  
27 US diplomatic cables, without redactions, potentially exposing thousands of individuals  
28 named in the documents to detention, harm or putting their lives in danger. The move has  
29 been strongly condemned by the five previous media partners – The Guardian, New York  
30 Times, El Pais, Der Spiegel, La Monde – who have worked with WikiLeaks publishing  
31 carefully selected and redacted documents." Quote: "“We deplore the decision of WikiLeaks  
32 to publish the unredacted State Department cables, which may put sources at risk”, the  
33 organisers said in a joint statement. Our previous dealings with WikiLeaks were on the clear  
34 basis that we would only publish cables which had been subjected to a thorough joint editing

1 and clearance process. We will continue to defend our previous collaborative publishing  
2 endeavour. We cannot defend the needless publication of the complete data – indeed, we are  
3 united in condemning it.” Now, would you agree with those sentiments?

4 A. My understanding, which may be incorrect, is that the information had come out  
5 before WikiLeaks made that decision, that WikiLeaks had gone to strenuous efforts to keep  
6 the information secret, which I was part of the process of, and did not release it until that  
7 unfortunately, alas, so far as I am concerned, came out of other places. That is my  
8 understanding.

9 Q. Well, we say your understanding is incorrect, so, for instance, on or about 25 August  
10 134,000 US State Department cables were published by WikiLeaks, which contained some  
11 names which said, “Strictly protect” and put people’s lives in danger. So in the light of that,  
12 if that is correct, I say that is our position, would you revise your answer to the previous  
13 question?

14 A. Again, I am sure you know those facts are disputed facts and the details are disputed.  
15 I do not want to give an answer to a hypothetical where I think that the facts are disputed and  
16 I do not understand it well enough. Sorry.

17 Q. OK. Well, that is fair enough, Mr Hager. Let me just show you one thing and see if  
18 you agree with this. If you go into the bundle - do you have the bundle there electronically,  
19 or?

20 A. I have got most of it printed out in front of me.

21 Q. Oh right, I am sorry it is so long, but if you just turn to page 335 in the bottom right-  
22 hand corner, there is an extract ---

23 A. 335. You are going to have to read it again, sorry, I did not get that far through it.

24 Q. Certainly, I will read it again, do not worry. I will tell you where it is from. It is from  
25 a book called “WikiLeaks: Inside Julian Assange’s War on Secrecy” by David Leigh and  
26 Luke Harding. Do you know who David Leigh is?

27 A. Yes, I have worked with him before.

28 Q. And what he says at page 210 is, “The knottiest problems surrounded redactions. The  
29 papers planned only to publish a relatively small number of significant stories and within  
30 them the text of a handful of relevant logs. WikiLeaks, on the other hand, intended  
31 simultaneously to unleash the lot. But many of the entries, particularly the threat reports  
32 derived from intelligence, mentioned the names of informants or those who had collaborated  
33 with the US troops. In the vicious internecine politics of Afghanistan, such people could be  
34 in danger. Declan Walsh was among the first to realise this.”

1 Quote: “I told David Leigh I was worried about the repercussions of publishing these  
2 names who could easily be killed by the Taliban or other military groups if identified.’ David  
3 agreed it was a concern and said he had raised the issue with Julian but he did not seem  
4 concerned. That night we went to a Moorish restaurant, Moro with two German reporters.  
5 David broached the problem again with Julian. The response floored me. ‘Well, they’re  
6 informants’, he said, that is Mr Assange. “so if they get killed they’ve got it coming to them.  
7 They deserve it.’ There was for a moment silence around the table. I think everyone was  
8 struck by what a callous thing that was to say.” Do you agree with the sentiments of  
9 Mr Assange in relation to informants?

10 MR FITZGERALD: Hang on. Assuming that that is correct.

11 MR LEWIS: Assuming that is ---

12 MR FITZGERALD: Assuming that is correct. My learned friend knows it is disputed and  
13 stopped Mr Goetz from dealing with it.

14 MR LEWIS: Well, we can go to it in various other ---

15 JUDGE BARAITSER: Assuming it is correct. Yes.

16 MR LEWIS: Assuming it is correct, do you agree with those sentiments?

17 A. I have to preface anything I say by saying that I am very aware through a list of  
18 journalism networks that there was bitter animosity between David Leigh and Julian Assange  
19 by this time and I would take anything written by the people defending their own side here  
20 with a grain of salt. I do not actually want to dignify it by having to comment on something  
21 with such loaded hearsay.

22 Q. Are you trying to help the court or are you just trying to help Mr Assange, Mr Hager?

23 A. What I am trying – what I am saying is, which I think is completely legitimate, is that  
24 if I think that a source that is really potentially unreliable, it does not make any sense for me  
25 to start drawing judgments on the basis of it and (inaudible).

26 Q. Well, let me just help you again, Mr Hager, he has repeated this very same sentiment  
27 on a number of other occasions, some of which we have videotaped recording of, which we  
28 can play to the court. We cannot play it to you because we are not ready, but we have it on  
29 videotape. It is the videotape of the Frontline Club in London in August 2010, so it is  
30 indisputable evidence. Do you follow, Mr Hager? And this you will find at paragraph 44 of  
31 Mr Kromberg’s affidavit. It is Mr Dwyer, it is page – I am trying to find the page in the  
32 bundle as you have it. I will just find it for you. Page 19 of Dwyer. I am just trying to locate  
33 it in the bundle. Yes. It is bundle page 21 and it is a separate but identical incident which is  
34 from a videotape. It is paragraph 44.

1 A. Paragraph 44 of what?

2 Q. Of Mr Dwyer's affidavit and it says, "In a recorded interview", that is why it is  
3 videotaped, "given at the Frontline Club",

4 Q. So, it is separate from the Moro restaurant incident, "In London in August 2010,  
5 Assange called it regrettable that sources disclosed by WikiLeaks may face some threat as a  
6 result, but in the same interview, Assange insisted, 'We are not obligated to protect other  
7 people's sources, military sources or spy organisation sources except from unjust retribution  
8 and in general, there are numerous cases where people sell information or frame others or  
9 engage in genuine traitorous behaviour and actually, that is something for the public to  
10 know'." So, do you agree with that sentiment?

11 A. No, I do not.

12 Q. Thank you. Let us just look at your written statement then, if we go back to your  
13 witness statement. Just forgive me one moment. If we look at paragraph 5, third bullet, you  
14 read out the fifth bullet, do you remember, to the court?

15 A. It is ---

16 Q. It is page 3 of your statement. It is paragraph 5. It is the third bullet on page 3. It  
17 begins, "Most information in the book." Do you have that, Mr Hager?

18 A. Yes. Yes thank you.

19 Q. And you say at the end, "It would have been impossible to write the book," which is  
20 your book, "without these confidential and leaked sources."

21 A. Yes, I say that.

22 Q. Did you need the names of the informants to extract that value?

23 A. No.

24 Q. Thank you. If we go to paragraph 6 ---

25 A. Can I add something?

26 Q. Well, you may be re-examined on it. Paragraph 6, first bullet. "It was only possible  
27 to write the book because of confidential sources and the contextual material I could draw  
28 from open sources, most importantly the WikiLeaks," so you wrote the book without ---

29 A. I do not know where you are at the moment.

30 Q. I am sorry, I do apologise. It is – I am just going to find it. It is definitely in your  
31 paragraph – I have got it down as paragraph ---

32 A. I have found it, thank you.

33 Q. So, I am right in saying you wrote your book without needing to name sources.

34 A. Yes.

1 Q. Paragraph 11 of your statement, you said, and I want to understand where you get this  
2 information from, in the penultimate sentence in paragraph 11: “The claims of harm are  
3 shown to have been widely exaggerated. No serious harm results.” Now, do you agree that  
4 when the classified names of sources of information, in a hostile foreign country are  
5 disclosed, it is not widely exaggerated to say the lives of those sources are put at risk.

6 A. I think we need to drill down on this a bit. That comment there is clearly in the  
7 context of a description of my life’s work, not particularly of the various allegations that we  
8 are talking about now.

9 Q. Alright, I see. Okay. Well, I will leave that. And something just puzzled me. Your  
10 paragraphs 33 to 34, I did not immediately understand the relevance to this case of reporting  
11 misuse of espionage charges in New Zealand. Is there any particular reason you put in  
12 paragraphs 33 and 34?

13 A. Yes, the reason I put them in there is because when I wrote this statement, I was under  
14 the belief that Julian Assange was threatened with espionage charges. This has changed.

15 Q. Okay, thank you very much. I just want to ask you one or two questions about the  
16 Operation Burnham report because when you wrote your statement, in fairness to you, Mr  
17 Hager, it had not yet delivered its findings, had it?

18 A. No.

19 Q. But it now has in July 2020.

20 A. Yes.

21 Q. Do you have that report handy?

22 A. No, but I know it relatively well.

23 Q. If you need it, it has been emailed separately to you, but it is a report I know you will  
24 have studied in some depth.

25 A. It is hundreds of pages. I will not know it ---

26 Q. No, I am not going to test you on the pages. Can I just take you to one of two or three  
27 findings? We are only going to the summary. This is the report which comes about because  
28 of your allegations in the book “Hit & Run.” That is correct, is it not, Mr Hager?

29 A. That is correct.

30 Q. And if we just go into the report, it is internal page 8, it is in the setting out the  
31 overview and at the bottom of page 8, and we will come to it in a little bit more detail, the  
32 enquiry found, paragraph 12(b), “More significantly, for present purposes, having reviewed  
33 the evidence, we are satisfied that the New Zealand Defence Force personnel were not  
34 involved in the planning, preparation or execution of this operation.” If we go over to (c),

1 “Contrary to the allegations in the book,” that is your book, “Hit & Run”, “New Zealand  
2 Defence Force personnel were not involved in its planning, preparation or execution,” so am I  
3 right in understanding your allegations were rejected by the public inquiry?

4 A. That is hilarious. I can explain exactly what is going on there. That was about a large  
5 number of subjects ---

6 Q. Yes, well, can we go through those?

7 A. Would you like me to explain this?

8 Q. We will go to those.

9 A. Can I answer your question?

10 Q. Certainly.

11 A. Can I answer your question, please?

12 Q. Of course you can.

13 A. The book was very disputed. It was a long and difficult inquiry, but the part you have  
14 just quoted there was a minor footnote to the book which the commissioners and I do not  
15 agree on, but it is not the main findings of the report, most of which were confirmed. Most of  
16 the main findings of the book were confirmed by the report.

17 Q. Thank you. If we go to page 21 in the top right-hand corner, it is chapter 1, it is the  
18 summary of findings and we go through the various claims which were put in the book,  
19 paragraph 61, “Hit & Run,” that is your book. It says, “While it is accurate in its account of  
20 the operations in some respects, it is inaccurate in other important respects.” And at 63, “The  
21 principal allegations in Hit & Run about the conduct of TF81 personnel, Operations Burnham  
22 and Nova are not accurate.” So, is it right that the tribunal, the public inquiry, found your  
23 allegations not to be accurate?

24 A. Actually, no. They did not write that particular summary that you are looking at  
25 there. Can I tell you what - I will tell you what I think happened. We alleged that there were  
26 civilian cases, including the death of a child. That was confirmed. We alleged that it was  
27 actively covered up by the SAS, the Special Air Service. That was confirmed. We alleged  
28 that there had been false reports given to ministers. That was confirmed. We alleged a lot of  
29 other things but we also alleged that there were Kurds who had been beaten up. That was  
30 confirmed. We also alleged that there was a prisoner who was put into torture and then  
31 nothing was done when they found out about the torture. That was also confirmed, and so on.  
32 So, no, we did not get everything right. It was a very hard disputed thing. In all the media,  
33 you will see that it is generally concluded that we got most of it right. I am not quite sure

1 what the relevance of this is but and I am questioning what relevance this is, but I (inaudible)  
2 point it out to you.

3 Q. Alright. Well, we can look at that ourselves. We can see at paragraph 66 and  
4 following other comments by the enquiry which I do not think requires a separate question.  
5 Let us just move to something else. Your paragraph 16, paragraph 16 of your statement, Mr  
6 Hager.

7 A. Yes.

8 Q. And you were asked specifically about redactions by my learned friend, how many  
9 cables did you personally review?

10 A. A few hundred. 20 of the New Zealand ones and some Australian ones, a collection  
11 of the information, and then I looked more widely. I had a look at some in other parts of the  
12 world, but I did not write about them. A small fraction of the cables.

13 Q. So, a few hundred. And what criteria for redactions did you use?

14 A. I (inaudible). Now, can I explain that there was a special case in what I was doing. I  
15 was writing about, reading about and writing about ---

16 Q. Well, Mr Hager, I am just going to ask you to answer the question, please. What  
17 criteria did you use to make redactions?

18 A. Well, I was just telling you that actually, which is that there were quite a few places  
19 where it said 'sensitive,' 'protect,' and words like that, but in the context of the countries I  
20 was looking at, there was no threat to the people. There was just a political embarrassment  
21 factor, not a risk to their lives so I was – because of the country that I was dealing with, there  
22 were different issues than there would be in other parts of the world.

23 Q. How long did it take you to review and redact a few hundred cables?

24 A. Some days.

25 Q. Some days. Because, for instance, Mr Maurizi - I think he is going to give evidence -  
26 said it took more than nine months for two people to look at just over 4,000 cables relating to  
27 Italy. Madam, for your note, that is bundle A, tab 22, paragraph 24. So, is that a good  
28 yardstick, Mr Hager, nine months for two people to look at 4,000 cables, to do the  
29 redactions?

30 A. All I can tell you from my experience was that the material I was reading was – I was  
31 comfortable that there were not risks to them and I am experienced in this.

32 Q. Okay. Let us go to paragraph 22, it is the Collateral Murder video, and you say, you  
33 have used the words, "With supporting documentation, the Iraqi rules of engagement."

34 A. Yes.

1 Q. Did you do a draft statement which you submitted to the defence?

2 A. Yes, I have as I have ever done an affidavit for any court case, yes.

3 Q. Was it suggested to you by the defence that you put in the rules of engagement  
4 alongside the Collateral Murder video?

5 A. Yes.

6 Q. Thank you.

7 A. However, I was happy to put it there.

8 Q. I see. Give me just one moment. Thank you very much, Mr Hager. That is all I ask.

9 Re-examined by MR FITZGERALD

10 MR FITZGERALD: Just a few questions, Mr Hager. You were asked firstly about what he  
11 was charged with and you were asked about publication. Do you understand him to also be  
12 charged with having obtained and received the Guantanamo detainee briefs, the rules of  
13 engagement and the Iraq and Afghan materials, of having obtained and received them?

14 A. Yes, thank you, and that is why I probably look slightly puzzled when I see that it is  
15 said that they were not part of the charges. Yes, precisely.

16 Q. So, in order to publish something, you presumably have to obtain it first.

17 MR LEWIS: Madam, that is really comment.

18 MR FITZGERALD: And so, he was charged with obtaining and receiving the Guantanamo  
19 detainee materials, the rules of engagement, which my learned friend has asked you about,  
20 and the Iraq and Afghan war diaries. Is that right?

21 A. Yes, that was my understanding when to look at it, yes.

22 Q. Yes. And then only three of the counts relate to publication and I think what my  
23 learned friend was putting to you there was that where it was publication there was the  
24 additional fact of the un-redaction of names, that is counts 15, 16, and 17, you are aware of  
25 that?

26 A. Yes, I am.

27 Q. Yes. Now, you explained to my learned friend's question that you work with sources  
28 and just so that we understand this, because there were sources and sources, the source of the  
29 information is the person who provides it to you, is that right?

30 A. That is right.

31 Q. That is the equivalent of Mr Manning in this case. He is the source who provides it to  
32 you. The ---

33 A. That is what we talk about when I say source, yes.

1 Q. Yes, yes. And of course, when one talks about the duty to protect sources that you  
2 referred to, it is the person who provides the information to you that you have a duty to  
3 protect, is that right?

4 A. Correct, yes, thanks.

5 Q. And my learned friend asked you questions about the naming of – sorry, about the  
6 Guardian article and you said that you understood that the September publications only took  
7 place after there had been general publication in other mediums, is that right? That they ---

8 A. Yes, can I ---

9 Q. Yes, go ahead.

10 A. Am I allowed to go ahead with it?

11 Q. Yes, go ahead. Yes, go ahead.

12 A. Now, I take that as being very significant because I believed the WikiLeaks people  
13 when they said – and invited me into a process of great care and protection and trying to  
14 redact and to avoid any damage to any people when the data was being looked at and I  
15 believe them on that. My personal opinion is that I do not believe that Julian Assange or the  
16 others somehow changed their minds later and did not care anymore.

