

IN THE CITY OF WESTMINSTER MAGISTRATES COURT

BETWEEN:

THE GOVERNMENT OF THE UNITED STATES OF AMERICA

-v-

JULIAN PAUL ASSANGE

AFFIDAVIT OF THOMAS ANTHONY DURKIN

STATE OF ILLINOIS:

COUNTY OF COOK:

THOMAS ANTHONY DURKIN, an attorney duly admitted to practice law before the Courts of the States of Illinois, California, New York, and Indiana, affirms the following to be true upon information and belief:

1. I am an attorney licensed to practice law in the states of Illinois, California, New York and Indiana, and admitted to practice in a number of United States federal District Courts, Circuit Courts of Appeals, as well as the United States Supreme Court. I have been practicing federal criminal law continuously since my admission to the Illinois Bar in 1974, and my practice has always been concentrated in that field. I make this affidavit on behalf of Julian Paul Assange.
2. This expert report, which is the second report I will have submitted in addition to my previous report of December 17, 2019. I have read Part 19 of the Criminal Procedure Rules relating to expert evidence and believe that my opinion is compliant with the rules. I understand that my duty as an expert witness is to try to help the court by providing objective analysis on matters within my expertise.

I. Professional Credentials

3. I practice criminal defense law in the state and federal courts, primarily in Illinois, but also in criminal cases across the United States. Throughout my career, my practice has

included a wide range of matters, including white collar fraud, public corruption, narcotics, and terrorism cases, both domestic and international. I have served as Law Clerk to the Honorable James B. Parsons, United States District Court Judge for the Northern District of Illinois from 1973 to 1974. I then practiced federal criminal defense law, primarily as a Court Appointed Panel Attorney for the Federal Defender Program of the Northern District of Illinois from 1974 to 1978. From March of 1978 to April 1984, I served as Assistant United States Attorney for the Northern District of Illinois in Chicago, where I prosecuted a wide variety of federal criminal cases, including fraud and public corruption. From 1984 to the present I have limited my private practice largely to the defense of federal criminal cases at the Chicago law firm I founded with my wife and law partner, Janis D. Roberts, under the name Durkin & Roberts.

4. I am a Distinguished Practitioner in Residence at the Loyola University Chicago School of Law where I teach National Security Law, and serve as the co-director of its National Security & Civil Liberties Program. I am also a Senior Research Fellow at the Fordham University Law School's Center on National Security. I have appeared as a speaker and panelist at legal, academic, and other functions on a wide variety of subjects related to criminal defense and national security law. I am also a member of the National Security Committee of the National Association of Criminal Defense Lawyers, and also served on its Select Committee on Military Tribunals.

5. I am also a member of the American College of Trial Lawyers. In 2007, along with other lawyers representing Guantanamo Bay detainees, I received the Frederick Douglass Human Rights Award from the Southern Center for Human Rights. In 2008, I received the Constitutional Rights Foundation of Chicago Bill of Rights in Action Award. More recently, in 2019, I received the Illinois Association of Criminal Defense Lawyer's Lifetime Achievement Award. I am a 1968 graduate of the University of Notre Dame (A.B.), and a 1973 graduate of the University of San Francisco (J.D.).

II. Relevant Professional Experience

6. In the course of my career, I have been involved as defense counsel, either at the trial or appellate level, and also as a consultant, in a significant number of other cases in various federal courts across the United States, as well as in an expert and/or consulting capacity (on matters of U.S. federal criminal law) for cases in the United Kingdom.

III. Description of Materials Reviewed

7. In preparing this Affirmation, I have reviewed materials provided to me by Mr. Assange's solicitors in the United Kingdom, including a timeline of events prepared by the solicitors. Those materials, and the timeline, included the U.S. request for extradition and supporting affidavit of Special Agent Megan Brown of the FBI, the affidavit of Kellen Dwyer, and the declaration of Assistant U.S. Attorney, Gordon Kromberg; as well as the expert reports and affidavits filed to date, along with the accusatory instruments from the Eastern District of Virginia (the Criminal Complaint, Indictment and Superseding Indictment.) I have also reviewed relevant statutes, regulations, and research materials (including case law) related to the issues involving U.S. law and practice discussed in this Affirmation. I also rely on my more than 45 years of experience practicing criminal law in U.S. federal courts, both as a defense attorney and a federal prosecutor.

IV. Relevant Issue

8. This expert report addresses the question of whether facts in the record or public domain might demonstrate that the current charges against Mr. Assange could be said to be the result of extraneous or political issues in the United States.

