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Your Man in the Public Gallery: Assange Hearing Day 13

By Craig Murray
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Craig Murray 20 September 2020

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Friday gave us the most emotionally charged moments yet at the Assange hearing, showed that strange and sharp twists in the story are still arriving at the Old Bailey, and brought into sharp focus some questions about the handling and validity of evidence, which I will address in comment.

Nicky Hager

The first witness of the day was Nicky Hager, the veteran New Zealand investigative journalist. Hager's co-authored book "Hit and Run" detailed a disastrous New Zealand SAS raid in Afghanistan, "Operation Burnham", that achieved nothing but the deaths of civilians, including a child. Hager was the object of much calumny and insult, and even of police raids on his home, but in July an official government report found that all the major facts of his book were correct, and the New Zealand military had run dangerously out of control:

> "Ministers were not able to exercise the democratic control of the military. The military do not exist for their own purpose, they are meant to be controlled by their minister who is accountable to Parliament."

Edward Fitzgerald took Hager through his evidence. Hager stated that journalists had a duty to serve the public, and that they could not do this without access to secret sources of classified information. This was even more necessary for the public good in time of war. Claims of harm are always made by governments against any such disclosures. It is always stated. Such claims had been frequently made against him throughout his career. No evidence had ever emerged to back up any of these claims that anybody had been harmed as a result of his journalism.

When Wikileaks had released the Afghan War Logs, they had been an invaluable source to journalists. They showed details of regular patrols, CIA financed local forces, aid and reconstruction ops, technical intelligence ops, special ops and psychological ops, among others. They had contributed much to his books on Afghanistan. Information marked as confidential is essential to public understanding of the war. He freqently used leaked material. You had to judge whether it was in the higher public interest to inform the public. Decisions of war and peace were of the very highest public interest. If the public were being misled about the conduct and course of the war, how could democratic choices be made?

Edward Fitzgerald then asked about the collateral murder video and what they revealed about the rules of engagement. Hager said that the Collateral Murder video had "the most profound effect throughout the world". The publication of that video and the words ""Look at

those dead bastards" had changed world opinion on the subject of civilian casualties. In fact the Rules of Engagement had been changed to put more emphasis on avoiding civilian casualties, as a direct result.

In November 2010 Hager had travelled to the UK to join the Wikileaks team and had become involved in redacting and printing stories from the cables relating to Australasia. He was one of the local partners Wikileaks had brought in for the cables, expanding from the original media consortium that handled the Afghan and Iraqi war logs.

Wikileaks' idea was a rigorous process of redaction and publication. They were going through the cables country by country. It was a careful and diligent process. Wikileaks were very serious and responsible about what they were doing. His abiding memory was sitting in a room with Wikileaks staff and other journalists, with everyone working for hours and hours in total silence, concentrated on going through the cables. Hager had been very pleased to see the level of care that was taken.

Edward Fitzgerald asked him about Julian Assange. Hager said he found him completely different to the media presentation of him. He was thoughtful, humorous and energetic. He dedicated himself to trying to make the world a better place, particularly in the post 9/11 climate of a reduction of citizen freedoms in the world. Assange had a vision that the digital age would enable a new kind of whistleblower which could correct the information imbalance between government and citizen. This was against a background of torture, rendition and war crimes being widely committed by western governments.

