IN THE WESTMINSTER MAGISTRATES' COURT

B E T W E E N:

GOVERNMENT OF THE UNITED STATES OF AMERICA

Requesting State

v

JULIAN ASSANGE

Defendant

OPENING SUMMARY
OF DEFENCE CASE

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1. Introduction

Course to be taken

1.1. I would like first to deal with the **history of this prosecution**. Because that history shows that this prosecution is not motivated by genuine concerns for criminal justice but by politics.

1.2. Next I will summarise the three ways in which we say these proceedings constitute an **abuse of process;**

i. First, because the prosecution is being pursued for ulterior political motives and not in good faith. That engages the jurisdiction recognised in the successive cases of *Bermingham* and *Tollman.*

ii. Secondly, because the request **fundamentally misrepresents the facts** in order to bring this case within the bounds of an extradition crime; both by misrepresenting that Julian Assange materially assisted Chelsea Manning in accessing national security information; and then by misrepresenting that there was a reckless disclosure of the names of particular individuals [as

alleged in counts 15, 16, 17]. That point engages the jurisdiction recognised in the successive cases of *Castillo, Murua* and *Zakrewski.* We will deal with it more fully in due course.

iii. Thirdly, because the request seeks extradition for what is a classic "**political offence"**. Extradition for a political offence is expressly prohibited by Article 4(1) of the Anglo-US Extradition Treaty. Therefore, it constitutes an abuse of this Court's process to require this Court to extradite on the basis of the Anglo-US Treaty in breach of the Treaty's express provisions.

1.3. That concludes my summary of the abuse case. I turn to the special protections set out in the Extradition Act itself and the successive bars to extradition which we rely on. We say that extradition should be refused on the following additional grounds:-

i. **Firstly**, extradition is barred under s81a by reason of the political motivation of the request. It is directed at him because of the political opinions he holds and that have guided his actions. Moreover extradition is barred under s81b because it exposes him to the real risk of discrimination on grounds of his foreign nationality and "political opinions" at every stage of the criminal justice process in the US.

ii. **Secondly**, extradition is barred under s87 because it would involve a flagrant denial of his right to a fair trial under Article 6 and a clear violation of his right to freedom of expression under Article 10.

iii. **Thirdly**, extradition is barred because it would expose him to inhuman and degrading treatment contrary to Article 3. That is because of the risk of a wholly disproportionate sentence, amounting in effect to a life sentence; and because of the virtual certainty of inhuman and degrading treatment in prison in the United States, if not an even worse fate.

iv. **Fourthly**, extradition should be refused under section 91 because it would be unjust and oppressive to extradite him by reason of his mental condition and the high risk of suicide if he is extradited.

v. **Fifthly**, we say that it would be unjust and oppressive to extradite him by reason of the lapse of time since the alleged offences. So we rely also on section 82.

1.4. I will take these points in turn. But first can I say something about the witnesses. You have before you a core bundle of witness statements. The tab references will be to that bundle.

1.5. The key witnesses whose evidence we propose adduce in relation to the **history** and **political motivation** of the prosecution, and the **free speech** issues raised by it, are as follows:

i. Professor Mark Feldstein, a distinguished academic specialising in broadcast journalism [tab 18].
ii. Carey Shenkman, an academic who has made a special study of history of the Espionage Act and the Computer Fraud Abuse Act [tab 4].
iii. Jameel Jaffer, Executive Director of the Knight First Amendment Institute at Columbia University [tab 22].
iv. Professor Michael Tigar, former journalist and academic specialising in constitutional and criminal law [tab 23].
v. Professor Noam Chomsky, Professor of Politics and world renowned author [tab 39].
vi. Professor Paul Rogers, Emeritus Professor of Peace Studies at Bradford Univeristy [tab 40].

1.6. I want to summarise the history of the proceedings.

2. History of the proceedings

2.1. The background facts are more fully set out in the chronology and in the Particulars of Abuse served on 20th February.

The original conduct

2.2. Extradition is being sought for the receipt and publication of materials provided to WikiLeaks by Chelsea Manning. All the relevant conduct occurred between 2010 and 2011, and was known about at that time. Yet, **Mr Assange's prosecution** and **this request** were not even begun until December 2017; and the superseding indictment on which the prosecution now rely did not come until 23rd May 2019. Moreover during the intervening period there was a well-publicised DOJ decision under the Obama administration that he should not be prosecuted.

Chelsea Manning's Court Martial

2.3. Chelsea Manning was arrested in 2010. She was convicted in 2013. At her trial, she explained her motivation for downloading documents and videos which exposed war crimes in Afghanistan and Iraq, and the torture of detainees in Guantanamo. (See Chronology at page 3). In her plea allocution statement to the Court Martial on the 30th July 2013, she stated "the decisions I made to send documents and information to the WLO website were my own decisions and I take full responsibility for my own actions". At that time no attempt was made to indict Julian Assange. The prosecution say that Julian Assange caused Chelsea Manning to obtain the materials referred to in Counts 2 – 4, 9 – 11, and 12 – 14. But her own account gives the lie to that false claim.

Decision not to prosecute Julian Assange in 2013

2.4. A decision was made under the Obama administration not to prosecute Julian Assange. That was because of what has been described as 'the New York Times problem', which is referred to in the Washington Post article dated 26th November 2013. The US prosecutors concluded that charging Assange would have been tantamount to prosecuting any journalist who published leaked national security information, and would thus violate the First Amendment [Feldstein, tab 18, §9] [Jaffer, tab 22, §21] [Shenkman, tab 4, §27] [Lewis 2, tab 3, §15].