17 In fact, I would go further than that and say that what I think - I think that this is what  
18 happened, I think that it was subsequently through very bad fortune, and perhaps partly the  
19 fact that these kind of leaks are a new thing and people of all sorts are not used to being  
20 engaged to them that the information got out that should not have.

21 However, what I was very conscious of and which I am relieved about is that the  
22 work that had been done when I was part of the process of redaction and the review of those  
23 documents was not wasted, and I will explain why I say that. Because the care that was taken  
24 before the first round of documents were released means that there was a nine month gap.  
25 That means from November of 2010 when we started to release the documents through to the  
26 beginning of September 2011, when the last of those documents came out in other ways, and  
27 that means that where the documents on behalf of the US Government talk about the efforts  
28 that they made, which of course I am aware they made, to notify people that they were at risk  
29 from these docs – from possible release of their names and being outed, there was a nine  
30 month period where that work could happen which probably explains why there was not  
31 more damage. In fact, there was – no mortal damage came out of that. In other words, what I  
32 am saying is that the efforts that Julian Assange led, starting in November 2010, allowed the  
33 process which the State Department and the US military and others engaged in where they  
34 contacted vulnerable sources and tried to help them to protect themselves which – and it was

1 done and it had nine months to happen before bad luck happened and the data came out. And  
2 so the precautions that were taken by Julian Assange at the beginning helped to explain why  
3 there was not the wholesale damage which might otherwise have happened from the  
4 unredacted documents finding their way out.

5 Q. Yes. And when you say the bad luck, what do you understand the bad luck problem  
6 to be?

7 A. I do not - I do not bring special knowledge to this, I only had the same reading as  
8 anyone can do, but this is not – what I am talking about is the publication of a password  
9 which related to a document – to a database of documents which was already on the internet  
10 where it could not be got back and the gradual news getting around over a period of months  
11 and the beginning of publication by other people who for their own reasons thought it was  
12 OK to publish that material.

13 Q. Yes. So, the publication ---

14 A. And my – I could be wrong in that ---

15 Q. --- the publication of the password as your understanding is in the publication of  
16 David Leigh, is that right?

17 A. That is correct, yes.

18 MR LEWIS: Well, that is ---

19 MR FITZGERALD: Well, given his understanding, madam ---

20 JUDGE BARAITSER: Well, he brings no special knowledge and he attends as an expert  
21 witness and therefore probably not the territory for him.

22 MR FITZGERALD: Yes. My learned friend put to you various things that – well, he put to  
23 you a remark attributed by David Leigh in his book and you said that it was well known that  
24 they had fallen out and that therefore you did not regard that as a reliable statement, is that  
25 right?

26 A. That is right, yes.

27 Q. And then my learned friend also ---

28 A. If I was writing a book I would not use that myself. I would not have used that as a  
29 solid piece of evidence, not in those circumstances.

30 Q. Right. And then is this right, that my learned friend put to you, something which is  
31 allegedly said in the Frontline Club where Mr Assange referred to having to protect other  
32 people's sources from unjust retribution? Would you agree that it would be right to protect  
33 people from unjust retribution?

34 A. Yes.

- 1 Q. Yes, and that is what Mr Assange said, but, on the other hand, if the person who is  
2 being named is, for example, an agent provocateur or is someone who is wrongly accusing  
3 other people, journalists frequently expose them, for example, in the context such as Northern  
4 Ireland where someone is acting as an agent provocateur or is falsely accusing people. That  
5 is right.
- 6 A. Maybe, but to honest these are, these are the kind of issues which are at the cutting  
7 edge of journalistic efforts ---
- 8 Q. Exactly.
- 9 A. --- and would be argued about a lot and so I will not take a position on that right now.
- 10 Q. No. But you would accept that the statement that one should protect people from  
11 unjust retribution is a perfectly proper statement?
- 12 A. Of course. Of course I accept that, yes.
- 13 Q. And I just want to check. Yes, I think you were asked questions about your own  
14 redactions in performing that task. So, you become involved in November 2010 and you are  
15 involved over a period of months after that, is that right?
- 16 A. No, I was involved for a relatively short time ---
- 17 Q. Right.
- 18 A. --- because I was, I was not - I travelled to the United States for the launch of the  
19 cables and be one of the first countries in a succession of countries that would be given  
20 access, so I was at the beginning of the process.
- 21 Q. Right. And as ---
- 22 A. And after that I went back to my other work.
- 23 Q. Right. And the original plan as I think you were explaining was that they would be  
24 rolled out gradually country by country after being vetted, is that right? After being tested?
- 25 A. That is correct, yes.
- 26 Q. And you have explained ---
- 27 A. And that was what the plan was. The plan was that things would go wrong if we tried  
28 to do everything at once and tried to do too many things. There was too much chance of error  
29 and so I really (inaudible) ---
- 30 Q. Yes.
- 31 A. --- released in a much safer way.
- 32 Q. Yes. You were asked about the Collateral Murder video and your addition of the  
33 rules of engagement and you said you were happy to add in the rules of engagement. Can

1 you explain what is relevant about the rules of engagement to the Collateral Murder video?

2 How do they assist?

3 A. The rules of engagement are the directions that – they are the legal directions from the  
4 commander to the – the orders from the commander of the troops to the staff about when they  
5 can and cannot use force. And so the relevance of that at that time was that it gave a  
6 yardstick – or two things really. First of all, it gave a yardstick to judge whether they were  
7 obeying their own rules of engagement, which is a serious subject, but it also allows the rules  
8 of engagement themselves to be evaluated because this was the period where, as I was  
9 saying, there was a realisation that civilian casualties were out of control in those two wars.

10 Q. Right.

11 A. And that – and so, one of the aspects of that is whether the rules of engagement are  
12 adequate, whether the rules of engagement also are consistent with the laws of armed  
13 conflict. So that is a highly relevant document to be looking at and one which I used and  
14 published before and I would not regard as there being a great risk in those things being  
15 discussed in the news media and before the public. In fact, I think it is appropriate.

16 Q. Yes.

17 A. With qualifications.

18 Q. You are aware that one of the charges relates to the receiving and obtaining of the  
19 rules of engagement?

20 A. Yes. Yes, I am aware of that, which is why it is on my mind, because the thing about  
21 rules of engagement is that eventually a necessary part of them, and I have seen lots of them,  
22 so a necessary part of them that they never interfere with the rights of self-defence of the  
23 troops. And so the idea that has been put around that publishing of them puts the troops in  
24 danger is very questionable, especially because all that would be required if they were  
25 published would be to make an adjustment in response to that. So I only mention this  
26 because I felt - I felt that the basis that this was some kind of dire risk to the troops was based  
27 on a misunderstanding about what the rules of engagement were like.

28 Q. Thank you. If you just wait, can I just check my notes? If you would just give me a  
29 minute?

30 JUDGE BARAITSER: Do you want me to rise?

31 MR FITZGERALD: Just to see.

32 JUDGE BARAITSER: Yes, I will.

33 MR FITZGERALD: If you can just wait there for a moment, I just want to see if there is any  
34 further matter I need to. My Lady, if I can just have two minutes then?

1 JUDGE BARAITSER: Two minutes? I will give you five.

2 MR FITZGERALD: OK, thank you very much.

3 (Short adjournment)

4 JUDGE BARAITSER: Enough time, Mr Fitzgerald?

5 MR FITZGERALD: Yes, thank you very much.

6 JUDGE BARAITSER: Good.

7 MR FITZGERALD: Thank you very much.

8 JUDGE BARAITSER: Any more questions for the witness?

9 MR FITZGERALD: Just one final question. You said that you included the words “rules of  
10 engagement” alongside the reference to the Collateral Murder video at the request of the  
11 defence but that you were happy to do so because you saw a link, is that right?

12 A. That is correct, yes.

13 Q. Yes. So there is no question of you saying anything that you did not believe was  
14 correct or right?

15 A. No, I - I am very clear that I would never put something in an affidavit that I did not  
16 think, yes.

17 MR FITZGERALD: Right, I am very grateful. Thank you very much, thank you.

18 JUDGE BARAITSER: Thank you very much. Thank you for giving up your time, Mr  
19 Hager, to give evidence to this court. Your involvement has now concluded and we will  
20 sever the link. Thank you very much for your attendance.

21 WITNESS: Thank you.

22 JUDGE BARAITSER: Thank you.

23 (The witness withdrew)

24 MR FITZGERALD: Thank you, madam. Maybe if we could have a few minutes’ break  
25 before the next witness because it looks like Mr Summers, who may be calling the next  
26 witness, is outside.

27 JUDGE BARAITSER: I see. So who is the next witness then, please?

28 MR FITZGERALD: I think it is Mr El-Masri, but I think there may be arrangements that  
29 will have to be made, my Lady.

30 JUDGE BARAITSER: I see.

31 MR FITZGERALD: So if you could just give us one minute.

32 JUDGE BARAITSER: I can. He attends by link, does he?

33 MR FITZGERALD: I think that is right, yes.

34 JUDGE BARAITSER: And is there an interpreter issue with him or not?

1 MR FITZGERALD: I understand the interpreter has not arrived yet. How long do we need?

2 UNIDENTIFIED SPEAKER: Apparently, she will be here in about half an hour. She is on  
3 her way.

4 MR FITZGERALD: OK.

5 JUDGE BARAITSER: And, the interpreter, do they have any credentials or qualifications  
6 such that the court can accept their interpreting skills? Who are they?

7 MR FITZGERALD: They have been provided to Mr Todhunter.

8 JUDGE BARAITSER: I see, all right.

9 MR FITZGERALD: Yes.

10 JUDGE BARAITSER: All right.

11 MR FITZGERALD: So, my Lady, there may be something that we can read in the  
12 meantime, but could you just give us a few minutes to work that out.

13 JUDGE BARAITSER: Do you want 30 minutes until the interpreter gets here or do you  
14 want just a few minutes?

15 MR FITZGERALD: I think it might be safer to say we have the 30 so that we can  
16 concentrate on solving this problem, yes.

17 JUDGE BARAITSER: Can I make it clear that when you do take your witness, Mr El-Masri,  
18 through his evidence, or Mr Summers does, that you confine yourself to the issues which are  
19 relevant to this case.

20 MR FITZGERALD: Of course.

21 JUDGE BARAITSER: We have already discussed that I am not going to make a decision  
22 about what did or did not happen ---

23 MR FITZGERALD: Yes.

24 JUDGE BARAITSER: --- to that person and, therefore, only the relevant parts of his  
25 statement should be examined in-chief.

26 MR FITZGERALD: We take that fully on board.

27 JUDGE BARAITSER: Thank you very much indeed. 30 minutes takes us to quarter to 12,  
28 are you content that is enough time for your interpreter to get here?

29 MR FITZGERALD: Yes, yes.

30 JUDGE BARAITSER: All right, quarter to 12, then.

31 (Short adjournment)

32 JUDGE BARAITSER: Is Mr Assange on his way up?

33 COURT USHER: Yes, he is, madam.

34 JUDGE BARAITSER: Lovely.

1 MR SUMMERS: Madam, we are awaiting the arrival of the interpreter. We will be able to  
2 make progress as soon as she arrives.

3 JUDGE BARAITSER: I see.

4 MR SUMMERS: In the meantime, I think there is some evidence that we can read.

5 JUDGE BARAITSER: So be it. No sign of the Government's lawyers.

6 COURT USHER: Where are the United States ---

7 JUDGE BARAITSER: And, as discussed, Mr Summers, you are going to read the gist of  
8 those statements, not verbatim, is that correct?

9 MR SUMMERS: Yes.

10 JUDGE BARAITSER: Thank you.

11 MS IVESON: Madam, I was proposing to read the statement of Ms Robinson. We have  
12 made some edits, so it is probably easier as it is a very short statement ---

13 JUDGE BARAITSER: All right.

14 MS IVESON: --- to read most of it, subject to agreed edits rather than just ---

15 JUDGE BARAITSER: But, going forward, I hope that does not apply to all of the agreed  
16 evidence and that you will make an effort to summarise the gist.

17 MR SUMMERS: Yes.

18 JUDGE BARAITSER: Can you make sure that the lawyers are in court. Would you mind  
19 make those enquiries, please. Can you phone downstairs again, please. How many of your  
20 statements are we going to deal with apart from Ms Robertson?

21 MR LEWIS: Sorry, I think it is just Ms Robinson at the moment. The process of editing  
22 carries on.

23 JUDGE BARAITSER: Can you just direct me to where her statement is in the bundle,  
24 please.

25 MR FITZGERALD: It is at tab 42.

26 JUDGE BARAITSER: Thank you, that is helpful. I beg your pardon, it is Robinson not  
27 Robertson.

28 MS IVESON: And, madam, there is just one typographical error which is that, on the front,  
29 the date referred to as 2019 should, in fact, read 2020.

30 JUDGE BARAITSER: Thank you, Mr Assange, please sit down. Ms Iveson.

31 MS IVESON: Madam, yes. This is the statement of Jennifer Robinson, barrister at Doughty  
32 Street Chambers. It is dated 14 February 2020:

33 "I am a barrister at Doughty Street Chambers in London. I first represented Julian  
34 Assange as a solicitor in relation to WikiLeaks' publications in 2010 and in the Swedish

1 extradition proceedings. I have advised Mr Assange and WikiLeaks on various legal issues  
2 since 2010 but do not address any matters which are subject to legal privilege.

3 “On 15 August 2017, I was asked by Mr Assange to meet him at the Embassy of  
4 Ecuador in London. Mr Assange informed me a US Congressman had requested the meeting  
5 and he asked that I attend to observe. The purpose of the Congressman’s request for a  
6 meeting was to convey an offer that he wished to make in person. As is now clear from the  
7 indictment, Mr Assange had not yet been indicted in the US.

8 “At the time we were not in a position to know this because any indictment would  
9 have been sealed. However, there was an ongoing criminal investigation and there had been  
10 reports of a sealed indictment. Mr Assange had been granted asylum by Ecuador because of  
11 this and he remained in the Embassy to protect himself from US extradition. Congressman  
12 Dana Rohrabacher attended the Embassy accompanied by Charles Johnson. “Prior to the  
13 meeting, I had no notice that Mr Johnson would attend the meeting and I did not know who  
14 he was. Mr Johnson explained that he was assisting the Congressman. During the course of  
15 the meeting, Congressman Rohrabacher and Mr Johnson made clear that they wanted us to  
16 believe they were acting on behalf of the President. They stated that President Trump was  
17 aware of and had approved of them coming to meet with Mr Assange to discuss a proposal  
18 and that they would have an audience with the President to discuss the matter on their return  
19 to Washington DC.

20 “Congressman Rohrabacher explained he wanted to resolve the ongoing speculation  
21 about Russian involvement in the Democratic National Committee leaks to WikiLeaks, which  
22 were published by WikiLeaks and other media organisations in 2016. He said that he  
23 regarded the ongoing speculation as damaging to US-Russian relations, that it was reviving  
24 old Cold War politics and that it would be in the best interests of the US if the matter could  
25 be resolved. He and Mr Johnson also explained that information from Mr Assange about the  
26 source of the DNC leaks would be of interest, value and assistance to President Trump.

27 “Congressman Rohrabacher and Mr Assange talked about Mr Assange’s situation and  
28 the fact he had to remain in the Embassy to protect himself from the US indictment and  
29 extradition for publishing his work with WikiLeaks. We discussed the clear free speech  
30 implications of any US indictment and extradition request for Mr Assange of his publishing  
31 work with WikiLeaks. We also discussed the fact that the alleged source for the publications,  
32 Chelsea Manning, had already had her sentence commuted by President Obama.

33 “Mr Assange and I both attempted to make the case for them to raise this with  
34 President Trump to persuade him that Mr Assange should not face prosecution on First

1 Amendment grounds. Congressman Rohrabacher raised and acknowledged the risk of Mr  
2 Assange's exposure to US prosecution and explained he had come to London to meet with  
3 Mr Assange to talk about 'what might be necessary to get him out'.

4 "Congressman Rohrabacher presented what he described as a 'win-win solution'  
5 which could allow Mr Assange to leave the Embassy and 'get on with his life' without fear of  
6 a US indictment and extradition request. The proposal put forward by Congressman  
7 Rohrabacher was that Mr Assange identified the source for the 2016 Election publications in  
8 return for some form of pardon, assurance or agreement which would both benefit President  
9 Trump politically and prevent US indictment and extradition.

10 "The meeting was concluded on the basis that Congressman Rohrabacher would  
11 return to have a direct conversation with President Trump about exactly what would be done  
12 to prevent Mr Assange's indictment and extradition. Mr Assange did not provide any source  
13 of information to the Congressman".