James Lewis QC then rose to cross-examine on behalf of the US government

> **Lewis** Have you read the indictment and the extradition request?
> **Hager** Yes.
> **Lewis** What charges do you see there?
> **Hager** I see a mish-mash. Some charges of publication, some of possession then other stuff added.
> **Lewis** Assange is not charged with publishing the collateral murder video your evidence says so much about
> **Hager** You can't look at the effect the Wikileaks revelations had on the world in that kind of neat and compartmentalised way. The cables, logs and all the rest affected the world as a whole.
> **Lewis** Is Assange charged with publication of any of the documents you have relied on in your works?
> **Hager** That would take me some research to find out, which he is charged with publishing and which with possession.
> **Lewis** Have you ever paid a government official to give you secret information?
> **Hager** No.
> **Lewis** Have you ever hacked?
> **Hager** No, probably. That depends how you define "hack".
> **Lewis** You have as a journalist merely been the passive recipient of official information. Presumably you have never done anything criminal to obtain government information?
> **Hager** You said "passive". That is not the way we work. Journalists not only actively work our sources. We go out and find our sources. The information might come in documents. It might come on a memory stick. In most cases our sources are breaking the law. Our duty is to help protect them from being caught. We actively help them cover their backs sometimes.
> **Lewis** In your report on Operation Burnham you protected your sources. Would

you knowingly put a source in danger?
Hager No, of course not. However…
Lewis No. Stop. You answered.

Edward Fitzgerald QC rose to object but found no support from the judge.

Lewis On 2 September 2011 the Guardian published an editorial article abhorring Wikileaks' publishing of unredacted cables and stating that hundreds of lives had been put in danger. Do you agree with those statements?
Hager My information is that Wikileaks did not release the cables until others had published.
Lewis We say your understanding is wrong. On 25 August Wikileaks published 134,000 cables including some marked "strictly protect". What is your opinion on that?
Hager I am not going to comment on a disputed fact. I do not personally know.
Lewis The book "Wikileaks: the Inside Story" by David Leigh and Luke Harding of the Guardian newspaper states that Assange "wished to release the whole lot sooner". It also states that at a dinner at El Moro restaurant, Assange stated that if informants were killed, they had it coming to them. Would you care to comment?
Hager I know that there was great animosity between David Leigh and Julian Assange by the point that book was written. I would not regard that as a reliable source. I do not want to dignify that book by answering it.
Lewis Are you trying to assist the court or assist Assange? In a talk recorded at the Frontline Club, Assange stated that Wikileaks only had a duty to protect informants from "unjust" retribution, and that those who gave information to US forces for money or engaged in "truly traitorous" behaviour deserved their fate. Do you support that statement?
Hager No.
Lewis You say it would have been impossible to write your book without confidential material from Wikileaks. Did you need the names of informants?
Hager No.
Lewis The Operation Burnham report found at p.8 that, contrary to your assertions "New Zealand Defence Forces were not involved in planning preparation and execution".
Hager What you have quoted does not relate to the main operations covered in the book. It only refers to something covered as a "minor footnote" in the book. Most of the findings of the book were confirmed.
Lewis The Official Report states of your book "Hit and Run was inaccurate in some respects".
Hager We did not get everything right. But the major points were all true. "Civilian casualties confirmed. Death of child confirmed. Prisoner beaten up confirmed. Falsified reports confirmed."
Lewis How many cables did you personally review?
Hager A few hundred. They were specifically cables relating to Australasia.
Lewis And what criteria did you use to make redactions?
Hager There were quite a few names marked "strictly protect". This was not, in the context, for reasons of safety in the countries which I was working on. It was purely to avoid political embarrassment.
Lewis But how long did you work in London on the cables?
Hager It was several days, to do several hundred cables.
Lewis Did you show your statement to the defence in draft?
Hager Yes, I have always done this when I have submitted an affidavit.

[This is normal. Affidavits or statements from defence witnesses are normally drawn up and, if affidavits, taken under oath by the defence solicitors.]

Lewis Did the defence suggest to you that you should place the section on Rules of Engagement next to the Collateral Damage video?
Hager Yes. But I was very happy to do it, it made perfect sense to me.

Edward Fitzgerald QC then rose again for the re-examination.