2.5. Former DOJ spokesman Matthew Miller set out the main reason for the decision in 2013: *"If you are not going to prosecute journalists for publishing*

classified information, which the department is not, then there is no way to prosecute Assange." (Politico, BK, Tab 4; The Washington Post, BK, Tab 5). Quoted at paragraph 9 of Feldstein (see tab 18).

2.6. This point is analysed by Professor Feldstein at paragraph 9 of his report. He also refers to the '*longstanding precedent that publishing secret records is not a crime'.* As all our First Amendment experts make clear, it is for that reason that no journalist had ever been prosecuted for like conduct in the US despite *'thousands upon thousands of national security leaks to the press'* [Feldstein, tab 18, §§5, 8-11] [Shenkman, tab 4, §§21, 25-27, 32-34, 41-42] [Jaffer, tab 22, §21] [Tigar, tab 23, pp16-18].

Political war on journalists under Trump

2.7. But the principled and consistent stand taken under the Obama administration was reversed under the present Trump administration from early 2017 onwards. And the prosecution initiated later in December 2017 was the result of President Trump's effective declaration of war on leakers and journalists.

2.8. You will see from the expert reports that President Trump has '*repeatedly referred to the press as 'the opposition party' a*nd the *'enemy of the people''* [Jaffer, tab 22, §§4, 28]. He has '*denounced the news media as a whole as 'sick', 'dishonest', 'crazed', 'unpatriotic', 'unhinged' and 'totally corrupt' and attacked them as 'purveyors of 'fake news"* [Feldstein, tab 18, §2] [Prince 2, tab 13].

2.9. So it is no surprise that in February 2017 President Trump met with FBI Director James Comey and agreed that they should be 'putting a head on a pike' as a message to journalists over leaks and 'putting journalists in jail' [Feldstein, tab 18, §9] [Shenkman, §30]. **As Professor Feldstein shows, President Trump then instructed his attorney general to '*investigate 'criminal leaks' of 'fake news' reports that had embarrassed the White***

House' [Feldstein, tab 18, §9] [Shenkman, tab 4, §30]. The Trump administration has thus set about systemically punishing whistle-blowers in general, and it '*dramatically escalated the number of criminal investigations into journalistic leaks'* [Feldstein, tab 18, §2]. As Feldstein further states: President Trump's *'use of government power to punish his media critics'* is a 'deliberate attempt to '*stifle the exercise of the constitutional protections of free speech and the free press''* such that '*all journalists work under the threat of government retaliation'* [Feldstein, tab 18, §2].

Julian Assange as target

2.10. It was against that background that President Trump and his administration then decided to make an example of Julian Assange. He was the obvious symbol of all that Trump condemned. He had brought American war crimes to the attention of the world [Boyle, tab 5, §11] [Tigar, tab 23, p8-9]. Again Professor Feldstein puts it in this way: **'*On a worldwide scale [he disclosed] significant governmental duplicity, corruption, and abuse of power that had previously been hidden from the public... [he] exposed outrageous, even murderous wrongdoing, including war crimes, torture and atrocities on civilians*'** [Feldstein, tab 18, §4]. You will see set out at paragraph 4 of his report [page 6] the sheer scale and significance of the revelations brought about by Julian Assange and WikiLeaks. They range from the video of American soldiers shooting unarmed civilians from a helicopter, to the brutal torture of detainees in Iraq and the exposure of the true figures of civilian deaths resulting from the invasion of Iraq. Such revelations obviously put him in the sights of the aggressive 'America First' ideologues of the Trump Administration.

The denunciations of Julian Assange in April 2017

2.11. That is why the prosecution of Mr Assange, based on no new evidence, was now pursued and advocated by the Trump administration, led by spokesman such as Mike Pompeo of the CIA and Attorney General Sessions. They began denouncing him in **April 2017.** I refer you to the following:

i. Firstly, the statements of **Mr Pompeo**, as director of the CIA, on 13 April 2017, denouncing Julian Assange and WikiLeaks as "**a non-state hostile intelligence agency**". [Feldstein, tab 18, p19 and K10]. On the same occasion, Pompeo also stated that Julian Assange as a foreigner had no First Amendment rights. (See Guardian article, bundle K)

ii. Then there was the political statement of **Attorney General Sessions** on 20 April 2017 that the arrest of Julian Assange was now a priority and that *'if a case can be made, we will seek to put some people in jail'* [Feldstein quoting Washington Post article of Ellen Nakashima, tab 18, at page 19].

2.12. The full scale of these denunciations is set out in the report of Professor Feldstein at page 19.

2.13. We say that these public denunciations indicate the political motivation that fuelled the later prosecution. They violate the presumption of innocence. And they prejudice the prospects of a fair trial. And they form the context in which Attorney General **Sessions,** a political appointee with a political agenda, was directly responsible for the First Indictment in December 2017.

2.14. Thus, as Professor Feldstein shows, pressure was then put on prosecutors by the Attorney General and *'the new leaders of the justice department'* to bring an indictment, even in the face of 'vigorous debate' from 'career professionals' who were 'sceptical' about its legality, and despite open objections from prosecutors directly involved in the case. That was the position in April 2017 as confirmed by reports in the Washington Post and the New York Times on April 20th 2017. [Feldstein, tab 18, paragraph 9, page 19].