14 JUDGE BARAITSER: Thank you very much. Is that what you ---

15 MR LEWIS: And, madam, just for the avoidance of doubt, the position of the Government is  
16 that we do not contest or challenge those things were said. We, obviously, do not accept the  
17 truth of the contents of what was said by others.

18 JUDGE BARAITSER: Yes, well, I am sure that on that basis that you understand that.

19 MR FITZGERALD: Yes.

20 JUDGE BARAITSER: Yes. Did you say the interpreter had arrived?

21 COURT USHER: The interpreter is here now, yes.

22 JUDGE BARAITSER: Lovely. Are they here in person?

23 COURT USHER: Yes, she is just waiting outside, I think.

24 JUDGE BARAITSER: Perhaps they can come in.

25 COURT USHER: Yes. Does the interpreter want to come inside? Oh, she is there, yes.

26 JUDGE BARAITSER: So we will need to swear the interpreter.

27 COURT USHER: I understand there might be an issue with getting Mr El-Masri to join us.  
28 Is he ready to?

29 JUDGE BARAITSER: What is the problem?

30 COURT USHER: He does not understand the instructions to join. That has to be interpreted  
31 to him.

32 JUDGE BARAITSER: Madam interpreter, I wonder if you would help us to communicate  
33 with Mr El-Masri so that we can get him onto our screen. You might have to go round the  
34 back. It may be that you will have to type some instructions in Arabic, are you able to do that

1 or are you willing to do that? I think it will take five minutes, so we will take about five  
2 minutes; is that right, something like that?

3 COURT USHER: Indeed.

4 JUDGE BARAITSER: All right, 12.00 noon. I think I will come back at 10 past in the hope  
5 that he is ready and on screen, thank you.

6 (Short adjournment)

7 (There followed a discussion re the technical problem)

8 MR SUMMERS: I think he is engaged in a good faith attempt to get connected and it is not  
9 straightforward and he is not a terribly technically adept gentleman. Madam, I can only ask  
10 for the court's indulgence and patience.

11 JUDGE BARAITSER: I am very happy to give you that, but is there a realistic possibility  
12 that we will achieve this, do you think, your best guess?

13 MR SUMMERS: I have spoken to him today via Zoom. It is a matter of regret generally that  
14 we cannot use easier platforms in this court such as Zoom and Teams, the CVP is markedly  
15 more difficult to deal with. But the answer, madam, is we have spoken to him today via  
16 video, so I do anticipate that in the end we are going to succeed in getting him onto the CVP.

17 JUDGE BARAITSER: You would not have any views one way or the other of using audio  
18 only for your purposes? Presumably no observations since he is your witness.

19 MR SUMMERS: It will affect the quality of his evidence from both sides.

20 JUDGE BARAITSER: So in principle you object.

21 MR SUMMERS: Yes.

22 MR LEWIS: We do not object and we have got almost no cross-examination because the  
23 whole point, we did offer a position that if it were to be accepted that he was not being called  
24 that, as I understood it, the agreed position was that the court is not going to be asked to  
25 decide upon the truth of his allegations ---

26 JUDGE BARAITSER: That is correct.

27 MR LEWIS: --- which we would accept.

28 JUDGE BARAITSER: Yes.

29 MR LEWIS: And therefore we had no desire to have him called.

30 JUDGE BARAITSER: Ah.

31 MR LEWIS: But that position was not acceptable to the defence.

32 JUDGE BARAITSER: Right, Mr Lewis, perhaps we should look at this now.

1 MR LEWIS: We do not have any difficulty with him being called on the telephone. My  
2 cross-examination if it lasts three minutes I would be surprised. Well, as long as he does not  
3 speak.

4 JUDGE BARAITSER: In terms of what you challenge, given my earlier indication in  
5 relation to what I understand is the defence's acceptance that they are not calling this witness  
6 to establish what happened to him, but calling him in relation to the usefulness and the  
7 importance of the cables in relation to his ICC case, what do you challenge about his  
8 account? What areas?

9 MR LEWIS: Well, if only that were the case, madam, because our position is, and the  
10 position we offered the defence, is if the defence reliance on the evidence of El-Masri is  
11 limited to the fact he makes allegations against the United States and the court is not asked by  
12 the defence to make any findings of fact on the allegations against the USA based on his  
13 evidence, we are happy for it to be read.

14 JUDGE BARAITSER: Thank you. Mr Summers.

15 MR LEWIS: That was not acceptable.

16 JUDGE BARAITSER: Thank you. Mr Summers, is that really not acceptable?

17 MR SUMMERS: Well, can I explain why we are where we are?

18 JUDGE BARAITSER: Yes.

19 MR SUMMERS: After Mr Goetz's evidence about his investigation into the El-Masri case  
20 and the relevance generally of the WikiLeaks' disclosures in his case, we intended to proceed  
21 to read Mr El-Masri. We and you, madam, were then met with Mr Lewis's objection that he  
22 does not agree the correctness of Mr El-Masri's allegations of torture and rendition. That led  
23 you to adjourn the summarising of that evidence and inviting us to find some way, some  
24 practical way, to proceed, subject to that reservation. We believed we had it. In short, the  
25 defence are prepared to accept that the court need not make findings in relation, or at least  
26 based on his evidence, as to the truth or otherwise of his allegations of torture and rendition.

27 JUDGE BARAITSER: I see. Well, that sounds like agreement between you and ---

28 MR SUMMERS: Yes.

29 JUDGE BARAITSER: --- Mr Lewis.

30 MR SUMMERS: But that ---

31 JUDGE BARAITSER: There is a proviso.

32 MR SUMMERS: Unfortunately, that is not where the story ends.

33 JUDGE BARAITSER: All right.

1 MR SUMMERS: So I can explain why in law that that is a concession I am prepared to  
2 make.

3 JUDGE BARAITSER: Yes.

4 MR SUMMERS: But I suspect I do not need to.

5 JUDGE BARAITSER: No.

6 MR SUMMERS: In short, it is not a necessary finding for your determining whether the  
7 exposure of ongoing war crimes or attempts to subvert the criminal justice system are  
8 protective conduct for the purposes of article 10. In some we believed we had achieved a  
9 pragmatic solution and we were prepared to have his evidence read on that basis. As an  
10 aside, it is rather an arid discussion, you might think, because you also know that the Grand  
11 Chamber of the Strasbourg Court has actually held his account to be true and hence the extent  
12 of the submissions developed in our written submissions based on that. But so far as his  
13 evidence is concerned, no predicate findings are required.

14 What then emerged when we attempted to agree a form of words that would reflect  
15 that position was that Mr Lewis's concerns travelled further than the correctness or otherwise  
16 of the torture and rendition claims, but extended instead to a dispute, or a challenge, to the  
17 whole of his evidence, including the fact that WikiLeaks revealed what it did, that is to say,  
18 US attempts to subvert justice in his case in particular. And there is quite frankly no  
19 pragmatic way around that. If that is the scope of the challenge in this case, it is one that  
20 needs to be put.

21 But in short, madam, and in order to keep this dignified, I am prepared to assume that  
22 the fault is entirely mine and I should have realised this right from the outset. Mr Lewis's  
23 problem with Mr El-Masri's evidence is not limited to the truth or otherwise of his torture  
24 and rendition allegations, it extends to the whole of his evidence which needs to be  
25 challenged, and that is, I am afraid, why we find ourselves today attempting to have him join  
26 us in person to give his evidence.

27 JUDGE BARAITSER: The nature of the challenge, Mr Lewis, please.

28 MR LEWIS: Madam, he goes on, in particular, to deal with matters saying that the United  
29 States pressurised the German government in a particular way. We do not accept that. There  
30 are three items, as it were: rendition, torture and pressure on Germany. As I understand it,  
31 you are not being asked to determine any of those matters. We simply cannot - I have no  
32 instructions to -  
33 accept those three matters as true.

34 JUDGE BARAITSER: Thank you.

1 MR LEWIS: And it is simply that.

2 JUDGE BARAITSER: Mr Summers, are you going to be asking for a finding from me that  
3 the United States Government placed pressure on the German Government in a particular  
4 way?

5 MR SUMMERS: I would invite you ---

6 JUDGE BARAITSER: Yes or no.

7 MR SUMMERS: --- to find that that is what the WikiLeaks disclosures revealed. That is the  
8 evidence as it happens that was given by Mr Goetz and not challenged.

9 JUDGE BARAITSER: Well, it is highly unlikely that I am going to make such a finding. I  
10 am certainly willing to look at the content, if you wish me to, of the particular relevant cables  
11 and what they said, but that is not going to lead to a finding one way or the other about the  
12 consequences of those cables passing from one government to another; namely, that pressure  
13 was put upon the German Government in a particular way.

14 MR SUMMERS: No, what is relevant for my case is that that is what the WikiLeaks'  
15 materials revealed. Whether it is true or not, I agree, is not necessary for you to resolve,  
16 although the Strasbourg Court has issued its view on it and we can get at it from that position,  
17 but so far as ---

18 JUDGE BARAITSER: Well, Mr Summers, I suspect there is more dispute about what the  
19 cables said because presumably you have them in black and white, what the cables say.

20 MR SUMMERS: And Mr Goetz has told us what they said as well.

21 JUDGE BARAITSER: Well, there is no dispute therefore about its content and I am not  
22 going to make a determination about their consequence and therefore there is no dispute  
23 between the parties. Is that a fair summary of the position?

24 MR SUMMERS: That is the position as we understood it.

25 JUDGE BARAITSER: Let me just make sure I have understood this. Mr Lewis, you do not  
26 object to the content of the cables being referred to?

27 MR LEWIS: No, madam, and the point is we will not accept that the European Court made  
28 the finding that Mr Summers says because when we look at the case we will see there is a  
29 tiny mention of WikiLeaks but nothing else and the United States was not a party to it, and  
30 the United States did not put evidence in. So all those matters will come in, but can be dealt  
31 with by way of submissions. We see no utility whatsoever in Mr El-Masri being called, none  
32 at all.

1 JUDGE BARAITSER: Well, do you agree with the position that you are happy for the  
2 content of the cable to come before me, although you clearly do not wish me to make a  
3 finding one way or the other about the consequence of it.

4 MR LEWIS: Yes, that is right.

5 JUDGE BARAITSER: And, Mr Summer, you equally agree with that position. That is  
6 correct?

7 MR SUMMERS: Yes.

8 JUDGE BARAITSER: All right. Well ---

9 MR SUMMERS: Our position, madam, is that Mr El-Masri, we will deal with it when we  
10 summarise it, but Mr El-Masri is making allegations about torture and rendition, the fact of  
11 those allegations is an important fact and it is what then links to the subsequent WikiLeaks'  
12 disclosures, and the fact that the WikiLeaks' disclosures on their face reveal that America  
13 was engaged in subverting the criminal – not whether it was or not, but whether that is the  
14 subject matter of the WikiLeaks' disclosures

15 JUDGE BARAITSER: Yes.

16 MR SUMMERS: Those are the important issues and that is what emerges from ---

17 JUDGE BARAITSER: There is no finding to be made because the content is what it is.

18 MR SUMMERS: Yes, absolutely.

19 JUDGE BARAITSER: I do not need to interpret the content for the purposes of this case.  
20 Good. Now, no doubt that statement will require editing in the light of this conversation.  
21 Perhaps you can - unless you are willing to let ---

22 DEFENDANT: Madam, I will not accept that. I will not accept that.

23 JUDGE BARAITSER: I am so sorry, Mr Assange, we have had this conversation so many  
24 times before.

25 DEFENDANT: I will not accept that.

26 JUDGE BARAITSER: Please sit down. Do you wish to take instructions from your client?

27 DEFENDANT: (Inaudible) the victim's statement before this court.

28 JUDGE BARAITSER: You do not wish to take instructions. Mr Assange, I have asked  
29 Mr Summers if he wishes to speak to you; he does not ---

30 DEFENDANT: (Inaudible).

31 JUDGE BARAITSER: --- at this stage, and therefore I am content that he has the  
32 instructions he needs to to make the submission that he makes. So you will remain seated  
33 and quiet.

1 Mr Lewis, do you require editing of Mr El-Masri's statement as it is in its current  
2 form or not in the light of the discussion that we have had?

3 MR LEWIS: No editing as long as it is made clear that we have no instructions to accept on  
4 behalf of the United States the truth of the matters he puts forward; that this court is not going  
5 to determine them. I do not think we can edit it because the editing would be very diff – he  
6 makes various statements, unless we were going to edit those out.

7 JUDGE BARAITSER: Yes.

8 MR LEWIS: But if my learned friend just wants the cables in, he can put the cables in and he  
9 can speak to them. Because, of course, madam, our position is (1) those cables have got  
10 nothing to do with this case because they were never part of Mr Assange. He is not charged  
11 with publishing those cables.

12 JUDGE BARAITSER: Yes, but the defence say the relevance is that he is charged with  
13 receiving them.

14 MR LEWIS: He is charged with receiving.

15 JUDGE BARAITSER: And obtaining them, say you.

16 MR LEWIS: Yes. Really and truly a lot of this could, we would have thought, be just done  
17 by agreement, but where we have got to, madam, is the slightly strange position where if we  
18 do not challenge the witness, we may be taken to – if you determine relevant, that it is  
19 admissible and relevant, because we have not challenged it, it becomes the truth.

20 JUDGE BARAITSER: Yes.

21 MR LEWIS: And as long as we can avoid that, we do not mind.

22 JUDGE BARAITSER: Well, Mr Summers is an officer of the court and he has made it  
23 perfectly plain the purpose to which he puts the statement and I have no doubt he will not go  
24 behind that.

25 MR LEWIS: And that is absolutely fine. So on that basis that the court is not being asked to  
26 make any determinations of fact on his evidence, we do not mind him being read.

27 JUDGE BARAITSER: Do you wish me to, again, summarise the conversations so that there  
28 is no avoidance ---

29 MR SUMMERS: No, I am entirely clear about the limits of what you will and will not find  
30 in due course and with that in mind, I understand that Mr Lewis is in no position to challenge  
31 what I am about to summarise.

32 JUDGE BARAITSER: So be it. In that case, I am going to release the interpreter. Is that a  
33 reasonable position to take? She is not required for any other reason.

34 MR SUMMERS: Yes, thank you madam.

1 JUDGE BARAITSER: Thank you very much for your attendance at court. I apologise that  
2 your services were not needed in the end, but thank you very much for attending, you are  
3 welcome to go. I wonder, actually, before you go, if you can just wait so that communication  
4 can be had with Mr El-Masri and an explanation can be given to him about what has  
5 happened this morning. Would you mind just waiting at the back of the court?

6 Good. We will have a summary then.

7 MR SUMMERS: Madam, Mr El-Masri's statement is your tab 53. By way of gist and I will  
8 do my best to gist what is a sensitive topic.

9 JUDGE BARAITSER: Yes, I appreciate that.

10 MR SUMMERS: Madam, paragraph 15 – let me begin, please, with paragraph 19. Mr El-  
11 Masri is a Lebanese man who had lived in Germany at the time of the events that we are  
12 concerned with for 20 years, a man of exemplary character and he was, madam, back to  
13 paragraph 1, a German citizen.

14 In, madam, paragraph 15, in June of 2004, he began making public allegations of  
15 treatment, he says, he had been subjected to. That treatment, madam, is summarised by him  
16 at paragraphs 1 through to 14 of his statement. In brief, he says that in December 2003,  
17 whilst on a tourist bus at the Macedonian border, he was detained for 23 days by Macedonian  
18 officials, held *in communicado*, ill-treated and kept against his will. Madam, I am instructed  
19 to stop and to take instructions.

20 JUDGE BARAITSER: So be it. It is 20 to, do you have any idea how long that might take?

21 MR SUMMERS: No.

22 JUDGE BARAITSER: Shall we give you ten minutes and hopefully we can complete the  
23 first statement by lunch time.

24 MR SUMMERS: Thank you.

25 JUDGE BARAITSER: Ten to then please.

26 (Short adjournment)

27 JUDGE BARAITSER: Thank you, Mr Summers.

28 MR SUMMERS: Mr El-Masri says that at the Macedonian border in December 2003, he was  
29 kidnapped, detained without reason, held *in communicado* and severely ill-treated for 23 days  
30 until the 23<sup>rd</sup> of January. He was then taken to Skopje airport and handed over to a CIA  
31 rendition team who cut off all his clothes apart from his blindfold. Mr El-Masri was beaten,  
32 shackled, hooded, sodomised and dressed in a nappy and a tracksuit with a bag over his head  
33 and ear-muffled and marched to the aircraft where he was chained, spread-eagled to the  
34 aircraft and given anaesthetic and rendered unconscious.