Fitzgerald You were asked if you know what Assange is charged with. Do you know he is charged with obtaining and receiving all of the diplomatic cables, the Iraq war logs, the Afghan war logs, the rules of engagement, and the Guantanamo detainee assessments?
Hager Yes.
Fitzgerald And he could not have published any of them without first obtaining and receiving them? So the distinction as to which he is charged for publishing makes no difference to the liability of journalists like yourself to the Espionage Act for obtaining and receiving US classified information?
Hager Yes.
Fitzgerald You work with sources. That means the person who provides you with the information or material. And do you have a duty to protect that source?
Hager Yes.
Fitzgerald You were asked about the September 2011 publication of cables. What do you know about how that came about?
Hager I believed the Wikileaks people and witnessed their extreme seriousness in the redaction process to which they invited me in. I do not believe they suddenly changed their mind about it. This publication came about through a series of bad luck and unfortunate events, not by Wikileaks. But that nine month redaction process was not wasted. Wikileaks had at an early stage warned the US authorities and invited them to be part of the redaction process. Assange had stressed to US authorities the danger to those named in the report. While the US authorities had not got involved in redaction, they had started a massive exercise in warning those named in the reports that they might have been in danger, and helping those the most at risk to take measures to relocate. I think this is overlooked. Julian Assange bought those people nine months. I also believe that is the major part of the explanation why in the end there were no identifiable deaths and was no wholesale damage.
Fitzgerald What do you believe the bad luck to have been?
Hager I understand it was the publication of a password in the Leigh/Harding book, but I have no direct knowledge.
Fitzgerald On this book, you have said there was bad blood between Luke Harding, David Leigh and Julian Assange.
Hager Yes, I would not put much weight on that book as a source myself.

[I hope you will forgive me for adding personal knowledge here, but the bad blood was nothing to do with redaction and everything to do with money. Julian Assange was briefly the most famous man in the world for a while and had not yet been tarnished with the allegations arranged in Sweden. Rights to an Assange book on Wikileaks and a biography were potentially worth millions to the authors. Collaboration had been discussed with Leigh but Julian had decided against. The Guardian were furious. That is what really happened. It seems a good explanation of why they instead published a money-spinning book attacking Assange. It does not really explain why they published the password to the unredacted cable cache in that book.]

Fitzgerald Julian Assange stated at the Frontline Club that sources had to be protected from “unjust retribution”. Do you agree with that?

Hager Yes.
Fitzgerald He was trying to draw a distinction with categories who do not deserve protection. Informants who give false information for money, agents provocateurs, those who turn in innocents for personal motives. We have seen the press in the UK, for example, name certain informants in Northern Ireland who had played a bad part. What do you think of naming informants in those kind of circumstances?
Hager I don't want to comment on Northern Ireland. It is all a very difficult topic.
Fitzgerald Could you comment further on the collateral murder video and the rules of engagement?
Hager The RoEs simply govern when soldiers can and cannot use force. They raise important questions. Are they correct? Do they minimise civilian casualties? Are they consistent with the laws of armed conflict?
Fitzgerald One charge related to receiving and obtaining the RoEs. Is that why you mentioned them?
Hager Yes. The soldiers always retain the base right of self-defence. There is no basis for claiming their publication poses a dire risk for the troops. It arguably leads to less conflict if people know when force will and will not be used.
Fitzgerald You affirm that when the defence asked you to put together the collateral murder video with the rules of engagement, you agreed purely on the basis that was correct and right in your own opinion?
Hager Yes.

Jennifer Robinson

The court then moved to its first witness with "read evidence". It has been agreed that some witnesses whom the prosecution does not wish to cross examine will have their evidence "read" into the record without having to appear. After substantial discussions and disagreements between the lawyers this has been resolved to be a short summary or "gist" of their evidence. My reports then for this group of witnesses are the gist of a gist; in this case of the evidence of Jennifer Robinson.

Jennifer Robinson is a lawyer who has advised Julian Assange since 2010. She represented him in his Swedish legal issues. On 15 August 2017 he asked her to join him for a meeting in the Ecuadorean Embassy in London with US Congressman Dana Rohrabacher and an aide Charles Johnson. Rohrabacher had stated he was acting on behalf of President Donald Trump and would report back to Trump on his return to Washington.