The Criminal Complaint in December 2017

2.15. That is why on 21st December 2017 a criminal complaint was made of computer misuse against Julian Assange; and his extradition on a provisional warrant was sought. The timing is also very significant because it coincided

with the grant of diplomatic status by the Ecuadorian government. The US were of course well-informed of all developments in the Ecuadorian embassy, because US intelligence agencies had access to recordings of all conversations between Julian Assange and his lawyers in the embassy. I will develop that point further later. And by then, prosecution had become a political imperative.

2.16. I will pass over the intervening period during which Julian Assange continued to have his conversations with his lawyers and family constantly monitored and recorded by a private agency acting on the instructions of US intelligence and for their benefit.

Superseding indictment

2.17. Then, in May 2019, a superseding indictment was proffered. That indictment charged Julian Assange under the Espionage Act. It charged him with publication of state secrets in a multi-count indictment that dramatically ratcheted up the scale of the charges, the pressure on him, and the potential penalties. As Eric Lewis shows, Mr Assange faces up to 175 years in prison if he is convicted of all offences charged in the Superseding Indictment [tab 3, para 36].

Unprecedented

2.18. This decision to prosecute for the **publication** of state secrets was **unprecedented.** The unprecedented nature of the decision is stressed by witness after witness whose reports you have before you. The Court is referred to:-

i. Professor Feldstein [tab 18, paras 5 and 8 – 11].
ii. Carey Shenkman [tab 4, paras 32and 41 – 42].
iii. Jameel Jaffer [tab 22, para 21].
iv. Professor Michael Tigar [tab 23, pages 16 – 18 and 20].

2.19. As Professor Feldstein says: '*The Indictment breaks all legal precedents. No publisher has ever been prosecuted for disclosing national*

secrets since the founding of the nation more than two centuries ago...The only previous attempts to do so were highly politicized efforts by presidents seeking to punish their enemies' [Feldstein, tab 18, §10]. '*The belated decision to disregard this 230-year-old precedent and charge Assange criminally for espionage was not an evidentiary decision but a political one'* [Feldstein, tab 18, §11].

2.20. Jameel Jaffer in his report at tab 22, characterises the novel nature of the Superseding Indictment in equally troubling terms. I quote: '*the government's indictment of a publisher under the act* ***crosses a new legal frontier'*** [see paragraph 21].

The Swedish investigation and the timing of the superseding indictment

2.21. **The timing** of the superseding indictment, the **23rd May 2019** is also highly significant. At that time, the Swedish prosecution had just made two significant statements. On the **13th May 2019**, they had announced that it was their intention to reopen the investigation of Julian Assange for sexual offences and on **14th May 2019,** they specifically announced that they intended to issue an EAW. The full facts are set out in the Defence Reply on Abuse of Process at paragraphs 53 to 54. As made clear there, the coincidence is too great. It leads to the inescapable inference that the US ratcheted up the charges so as to ensure that their extradition request would take precedence over any Swedish request. Again this is not about criminal justice. It is about the manipulation of the system, to ensure that the US was able to make an example of Julian Assange.

3. Accompanying abuses of the rule of law

3.1. The means employed in the targeting of Julian Assange further show that he has been made the object of exceptional extra-legal measures; and that this is no ordinary case.

Invasion of legal professional privilege

3.2. First, his conversations with his lawyers were monitored and recorded by private security agents acting on behalf of the US whilst he was sheltering in the Ecuadorian Embassy. Then he was evicted from the Embassy after the intervention of the US. Finally his confidential papers were illegally taken from him at the request of the US. That is confirmed by the second statement of Gareth Peirce, tab 21, paragraph 12(v) and (vi).

3.3. To pause for a moment, the evidence of illegal monitoring and intrusion is set out in detail in the particulars of abuse at tab 5 of the submissions bundle, at paragraphs 36 – 39 and in the statement of Witness 2, [at tab 12]. Can I turn to these briefly just to spell out the details?

3.4. All this points to an agenda that is not confined to a *bona fide* prosecution. It also points to a casual disregard for the rule of law. It violated the sanctity of diplomatic premises. And it took place in this country, which is relevant to the question of abuse.

Pressuring Ecuador to expel Julian Assange

3.5. Then too steps were taken to ensure that he was expelled from the Ecuadorian embassy by a process of bullying and bribing Ecuador into expelling him, so as to make him available for extradition. This is set out at paragraphs 43 to 45 of the Particulars of Abuse.

Further breach of legal privilege

3.6. After the removal and arrest of Julian Assange, his legally privileged papers were seized. They have not been returned – see Gareth Peirce's second statement at tab 21, paragraph 12(v) and (vi). It is respectfully submitted that the US ought to clarify whether they now have access to those materials, why they were requested and why they have not been returned to Mr Assange's lawyers.