9. In my professional opinion, there are facts in the record and public domain that would indicate that this current prosecution of Mr. Assange could be said to be based upon extraneous or political issues in the United States. This opinion is based upon the following:

- (a.) The events charged in the initial and superseding indictments are alleged to have taken place approximately eight to nine years before the return of the initial indictment on March 6, 2018.¹ Notably, this indictment was brought only days before the expiration of the Statute of Limitations.
- (b.) All of the information regarding the charged events appear to have been in the U.S. government's possession during the investigation of Private Chelsea Manning, and appear to have been investigated by federal law enforcement

¹ Count One alleges that the events took place "in or about November 2009 and continuing until at least September 2011." Counts 2-15 are alleged to have taken place between "in or about November 2009 and in or about May 2010." Counts 16 & 17 are alleged to have taken place "from in or about July 2010 and continuing until at least the time of this Superseding Indictment." Count 18 is alleged to have taken place "beginning on or about March 2, 2010, and continuing thereafter until on or about March 10, 2010." While arguably counts 16 & 17 would appear to allege conduct up to the date of the indictment in 2018, there do not appear to be any factual allegations in the indictment after 2010.

and one or more federal grand juries in the U.S. District Court for the Eastern District of Virginia, beginning as early as November 9, 2010.²

- (c.) On May, 11 2011, a report in *Salon* indicated that a grand jury subpoena in Alexandria, Virginia had been issued to an individual in an investigation involving Mr. Assange and Wikileaks, investigating possible violations of the Espionage Act.
- (d.) On November 26, 2013, the *Washington Post*, quoting high ranking U.S. Department of Justice officials, reported that Mr. Assange was unlikely to face U.S. charges over publishing classified materials without the same theory being applied to other U.S. journalists.
- (e.) On January 17, 2017, just before leaving office, President Obama commuted the sentence of Private Chelsea Manning to the seven-year sentence she had already served. This commutation was met with vigorous opposition from incoming President Donald Trump and his newly appointed Director of the Central Intelligence Agency (CIA), Mike Pompeo. President Trump went so far as to say that Manning was a “traitor” who “should have never been released from prison.”³
- (f.) In April of 2017, in an interview with *The Guardian*, newly-installed U.S. Attorney General Jeff Sessions, a Trump administration appointee, described the arrest of Mr. Assange as now being a priority for the Justice Department. This is the opposite conclusion reached by the Obama Department of Justice, based upon significant First Amendment constitutional privileges concerning freedom of the press.
- (g.) It is widely known from reports in the U.S. press during the Trump

² See, e.g., *Washington Post* article dated 29th November 2010, citing the fact that “Federal authorities are investigating whether WikiLeaks founder Julian Assange violated criminal laws in the groups release of government documents.” This is confirmed by CNN and a public statement of then U.S. Attorney General, Eric Holder.

³ See Ellen Nakashima and Sai Horwitz, *Obama commutes sentence for Chelsea Manning, soldier convicted of leaking classified information*, THE WASHINGTON POST (January 17, 2017), https://www.washingtonpost.com/world/national-security/obama-largely-commutes-sentence-of-chelsea-manning-us-soldier-convicted-for-leaking-classified-information/2017/01/17/f3205a1a-dcf8-11e6-ad42-f3375f271c9c_story.html.

presidential campaign that it was a stated goal of the Trump administration to reverse as many decisions of the Obama administration as possible. This reversal of positions regarding the First Amendment would appear to be an example of such a position.

- (h.) Upon information and belief, on August 16, 2017, U.S. Congressional Representative Dana Rohrabacher, Chair of the House Committee on Eurasia Policy, met with Mr. Assange at the Ecuadorian Embassy and raised the possibility of a pardon to Mr. Assange in exchange for Mr. Assange making clear that Russia was not involved in the hacking and leaking of emails from the Democratic National Committee. Mr. Rohrabacher suggested that this offer of a pardon had been authorized by President Trump.⁴
- (i.) On December 22, 2017, the United States requested a provisional arrest of Mr. Assange. This provisional arrest was based upon the issuance of an arrest warrant for Mr. Assange based upon a Criminal Complaint filed by the U.S. Attorney's Office of the Eastern District of Virginia.
- (j.) On March 6, 2018, Mr. Assange was indicted by the March 2018-Term Grand Jury sitting at Alexandria, Virginia. It is significant to note that this grand jury is known in the United States as a "regular" grand jury, as opposed to a "Special Grand Jury." The former type of grand jury sits only for one month and can be extended by court order for an additional ninety days. Special Grand Juries, on the other hand, sit for eighteen months and can be extended by court order for an additional eighteen months. The fact that Mr. Assange was indicted by a regular grand jury is significant to my opinion, based in part on the Declaration of Assistant U.S. Attorney Gordon Kromberg in the Response of the U.S. filed in these proceedings on January 17, 2020, in which he relies in significant part on the purported independence of the grand jury that returned the indictment and superseding indictment. Mr. Kromberg cites federal case law about the theoretical

⁴ Such a statement from Mr. Assange would have been quite helpful to President Trump at this particular time in light of the Mueller investigation and other public controversy surrounding possible interference by the Trump Campaign Committee in the 2016 Presidential election.

independence of the grand jury in U.S. law. The reality of the situation is quite different in my experience as both a former federal prosecutor and defense attorney.

(k.) Aside from ignoring the fact that it was his office and the Department of Justice alone that made the initial decision to charge Mr. Assange by means of the Criminal Complaint on December 21, 2019, the independent function of the modern grand jury in the United States is vastly overstated. It has been criticized by many practitioners, legal scholars, and judges. In fact, the National Association of Criminal Defense Lawyers (NACDL), the premier defense bar organization in the U.S., saw fit to assemble a blue ribbon panel of lawyers and professors to form a “Commission to Reform the Federal Grand Jury.”