Rohrabacher said that the "Russiagate" story was politically damaging to President Trump, was damaging to US interests and to US/Russian relations. It would therefore be very helpful if Julian would reveal the real source of the DNC leaks. This would be in the public interest.

Julian Assange had put the case for a full pardon for Chelsea Manning and for any indictment against himself as a publisher to be dropped on First Amendment grounds. Rohrabacher had said there was an obvious "win win solution" here and he would investigate "what might be possible to get him out." Assange could reveal the DNC source in return for a "pardon, deal or arrangement". Assange had however not named any source to him.

Khaled El-Masri

There had been three days of intense discussion between the counsel and the judge, with the United States government objecting bitterly to Mr El-Masri being heard. A compromise had been reached that he could give evidence provided he did not allege he was tortured by

the US Government. However, when he came to give evidence, Mr El-Masri was strangely unable to connect by videolink, even though the defence team had been able to speak to him by video a few hours earlier. Technical staff in the court having been unable to resolve the (ahem) technical issue, rather than simply postpone his evidence until a videolink had been established – as had happened already with two other witnesses when quality issues arose – Judge Baraitser suddenly decided to raise again the issue of whether el-Masri's evidence should be heard at all.

James Lewis QC for the US Government stated that they did not merely oppose his evidence of being tortured. They opposed the making of any claim that a Wikileaks-released cable showed that they had put pressure on the government of Germany not to arrest those allegedly concerned in his alleged extradition. The US Government had not pressurised the Government of Germany, Lewis said. Mark Summers QC for the defence said that the Supreme Chamber of the European Court in Strasbourg had already judged his claims to be true, and that the Wikileaks cable plainly and inarguably showed the US Government exerting pressure on Germany.

1. (S/NF) In a February 6 discussion with German Deputy National Security Adviser Rolf Nikel, the DCM reiterated our strong concerns about the possible issuance of international arrest warrants in the al-Masri case. The DCM noted that the reports in the German media of the discussion on the issue between the Secretary and FM Steinmeier in Washington were not accurate, in that the media reports suggest the USG was not troubled by developments in the al-Masri case. The DCM emphasized that this was not the case and that issuance of international arrest warrants would have a negative impact on our bilateral relationship. He reminded Nikel of the repercussions to U.S.-Italian bilateral relations in the wake of a similar move by Italian authorities last year.

2. (S/NF) The DCM pointed out that our intention was not to threaten Germany, but rather to urge that the German Government weigh carefully at every step of the way the implications for relations with the U.S. We of course recognized the independence of the German judiciary, but noted that a decision to issue international arrest warrants or extradition requests would require the concurrence of the German Federal Government, specifically the MFA and the Ministry of Justice (MOJ). The DCM said our initial indications had been that the German federal authorities would not allow the warrants to be issued, but that subsequent contacts led us to believe this was not the case.

3. (S/NF) Nikel also underscored the independence of the German judiciary, but confirmed that the MFA and MOJ would have a procedural role to play. He said the case was subject to political, as well as judicial, scrutiny. From a judicial standpoint, the facts are clear, and the Munich prosecutor has acted correctly. Politically speaking, said Nikel, Germany would have to examine the implications for relations with the U.S. At the same time, he noted our political differences about how the global war on terrorism should be waged, for example on the appropriateness of the Guantanamo facility and the alleged use of renditions.

4. (S/NF) Nikel also cited intense pressure from the Bundestag and the German media. The German federal Government must consider the "entire political context," said Nikel. He assured the DCM that the Chancellery is well aware of the bilateral political implications of the case, but added that this case "will not be easy." The Chancellery would nonetheless try to be as constructive as possible.

Judge Baraitser said she was not going to determine if the US had pressurised Germany or if el-Masri had been tortured. Those were not the questions before her. Mark Summers QC said that it went to the question of whether Wikileaks had performed a necessary act to prevent criminality by the US Government and enable justice. Lewis responded that it was unacceptable to the US government that allegations of torture should be made.