The pardon offer

3.7. Further evidence of the bad faith and abuse of power at the heart of this prosecution is evidenced by the approach to Mr Assange by Republican Congressman Dana Rohrabacher, in August 2017. Mr Rohrabacher visited Julian Assnage and discussed a pre-emptive pardon in exchange for personal assistance to President Trump in the enquiry then ongoing concerning Russian involvement in the hacking and leaking of the Democratic National Committee emails [Peirce 1, tab 1, §28] [Witness 2, tab 12, §30] [Peirce 2, tab 21, §9]. You now have admitted the statement of Jennifer Robinson at tab 42. This statement sets out clearly that on 15 August 2017 the visit took place to Mr Assange in the embassy by Mr Rohrabacher and a man called Charles Johnson [who we know to be closely associated with President Trump]; that they told Julian Assange and Jennifer Robinson that President Trump was aware of and approved of them coming to meet with Mr Assange to discuss a proposal [paragraph 5]. And as to the nature of the proposal itself, Jennifer Robinson explains it in this way at paragraph 10 of her statement:-

> "*the proposal put forward by Congressman Rohrabacher was that Mr Assange identify the source for the 2016 election publications in return for some kind of pardon, assurance or agreement which would both benefit President Trump politically and prevent US Indictment and extradition.'*

3.8. Rohrabacher has publicly stated in the last few days that he and Charles Johnson did meet with Julian Assange, that he did make the proposal about a pardon. But he denies it was at the direction or with the approval of President Trump. President Trump himself denies everything. But in the immortal words of Mandy Rice Davies: 'Well he would, wouldn't he?'. And there may yet be further developments in relation to this particular aspect of the case, prompted by the public reporting of this allegation last week.

3.9. We say that this whole pardon incident shows that, just as the prosecution was initiated in December 2017 for political purposes, so too the Trump

administration had been prepared to use the threat of prosecution as a means of extortion to obtain personal political advantage from Mr Assange.

4. The particulars are capable of amounting to abuse

4.1. The whole history that I have just set out provides the clearest evidence that this extradition request is an abuse of process by reason of bad faith and abuse of power.

4.2. The prosecution required us to identify the particulars of abuse. We have done so in the Particulars of Abuse document. I refer you in particular to the 12 particulars of abuse set out at paragraph 7, tab 5 of the submissions bundle. There is also a shorter summary at paragraph 87. We say that these allegations, if made good, amply make out a case of abuse.

4.3. We have dealt with the legal test for abuse of process at paragraphs 11 – 16 of the Particulars skeleton and have further developed it in our reply at paragraphs 6 – 28. We say that it is clear that the allegations, if made out, would satisfy the test of a prosecution pursued in bad faith for ulterior purposes, with accompanying violations of the rule of law. That satisfies the test laid in ***Bermingham*** [tab 19] and ***Symeou*** [tab 29], and in ***Fuller v Att Gen of Belize***. [tab 32]. Procedurally, that is all that is required for the second stage laid down in the ***Tollman*** procedure.

4.4. **Madam you yourself have questioned the point of the exercise required by the prosecution.** That is because in this case, any ruling at this stage would fail to exclude any significant factual issue. And it would fail to render any evidence inadmissible – because the evidence goes in any event to make out our case on the statutory bars.

4.5. But I am ready if necessary to argue this point in detail if you would wish me to do so – after I have summarised our overall case that extradition is ruled out under the successive statutory bars.

***Zakrzewski* abuse**

4.6. The key witnesses on the ***Zakrzewski*** abuse are:

i. **Patrick Eller,** a former US Army investigator and expert in digital forensics [tab 17];
ii. **John Goetz,** an international investigative journalist who worked with Der Spiegel in collaboration with WikiLeaks in 2010 – 2011 [tab 31].
iii. **Jakob Augstein,** an experienced journalist who worked at Der Freitag at the relevant time [tab 32].
iv. **Andy Worthington,** a journalist who worked collaboratively on the WikiLeaks disclosures relating to the Guantanamo Detainee assessment briefs [tab 33].
v. **Emily Dische-Becker**, a journalist who was working in Beirut at the relevant time, in a media partnership with WikiLeaks. She deals with the impact of the revelations and the work done to minimise risk to opposition activists [tab 34].
vi. **Sami Ben Garbia,** a journalist based in Tunisia, who confirms the efforts made to ensure redaction and the lack of any knowledge or evidence of persons physically harmed as result of the publications [tab 35].
vii. **Professor Christian Grothoff,** professor of Computer science, who confirms that *'at the time when the WikiLeaks site re-published the unredacted cables the information was already easily available to any technically competent person'* [tab 36.3].

4.7. As to ***Zakrzewski*** abuse, we say that the facts have been presented in a misleading way so as to bring this case within the ambit of an extradition offence. Therein lies the abuse. In particular, we say the following:

i. The prosecution misrepresented the position by suggesting that Julian Assange caused Chelsea Manning to obtain and upload the classified documents to WikiLeaks. **Chelsea Manning's own evidence at the Court Martial refutes this.**

ii. The allegation that Julian Assange assisted Chelsea Manning in decoding the hash value is simply incorrect; and in any event a complete red herring. I say that based on the **evidence of the Manning Court Martial itself** and the expert opinion of **Patrick Eller** explaining that evidence.

iii. Finally, it is completely misleading to suggest that it was Julian Assange and WikiLeaks that were responsible for the disclosure of unredacted names to the public. In fact Julian Assange took every step to prevent the disclosure of unredacted names; and WikiLeaks only published the unredacted materials after they had been published in full by others who themselves have never faced legal action. These points are established by the evidence of John Goetz, Professor Grothoff and other key participants in the events relating to publication I have just mentioned. We have summarised the effect of their evidence in the Abuse skeleton at paragraphs 54 – 85.