1 He then found himself in Afghanistan in a prison where he was held *in communicado*  
2 in a concrete cell, naked, humiliated with a bucket for a toilet and over the course, madam, of  
3 the next four months was interrogated. He went on hunger strike, he said, and was forcefully  
4 fed through a tube through his nose whilst tied to a chair.

5 Eventually, madam, he was released at the end of May 2004, so he had been held in  
6 those conditions, madam, for some five months. He was interrogated throughout he says,  
7 including by the American prison director. He was released on the condition that he was  
8 never to mention what had happened to him whereupon he was blindfolded again and  
9 handcuffed, given his suitcase that he had been carrying in Skopje and taken back to an  
10 aircraft, chained to the seat, and flown back to Europe. In fact, the plane landed in Albania  
11 where was put in the back of a vehicle, driven up a mountain road and told to get out and told  
12 to walk back down the road without turning back.

13 It was dark. It was at night. He thought he was going to be shot in the back. In fact,  
14 he rounded a corner and encountered three members of the Albanian police who naturally  
15 asked him why he was in Albania with no legal permission. He did not know where he was  
16 and he was told in Albania.

17 He then repatriated, madam, back to Germany and there we are back, madam, where  
18 we started. In June 2004, he began telling people or trying to tell people about what had  
19 happened to him and trying to establish accountability, as he puts it, for what had happened.

20 Madam, just by way of context, he went back to his house, paragraph 18, to find that  
21 he had been abandoned and his wife and children had returned to the Lebanon thinking him  
22 dead.

23 Madam, his quest for accountability, paragraph 22, then began. It resulted in attacks  
24 on him, intimidating and slurs on his character. That, madam, he makes the point, paragraph  
25 34, that governments, both his own and those who had been responsible for what had  
26 happened to him, sought to discredit him and his account and to silence him. He instructed a  
27 local lawyer, madam, paragraph 24 who began the process of trying to establish and prove  
28 what had happened.

29 There was difficulty in anyone believing him. Complete silence from those who  
30 could have corroborated his story and he began a long struggle to expose, with the help of a  
31 local lawyer whom he names and others who sought to help him. One of those, madam,  
32 paragraph 26 was Mr Goetz from whom you heard on Wednesday and you heard, madam,  
33 you will recall I am sure Mr Goetz's evidence of how he was able to reconstruct the path of

1 the rendition flight, putting bits and pieces together and eventually finding the names of the  
2 13 CIA officers involved and that is something that Mr El-Masri talks about at paragraph 26.

3 The result of that was that the Munich state prosecutor issued an international arrest  
4 warrant for the CIA rendition team. You know, madam, that that warrant was not executed  
5 and what Mr El-Masri says at paragraph 19 was that it became clear in 2010, 2011, when  
6 WikiLeaks published the cables that pressures had been placed on Germany by the US not to  
7 give effect to that arrest warrant and the terms of that pressure, madam, are summarised at  
8 paragraph 19. That is the content of the cables. That is the Deputy Chief admission to  
9 Germany in 2007 had warned the German deputy security advisor that the issue in  
10 international arrest warrants would have a negative impact on their bilateral relationship.

11 As a result of the cables, madam, Mr El-Masri says that it is now know, but was not at  
12 the time of the arrest warrant in 2006 that the German Government bowed to pressure from  
13 the US Government not to seek extradition of the rendition team and similarly, paragraph 28,  
14 as a result of the cables, it is known that the US had interfered to block that judicial  
15 investigation in Germany.

16 Mr El-Masri goes on to speak about parliamentary investigations in Germany and  
17 how they were the subject of impediments and the hostile experiences that he and his family  
18 endured over the following years.

19 Madam, at paragraph 33, he records that the grand chamber of the European Court of  
20 Human Rights issued its judgment in his case in 2012, madam, and madam, if you look back  
21 at paragraph 15, you will see that he says that the revelations in the cables were relied upon  
22 by the court in December 2012.

23 Madam, some of the findings of the court you will find at paragraph 2, the grand  
24 chamber made a series of findings confirming that he had been beaten, sodomised, shackled,  
25 hooded in the presence of state officials of Macedonia.

26 So, madam, that is the position up to 2012. So far as accountability in the US for  
27 what happened, paragraph 36, he says there has been none. Freedom of information lawsuits  
28 apparently revealed that the CIA's Inspector General had investigated the rendition and  
29 torture and concluded that there had been no basis to render or detain him and his detention  
30 was unjustified.

31 Paragraph 37, he commenced a lawsuit before the US District Court for the eastern  
32 district of Virginia – that is the court with which we are concerned in this case, madam –  
33 against the CIA agents and those who controlled them, but paragraph 38, the office of the US  
34 Attorney for the eastern district of Virginia declined to pursue the case.

1 Madam, he tells us at paragraph 43 that the American Civil Liberties Union have  
2 initiated proceedings firstly, in the interim American commission on human rights and  
3 secondly, in the International Criminal Court and his complaint to the latter court has  
4 included submission of the body of evidence including the WikiLeaks publications and he  
5 tells us and we know from other sources that in March of this year, the International Criminal  
6 Court agreed to investigate and he also tells us that pursuant to that, the US Secretary of  
7 State, Mr Pompeo, has reacted by stating that extreme measures will be taken against the  
8 court if the prosecutor, their families and any involved in bringing cases to the court which  
9 would cause the US to be the subject of investigation.

10 His belief, madam, is that without the dedicated and brave exposure of the state  
11 secrets in question, what happened to him would never have been acknowledged and  
12 understood, but the threats and intimidation are not diminishing.

13 Madam, you have his statement. I have sought to gist its contents but there is, of  
14 course, a great deal more detail in it and in due course, madam, we will invite you to consider  
15 in detail the written evidence you have.

16 JUDGE BARAITSER: Thank you very much, Mr Summers. That has very helpfully gisted  
17 the facts. Alright, it is now just after one o'clock. Mr Shenkman will be back, I hope, at 2  
18 o'clock on the link. Is that the expectation?

19 MR SUMMERS: Yes madam.

20 JUDGE BARAITSER: Thank you very much. 2 o'clock then, please.

21 (Luncheon adjournment)

22 JUDGE BARAITSER: Please sit down. We will just wait for Mr Assange to come in. I can  
23 see we have Mr Shenkman on the telephone. Oh, he is there, lovely. Mr Assange, do you  
24 want to just take your seat, please.

25 COURT USHER: And, madam, do you deem that Mr Shenkman is still under affirmation.

26 JUDGE BARAITSER: Yes, I do. We will just remind you of that, Mr Shenkman. You are  
27 still under oath, as you were yesterday. Do you appreciate that?

28 WITNESS: I understand.

29 JUDGE BARAITSER: Thank you very much.

30 CAREY SHENKMAN, On former affirmation

31 Cross-examined by MS DOBBIN (cont.)

32 Q. Thank you, my Lady. Mr Shenkman, I am going to pick up where we left yesterday  
33 and ask you some more questions about how the law operates in this field. First of all, as  
34 regards the position of publishers - and for the purposes of this question I mean publishers

1 like The New York Times or the Guardian, publishers who employ national security  
2 journalists - you are not suggesting, are you, that there is any blanket law precluding their  
3 being prosecuted under the Espionage Act for publishing leaked national defence  
4 information?

5 A. Sorry, can you rephrase the question? I just want to make sure that I understand.  
6 Possibly, there is a little bit of a delay.

7 Q. Of course, Mr Shenkman. Let me try again. You are not suggesting, are you, that  
8 there is any law that precludes the prosecution of a publisher under the Espionage Act for the  
9 publication of leaked national defence information?

10 A. Certainly, my - my position and the position in the submission is that the Espionage  
11 Act is so broadly worded as to allow for prosecution of the mainstream press.

12 Q. OK. So we have common ground. We accept that the state of the law is such that  
13 publishers can be prosecuted under the Espionage Act for the publication of national defence  
14 information, yes?

15 A. Well, there is - there are two layers to that. I mean, if you are asking if there is a  
16 statute that precludes, specifically precludes that, but there is also the US Constitution. So, as  
17 a matter of law, the law, if you ask what the law allows us going to - I am sorry, I am getting  
18 a little bit of feedback, I am so sorry. It may be part of my delay in speaking, but I am  
19 hearing a little bit of feedback through the phone.

20 Q. All right. Will you ---

21 A. I think it is a little bit better, better.

22 Q. Let me tell ---

23 A. I mean, let me carry on and then, if it is bad, I will stop again. But, no, the law is - if  
24 we are talking about the law, then that can be a combination of statute and the interpretation  
25 of the common law in the courts and the application of the Constitution. So whether there is  
26 a specific statute that says you cannot have such a prosecution, that is a different question  
27 than does the law generally and there is a very strong argument that the First Amendment  
28 would take serious issue with such a prosecution for publication of secrets.

29 Q. So you referred there to "argument", you cannot refer, for example, to any case which  
30 establishes that as a matter of law, can you?

31 A. I mean, the Constitution is the law of the land, so.

32 Q. I understand you to say, Mr Shenkman, that you are saying that it is arguable that the  
33 First Amendment would preclude prosecution. I am asking you whether or not there is any  
34 case which establishes that?

1 A. It has not been brought before - the Espionage Act has not been used against a  
2 publisher and brought before a court in this manner before.

3 Q. Do you accept ---

4 A. As a First Amendment issue.

5 Q. Do you accept that The New York Times case in the Supreme Court left the door open  
6 to such a prosecution?

7 A. I mean, I think it is - it is difficult to say that the door was left open. It was - if that  
8 was the issue that had come before the court. I mean, I think I understand what you are  
9 referring to, which is the discussion and *dicta* from justices about the possibility of criminal  
10 prosecution under the Act, but that was not the issue that was brought before the Supreme  
11 Court in that case; it was an issue of prior restraint.

12 Q. Can ---

13 A. And that was not briefed. It was not argued.

14 Q. Can you turn, please, to page 78 in the bundle that you were given yesterday, the  
15 bundle that has your article at the start of it.

16 A. Yes, I have that right here.

17 Q. It is the judgment in the case of *Rosen*. Are you familiar with that judgment?

18 A. Yes, I have that in front of me.

19 Q. And ---

20 A. It discusses the Pentagon Papers' decision.

21 Q. Yes, that is the decision I am talking about, Mr Shenkman. If we pick it up at 54, it  
22 says:

23 "The *per curiam* decision was accompanied by six concurring opinions and three  
24 dissents, and although the issue was not directly before the Court, a close reading of these  
25 opinions indicates that the result may have been different had the government sought to  
26 prosecute the newspapers under section 793(e) subsequent to the publication of the Pentagon  
27 Papers. Of the six justices concurring in the result three - Stewart, White and Marshall -  
28 explicitly acknowledged the possibility of persecution of the newspapers under section  
29 793(e). And, with the exception of Justice Black, whose First Amendment absolutism has  
30 never commanded the majority of the Supreme Court, the opinions of the other concurring  
31 justices arguably support, or at least do not contradict, the view that the application of section  
32 793(e) to the instant facts would be constitutional".

33 I am going to skip down a bit because we see, if we pick it up just before 693:

34 "Furthermore, while the dissenting judges chiefly objected to the feverish manner of

1 the Supreme Court’s review of the case, a survey of their opinions indicates the likelihood  
2 that they would have upheld a criminal prosecution of the newspapers as well”.

3 And then it goes down:

4 “Thus, the Supreme Court’s discussion of 793(e) in the Pentagon Papers case supports  
5 the conclusion that 793(e) does not offend the Constitution”.

6 And then it goes on to say:

7 “While the Supreme Court’s discussion of the application of 793(e) to the newspapers  
8 is clearly *dicta*, lower courts are bound by the Supreme Court’s considered *dicta* almost as  
9 firmly as by the court’s outright holdings, particularly when, as here, *dictum* is of recent  
10 vintage and not enfeebled by any subsequent statement”.

11 That judgment tends to suggest that the prosecution of newspapers under the  
12 Espionage Act was left open. Do you agree, Mr Shenkman?

13 A. No, I mean the *Rosen* case is - I mean, I prepared some material on specifically this  
14 point because it has been discussed in some of the discussion and scholarship. There was a  
15 pretty prominent law review article in 2007 by Professor Steve Vladeck, who is a national  
16 security law professor, because there were certainly questions about the point that you are  
17 raising and thinking, well, OK, this is perhaps doomed after an opinion like this. But the  
18 bottom line is that that was not the issue before the court and while - I mean, while this  
19 language was there and that analysis was there, the case ultimately did not concern  
20 disclosures to the press; it concerned an oral transition to an intermediary. It did not involve  
21 the media at all. And this is a fact. I do not need to go too far into the details, but it  
22 concerned oral transition to AIPAC lobbyists - this was the *Rosen* case. Ultimately, the  
23 prosecution was brought and I think part of that was due to some of these types of First  
24 Amendment concerns. So, I mean while we are just there, I think I ought to direct you to the  
25 end of page 55 where it mentions that, “It must be emphasised that this conclusion rests on  
26 the limitation of 793 to situations in which national security is genuinely at risk”. And  
27 certainly this type of analysis is not occurring in a vacuum, it is subject to the First  
28 Amendment. I mean, I certainly would not read the case as ---

29 Q. Mr Shenkman, can I just - can I just stop you there. Do you take any issue with the  
30 fact that what I was referring to there was the court in *Rosen*’s interpretation of the effect of  
31 the judgment of the Supreme Court in *The New York Times*’ case and that it treated it as  
32 binding on it. Do you accept that that is what the court was saying ---

33 A. I think ---

34 Q. --- or are you saying that the court was wrong?

1 A. I think there is ambiguity about the application of *dicta*. Again, as we discussed  
 2 yesterday, I mean this is part and parcel of what attorneys are doing. So if there is an  
 3 Espionage Act case (inaudible) with the First Amendment, I am positive that a case like this  
 4 would be cited by the prosecution because it has positive statements like these, but there are  
 5 certainly counter arguments and there is certainly going to be case law that goes the other  
 6 direction. I mean, the bottom line again is that the issue was not briefed before the Supreme  
 7 Court. The issue was not briefed before Judge Harlan in the *Rosen* case and the case was  
 8 ultimately dropped. It does not have - it is not a precedential prosecution. There was not  
 9 even a successful prosecution of a third party. So these issues are theoretical in their nature  
 10 and do not even apply to the specific facts of the case.

11 Q. So, Mr Shenkman, what I think you are ultimately saying then is that the effect of The  
 12 New York Times' case is arguable either way, correct?

13 A. I mean, I think the factor in The New York Times' case is that it prohibited a prior  
 14 restraint of The New York Times and that would be an issue before the court in that case.

15 Q. Right, well ---

16 A. And you have some - and you have some Supreme Court justices who are no longer  
 17 on the court who - who express language on issues that were outside of - outside of that case.  
 18 Certainly, and ultimately I - again, I kind of follow a line of curiosity as to yesterday when  
 19 we had the conversation as to what the - what the end point is. I mean, I think the point of  
 20 my testimony and the point of my report is to argue about the historical and political  
 21 application and the breadth of the Espionage Act.

22 Q. Right.

23 A. Rather than to, really, hypothetically guess what do you think an US judge would say  
 24 one way or the other on this issue.

25 Q. So are you saying, to be clear, Mr Shenkman, that you are not qualified to offer an  
 26 opinion to this court on the legal ambit of the Espionage Act?

27 A. I am saying that your questions are - I do not see the immediate relevance of your line  
 28 of questions to the reports that I provided.

29 Q. Mr ---

30 A. I am happy to discuss my research and ---

31 Q. Mr Shenkman, you have come to this court to offer an expert opinion on the reach of  
 32 the Espionage Act and I am trying to understand whether or not you are saying that you are  
 33 not qualified to give an opinion on that?

34 A. No, I am not saying that. I did not say that.

1 Q. Right. I am going to move on. You describe the Espionage Act as having  
2 extraordinary breadth throughout your opinion. Do you mention anywhere in your opinion  
3 that the Act and section 793 specifically has been challenged for vagueness and over-breadth  
4 on a number of occasions and that those challenges have failed?

5 A. Within - within US courts and in some jurisdictions, these arguments have been raised  
6 but they have also not been taken and briefed in the context of government employees  
7 typically. And also - one of the issues with the Act is that the precedent that has been set and  
8 the interpretations have been under sets of facts ---

9 Q. Right.

10 A. --- very different than the case at hand with very different legal and also policy and  
11 constitutional concerns. So, I mean, there is a whole other body of law under the Espionage  
12 Act concerning classic spies in the sense of an individual who is accused of clandestinely  
13 providing secrets to a foreign government that is distinguishable from the types of media  
14 cases that we have largely been discussing and that *Rosen* discusses. But, certainly, in those  
15 cases those interpretations have been of some of these terms and one of the points of the  
16 scholarship, and Professor Vladeck makes this point frequently, is that you have a lot more  
17 prejudice when it comes to those types of cases than you would in cases involving a member  
18 of the media when it comes to interpreting these terms.