At this point, Julian Assange became very agitated. He stood up and declared very loudly:

> "I will not permit the testimony of a torture victim to be censored by this court"

A great commotion broke out. Baraitser threatened to have Julian removed and have the hearing held in his absence. There was a break following which it was announced that el-Masri would not appear, but that the gist of his evidence would be read out, excluding detail of US torture or of US pressure on the government of Germany. Mark Summers QC started to read the evidence.

Khaled el-Masri, of Lebanese origin, had come to Germany in 1989 and was a German citizen. On 1 January 2004 after a holiday in Skopje he had been removed from a coach on the Macedonian border. He had been held incommunicado by Macedonian officials, ill-treated and beaten. On 23 July he had been taken to Skopje airport and handed over to CIA operatives. They had beaten, shackled, hooded and sodomised him. His clothes had been ripped off, he had been dressed in a diaper, shackled to the floor of an aircraft in a cruciform position, and rendered unconscious by an anaesthetic injection.

He awoke in what he eventually learned was Afghanistan. He was held incommunicado in a bare concrete cell with a bucket for a toilet. He was held for six months and interrogated throughout this period [details of torture excluded by the judge]. Eventually in June he was flown to Albania, driven blindfold up a remote mountain road and dumped. When he eventually got back to Germany, his home was deserted and his wife and children had left.

When he made his story public he was subject to vicious attacks on his character and his credibility and it was claimed he was inventing it. He believes the government sought to silence him. He sought a local lawyer and persisted, eventually getting in touch with Mr Goetz of public TV, who had proven his story to be true, traced the CIA agents involved to North Carolina and even interviewed some of them. As a result, Munich state prosecutors released arrest warrants for his CIA kidnappers, but these were never executed. When Wikileaks issued the cables the pressure that had been brought on the German government not to prosecute became plain. [The judge did not prevent Summers from saying this.] We therefore know the US blocked judicial investigation of a crime. The European Court of Human Rights had explicitly relied on the Wikileaks cables for part of its judgement in the case. The Grand Chamber confirmed that he had been beaten, hooded, shackled and sodomised.

There had been no accountability in the USA. The CIA Inspector-General had declined to take action over the case. The ECHR judgement and supporting documentation had been sent to the office of the US Attorney in the Eastern District of Virginia – precisely the same office that was now attempting to extradite Assange – and that office had declined to prosecute the CIA officers concerned.

A complaint had been made to the International Criminal Court including the ECHR

judgement and the Wikileaks material. In March 2020 the ICC had announced it was opening an investigation. In response US Secretary of State Mike Pompeo had declared any non-US citizen who cooperated with that ICC investigation, including officers of the ICC, would be subject to financial and other sanctions.

Finally, el-Masri testified that Wikileaks' publication had been essential to him in gaining acceptance of the truth of the crime and of the cover-up.

In fact, the impact of Mark Summers' reading of el-Masri's statement on the court was enormous. Summers has a real gift for conveying moral force and constrained righteous anger in his tone. I thought the testimony had a definite impression on Judge Baraitser; she showed signs not of discomfort or embarrassment, but of real emotional distress while she was listening intently. Subsequently, two different witnesses, each situated in separate sections of the court from me, both in separate and unprompted conversations with me, told me that they thought that el-Masri's testimony had really gotten through to the judge. Vanessa Baraitser is after all only human, and this is the first time she has been forced to deal with what this case is actually about.

Dean Yates

The United States had objected that Mr Yates' evidence should not include description of the actual content of the Collateral Murder video. I could not hear or understand any rationale why Baraitser agreed to this, but she did so rule, and four times she interrupted Edward Fitzgerald QC while he was reading the "gist" of Yates' statement, to tell him he must not mention the content of the video.