The evidence of Patrick Eller

4.8. These points will be dealt with in detail by my learned friend Mr Summers in due course. But we respectfully submit that the court was right to indicate the better course is to hear and assess the evidence relating to ***Zakrzewski*** abuse and related issues, and then decide all matters at the conclusion of the hearing. That is particularly so in relation to the evidence of Patrick Eller, which seems to be the only evidence the prosecution continue to seek to exclude as inadmissible.

4.9. **Against that background I now turn to the statutory bars and will deal with them in turn.**

5. <u>Political motivation and section 81(a)</u>

5.1. I start with political motivation and the protection of section 81. Mr Assange's extradition is now being sought on the basis of a prosecution for Espionage because of his alleged act of publishing state secrets in 2010.

5.2. As set out above, the prosecution has all the hallmarks of a politically motivated prosecution:-

i. The prosecution initiated at the end of 2017 constitutes a complete reversal of the decision taken under the Obama administration in 2013 not to prosecute him. The reason for that earlier decision under President Obama not to prosecute him was that to do so would constitute a violation of the First Amendment of the American Constitution.
ii. It is unprecedented to indict a publisher of official secrets under the Espionage Act.
iii. The prosecution was the culmination of an escalating public war on free speech by the Trump administration which first targeted whistle blowers and then proceeded to attack investigative journalists and publishers.
iv. It was preceded and accompanied by public denunciations of Julian Assange by senior figures in the Trump administration including Mike Pompeo and Attorney General Sessions.
v. Finally, the means adopted to monitor and target Julian Assange and to strip of his protections in the Ecuadorian Embassy were the actions of a lawless state bent on adopting any means necessary to 'bring him down'. Even if it meant violating public international law. Even if it meant violating legal professional privilege and the sanctity of the Embassy's protection.

Political Opinions

5.3. For the purposes of section 81(a), I next have to deal with the question of how this politically motivated prosecution satisfies the test of being directed against Julian Assange because of his political opinions. The essence of his **political opinions** which have provoked this prosecution are summarised in the reports

of Professor Feldstein [tab 18], Professor Rogers [tab 40], Professor Noam Chomsky [tab 39] and Professor Kopelman:-

i. He is a leading proponent of an open society and of freedom of expression.
ii. He is anti-war and anti-imperialism.
iii. He is a world-renowned champion of political transparency and of the public's right to access information on issues of importance – issues such as political corruption, war crimes, torture and the mistreatment of Guantanamo detainees.

5.4. Those beliefs and those actions inevitably bring him into conflict with powerful states including the current US administration, for political reasons. Which explains why he has been denounced as a terrorist and why President Trump has in the past called for the death penalty.

5.5. But I should add his revelations are far from confined to the wrongdoings of the US. He has exposed surveillance by Russia; and published exposes of Mr Assad in Syria; and it is said that WikiLeaks revelations about corruption in Tunisia and torture in Egypt were the catalyst for the Arab Spring itself.

5.6. **The US say he is no journalist.** But you will see a full record of his work in Bundle M. He has been a member of the Australian journalists union since 2009, he is a member of the NUJ and the European Federation of Journalists. He has won numerous media awards including being honoured with the highest award for Australian journalists. His work has been recognised by the Economist, Amnesty International and the Council of Europe. He is the winner of the Martha Gelhorn prize and has been repeatedly nominated for the Nobel Peace Prize, including both last year and this year. You can see from the materials that he has written books, articles and documentaries. He has had articles published in the Guardian, the New York Times, the Washington Post and the New Statesman, just to name a few. Some of the very publications for which his extradition is being sought have been refereed to and relied upon in Courts throughout the world, including the UK Supreme Court and the

European Court of Human Rights. In short, he has championed the cause of transparency and freedom of information throughout the world.

5.7. Professor Noam Chomsky puts it like this: - ***'in courageously upholding political beliefs that most of profess to share he has performed an enormous service to all those in the world who treasure the values of freedom and democracy and who therefore demand the right to know what their elected representatives are doing'*** [see tab 39, paragraph 14]. So Julian Assange's **positive impact** on the world is **undeniable**. The hostility it has provoked from the Tump administration is **equally undeniable.**

The legal test for 'political opinions'

5.8. I am sure you are aware of the legal authorities on this issue: namely whether a request is made because of the defendant's political opinions. A broad approach has to be adopted when applying the test. In support of this we rely on the case of *Re Asliturk* [2002] EWHC 2326 (abuse authorities, tab 11, at paras 25 – 26) which clearly establishes that such a wide approach should be adopted to the concept of political opinions. And that will clearly cover Julian Assange's ideological positions. Moreover, we also rely on cases such as *Emilia Gomez v SSHD* [2000] INLR 549 at tab 43 of the political offence authorities bundle. These show that the concept of "political opinions" extends to the political opinions imputed to the individual citizen by the state which prosecutes him. For that reason the characterisation of Julian Assange and WikiLeaks as a "non-state hostile intelligence agency" by Mr Pompeo makes clear that he has been targeted for his imputed political opinions. All the experts whose reports you have show that Julian Assange has been targeted because of the political position imputed to him by the Trump administration – as an enemy of America who must be brought down.