19 Q. Mr Shenkman, I am going to stop you because you are moving very far away from the  
20 question that was asked. You give an opinion about the general breadth of the Espionage Act  
21 but it is correct and you accept that a number of courts in the United States have rejected that  
22 it is over-broad or vague under the due process ---

23 A. Again ---

24 Q. --- protection in the constitution.

25 A. --- I am trying to provide context for my answers. I mean if these questions were  
26 simple I would not have written hundreds of thousands of words on the stuff. So, I mean, the  
27 context is that there have been numerous failed statements, challenges, yes, but there is a  
28 reason for that because of the context of those challenges. When you look at the last  
29 complete three categories of individuals, classic spies, government insiders, and members of  
30 the general public, and everyone on earth ---

31 Q. OK. Mr Shenkman, I am just going to ---

32 A. --- you know, essentially the primary ---

33 Q. am going to stop you there, not because I want to cut you off but because I want to  
34 take you to case law about that. I am going to move on then to my next question. On the

1 subject of breadth, do you in your report make clear that the Espionage Act has been the  
2 subject of judicial refinement in a series of rulings?

3 A. I am sorry, is the question - do you want me to make clear that ---

4 Q. Yes, the ---

5 A. --- the Act has been the subject of judicial refinement?

6 Q. Yes. When you talk about breadth, in your report, do you anywhere refer to the fact  
7 that the Act has also been refined through judicial interpretation?

8 A. I mean, I – when you say the fact that if the refinement has been interpretation but I  
9 think that there would certainly be the feeling of scholarship about whether that could be  
10 called refinement.

11 Q. OK.

12 A. And in terms of the qualified, certainly there is – I am sorry, can I just finish? For one  
13 instance. the term “national defence information” has been subject to much interpretation  
14 over the decades, primarily in the first category of cases I mentioned, classic spying cases,  
15 but that – I do not think the scholars would actually say that that has been refined in the sense  
16 that it has been narrowed. If anything, some of these terms were brought in, including the  
17 term “national defence information”, in (inaudible) opinion.

18 Q. Second question on that. When you suggest that the extraordinary breadth of this  
19 statute means that it can be used for arbitrary purposes, you do not mention anywhere in your  
20 opinion that it has been interpreted so as to preclude arbitrary enforcement, do you?

21 A. How is, how is there any support that has been there for interpreted to preclude  
22 arbitrary enforcement?

23 Q. OK. Can you look at page 64 of your bundle please? The one from yesterday. And I  
24 am going to use the *Rosen* case because it synthesises a number of the authorities on this  
25 point. And if we look at the second paragraph on page 64 it reads, “The second judicially  
26 imposed limitation” - so, Mr Shenkman, that is what I meant by refined - “limitation on the  
27 phrase “information relating to the national defence”, is the requirement that disclosure  
28 would be potentially damaging to the United States or useful to an enemy of the United  
29 States?”. That is the case of *Morrison* which you have cited in your opinion.

30 “This important requirement is implicit in the purpose of the statute and assures that  
31 the government cannot abuse the statute by penalising citizens for discussing information the  
32 government has no compelling reason to keep confidential. As the Supreme Court has  
33 instructed, the statute only applies to information for which there is an occasion for secrecy

1 and there is no occasion for secrecy unless disclosure of the information the government  
2 seeks to implicate and important government interests such as the national security.”.

3 “This second national defence information judicial gloss” - ie, Mr Shenkman, a  
4 refinement as I described it - “was explicitly relied upon in the concurring opinions of Judge  
5 Wilkinson and Phillips in *Morrison* as necessary to save the statute from *Morrison*’s first  
6 amendment challenge.”. And it sets out there what Judge Wilkinson explained.

7 “The District Court’s limiting instructions properly confined prosecution under the  
8 statute to disclosures of classified information potentially damaging to the military security of  
9 the United States. In this way, the requirements of vagueness and over-breadth doctrines  
10 restrain the possibility that the broad language of this statute would ever be used as a means  
11 of punishing mere criticism of incompetence and corruption.”. And it goes on to cite a bit  
12 more of Justice Phillips.

13 And then if we look at the final paragraph, “Does the phrase “information relating to  
14 the national defence”, while it is potentially quite broad, is limited and clarified by the  
15 requirements for information to be government secret, that is that it is closely held by the  
16 government, that the information is the type that if disclosed could threaten the national  
17 security of the United States.”.

18 “So cabined” - I think that is the word - “the phrase “information relating to the  
19 national defence avoids fatal vagueness and passes Due Process muster; given these two  
20 limitations the phrase provides fair notice of what it encompasses and is also an adequate  
21 safeguard against arbitrary enforcement.”.

22 Now, that makes the position clear, does it not, Mr Shenkman? First of all, the Act  
23 has been refined by reference to judicial interpretation and that includes an interpretation  
24 which precludes against arbitrary enforcement. Can you see that?

25 A. I am not quite clear what your question – so, is your question about whether the  
26 passage of the opinion supports the claim that there has been judicial refinement of the Act?

27 Q. The first question I asked you, Mr Shenkman, was whether your report refers at all -  
28 whenever it criticises the breadth of this Act, whether it refers to the fact that the Act has  
29 actually been refined through a series of judgments? I think the answer to that is no. Is that  
30 correct?

31 A. I refer to a, I refer to scholarship that takes into account this opinion and discusses it.  
32 One of the, one of the scholars that a – I will double check my report but there is quite a  
33 number of references to contemporary scholars but again, Steve Vladeck has discussed this  
34 opinion extensively. I believe Yochai Benkler may have incorporated it as well. I mean, I

1 discussed and incorporated plenty of scholarships and it makes and agrees with the claims  
2 about over-breadth that follow the *Rosen* opinion that in any event occurred in 2006 and there  
3 is quite a bit of scholarship 2010 and beyond.

4 I mean, the bottom line in terms of the passage that is cited is that it interprets one  
5 phrase and one element of the Espionage Act which is we have still got national defence  
6 information, and that is a term that has been hotly litigated and the scope of that has been  
7 questioned, but when there is the application of over-breadth and vagueness challenges, there  
8 are several other elements of the law that are taken into consideration. When I am making  
9 arguments in my report, my report is not specifically discussing the scope of national defence  
10 information.

11 I mean, I think that it is a term that there is a fair consensus that it applies to a broad  
12 range of information and even in a - even the precedent is clear it does not have to be  
13 classified in order to fall into the ambit of national defence information; it is quite a broad  
14 term. My report is specifically referring to the malleability of the interpretation and the lack  
15 of willing principles which allow the law to be used not only against the government insider  
16 who is accused of releasing information but against intermediaries, against a member of the  
17 press, against a member of the general public, and by the same legal standard against all those  
18 categories of individuals.

19 The issue is that all the cases that are interpreting the issue have been interpreting  
20 kind of close to the centre. If you imagine a, imagine a circle, on the centre of a circle is the  
21 government insider and if you get further away from that circle, legal standards stay the same  
22 and that is the issue that scholars ultimately have with the Espionage Act and the press,  
23 because the same legal standards are very clumsily applied to all these different  
24 categories and there has not been a test case to actually reveal these problems or the fact that  
25 by reciting these cases are - would in a - we are in cases that are looking at the inner  
26 categories, government insiders. The furthest away it has ever gotten is in the *Rosen* case in  
27 which there is mention of oral transmission to an intermediary rather than any interaction  
28 with the press and any public interest in terms that are located in the First Amendment  
29 concerns that are implicated by that.

30 Q. Mr Shenkman, I am going to move on to my next question because in the part of your  
31 report where you say that the executives through classification has effectively been able to  
32 decide the scope of criminal law. In light of what I have just read from the *Rosen* judgment,  
33 synthesising the authorities on this point, that paragraph is misleading, is it not?

34 A. I was not ---

1 Q. It is not the ---

2 A. --- saying that because ---

3 Q. It is not the executive that determines whether or not information is national defence  
4 information and whether it meets the three requirements to be national defence information, it  
5 is the criminal court that will determine that. Correct?

6 A. It is the executive that determines the scope of classification or the type of  
7 information and whether a prosecution has been ultimately brought.

8 Q. Right. Well, Mr Shenkman, I am not going to waste any more time on this because  
9 your report says that the executive decides the scope of criminal law and that is obviously  
10 wrong when it comes to the definition of national defence information.

11 A. That is not, it is not the case at all. I mean, the executive by executive order and by  
12 other means is determining the scope of information that is protected and the classification  
13 order, the executive order that is an executive determination, and the protections of that  
14 information are executive determinations ---

15 Q. Yes ---

16 A. --- and the decision to bring a prosecution is an executive determination. The  
17 argument I am making is that under the plain text of the Espionage Act and the way that has  
18 been interpreted, even following the *Rosen* case, the law does not permit the equal application  
19 of this law against the mainstream media like in your time with the Guardian as well as  
20 (inaudible) individuals who are sharing that information on social media ---

21 Q. Mr Shenkman, I am going to move on.

22 A. --- who are re-tweeting that information after that. No, I mean, I am responding to  
23 your point and the point is regarding the breadth is – because I think we are talking about  
24 slightly different things here as well. You are talking about whether or not a US court says  
25 that this is overbroad, I am talking about the application of this long and political and  
26 selective application of it. I am talking about the application, because in the very  
27 Constitution before it even winds up in a court, I am talking about the chilling effect that that  
28 has on members of the media about the implication and the effect that investigators measure  
29 and have on members of the media, about the impact that it has historically when it is  
30 reported that there is an Espionage Act investigation against members of the media. That is  
31 all due to the breadth and the ability to mount investigations under this law.

32 Q. OK. Mr Shenkman, I am going to come back to that. I just want to clarify the scope  
33 of the law first. Do you accept that section 793 of the Espionage Act is intended to apply to  
34 cases that do not concern espionage in the classical sense?

- 1 A. Where do you have support for that proposition? I mean, there is a lot of legislative  
2 history that indicates that section 793 was never intended to apply to publishers of  
3 information. That is clear from the censorship provisions that were rejected that the Wilson  
4 administration proposed in the law, the Edgar and Schmidt article I wrote. I will not go into  
5 detail, that is a matter the court has, the Edgar and Schmidt article, and I would refer to that  
6 for interpretation of the breadth of the law. Also, I point to an early drafts of the Act that  
7 were rejected by Congress that considered permitting publication. I also refer to the fact that  
8 another provision of the Espionage Act, section 798, specifically refers to publication as one  
9 of the criminalised forms of conduct ---
- 10 Q. Mr Shenkman, I am ---
- 11 A. ---793 does not bear the words ---
- 12 Q. --- I am going to stop you because you may be at cross-purposes. The question was  
13 whether or not you accepted that section 793 of the Espionage Act was intended to apply  
14 outwith the circumstances of classical espionage, that is, the handing over, the provision of  
15 information to an enemy or to someone who has animus to a state. Do you accept that?
- 16 A. I do not think that there is a scholar that will make any claim as to what – about a  
17 singular intent of the original law. I think one of the points is that is very clumsily drafted  
18 and that there is certainly clarity as to what it did not intend.
- 19 Q. Right. Can I just stop ---
- 20 A. But the ultimate ---
- 21 Q. Can I stop you there? You are familiar with the judgment in *Morrison*, are you not,  
22 Mr Shenkman?
- 23 A. Yes.
- 24 Q. Right. So what did the Court of Appeals decide in *Morrison* in respect of section  
25 793?
- 26 A. The court in *Morrison* found that it applied to Mr Morrison in that case under this  
27 Act.
- 28 Q. Right. Can you look at page 90 ---
- 29 A. But when you are ---
- 30 Q. --- of the small bundle.
- 31 A. Right, but I did not – I will look in a moment, but I wanted to be clear your question  
32 was what the Act intended.
- 33 Q. Yes.

1 A. Now you are asking about judicial interpretation of it, so I mean those are totally  
2 different questions and I just want to be clear.

3 Q. Well, let us ---

4 A. If you are asking about what the Act intended or talking about the original Congress  
5 in 1917 and the amendment in 1950, if you are asking about what (inaudible) Court of  
6 Appeal read into that, then that is a distinct question. Those are two separate things.

7 Q. Can we look at page 90, please, of the small bundle, which is the judgment in  
8 *Morrison*? And if we pick it up at the third paragraph down, my Lady. Mr Morrison argued,  
9 did he not, Mr Shenkman, that section 793 did not prohibit the conduct that he was charged  
10 with. Specifically, he argued that the prohibitions in these subsections were to be narrowly  
11 and strictly confined to conduct represented in classic spying and espionage activity. That is  
12 what he was arguing, was he not, was the purpose behind section 793.

13 A. Sorry. Can you refer me to that page again? I am still trying to find it.

14 Q. Yes, it is page 90.

15 MR SUMMERS: While that is going on, may Mr Assange just leave the dock for a moment  
16 for a comfort break?

17 JUDGE BARAITSER: Does he mind the evidence continuing in his absence?

18 MS DOBBIN: I do not mind if he would like me to stop.

19 JUDGE BARAITSER: Let me just find out. Does he wish to be present for this next part?

20 DEFENDANT: It will be very brief.

21 JUDGE BARAITSER: Shall we wait for you? All right. Do you want me to rise, or shall I  
22 stay where I am, Mr Assange?

23 DEFENDANT: Stay where you are.

24 JUDGE BARAITSER: All right. I will do that.

25 MR SUMMERS: Sorry to interrupt.

26 JUDGE BARAITSER: Just so you understand, Mr Shenkman, Mr Assange is just taking a  
27 comfort break. He will not be terribly long. I am going to stay in court. You have had about  
28 half an hour. Obviously we will give you the five minutes, Ms Dobbin, back to you. You  
29 have had about half an hour. Thank you. If you sit down then, please. Ms Dobbin.

30 MS DOBBIN: Thank you. Mr Shenkman, we have seen the introduction to this argument. It  
31 was being contended that these sections only applied to classic spying and espionage activity.  
32 If we go to the next paragraph down, so that is the fourth paragraph, it is right, is it not, that  
33 the court found, and in fact it was conceded, that the statutes in their literal phrasing were not  
34 ambiguous on their face and provided no warrant for that contention.

- 1 A. I mean ---
- 2 Q. Do you agree that that is ---
- 3 A. I mean I do not want to waste our time here. I mean we have heard testimony about  
4 all the government insiders that have been prosecuted under the Espionage Act under the  
5 Obama administration, but I think it is plain that US courts take the position, have taken the  
6 position of just looking at the facts of what has been happening over the last - definitely since  
7 the *Morrison* decision that the Espionage Act applies to government insiders.
- 8 Q. Yes, and, Mr Shenkman, my question was about intent, that it was the intent of the  
9 Act to apply outside classical espionage situations.
- 10 A. But that is not. I mean I would direct you to the Edgar and Schmidt article, which is  
11 over a hundred page analysis of this question of legislative history, a particularly very sticky  
12 issue, and I do not think that there is a clear answer to that. I think there is significant  
13 evidence that ---
- 14 Q. Can I stop you, Mr Shenkman ---
- 15 A. --- it was never intended to apply to publication, which one of the Supreme Court  
16 justices in the Pentagon Papers decision cited that the Espionage Act provisions do not  
17 expressly refer to publishing and did reject that.
- 18 Q. Mr Shenkman, I am just looking at the final paragraph. “The defendant posits that the  
19 legislative history demonstrates conclusively that these statutes, whatever their (inaudible)  
20 language, were to be applied only to classic spying and they should be limited in their  
21 application to this clear legislative intent.” And the court goes on to say, “The threshold  
22 difficulty in pressing this contention in the case is that when the terms of that statute are clear,  
23 its language is conclusive and courts are not free to replace it.” Correct?
- 24 A. And that is what that decision says and what the (inaudible) application entails but, as  
25 I mentioned, my submission deals with the scholarship on the Act and its history and its  
26 legislative history and there is debate about that and there was continuing debate in 2010, so I  
27 would direct you to congressional hearings in 2010 where numerous professors testified,  
28 including Professor Steve Vladeck, and this is following the ---
- 29 Q. Mr Shenkman, I ---
- 30 A. --- *Rosen* decision and ---
- 31 Q. Can I stop you. I ---
- 32 A. --- despite that clear ---
- 33 Q. I am familiar with what Professor Vladeck said in 2010. I am focusing on what courts  
34 have found in respect of this question because if we go over the page to page 91 and we look

1 at the second paragraph, “The court notwithstanding that it found the language was  
2 unambiguous, went on to say, we are convinced though that the legislative history will not  
3 support the defendant’s construction of section 793(d) and (e)” and it sets out its analysis as  
4 to why that is not the position and it compares ---

5 A. The defendant was not a member of the media. That was not the issue before the  
6 court and it also was not the issue that was briefed. There was an immediate brief that – in  
7 this I attached it as part of my submissions. There are nearly 30 news organisations that  
8 submitted this brief, and the court issue was an issue of source liability. The issue of any  
9 further third party liability was not an issue, it was not briefed in that case. It was not ---

10 Q. Mr Shenkman.

11 A. --- before the court and we did not have the record of that.

12 Q. Again you are travelling far from the question. I was asking you about the intent of  
13 the legislative and whether you accepted that it was not the intent of the legislation only to  
14 apply to classic espionage cases. And this judgment ---

15 A. But there is ---

16 Q. --- in the case of *Morrison* finds that it was not the legislative intent and that section  
17 794 is the provision that applies to classic espionage. Is that not right?