Edward Fitzgerald read out that Mr Yates was a highly experienced journalist who had been Bureau Chief for Reuters in Baghdad. Early on 12 July 2007 "loud wailing" broke out in their office and he learnt that Namir, a photographer, and Saeed, a driver, had been killed. Namir had left early to cover a reported conflict with militants. Yates could not work out what had happened. A minivan nearby had its front shattered; the US military had taken Namir's two cameras and refused to release them. The report was thirteen killed and nine injured. There did not appear to be any evidence of a firefight at the scene.

Yates had attended a US military HQ briefing where he was told that a hostile group had been deploying Improvised Explosive Devices in the road. He was shown photographs of machine guns and RPGs allegedly collected from the scene. He was shown three minutes of the video. It showed [Here Baraitser cut Fitzgerald off].
Yates had subsequently submitted a request to the US military to view the whole video, which had been denied. So had requests for the rules of engagement.

When Wikileaks released the Collateral Murder video, in the video Saeed was shown for three minutes crawling and trying to get up, while the Americans watching him remotely were saying "come on buddy, all you've got to do is pick up a weapon" so they could shoot him again. The Good Samaritan pulled up to help and the shots were seen destroying his windscreen and car. Edward Fitzgerald kept doggedly reading out bits of Yates' testimony as Baraitser continually asked him to stop in a manner that was almost pleading.

Yates said that when he saw the video he immediately realised the US had lied to them about what happened. He also immediately wondered how much of that meeting at USHQ had been choreographed.

Something struck Yates very hard later. He had always blamed Namir for peering round the corner with his camera, which had been mistaken for a weapon and therefore caused him to be shot. It was Julian Assange who subsequently made the point that the order to kill Namir had been given before he had peered round the corner. He vividly recalled Assange saying "and if that's within the RoEs, then the RoEs are wrong." Yates was glad to absolve Namir but felt a terrible burden of guilt for having blamed him all the while for his own death.

Yates concluded that had it not been for Chelsea Manning and Julian Assange, the truth of what had happened to Namir and Saeed would never have been known. Thanks to Wikileaks, their deaths had a profound effect on public opinion.

James Lewis QC stated the American government had no questions but this did not imply the evidence was accepted.

Carey Shenkman

Finally, we turned to the second half of Clair Dobbin's cross-examination of Carey Shenkman on his testimony on the history of the Espionage Act. This may seem dull, but it has actually been extremely revealing in terms of revealing US government claims of the right to use the Espionage Act (1917) against any journalist, anywhere in the world, who obtains US classified information.

Dobbin opened part 2 by asking Shenkman whether he was seriously arguing that there existed any law that precluded the prosecution of a journalist under the Espionage Act for revealing national security information. Shenkman replied that the law had components; legislation, common law and the constitution, and that these interact. There is a very strong argument that the First Amendment does preclude such prosecution.

Dobbin asked whether any case established this beyond doubt. Shenkman replied that there had never been such a prosecution, so it had never come before the Supreme Court. Dobbin asked whether he accepted that in the New York Times case, the Supreme Court had said such an Espionage Act case could be brought. Shenkman replied that some of the judges had mentioned the possibility in their dicta, but that is not what they were ruling on and they had not heard any arguments before them on the issue.

Dobbin said that the judge in the Rosen case had stated that the New York Times case might have had a different outcome if pursued under the espionage act 79/3/e and such future prosecution was not precluded. Shenkman said the Rosen judgement was an outlier and did not refer to media publication. The Justice Department had decided no further action on Rosen. Shenkman referred her to a 2007 Harvard Law Review article on Rosen. It had been dropped because of First Amendment concerns.

Dobbin tried again and asked Shenkman whether he accepted that the judgement in Rosen found the interpretation of dicta in the New York Post case did not preclude prosecution. Shenkman, who seemed to be enjoying this, said the issue had not been briefed before the Supreme Court. And the Rosen judgement had not been carried through. Dobbin suggested this meant it was arguable both ways. Shenkman replied the Supreme Court judgement in NYT was about prior restraint.