6. Prejudice in his treatment at trial, sentencing and subsequent detention by reason of political opinions and his status as a foreigner

6.1. Turning to section 81(b) we submit that Julian Assange will be exposed to prejudice and discrimination both at trial and on sentence and in any subsequent detention by reason of his political opinions and indeed his foreign status. That is for the following reasons:

i. He has been publicly denounced by the most high-ranking public officials, including the President, the Secretary of State and the Attorney General because of his political opinions. Those overtly intemperate denunciations have irretrievably prejudiced the presumption of innocence and his prospects of a fair trial. That is highly relevant to section 81(b).

ii. Furthermore the US are taking the position **that he has no First Amendment rights as a foreigner.** That is clear from the statement of Mr **Pompeo** reported in the Guardian on 21 April 2017 that '*Julian Assange has no First Amendment Freedoms'* because *'he is not a US citizen'* [see bundle K tab 11]. Even the prosecution attorney Mr Kromberg indicates an intention to argue that *'foreign nationals are not entitled to protections under the First Amendment'* at paragraph 71 of his First Declaration, prosecution bundle, tab 2].

iii. Mr Assange's political status will also result in him being held in especially harsh prison conditions. He is likely to be placed in isolation both pre-trial and post-trial, and may well be held under the excessively restrictive regime of SAMs. That is established by the evidence of the US lawyer **Yancey Ellis** at tab 15 **and Joel Sickler,** the renowned expert on the US prison system, at tab 20. **US Attorney Kromberg** himself accepts the real possibility that Mr Assange will be put in administrative segregation because of his notoriety [see paragraph 84 of his First Declaration, prosecution bundle, tab 2]. This point is further developed in part 8 below.

iv. Finally Julian Assange's trial, sentence and any subsequent detention will all take place in the context of a criminal justice system that lends itself to political manipulation in cases such as this. And all this at a time when the Trump Administration is blatantly demonstrating its readiness to interfere in

the criminal justice system to harm its enemies and favour its supporters (such as Roger Stone).

7. Flagrant Denial of Justice and Article 6

7.1. The evidence of a number of experts supports the view that there is a real risk that Julian Assange will be exposed to a flagrant denial of justice both at trial and at the sentencing stage. The Court is referred to the evidence of:

i. **Eric Lewis,** a practicising lawyer in the US who deals with issues both of trial and sentence [tab 3, tab 24]
ii. **Barry Pollack,** Julian Assange's lawyer in the US [tab 19].
iii. **Robert Boyle,** an expert on grand juries, who deals with Chelsea Manning contempt proceedings [tab 5].
iv. **Thomas Durkin,** a former Federal Prosecutor who will deal with the history of this prosecution and fair trial issues tab 16, tab 43].

7.2. The US Federal System operates to secure pleas through coercive plea-bargaining powers, swinging sentences and overloaded indictments designed to increase sentence exposure [Lewis 1, tab 3, §§36-48] [Durkin, tab 16, §§17-23]. These pressures are coupled, in case such as this, with the effects of pre-trial detention in solitary confinement in a '*cage the size of a parking space, deprived of any meaningful human contact'* [Lewis 1, tab 3, §§12-23] [Ellis, tab 15, §§7-8]. The result is a system in which the plea rate is over 97%, higher than any other country, including Russia. That is confirmed by the evidence of Eric Lewis in his statement at tab 3, paragraph 40 and by the first statement of Thomas Durkin at tab 16, paragraph 18.

7.3. But the system will be skewed even further against Julian Assange, because this prosecution will be located in Alexandria, Virginia; from which a jury pool comprised almost entirely of government employees and/or government contractors is guaranteed [Pollack, tab 19, §§10-11] [Prince 1, tab 13].

7.4. He will then be deprived of the supporting evidence of Chelsea Manning because of coercion by the contempt proceedings - described by grand jury expert Robert Boyle at tab 5.

His trial will be prejudiced by public denunciations violating the presumption of innocence

7.5. In addition, his trial will be prejudiced irretrievably by the very fact of the public denunciations of him made by a series of administration officials from the President, to the present secretary of state Mike Pompeo and successive Attorney Generals. These intemperate public denunciations violate the presumption of innocence, as is clearly established by the European Court decision in ***Allenet de Ribemont***.

The unjust sentencing procedure

7.6. Moreover, his sentence can be enhanced on the basis of unproven allegations even where he is acquitted of those same allegations at trial. This point is dealt with by the former federal prosecutor Thomas Durkin in his first statement tab 16, paragraphs 19 – 24. The prosecution say that this procedure has been found to accord with the principles of specialty. That may be so, but it does not mean that a procedure which enables the Court to enhance the sentence by reference to allegations rejected even by the jury, accords with the fundamental principles of a fair trial.

7.7. For these reasons his extradition would violate Article 6.

8. Article 10 and Article 7

8.1. The same witnesses as are relied in relation to political motivation also support the case that Julian Assange will be exposed to a flagrant denial of his Article 10 rights.

8.2. In short summary, we submit that this unprecedented prosecution of a journalist for publication of state secrets clearly violates Article 10. And we will seek to make that good by reference to the expert reports of Professor Feldstein, Jameel Jaffer, Professor Chomsky and Professor Russell.