18 A. So I mean I would just ask if you believe that serious scholars like Professor Vladeck  
19 and others that have kept his eye on this point following would risk their careers spouting  
20 nonsense about questioning the legislative intent of various aspects of the Espionage Act.  
21 What I am saying is that this is one star in the sky when it comes to interpretation of the Act  
22 and there is a matter of US constitutional interpretation. Yes, I mean this is one point of  
23 interpretation that you could examine, but again I would wonder what was before the court  
24 and I have looked at the significance of view and the significant disagreement and contention  
25 that there has been around the scope of the Espionage Act on questions that were not before  
26 the *Morrison* court. These questions were not before that panel.

27 Q. I am just going to go to the concl ---

28 A. And it is clear from the testimony and debate since. I mean look at it again. You  
29 have mentioned you have Mr Vladeck so you know that he has criticised the conviction of  
30 five government insiders and private persons in the press in 2010. He had also said that he  
31 doubted that Congress, that draft of the Act, meant for it to cover each of these categories, let  
32 alone cover them equally. Serious scholars have been questioning and asking questions that I  
33 am questioning now. I do not think any of these scholars would be giving you a, you know,

1 binary answer on questions that are really a lot more complex. I mean I appreciate what your  
2 job is right now and what you are trying to establish, but ---

3 Q. Mr Shenkman, I am ---

4 A. --- the problem is that it is really not that simple.

5 Q. I am just going to stop you and go to the court's holding. In short, section 794 covers  
6 classic spying, section 793(d) and (e) cover a much lesser offence than that of spying and this  
7 extends to disclosure to any person not entitled to receive the information. You accept that  
8 the court found that, do you not, Mr Shenkman?

9 A. I mean I point to what I just said that the scholarship since then has taken serious  
10 issue with the conflation of these categories and I do not think the claim that 793 is a lesser  
11 offence is one that has any unanimous agreement. And, again, I know that we have limited  
12 time and I do not want to do your job for you, but I would encourage you to ask me whatever  
13 questions that you need to ask rather than reading large blocks from that. I have that and the  
14 court has that. Again, I mean you can do whatever you wish with the remaining time, but I  
15 just want to be useful to the court.

16 Q. Mr Shenkman, can I assure you that it is my job to highlight to this court where your  
17 opinion is incomplete, or not objective, or where there is judgment that is contrary to some of  
18 the things that you have said. I am going to ---

19 A. The scholarship that I cite in my report incorporates all of these points that you are  
20 making and, if there is anything that is not specifically cited, it has certainly been examined  
21 by the opinions that I am citing. Again, what I am - what I am proposing is not - is not out of  
22 the ballpark of any serious scholarship. It is in agreement with what Professor - what Mr  
23 Vladeck and Mr Benkler and others are saying and Professors Edgar and Schmidt. If  
24 anything, the language that I have been using to describe the Act has been - has been less  
25 critical and much less critical than what the published scholars have said.

26 Q. Mr Shenkman, I am going to move on to the next question, please. At your paragraph  
27 34, you cite examples of examples against publishers which I think you almost always  
28 describe as having been dropped, is that correct?

29 A. That is in each of those cases, that is correct.

30 Q. And what that would tend to suggest is that, rather than there being misuse of this Act  
31 that, ultimately, there has been restraint; that, regardless of how exasperated administrations  
32 have been, there has been a wariness to deploy the Espionage Act against publishers, do you  
33 agree with that?

34 A. I do not agree that misuse has constituted restraint. I mean, the press in the 1980s was

1 extraordinarily nervous as shown in the fact that resulted in stories being held off for months.  
2 In the cases of The Chicago Tribune and Beacon Press, they devoted significant resources to  
3 their legal defence and, particularly, Beacon, they nearly went bankrupt. Even the presence  
4 of these investigations has deleterious effects on their ability to gather news and the  
5 propensity of other publishers to risk - to risk reporting on the same matters. So it has had a  
6 significant chilling effect.

7 Q. OK.

8 A. So I do not - I would not agree that that is an act of type of restraint. If anything, the  
9 records in the Nixon tapes show that these investigations were actually used to send a  
10 message. Now particularly in the early days and in terms of World War II, a lot of folks do  
11 not know about FDR, Franklin Delano Roosevelt, attempts to prosecute the African  
12 American press, which was a very bleak time in US history, and that was under the  
13 Espionage Act. There were investigations where the FBI were sent to investigate black  
14 publishers, White Fisher (inaudible) Defender and others.

15 Q. Right.

16 A. And this had an enormous chilling effect and that was on account of opposition to the  
17 war for civil rights issues. So - I mean, the - I think it provides some context that  
18 successful prosecutions is not all you need to limit freedom of press.

19 Q. I think we can agree, I do not think it is contentious between us, Mr Shenkman, that  
20 there has not actually been a prosecution though, is that right?

21 A. That is right, not under the Espionage Act for the publication of secrets.

22 Q. And I think in the cases that you cite they are almost all examples of publishers, in the  
23 conventional sense, in other words, serious news outlets employing serious national defence  
24 journalists or publishing houses ---

25 A. No, not ---

26 Q. --- is that correct?

27 A. No, no, not in - I mean, Beacon Press was a - was the publishing arm of the Unitarian  
28 Universalist Association. These were often not mainstream news outlets at all. They were  
29 often outlets that had political views that were perceived to be contrary to the administration  
30 or that were exposing either secrets or policies that were - that were deemed - that were  
31 deemed in opposition to prevailing policies. In the *Amerasia* case, *Amerasia* was a tiny,  
32 niche journal with a subscription of less than 2,000 individuals but it was greatly respected by  
33 the - what were called the China hands, the China experts in the State Department and their  
34 publications were routinely critical of East Asia policies at the time. I mean, there was not

1 any evidence that there was a risk of harm to the national security but at the time there was  
 2 serious political infighting within the State Department about the direction that the US was  
 3 going to take towards China following World War II and, as a result of that, some of the  
 4 experts within the State Department were disclosing documents to this journal and the  
 5 high-ups in the State Department, as it came out later, were furious with this and, for political  
 6 reasons, they did it because they wanted to advance their own policies - and the scholarship is  
 7 clear on this - for political considerations they brought forward a conspiracy Espionage Act  
 8 case against the editors and against alleged sources. So, I mean, there has been a range. I  
 9 mean, certainly Chicago Tribune and The New York Times are among the list and the  
 10 Washington Post, but there have also been outlets that have not - that have not necessarily  
 11 met the definition of traditional - but I would hesitate to even call it - because the First  
 12 Amendment does not make any such distinction. The Espionage Act does not make any such  
 13 distinction.

14 Q. OK.

15 A. So I think if we are talking about the mainstream, I think it is broadly used against  
 16 anyone, and that is the - that is the primary criticism that the thing was intended to apply  
 17 across the board.

18 Q. None of those examples resemble what is alleged against Mr Assange and WikiLeaks,  
 19 do you agree with that?

20 A. No, I think there is certainly - I think there, actually, certainly are common grounds.  
 21 In the *Amerasia* case, that involved an allegation of conspiracy where - where the editors and  
 22 journalists in that case were alleged to have conspired to obtain and publish documents with  
 23 insider sources. With Beacon Press, Beacon took the position of wanting to publish a library  
 24 of information. So the New York Times actually and Washington Post were publishing  
 25 snippets of the Pentagon Papers and there is a whole - you can read this on your own, I do not  
 26 need to get into it, but there is a whole other thread about how Senator Mike Gravel, who was  
 27 recently a presidential candidate, actually, he is still around, he read the entirety of the  
 28 Pentagon Papers into the congressional record.

29 And Beacon Press wanted to publish the whole thing because their position was that  
 30 they wanted a library of information to be available for the public and scholars to find. It was  
 31 actually, in my view, I think, a precursor to the type of velocity behind WikiLeaks having  
 32 libraries of information available for human rights' defenders and for various experts. So  
 33 Beacon wanted to publish the whole thing and President Nixon and the administration was  
 34 furious and he sent the FBI after them, attempted to bankrupt the paper. So, I mean, this is all

1 to say that I think there are - there are threads and this is part of the reason for my submission  
2 of this report because I think there are historical examples of attempts to use the Act in this  
3 way. I think there is historical evidence about the prosecutorial use and misuse of this Act for  
4 what are, ultimately, political rather than legal reasons.

5 Q. OK, I am just ---

6 A. And one of the questions that I have is where do the limitations of this law lie? Are  
7 they legal limitations in terms of the application, so is there a legal principle to limit the  
8 application to The New York Times and the Washington Post under these facts, or is there a  
9 political implication?

10 Q. OK.

11 A. And upon my reading of this indictment it is all political implications.

12 Q. Mr Shenkman, I am just going to stop you because time is short and I have some  
13 things that I want to put to you about that. You referred to The New York Times publishing  
14 snippets of the Pentagon Papers. What is alleged against Mr Assange is that WikiLeaks - and  
15 I am going to just summarise the indictment - WikiLeaks' very purpose and design was to  
16 secure unlawfully obtained classified and sensitive materials from those within Government  
17 acting illegally and those outwith Government - that is computer hackers - acting illegally.  
18 You understand that that is the allegation that is made, do you not?

19 A. I - I - I am not trying to draw a comparison, I am drawing a comparison with Beacon  
20 Press and previously to pros - attempted prosecution by Amerasia. I mean, every paper is  
21 going to be different ---

22 Q. Mr Shenkman, the question ---

23 A. But the description that ---

24 Q. The question was whether or not you understand that that is the allegation that is made  
25 against Mr Assange.

26 A. An allegation of alleged conspiracy with an alleged source is something that the  
27 Department of Justice has certainly weighed and tried before against outlets and failed to do  
28 so due to First Amendment implications and the history is clear on that.

29 Q. I am going to go through this very briefly, Mr Shenkman because it is based on what  
30 is alleged in the indictment. That WikiLeaks solicited for unlawfully obtained information on  
31 a mass scale, but the solicitation for unlawfully obtained materials extended, for example, to  
32 telling people that, unless they were members of the US military, they would have no liability  
33 to be prosecuted for supplying classified material, extended to the exhortation of people to  
34 join the CIA in order to provide material unlawfully obtained (see paragraph 86 of the

1 indictment). As regards Ms Manning, that Mr Assange encouraged and assisted her illegal  
2 conduct in terms of providing the mass and indiscriminate provision of classified and  
3 sensitive material. The allegation includes the accusation that he assisted her to attempt to  
4 crack an encrypted password hash and when it comes to publication, Mr Shenkman, you  
5 understand that it is limited to the publication of people's names who are said to have been  
6 put at risk by that, do you understand that ---

7 A. Actually, I am - I am happy you brought that up because that was actually one of my  
8 biggest curiosities out of the indictment because there actually is not any - there is not any  
9 limitation in the test of the Espionage Act but there is definitely an interpretation that that  
10 makes this issue of, I suppose the issue of informants an element ---

11 JUDGE BARAITSER: Mr Shenkman, I am going to stop you because, first of all, you have  
12 not been asked the question and, secondly, I am not sure that your curiosity really has any  
13 relevance to this court's findings. So just listen to the question and see if you can answer it.

14 MS DOBBIN: Mr Shenkman, it is really simple. The first point, do you understand the  
15 nature of the allegations that Mr Assange faces?

16 A. Yes.

17 Q. Do you accept that, in terms of character and scale, they bear no comparison to the  
18 sorts of examples that you have cited in your report?

19 A. I do not necessarily agree with that. I - in the case of Beacon Press, similar  
20 allegations were made about the implications of publication of the original Pentagon Papers -  
21 of the original entire set of the Pentagon Papers and in prior cases, like the *Amerasia* case,  
22 there was anxiety about - about the development of nuclear weapons following World War II.  
23 So, I mean, there have certainly been points of great concern in past cases.

24 Q. Mr Shenkman, I am going to suggest to you that that is a frivolous assertion and a  
25 nonsensical one in the face of the allegations that are made out on the indictment.

26 A. And that is - that is your position but I think the history in the statements that have  
27 been made and the evidence that I have submitted and cite too certainly would disagree with  
28 that.

29 MS DOBBIN: Right, I ---

30 JUDGE BARAITSER: Now you have five minutes left, so if there are any other important  
31 points that you want to elicit from this witness ---

32 MS DOBBIN: Yes.

33 JUDGE BARAITSER: --- it is probably best to go there now.

34 MS DOBBIN: I am on my final point, madam. I am on track. Mr Shenkman, finally this.

1 You also suggest in your opinion that the Computer Fraud and Abuse Act is also extremely  
2 broad as well, do you not? I just need a yes or no answer to that?

3 A. I do, yes.

4 Q. Can I just, and I understand you in large part to base that opinion on an article that  
5 was written by Professor Oren of Georgetown University in the Minnesota Law Review, is  
6 that correct?

7 A. He is currently a Professor at Berkeley Law, but I do cite that article. It is not the only  
8 citation I have but, yes, I know the article you are referring to. I have it in front of me.

9 Q. Yes, you rely on it to say that there is a debate or a dispute as a matter of United  
10 States law about the law relating to unauthorised access to a computer, is that right?

11 A. Yes, and I know the point you want to bring up already, so I will go ahead and address  
12 it. I mean you are ---

13 Q. No, Mr Shenkman, you will ---

14 A. --- referring ---

15 Q. You will ---

16 A. --- to Mr Kromberg's report.

17 MS DOBBIN: Mr Shenkman ---

18 JUDGE BARAITSER: Mr Shenkman, I do not think you can guess at the question.

19 A. But the point about that was ---

20 Q. Mr Shenkman, I do not think you can guess at the question. You have to hear what  
21 the question is and try and answer it. Just listen to the question, please.

22 MS DOBBIN: So, madam, it is at page 127.

23 JUDGE BARAITSER: Thank you.

24 MS DOBBIN: And he refers to the debate and I do not have time to go through and give the  
25 foundation ---

26 JUDGE BARAITSER: No.

27 MS DOBBIN: --- of this article, Mr Shenkman, but you are familiar with it. Two particular  
28 cases gave rise to the question of what "without authorised access to a computer" meant and  
29 he goes on to say, "Is it authorised if the computer owner tells the person not to access the  
30 computer? Is it unauthorised if the access is against the interests of the computer owner? Is  
31 it unauthorised if the access violates a contract of access? Presently, the answer is  
32 remarkably unclear". But he goes on to say, "To be sure, there are some obvious cases. If A  
33 guesses B's password and logs into B's email account to read B's email, A's access to the  
34 computer is clearly unauthorised. A has hacked into B's account. If hacking is not

1 authorised access, nothing is.”

2 I note that the professor does not seem to have any problems with the use of the word  
3 ‘hacking,’ Mr Shenkman, but in short, you understand, do you not, that what the professor  
4 says is clear beyond doubt constitutes hacking, is precisely what is alleged against Mr  
5 Assange, do you not?

6 A. No I do not because that actually contradicts what he himself has said about the  
7 indictment against Mr Assange. I see the language that you are pointing to, but there is more  
8 ambiguity in these terms and I actually point to the court that (inaudible), that Mr Kromberg  
9 cites extensively.

10 In response to the indictment of Mr Assange, clearly now I think the day of the  
11 second, the day after, that the interpretation of the CFA by the Justice Department  
12 proceedings in this case was ‘aggressive’ and also ‘controversial’ and was based on a  
13 controversial interpretation because it is not purely about - it is about access and violation of  
14 an order on classified material and he pointed to the idea that alleged acts in violation of an  
15 order on classified material being unauthorised material is a controversial legal point of CFA  
16 scholarship.