Dobbin then asked Shenkman whether he accepted the fact that the vagueness objection to the Espionage Act had been rejected by the courts in whistleblower cases. Shenkman said

there were many and sometimes contradictory cases in different appellate jurisdictions. But these were all cases involving government insiders not journalists.

Dobbin then asked why Shenkman's witness statement did not make clear that the Espionage Act had been subject to judicial refinement. Shenkman replied that was because he did not think most academics would agree with that. It had been interpreted but not refined. Dobbin said that the effect of the interpretation had been to narrow its scope. She quoted the Rosen judgement again and the Morison judgement. They narrowed the scope to leak of official information that was damaging to the interests of the United States. This was an important new test. The Rosen judgement said this was "a clear safeguard against arbitrary enforcement."

Shenkman replied that addresses only one particular aspect of the Espionage Act, the definition of national security information, and there had been whole books written on that. Quoting one line of one judgement really did not help. Other aspects were extremely broad. The main problem with the Act was the same legal standard is applied to all categories of recipient – the whistleblower, the publisher, the journalist, the newspaper seller and the reader could all be equally liable.

Dobbin then suggested the prosecution could not be political because it was the court that decides the definition of national security information. Shenkman replied that on the other hand it is the executive that decides what material is classified, who is prosecuted and on what charges. It was not just a matter of prosecution. The Espionage Act could be shown historically to have a chilling effect on important journalism.

Dobbin then asked Shenkman whether he agreed that the provisions under which Assange were tried had never been intended to apply to "classic espionage". Shenkman said most authorities would reject the idea of a clear and singular intent. Dobbin said that in the Morison case the judgement had rejected the argument that the provision was limited to classic espionage. Shenkman rather wickedly agreed that yes, that judgement had indeed broadened the application of the act – as opposed to refining it. But other judgements were available. Besides, she had asked him about intent. What Congress intended in 1917 and what the Morison court decided were two different things. There had been numerous successful prosecutions of whistleblowers under Obama. Plainly the courts generally accepted that these provisions apply to government insiders. There had never been a prosecution of a journalist or publisher.

Dobbin, who is nothing if not persistent, asked Shenkman if he accepted that the Morison judgement says that only provision 79/4 applies to classic espionage. Shenkman replied that the Morison judgement was a single star in the night sky among myriad points of navigation through these laws. They then got in to discussion of the views of various professors on the subject.

Now I cede to very few in my interest in the details of this case, and certainly I absolutely appreciate the fundamental threat posed by the insistence on the general application of the Espionage Act against journalists as outlined by the prosecution, above all in the current political climate; but it was now late Friday afternoon after a very hard week and I have my limits. I decided to see how many verses of Shelley's The Masque of Anarchy I could recall instead.

When my consciousness groped its way back to the courtroom, Dobbin was putting to

Shenkman that the fact that numerous potential prosecutions had been dropped, just proved the act was used responsibly and properly. Shenkman said that was to ignore the chilling effect both in general and in specific threats to prosecute. Chilling caused papers costs, delays and even bankruptcies. President Roosevelt had used the threat of the Espionage Act to suppress independent black newspapers.

Dobbin suggested that in the instances where it had been decided not to prosecute due to the First Amendment, these cases had related to responsible major media titles. Shenkman replied that this was not true at all. Beacon Press, for example, which published the full Pentagon Papers, was a small religious organisation.

Dobbin said none of the past examples resembles Wikileaks. Shenkman again disagreed. There were many striking points of similarity in different cases. Dobbin replied that Wikileaks' sole purpose and design was to source material from those entitled to receive it and give it to those not entitled to see it. It was solicitation on a mass scale. Shenkman said she was reaching for a distinction. Similarities to the Beacon Press and Amerasia cases were obvious.