8.3. **Professor Feldstein** sums up the threat to Article 10 rights posed by this prosecution and extradition request (Tab 18, para 11); ***"Julian Assange faces lifetime imprisonment for publishing truthful information about governmental criminality and abuse of power, precisely what the First Amendment was written to protect. In the end, however, this case about more than Assange or journalism.*** *It is about the right of citizens to have the information they need to participate in a democracy. A free society depends on democratic decision-making by an informed public. And an informed public depends on a free and independent press that can serve as a check on governmental abuse of power—the kinds of abuses that WikiLeaks made public. "In a free society, we are supposed to know the truth," a US congressman said when WikiLeaks first began publishing this batch of documents. "In a society where truth becomes treason, we are in trouble."*

8.4. **Jameel Jaffer** similarly concludes that this prosecution is a '*deliberate effort on the part of the Trump administration to deter journalism that is vital to American democracy'* [Jaffer, tab 22, §§4, 22, 29].

8.5. This prosecution will have a chilling effect on freedom of expression in this country and throughout the world. For that reason Julian Assange's extradition would not be in accordance of the requirements of Article 10.

Article 7 and uncertainty of the law

8.6. But there is in addition the fact that the interference with freedom of expression posed by this prosecution comes as a result of the arbitrary and unpredictable application of the law. This point is made by all the US First Amendment

experts whose evidence we have adduced. The very fact that what was regarded as incapable of being prosecuted under the Obama administration is now being aggressively prosecuted under the Trump administration points to the uncertainty of the law and the fact that any conviction would represent an interference with freedom of expression that is neither foreseeable, nor in accordance with the principle of legal certainty. This gives rise to a violation of both article 10 and article 7 itself.

8.7. These points will be developed at the full hearing after hearing all of the evidence.

9. Article 3

9.1. I turn to Article 3 and the real risk that Julian Assange will be exposed to inhuman treatment whilst detained in the United States. In support of the submission that extradition would violate Article 3, we rely upon the evidence of:

i. **Eric Lewis,** on the issue of sentencing [tab 3].
ii. **Yancey Ellis,** an experienced lawyer who practices in the very area of Virginia in which Mr Assange's trial and pre-trial detention will take place [tab 15].
iii. **Joel Sickler,** a renowned expert on prison conditions in the Federal System [tab 20].

9.2. **Firstly**, I should stress that we are dealing here with an individual who is likely to be singled out for special conditions of administrative segregation both at the pre-trial stage and the post-trial stage because of his political profile. **As to the pre-trial stage** the risk of detention in administrative segregation and even the most repressive regime of special administrative measures ("SAMS") is confirmed by the evidence of Yancey Ellis at paragraph 6 and paragraph 10. And the evidence of Sickler tab 20, paras 13 – 16. Indeed Mr Kromberg at

paragraph 95 expressly recognises the possibility that Julian Assange would be subject to SAMs.

9.3. **As to the post trial stage** there is then the risk detention under special segregation in a Communications Management Unit or worse still the notorious ADX Colorado, at paragraphs 102 – 106. Again Mr Kromberg does not rule out detention in ADX Colorado. The reality is, that this would involve conditions tantamount to solitary confinement. For prolonged periods. Without proper review. And without proper consideration of his mental condition.

9.4. The evidence is clear that such a regime precipitates mental breakdowns and heightens the risk of suicide even for mentally stable prisoners and that such a regime is inappropriate and dangerous for mentally ill inmates. Mental health treatment and care in these regimes fails to comply with minimum Article 3 protections [see for example Joel Sickler, tab 20, paragraphs 18 – 19].

Relevant Judicial Observations

9.5. Both the English High Court and the European Court of Human Rights have expressed profound concerns about the inhumanity of conditions in so-called administrative segregation in the US prison system, amounting effectively to solitary confinement. In the case of ***Abu Hamza v United States*** [2008] EWHC 1357 (admin) Lord Judge stated "*like Judge Workman, we too are troubled about what we have read about the conditions in some of the Supermax prisons in the United States… confinement for years and years in what effectively amounts to isolation may well be held to be, if not torture, then ill treatment which contravenes Article 3. This problem may fall to be addressed in a different case".* Moreover in the case of ***Aswat v UK*** *(Application no. 17299/12)* [2013] 4 WLUK 283, the European Court refused extradition of an accused terrorist because they were not satisfied that there was sufficient provision in the US prison system for the appropriate treatment of a mentally ill prisoner in high-security conditions.

9.6. Those cases are significant because here were are dealing with an extremely vulnerable person with a long history of clinical depression and an established risk of suicide. Detention in such conditions for Julian Assange would be the height of inhumanity. And the High Court and European Court have refused extradition in circumstances where the combination of a long standing mental disorder with the appalling conditions in pre-trial detention in the US have resulted in the real risk of article 3 inhumanity. I refer to the cases of ***Aswat*** and ***Laurie Love.***

9.7. And it does not even end there. Because added to that there is a real risk of a sentence that effectively amounts to a life sentence without any realistic possibility of review or parole. That too is inconsistent with the minimum requirements of Article 3 as laid down by the European Court in the case of ***Trabelsi v Belgium.***

9.8. We say that, when you put all those factors together, there is a real risk of treatment so cruel and degrading that it violates Article 3.