17 He also called that at that point a place holder for what it is worth, so I think in terms  
18 of working out the CFAA, I think there are many different elements that play into account in  
19 that discussion in that law review article. I do not believe (inaudible) but I think there is a lot  
20 of ambiguity when it comes to unauthorised access in the (inaudible) et cetera and apparently,  
21 an issue is upcoming before the US Supreme Court, actually, the Van Buren case, which is  
22 just being briefed actually right now and that concerns (inaudible) to exceed authorised  
23 access. So, no, I would not agree that Professor Kerr takes the position that this CFAA  
24 indictment is clear cut, because I do not think it is true based on what he himself has said.

25 MS DOBBIN: Well, Mr Shenkman, I do not think it gets much clearer. The allegation is  
26 that Mr Assange agreed with Miss Manning to crack and encrypted password cache in order  
27 to obtain access to a computer. It does not get much clearer than that. That is hacking as  
28 Professor (inaudible) says.

29 A. I mean, you can take his words from 2010 or you can take his words from 2019 and  
30 respond to the facts of the case.

31 Q. Thank you.

32 JUDGE BARAITSER: Thank you, Mr Summers.

33 Cross-examined by MR SUMMERS

34

1 MR SUMMERS: Mr Shenkman, can you hear me?

2 A. Yes, I can.

3 Q. Paragraph 34, please, of your report, you have been accused of being frivolous and  
4 non-sensical in the citation of these precedents in which the act has been threatened against  
5 the press, but never carried through. It has been suggested that none of them are comparable  
6 to this case and I think you disagreed with that accusation.

7 MS DOBBIN: Madam, can I make clear I was saying that the allegations are of a completely  
8 different order and that the comparison as regards what was alleged was frivolous.

9 JUDGE BARAITSER: Yes.

10 MR SUMMERS: You have heard Ms Dobbin what she suggested to you. Can we just look  
11 at, let us just take one of them. Let us take the Jack Anderson example. Anderson published,  
12 you tell us, a top secret report pertaining to US involvement in an ongoing war.

13 A. Yes. In fact, I think the majority of these examples actually concerned ongoing wars  
14 or conflicts. The Chicago Tribune case actually involved naval, US Battle of Midway.

15 Amerasia concerned the Cold War and the Jack Anderson story concerned the India/Pakistan  
16 war and secret US involvement with, in particular, Pakistan in that conflict.

17 Q. And it is right, is it, that at least some of the press outlets to which you have referred  
18 were in the business of publishing top secret classified information.

19 A. Certainly, not just top secret, but perhaps some that were made against The Post and  
20 other outlets in the 1980s by Director Bill Casey were under section 798 of the statute which  
21 specifically prohibits publication and that refers to communication intelligence which is  
22 another narrow category that Congress marked for prohibition on one occasion, (inaudible)  
23 have that term and (inaudible).

24 Q. And you have told us that you are generally familiar with the allegations made in this  
25 case. Are you aware that there are no allegations in this case concerning top secret materials.

26 A. That is right.

27 Q. So, what do you say to the suggestion that it is frivolous to suggest that the examples  
28 you give are comparable to what is alleged in this case?

29 A. I try not to get offended by such things just as a general rule in life, for my own  
30 wellbeing, but I disagree with it, of course.

31 Q. Thank you. Well, perhaps we can all learn something from that. Earlier on in your  
32 questioning, a number of sentences were extracted for you from judgments including  
33 *Morrison* and you were asked to agree that they were, or constituted incontestable  
34 propositions of US law and I think you told us some of that was wrong and the rest was a bit

1 more nuanced. Can I just test those answers with you, please, or just clarify what you meant.  
2 So, *Morrison*. Do you have a copy of *Morrison* with paragraph numbers because I think this  
3 will go a bit easier if you do?

4 A. I can find it.

5 JUDGE BARAITSER: I do not. It does not matter. I am sure I can follow.

6 MR SUMMERS: I am sure I can do it, but, madam, you will just have to bear with me  
7 slightly then. So, you were taken to what is paragraph 31 or a sentence in the middle of  
8 paragraph 31 and you will find it and, madam, you will find it - it is the paragraph ---

9 A. Is it followed by Judge Wilkinson's concurrence?

10 Q. Well, no, that is the problem. So, you were taken to Judge Russell, you were taken to  
11 Judge Russell, paragraph 31. Madam, it is your page 94. It is the paragraph that begins, "If  
12 Bransburg," and you were taken to the middle of that paragraph where Judge Russell says  
13 that the defendant in that case, *Morrison*", who was a whistleblower, of course, "is not  
14 entitled to invoke the First Amendment as a shield to immunise his act of thievery. To permit  
15 the thief thus to misuse the Amendment would be to prostitute the salutary purposes of the  
16 First Amendment." And that was read out to you and you were asked to agree that that was  
17 an incontrovertible proposition of US law. Do you remember that?

18 A. Yes, I recall. I recall, yes.

19 Q. Okay, now, that was Judge Russell. I do not think you agreed that that was an  
20 incontrovertible proposition of US law.

21 A. No I do not.

22 Q. Are you aware that the other two judges in that case took a rather different view?

23 A. Yes, absolutely.

24 Q. So, Judge Wilkinson's judgment begins at page 101 and madam, what is paragraph 81  
25 of the judgment is on page 102, the paragraph that begins, "I do not think."

26 A. Yes.

27 Q. So, Judge Wilkinson, paragraph 81, "I do not think the First Amendment interests her  
28 here are insignificant and he explains why and then, the next paragraph, paragraph 82, "The  
29 First Amendment interest in informed popular debate does not simply vanish at the indication  
30 of the words national security." That was Judge Wilkinson and then, Judge Phillips, his  
31 judgment begins, madam, your page 105 and what is paragraph 106 of the judgment is the  
32 paragraph, madam, that begins, "I concur." Of some note, on this paragraph, "I concur in the  
33 judgment and with only reservation in Judge Russell's careful opinion. My reservation has to  
34 do only but critically with the opinions, discussion on the First Amendment issues raised by

1 the defendant, but whilst these are ultimately discussed and rejected, there are earlier  
2 suggestions that as applied to the conduct of the type charged to Morrison, the Espionage Act  
3 statute simply do not implicate any First Amendment rights on that point. I agree with Judge  
4 Wilkinson’s differing view that the First Amendment issues raised by Morrison are real and  
5 substantial. I, therefore, concur in that opinion.”

6 Now, having had your attention drawn to the three judgments in that court and in the  
7 judgment in *Morrison*, is it, therefore, right to assert as an incontrovertible proposition of US  
8 law that whistle blowers, government employees have no First Amendment Rights?

9 A. I do not think that is - yes, yes, I mean, I do not think that is - as I was saying earlier, I  
10 do not think you can just look at the one particular opinion in isolation and say that that is an  
11 incontrovertible conduct of law. That is just not the way it works. I mean, there is certainly  
12 ambiguity in the legislative history and in the interpretation and I think the other opinions  
13 make that absolutely clear.

14 Q. Okay. Can I move, then, to a different topic about which you were pressed to agree  
15 something as an incontrovertible proposition of US law, “*Bartnicki* and the proposition that  
16 the press cannot violate criminal laws,” and I think your responses were, “Well, that is a bit  
17 over-simplified. There is a spectrum and it depends.”

18 A. That is right. That was my response.

19 Q. What, to your understanding, is it that cases like *Bartnicki* prevent the press from  
20 doing?

21 A. Well, that issue, the issue before the court in *Bartnicki* concerned wiretapping laws.

22 Q. Alright. So, *Bartnicki* tells us, does it, that the press cannot engage in separate  
23 criminal activity to obtain classified information?

24 A. (Inaudible), yes.

25 Q. Alright. What about engaging in news gathering practices to assist a government  
26 employee liberate classified information?

27 A. I do not think his line of questioning before was suggesting that it prohibits that or  
28 suggests that that would be criminal conduct.

29 Q. I think it was, so do you agree that soliciting a government employee to liberate  
30 classified information is criminal conduct of the type prohibited in cases like *Bartnicki*?

31 A. I do not think *Bartnicki* clearly extends to that.

32 Q. And your researches of the history of the threats to use this Act against the press, have  
33 they thrown up any prior examples of that kind of prosecution theory being peddled, that is to

1 say aiding and abetting a whistle blower through news gathering activity to liberate classified  
2 materials?

3 A. Absolutely. As I was mentioning earlier, the case against *Amerasia* was not an  
4 Espionage Act conspiracy and it was not a substantive publication - prosecution against the  
5 editors. Similarly, the other cases involved. The Grand Jury investigation, the New York  
6 Times, it involved conspiracy and the investigation of Beacon Press. Also, from what was  
7 known as connections to what is publicly known as connections to Boston Grand Jury also  
8 involved alleged conspiracy. The kind of publisher to allege force is a theory that has been  
9 pursued. We see it in the Jack Anderson Wrathburg affair and numerous other cases that I  
10 cite. So it is certainly not a first instance theory.

11 Q. And ---

12 A. --- (Inaudible).

13 Q. --- so it is a theory that is sometimes pedalled but has it ever, before this case,  
14 produced an indictment?

15 A. It has never produced an indictment and one of the key reasons for that are the First  
16 Amendment concerns and the impact on news gathering.

17 Q. Thank you. We know, and it appears to be agreed, that there has never been an  
18 indictment of the press under section 793, and I think you have told us some of the reasons  
19 why you think that is. You were taken in cross-examination to the case of *Stephen Rosen* and  
20 ---

21 A. Yes.

22 Q. --- I just want to make sure I understood what you had to say about it. I think in  
23 relation to something else you said it is one star in the sky and I just want to know how bright  
24 this particular star is. It is a District Court judgment so where in the scheme of precedent in  
25 America does the District Court sit, please?

26 A. District Court would have been a Court of First Instance.

27 Q. Is there any court below it?

28 A. No, there is no court below it. You may have in some cases a magistrate judge sits on  
29 some matters but typically this type of opinion would begin with a District Court judge.

30 Q. And you told us that it was obiter? Is that right?

31 A. I am sorry, can you clarify?

32 Q. You told us that the opinion in *Rosen* on the possible application of section 793 to the  
33 press was obiter.

34 A. How do you mean by obiter?

- 1 Q. Well, not relevant to the decision under, under issue.
- 2 A. Oh. Yes, the ---
- 3 Q. *Dicta* ---
- 4 A. --- facts were completely distinct. The main concern was information forwarded to  
5 the press for - rather the publication and then to the public.
- 6 Q. They involved I think you said an intermediary?
- 7 A. Yes.
- 8 Q. So, somebody who was taking classified information from a government employee,  
9 *Franklin*, and then passing it to the press.
- 10 A. Yes. In fact, the press was not even charged or implicated in that case.
- 11 Q. Well, that is curious, is it not, if this is of precedential value that in that case that the  
12 materials were provided to the press but that no one prosecuted the press for receiving them?
- 13 A. That is right.
- 14 Q. And it was a prosecution that was ultimately dropped I think you told us?
- 15 A. That is right.
- 16 Q. Yes. And I think I heard you say it is a decision with no precedential value?
- 17 A. It is precedential within, I mean, within, within that district, but the value of it would  
18 depend on its application to the facts and the application of that decision to the publication  
19 would be an extension of the opinion notwithstanding the language that was cited, and the  
20 District Court would be welcome to disagree and distinguish, and this happens as part and  
21 parcel of US proceedings all the time where matters that are not before the court in one case  
22 are distinguished factually by a future decision.
- 23 Q. OK. Thank you. I am just trying to work out how bright this star is in the sky. Just  
24 help us then with the Fourth Circuit Court of Appeals. Are their opinions of precedential  
25 value?
- 26 A. Yes, within the jurisdiction that comprises the Fourth Circuit.
- 27 Q. Right. And what is the circuit that would govern this particular case?
- 28 A. That would be the – do you mean in terms of the indictment?
- 29 Q. Eastern Virginia. Sorry.
- 30 A. Yes, that would be the Fourth Circuit.
- 31 Q. All right. Now can you remember what Judge Wilkinson had to say about this issue  
32 in *Morrison*?
- 33 A. I would have to call up the opinion.
- 34 Q. All right. Well, you might want to look at paragraph 79.

1 A. My version does not have the paragraphs, so.

2 Q. I will read it. We can read *Morrison* for ourselves.

3 A. Yes.

4 Q. We have learned that there has never been an indictment of the press under section  
5 793. Forgive what might be an obvious question. Does it therefore follow that there has  
6 never been an indictment of a foreign publisher under section 793 as well?

7 A. That is right, yes. And I mention there the fact there has never been.

8 Q. And on a different topic you told this court that you would never have imagined that  
9 this indictment, that is to say, the prosecution of the press, would have emerged in this case.  
10 How foreseeable would it have been in 2010 that a foreign publisher would have been the  
11 subject of an indictment under section 793 in your view?

12 A. I think it was completely unforeseeable. I mean as a matter of US law for any US  
13 publisher this is a contentious issue and there are certainly ambiguities and I think the  
14 scholarship that I cited reflects that, even going to 2007.

15 Q. OK. Then finally vagueness. Can I just try and understand your responses to  
16 questions on vagueness. You were taken to various decisions which have held in different  
17 contexts that 793 of the Espionage Act is not vague in its application in those contexts. I  
18 think you told us that the outcome will depend on the factual context of the challenge under  
19 consideration.

20 A. That is right.

21 Q. Has vagueness of this Act insofar as it applies potentially to the press ever been the  
22 subject of any court decision?

23 A. No, it has not.

24 Q. And then finally this. I think we all know from a list that you have given us that it  
25 has, nonetheless, been used to threaten the press down the years. What is the common theme,  
26 please, if there is one, by way of context for all of those threats against the press?

27 A. The common theme has been its use against press outlets that are in political  
28 opposition to the sitting administration, or that are revealing misconduct, or are revealing  
29 policies contrary to the ones that the sitting administration wishes to pursue.

30 MR SUMMERS: Thank you very much, Mr Shenkman, that is all I ask. Madam, do you  
31 have any questions?

32 JUDGE BARAITSER: I do not have any questions. Thank you very much, Mr Shenkman,  
33 for appearing over the course of two days to give your evidence. The court is very grateful  
34 for the time that you have given for that. That concludes your involvement in this case, so it

1 just remains for me to say thank you and we are going to sever the link now. Thank you very  
2 much.

3 Turn 17 ends here

4 WITNESS: Thank you. Have a good weekend.

5 JUDGE BARAITSER: Thank you.

6 (Witness withdrew)

7 MR SUMMERS: Thank you, madam. There is no further live evidence today but potentially  
8 a statement that could be read or gist-ed.

9 JUDGE BARAITSER: Yes, please.

10 MR SUMMERS: But can we take please, madam, just 10 minutes to finalise that process?

11 JUDGE BARAITSER: You can. Who is going to be called for tomorrow, please?

12 MR SUMMERS: Well, hopefully no one.

13 JUDGE BARAITSER: Well, we could sit tomorrow but maybe perhaps we should not.  
14 Monday?

15 MR SUMMERS: Mr Augstein, Mr Grothoff, and because we have been informed by Mr  
16 Smith that the cross-examination of both of those witnesses would be less than we had  
17 anticipated we were looking for a witness for the afternoon.

18 JUDGE BARAITSER: OK, that is fine.

19 MR LEWIS: Madam, could I just make clear so far as Mr Augstein is concerned, it will be a  
20 matter of minutes.

21 JUDGE BARAITSER: Minutes?

22 MR LEWIS: It will not be at all lengthy. So far as Mr Grothoff is concerned, I think he is  
23 down for an hour. Might be an hour and a half but it is not going to be an entire day's worth.

24 JUDGE BARAITSER: Thank you very much indeed. So, we are looking for a third witness  
25 if at all possible.

26 MR SUMMERS: We will do our best and preferably an American one because it can only be  
27 him in the afternoons.

28 JUDGE BARAITSER: Can I just raise an issue that has been raised with me about releasing  
29 the transcripts to the media? The reason I raise it is because the transcript has been arranged  
30 and paid for by the parties and therefore it may or may not be within the court's gift to  
31 authorise its disclosure. In fact, only a very small part of the transcript has been requested.  
32 Just perhaps you can give it some thought as to whether or not - well, whether you object to it  
33 being disclosed and whether you think my authority is required for its disclosure or whether  
34 that is a matter for the parties?

1 MR SUMMERS: Can I consider it? I suspect that it is something we all ought to consider  
2 together.

3 MR FITZGERALD: Yes.

4 JUDGE BARAITSER: 10 minutes then for your agreements ---

5 MR FITZGERALD: Oh ---

6 JUDGE BARAITSER: Something else?

7 MR FITZGERALD: There is just one, because I am going to forget it otherwise. Could I  
8 just make a plea that if there are to be materials put to the defence witnesses we could receive  
9 them in advance in sufficient time for them and us to digest because you have seen how very  
10 often they are having to read it ---

11 JUDGE BARAITSER: I have seen it.

12 MR FITZGERALD: --- as they are giving evidence and we will endeavour to do the same if  
13 there is something we wish to put to the two prosecution witnesses.