(l.) In its report, issued May 18, 2000, the NACDL Commission stated at the very outset as follows:

House Judiciary Committee Chairman Henry Hyde (R-IL) recently noted that the federal grand jury, originally established by the Founding Fathers as a means of protecting American citizens against government excess, is today a captive of federal prosecutors. The prosecutor exercises enormous power, unrestrained by law or judicial supervision. The grand jury process itself is largely devoid of legal rules. The process has become one that wholly fails to protect ordinary American citizens. The balance has shifted so dramatically in favor of the prosecution that it has been noted, time and again, that “a good prosecutor could get a grand jury to indict a ham sandwich.”⁵

(m.) Thus, although the legal authorities cited by Mr. Kromberg with respect to grand juries are legally accurate, I do not believe the fact that Mr. Assange was indicted by a grand jury lends much, if any, support to the proposition that the charges against Mr. Assange could not be seen to be based upon extraneous or political considerations. It is my professional opinion, consistent with the aforesaid scholarly criticisms of modern federal grand

⁵ NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FEDERAL GRAND JURY REFORM REPORT & “BILL OF RIGHTS,” (May 18, 2000). See also Peter Arnella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction without Adjudication*, MICH. L. REV. 463 (1980); *Miller v. Brundsmann*, 599 F.3d 517 (6th Cir., 2010) (stating “the modern grand jury is not exactly a robust check on prosecutorial discretion”); Suja A. Thomas, *The Missing Branch of the Jury*, 77 OHIO ST. L. J. 1262, at 1270 (2016) (“...people continue to denounce grand juries for being unready to deviate from the direction of prosecutors”).

jury practice, that the decision to indict in the federal courts is the province of the Department of Justice and the various U.S. Attorneys Offices. In this instance, the return of the superseding indictment further supports this fact in that it was not even the same grand jury which returned the superseding indictment against Mr. Assange over fourteen months later on May 23, 2019. This superseding indictment was returned by a new and different regular grand jury sitting in Alexandria, the May 2019 Term. Thus, it appears that the U.S. Attorney's Office for the Eastern District of Virginia simply went before a new regular grand jury to obtain the superseding indictment. While this procedure is accepted practice in the federal courts, it cannot be said to suggest that any political or otherwise extraneous reasons did not influence the seeking of the return of the Assange indictment or superseding indictment.

- (n.) This same conclusion is bolstered by several expert opinions previously filed of record in this matter. For example, Professor Mark Feldstein has specifically opined that “the political dimensions of this case are inescapable;” and that while “[t]he government casts Assange as a criminal and a threat to the state but his real offense is political.”⁶ Feldstein goes even further to say that Assange’s indictment “may be ‘more symbolic statement’ than ‘genuine charging document’ designed ‘to deter future WikiLeaks-like activities or to intimidate traditional journalists.’”⁷
- (o.) Noted U.S. First Amendment lawyer and scholar, Jameel Jaffer, noted that the Assange indictment “poses a serious threat to the ability of the press to inform the public about matters relating to war and security.”⁸ Jaffer also points out the well known and well documented fact that press freedom groups note that the hallmarks of President Trump’s presidency have been the “continued vilification of the press” and “notorious anti-press rhetoric.”⁹ Finally, Jaffer opines unequivocally that he believes “that the indictment of

⁶ Feldstein Declaration, ¶10, pp. 23-24.

⁷ Id., p. 24.

⁸ Jaffer Declaration, ¶21, p. 12.

⁹ Id. ¶28, p. 15.

Mr. Assange must be understood as a deliberate effort on the part of the Trump administration to deter journalism that is vital to American democracy.” And, that “the government’s successful prosecution of him would certainly have this effect.”¹⁰

(p.) Renowned U.S. defense attorney and law professor, Michael E. Tiger, in opining why he believes Mr. Assange will not be able to receive a fair trial in the U.S., cites what he describes as “a legitimate criminal justice concern” that the current U.S. Department of Justice led by Attorney General William Barr “does not have independence from the White House.”¹¹

(q.) Similarly, in his expert report, Carey Shenkman points out the Assange indictment “of a publisher for the publication of secrets under the Espionage Act has no precedent in U.S. history.”¹²

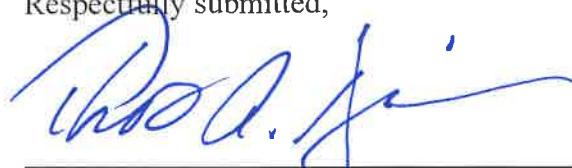
10. For all of the above reasons, it is my opinion that it is more likely than not that extraneous or political issues concerning U.S. freedom of the press issues factored in the Department of Justice charging decisions regarding Mr. Assange.

¹⁰ Id., ¶ 29, pp. 16-17.

¹¹ Tiger Declaration, p. 20.

¹² Shenkman Report, ¶, 32, p. 17.

Respectfully submitted,



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Dated: 21 February 2020
Chicago, Illinois

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