10. Section 91: unjust and oppressive to extradite by reason of Julian Assange's medical condition

10.1. Section 91 affords a protection from extradition where extradition would be rendered unjust or oppressive by reason of physical or mental disorder. In this context we rely upon the evidence of expert psychiatrists and psychologists who will deal with Mr Assange's history of clinical depression and trauma, and the risk of suicide if he is extradited to the US. They are, in turn:

i. **Professor Kopelman**, a distinguished forensic psychiatrist who's report you have at tab 6.

ii. **Dr Sondra Crosby,** who examined Mr Assange in the Ecuadorian Embassy and whose report is at tab 7.

iii. **Professor Mullen,** who was his treating psychiatrist in Australia and who has prepared a report on his current condition, following a recent visit whose evidence is at tab 8.

10.2. We rely also **on section 91**. This is a sensitive issue but I have to go into it because it is relevant and of itself entitles him to discharge. We say this is a classic case for invoking the jurisdiction exercised by the High Court in the case of ***Lauri Love***. That case provides this Court with a precedent for protecting a person suffering from mental illness from the high risk of suicide posed by extradition to, and detention in, the oppressive conditions of the US prison system.

History of Clinical Depression and Trauma

10.3. There is no doubt that Julian Assange suffers from a long history of clinical depression that dates back many years. It is aggravated by his experience as the object of death threats, and in wholly abnormal conditions over the years when he was confined to the Ecuadorian Embassy. It is further aggravated by his knowledge that throughout his time in the embassy, he and his family were being surveilled and recorded, and that he himself was being targeted for extradition or some even worse fate than that. You will have seen the reference by Witness 2 to more extreme measures being discussed, including plans to try to kidnap or poison Mr Assange whilst in the embassy [see tab 12, page 7]

10.4. As a result, Julian Assange is now in the situation where the very thought of extradition to the US understandably fills him with overwhelming dread – that he will not be fit to defend himself, that he will not get a fair trial, that he will receive an excessive sentence, and that he will be detained thereafter in conditions of long-term solitary confinement. I refer you to the report of Professor Kopelman at pages 10 – 11 and 12. He spells out the fatal consequences if Julian Assange is taken away from this country, where he has the support of his own family unit and is then exposed to the brutal isolation of

the US prison system. The European Court in ***Aswat*** attached significance to the separation of a mentally ill person from all family support in the alien and hostile prison system of the US. So too did the English High Court in ***Love.***

High risk of suicide

10.5. Both **Professor Kopelman** and **Professor Mullen** refer to the high risk of suicide if Julian Assange is extradited. Professor Kopelman puts it in this way:

"Mr Assange shows virtually all the risk factors which researchers from Oxford have described in prisoners who either suicide or make lethal attempts". … I am as confident as a psychiatrist can ever be that, if extradition to the United States were to become imminent, Mr Assange would find a way of suiciding." (paras 14 (i) and 35 of the Kopelman's report at tab 6.)

10.6. **Dr Sondra Crosby** puts it this way in her statement at tab 7:

"It is my strong medical opinion that extradition of Mr Assange to the United States will further damage his current fragile state of health and very likely cause his death. This opinion is not given lightly."

10.7. In dealing with the question of oppression under s91, the Court is entitled to look at all factors, including the nature of the charges. Here the charges are, to say the least, highly controversial. Though the relevant facts were known in 2010, it was not even considered proper to pursue them until 2017, when President Trump took office. The Court can have regard to all these matters. It can take account of the delay and the highly unusual and unprecedented nature of the case against him. In the light of all these factors taken together it is our case that it would be "oppressive and "unfair" to expose Julian Assange to the very high risk, if not certainty, of suicide if he is extradited to the US.

11. Section 82

11.1. I turn finally to the fact of the passage of time and the protection against extradition where it has become unjust and oppressive by reason of the passage of time. I know that you will be fully aware of the authorities on this issue. So I will simply make these short points at this stage.

11.2. **Firstly,** there clearly has been a long passage of time. No explanation has been given by the US for bringing the charges as late as December 2017 in respect of conduct known as long ago as 2010.

11.3. **Secondly,** there has been an earlier considered decision not to prosecute, in 2013. The fact of an earlier inconsistent decision not to pursue a prosecution was recognised to be a highly significant factor in determining injustice and oppression in the leading case of ***Kakis.***

11.4. **Thirdly**, there is a real risk of prejudice given the great difficulties in reconstructing the events of 2010 and 2011. But this will be necessary in order to rebut the US's misleading allegations as to recklessness to the causation of harm. Gareth Peirce's Affidavit of 12 February 2020, at tab 35, paragraphs 10 – 18, explains the grave problems in now attempting to reconstruct and prove the sequence of events in 2011 which led to the eventual publication of unredacted materials after publication by others. She further explains at paragraphs 15 – 17 the difficulties of rebutting the allegations that individuals in various countries were exposed to danger as a result of the revelations. This gives rise to a real risk of prejudice at any forthcoming trial.

11.5. **Fourthly,** during the intervening period, Julian Assange's mental state has deteriorated such that there is a real risk he could not effectively participate in his trial. That is in no small part due to the prolonged period of uncertainty caused by the original decision not to prosecute followed by repeated calls for prosecution in 2017 and the eventual bringing of a criminal complaint in December 2017.

11.6. **Finally,** it is oppressive to seek his extradition now after the well-publicised decisions in 2013 not to prosecute him for espionage or any other

offences. In dealing with this issue of oppression, the Court can also take into account the very grave effect of all this on Julian Assange's own fragile mental condition.

Edward Fitzgerald QC
Mark Summers QC
Florence Iveson

24 February 2020