14 JUDGE BARAITSER: I think Mr Smith ---

15 MR FITZGERALD: No, I do not think we are going to hear from Mr Kromberg or from the  
16 witness, Mr Luca Feltz. As I understand it they are not – obviously we would like to question  
17 to them but they are not going to be attending for cross-examination.

18 JUDGE BARAITSER: I see. Thank you. I am sure that the prosecution team have heard  
19 what you have had to say. 10 minutes then please. 20 to 4.

20 (Short adjournment)

21 JUDGE BARAITSER: Thank you.

22 MR FITZGERALD: My Lady, it is the statement of Dean Yates at tab 67. My learned friend  
23 has agreed that I can read and summarise it, subject to arguments about relevance that will be  
24 at the end of the hearing.

25 JUDGE BARAITSER: All right, thank you.

26 MR FITZGERALD: My Lady, do you have tab 67?

27 JUDGE BARAITSER: I do.

28 MR FITZGERALD: So I will, where it is appropriate just - there are some parts which I  
29 simply must read out or it does not make any sense.

30 JUDGE BARAITSER: All right.

31 MR FITZGERALD: So, my Lady, it is by Dean Yates and he gives his address, which you  
32 will see: "I am, by profession, a journalist and writer. I was for 23 years employed by  
33 Reuters, the world's largest news provider, as a journalist, bureau chief and senior editor. I  
34 make this" - and, then, paragraph 3, "I make this statement in respect of events in 2007, at

1 which time I was the bureau chief in Baghdad, Iraq”.

2 Then, at paragraph 4, “Early on 12 July 2007, it was at my desk in the Reuters office  
3 in Baghdad’s Red Zone. It was quieter than usual. Suddenly, loud wailing broke out near the  
4 back of our office. I still remember the anguished face of the Iraqi colleagues who burst  
5 through the door. Another colleague translated, ‘Namir and Saeed have been killed’. Reuters  
6 staff drove to the Al-Amin neighbourhood. Namir had told colleagues he was going to check  
7 out a possible US dawn air strike. Witnesses said Namir, a photographer, and Saeed, a  
8 driver-fixer, had been killed by US forces possibly in an air strike during a clash with  
9 militants. It was my task at the same time as trying to discover what had happened to file a  
10 news story about the deaths”.

11 And then he deals with the attempts to obtain information from Vice-Admiral Mark  
12 Fox and to “the pictures that were taken by our photographers at the time” at paragraph 5,  
13 “Which showed a minivan at the scene, its front mangled by a powerful concussive force.  
14 There was much we did not know. As US soldiers had seized Namir’s two cameras, we were  
15 unable to check what he had been photographing”. And then he deals with that, “By early  
16 evening the military spokesmen still had not replied. I pressed him for a response and for the  
17 return of Namir’s cameras. Just after midnight, the US Military released a statement  
18 headlined, “Firefight in New Baghdad. US Iraqi forces killed nine insurgents, detained 13”.

19 It quoted a US Lieutenant-Colonel as saying, “Nine insurgents were killed in the  
20 ensuing firefight, one insurgent was wounded and two civilians were killed during the  
21 firefight. The two civilians were reported as employees for the Reuters news service. There  
22 is no question that Coalition forces were clearly engaged in combat operations against a  
23 hostile force”. That was what was said. “I updated my story to take in the US Military’s  
24 statement”. He then presses for the US Military to give him Namir’s cameras and, on 15  
25 July, the US Military returned Namir’s cameras. There were no frames of insurgent gunmen  
26 or clashes with US forces.

27 At paragraph 8, “Reuters staff had by now spoken to 14 witnesses in Al-Amin. All of  
28 them said they were unaware of any firefight that might have prompted the helicopter strike.  
29 The Iraqi staff at Reuters were concerned that the bureau was too soft on the US Military, but  
30 I could only write what we could establish and the US military was insisting Saeed and  
31 Namir were killed during a clash”. And then over ---

32 JUDGE BARAITSER: You must remember, Mr Fitzgerald, the purpose of this statement  
33 again is it relates to the video.

34 MR FITZGERALD: Yes.

1 JUDGE BARAITSER: And the importance of its release to the general public. The content  
2 has no relevance, as far as I can see, to this case.

3 MR FITZGERALD: My Lady, can I just, because we now come to the rules of the  
4 engagement which are important in the next paragraph.

5 JUDGE BARAITSER: All right, just bear in mind the purpose of the statements.

6 MR FITZGERALD: Yes, of course, my Lady. “In an effort to improve journalists’ safety in  
7 Iraq, I led an effort with other foreign media organisations to engage with the US Military to  
8 better understand the rules of engagement. On 25 July, I attended a meeting at US Military  
9 headquarters”. And then he describes at paragraph 11, “The generals outlined a considerable  
10 amount of detail, telling us a US battalion had been seeking militias responsible for roadside  
11 bombs”.

12 Just taking it further down, “Crazyhorse 1/8”, that was the Apache, “requested  
13 permission to fire after seeing a group of military-aged males who appeared to have weapons  
14 and were acting suspiciously”. So that is what they were being told. “We were told that  
15 those men were then engaged. The generals showed us photographs of what was collected  
16 after the shooting, including one AK-47, two RPG rocket propelled grenade launchers and  
17 two cameras”.

18 My Lady, he then refers to the fact that there was a debate with the generals about the  
19 legality and you can see that at the bottom they are shown three minutes of video and, then, “I  
20 did not know what was on the rest of the tape. I just watched the lead-up to Namir and  
21 Saeed’s death. We had never heard of the rules of engagement that Brooks cited to justify the  
22 initial attack”. And then one has the reference at paragraph 13, just gisting it, my Lady, to,  
23 “He had, in fact, a camera and was using that and one of the crew says ‘he has got an RPG’  
24 and, then, another 15 to 20 seconds, the crew regrets a clear line of sight. On the video I can  
25 see Namir crouching down and his camera, which the pilot thinks is an RPG and they are  
26 about to open fire”.

27 JUDGE BARAITSER: Again, this has no relevance to this case, Mr Fitzgerald.

28 MR FITZGERALD: Can I just take you to the WikiLeaks’ revelations.

29 JUDGE BARAITSER: I think that is probably sensible.

30 MR FITZGERALD: Well, it is because it is against the background of that denial that the  
31 WikiLeaks’ revelation becomes important.

32 JUDGE BARAITSER: Yes, but what you are reading out is a description of the content of  
33 the video.

34 MR FITZGERALD: Yes. What then happens is they ask for information and there are three

1 denials. They ask to see the additional footage. Brooks said no. They ask for a full video  
2 and the photographs. The answer was no. And there was a freedom of information  
3 application denied. Then, if one sees it that then the video, the WikiLeaks release the  
4 Collateral Murder video on 5 April 2010. My Lady, that is at paragraph 16, and then if one  
5 goes over there at paragraph 17, the impact of it, “Here, was the full horror. Saeed had been  
6 trying to get up for roughly three minutes when a good Samaritan pulls over in his minivan  
7 and the Apache opens fire again and just obliterates them. It was totally traumatising”.

8 And, then, going on from there, he deals with the arrival of two Apache gunships and  
9 they just spot the group that included Namir and Saeed. And, then, further down, “Some 20  
10 seconds later, Namir can be seen crouched down peering around a street corner with his long  
11 lens camera raised. He is about to photograph US Humvees. One of the Apache’s crew  
12 explains he has got an RPG. About 45 seconds later, the helicopter” ---

13 JUDGE BARAITSER: I am going to interrupt you again, Mr Fitzgerald, for exactly the same  
14 reason. What is the relevance of this to this case?

15 MR FITZGERALD: It is what it reveals about the truth of what happened and about the rules  
16 of engagement which are the subject of - the disclosure of the rules of engagement, as you  
17 know, is one of the counts.

18 JUDGE BARAITSER: I do know that but the video footage, which you are describing in  
19 significant detail, is not.

20 MR FITZGERALD: Can I - my Lady, I am trying to summarise the gist.

21 JUDGE BARAITSER: I know you are.

22 MR FITZGERALD: So can I ---

23 JUDGE BARAITSER: But you are not necessarily succeeding.

24 MR FITZGERALD: Can I take you to paragraph 21 then, my Lady.

25 JUDGE BARAITSER: Yes.

26 MR FITZGERALD: It describes how Saeed survived the first shots and the video shows the  
27 chopper circling, Saeed in the sights as he crawls badly injured, the crew wants to finish him  
28 off and they say, and this is about the rules of engagement,, “Come on buddy”, says one.  
29 “All you’ve got to do is pick up a weapon”, says the other, apparently referring to the US  
30 rules of engagement that will give the green light for another volley of cannon fire. And then  
31 one has the fact that the good Samaritan, Mr Tomel, who stopped in his van gets out and  
32 slides open the cargo door, two other men who had arrived on the scene apparently unarmed,  
33 pick up Saeed and put him in the vehicle. Permission to attack is given. The Apache fires  
34 several bursts, 120 rounds in total. Saeed and Tomel, he is the good Samaritan, killed, two of

1 Tomel’s children, his son Saeed 10, and daughter Derba five, were wounded but miraculously  
2 survived and then the comment is made, “Oh yeah, look at that right through the windshield”  
3 by the people in the Apache

4 “I immediately realised”, he says there at paragraph 23, “that the US military had lied  
5 to us. When I think back to that meeting with the two generals in Baghdad I feel cheated;  
6 they were not being honest. I have wondered for many years how much of that meeting was  
7 choreographed so that we could go away with a certain impression of what happened. The  
8 day after collateral murder was released a spokesman for US central command sent an  
9 investigation into the incident shortly after it occurred. Found that the US forces were not  
10 aware of the presence of the news staffers and thought they were engaging armed  
11 insurgents.” And then he quotes what was said at the time and so it was investigated.

12 My Lady, just to turn to the rules of engagement, again at paragraph 25, “When I had  
13 first been shown a part of the video in 2007 by the US military, it had been burnt into my  
14 mind that the reason the helicopter opened fire was because Namir was peering around the  
15 corner. I came to blame Namir, thinking the helicopter fired because he had made himself  
16 look suspicious and it just erased from my memory the fact that the order to open fire had  
17 already been given. The one person who picked this up was Assange. On the day he released  
18 the tape he said the helicopter opened fire because it sought permission and was given  
19 permission. He said something like, ‘If that’s based on the rules of engagement, then the  
20 rules of engagement are wrong.’” And we have that, if necessary.

21 “I found it impossible to grapple with the moral injury. I had in my mind I fairly  
22 blame Namir for the Crazy Horse 1-attack. I was devastated that having failed to protect my  
23 staff by uncovering the rules of engagement in the US military before they were shot and for  
24 not disclosing earlier my understanding of the extent to which the US had lied. I was  
25 profoundly affected .”

26 “So far as the others are concerned, my reaction is the US knows how devastating the  
27 collateral murder is, how shameful it is to the military. They are fully aware that experts  
28 believe in the shooting ---

29 JUDGE BARAITSER: Again, Mr Fitzgerald, how is that relevant to this case, please?

30 MR FITZGERALD: Well, it is because the importance of the revelation combined with the  
31 revelation of the rules of engagement.

32 JUDGE BARAITSER: Well ---

33 MR FITZGERALD: Can I just ---

34 JUDGE BARAITSER: You are focusing all of your gist on the content of the video.

1 MR FITZGERALD: Yes.

2 JUDGE BARAITSER: And I have already said several times that does not form a part of this  
3 case. I appreciate the rules of engagement do.

4 MR FITZGERALD: Madam, the rules of engagement are, yes. Well ---

5 JUDGE BARAITSER: But you are not focusing on those.

6 MR FITZGERALD: Well, my Lady, those last two paragraphs ---

7 JUDGE BARAITSER: Please sit down, Mr Assange. If you want to speak to Mr Fitzgerald  
8 I will give you an opportunity in a moment, but let him finish first. Please sit down.

9 MR FITZGERALD: My Lady, can I just read paragraph 28. "Had it not been for Chelsea  
10 Manning and Julian Assange, the truth of what happened to Namir and Saeed, the truth of  
11 what happened on that street in Baghdad on July 12<sup>th</sup> would not have been brought to the  
12 world. What Assange did was 100 per cent an act of truth telling exposing to the world how  
13 the war in Iraq in fact was and how the US military behaved and lied." And then it deals with  
14 the impact.

15 My Lady, just to recap, you will see that the rules of engagement are referred to at  
16 paragraphs 9, 12, 21, 25 and 26.

17 JUDGE BARAITSER: Thank you, that is very helpful. Would you like to speak to your  
18 client before you sit down?

19 MR FITZGERALD: Yes. (Mr Fitzgerald took instructions) My Lady, the point that I did  
20 not perfectly bring out is that the collateral murder video is released at the same time as the  
21 rules of engagement, and so the ---

22 DEFENDANT: (Inaudible)

23 JUDGE BARAITSER: Well, let Mr Fitzgerald finish and then if you want ---

24 MR FITZGERALD: My Lady, that is about it. If there is a dispute about that, that can be,  
25 but that is our case. And, my Lady, you have seen that there are five references in this to the  
26 importance of the rules of engagement in throwing light on what the video actually showed.

27 JUDGE BARAITSER: Yes. The only reason I stop you is when you describe the content of  
28 the video, no other reason than that.

29 MR FITZGERALD: My Lady, I am grateful for that clarification, but obviously what we say  
30 is by showing the rules of engagement it threw light on the position. The disclosure of the  
31 rules of engagement are the - the receipt of the rules of engagement for some unknown reason  
32 are the subject of one of the charges. I cannot think why, but they are.

33 JUDGE BARAITSER: They are indeed. And Thank you very much. I have received the  
34 relevant evidence. Nothing else from you and, Mr Lewis, nothing else from you at this point.

1 MR LEWIS: No, my Lady, simply to say for the avoidance of doubt, and you had asked us  
2 to reach a pragmatic solution, for the purposes of these proceedings we have no questions of  
3 this witness. That should not be taken for the purposes of any other proceedings that we  
4 accept his evidence.

5 JUDGE BARAITSER: All right. Is there anything else that can be read this afternoon?

6 MR FITZGERALD: My Lady, I do not think there is. We are still working on other  
7 witnesses who we may be able to read with my learned friend. We are in the process of  
8 discussions and we have listened to your suggestion that where possible we reach a pragmatic  
9 solution.

10 JUDGE BARAITSER: Thank you. Any other comment on the request from the press to  
11 release the transcripts? If it was court recorded then it would be within my gift, it would be  
12 my decision.

13 MR LEWIS: I agree.

14 JUDGE BARAITSER: I am just slightly concerned this is not something that the court has  
15 been involved in procuring.

16 MR LEWIS: My Lady, what one would normally expect is for the court to have a power  
17 over the rulings because you may wish to amend any transcripts of any ruling.

18 JUDGE BARAITSER: Yes.

19 MR LEWIS: And therefore the right thing so far as rulings are concerned is they must  
20 remain in your purview.

21 JUDGE BARAITSER: And that has happened every day thus far.

22 MR LEWIS: The other matters really we take a neutral view. We have paid for them, or  
23 paid for half.

24 JUDGE BARAITSER: You have?

25 MR LEWIS: Yes, we have paid for half, so it is really a matter of negotiating with those who  
26 paid for it.

27 JUDGE BARAITSER: Yes. I think it is your decision.

28 MR LEWIS: I do not think it is a matter for the court.

29 JUDGE BARAITSER: I do not think so either.

30 MR LEWIS: As the actual transcript of the (inaudible – 15.59.24 -court/core?) hearing of  
31 what it said is concerned.

32 JUDGE BARAITSER: Yes, and there is no recording equipment so far as the court is  
33 concerned. I can see it is here and it is switched off.

1 MR FITZGERALD: Yes. Could we consider that over the weekend and come back to it on  
2 Monday?

3 JUDGE BARAITSER: Yes. I will not disclose anything, but just remember to just apply  
4 your mind to it. I think it is probably a matter for you rather than for me, but I just want  
5 confirmation of that.

6 All right. Mr Assange, you remain in custody over the weekend, back on Monday  
7 morning as before and I adjourn this court until 10 o'clock on Monday morning. Thank you.

8

9 ADJOURNED AT 16.00 UNTIL MONDAY, 21<sup>ST</sup> SEPTEMBER 2020

10

-----

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