Dobbin concluded that Shenkman's opinion and evidence was "frivolous and nonsensical".

Mark Summers then re-examined Shenkman. He referred to the Jack Anderson case. Anderson had published entire Top Secret documents, unredacted, in time of war. He had not been prosecuted under the Espionage Act on First Amendment grounds. Shenkman replied yes, and the documents he had published were particularly sensitive communications intelligence (intercepts).

Summers referred to sentences from judgements which Dobbin had invited Shenkman to accept as "uncontrovertible statements of the law" but which were anything but. In the Morison case he pointed out that the two other judges in the case had explicitly contradicted the very sentence Dobbin had quoted. Judge Wilkerson had stated "the First Amendment interest in informed national debate does not simply vanish at the mention of the words "national security"".

Summers said above all the US government now relied on the Rosen judgement. He asked what level of court that had been. Shenkman replied that it was a district court, the lowest level of US court. And the Justice Department had decided against proceeding with it. Finally Summers said that Shenkman had stated there had never been a prosecution, but there had been threats resulting in a chilling effect. What types of people had been threatened with prosecution under the Espionage Act for publishing? Shenkman stated that in every case it was political; opponents of the Presidency, minority groups, pacifists and dissidents.

That concluded the week.

Comment

There are numerous serious questions relating to the handling of evidence in this case. I should start by saying that the government of the United States had objected to almost all of the defence evidence. They want the defence witnesses ruled as either not expert (hence the sustained rudeness and attacks) or not relevant. Judge Baraitser had ruled that she will hear all the evidence, and decide only when she comes to judgement, what is and is not admissible.

Against that we then have her decision that the witnesses can only have half an hour of going through their statements before cross-examination. That is against a US government request that witness statements should not be heard before cross-examination at all. Theoretically Baraitser agreed to this, but she let in half an hour to "orient the witness", which gets the basic facts out there. Baraitser rejected the defence arguments that statements should be read or explained at length by the witness in court, for the benefit of the public, on the basis that the statements are published. But they are not published. The Court does not publish them. It gives copies to journalists registered to cover the trial, but those journalists have no interest in publishing them. The first two days' witness statements were published here, but for several days they stopped. They seem to have started again on Friday, but this is not satisfactory for the public.

Next we have the specific pieces of evidence that are banned on US objection, like the details of el-Masri's torture or of the content of the Collateral Murder video. I can understand that it is true that this court is not judging if el-Masri was tortured – in fact that is now established by the ECHR. But plainly his story is relevant to Wikileaks' defence of necessary publication to prevent crime and enable judicial process. The fact is that the USA wants to avoid the political embarrassment and media publicity of el-Masri's torture and the events of the Collateral Murder video being detailed in court. Why an English court is complying in this censorship is beyond me.

I am deeply suspicious of the "breakdown" of the videolink making el-Masri's evidence in person "technically impossible" after days in which the US government tried to block that evidence. I am also deeply suspicious of the strange fact that unlike other witnesses with video problems, there was no rescheduling. Video and sound quality has been deplorable for several defence witnesses. In a world where we have all got used to videocalls this last few months, the extraordinary failure of the court to operate everyday technology is a level of incompetence it is difficult quite to believe in.

Finally and more importantly, what constitutes evidence?

Lewis consistently and repeatedly quotes the words of Luke Harding and David Leigh to witnesses, more or less every day, yet Leigh and Harding are not in the witness box to be cross-examined on their words. As you know, I am absolutely furious that Lewis has been allowed to repeat Harding's words about the conversation in the El Moro restaurant to witness after witness, but that John Goetz, who was actually part of the conversation and an eyewitness, was not permitted by the court to testify on the subject. That is absolutely ludicrous.

Finally, we have the affidavits submitted by Kromberg and Dwyer on behalf of the US government. These are apparently treated as "evidence". Lewis specifically categorised Dwyer's proof free assertion in Dywer's affidavit that informants had been harmed, as "evidence" this had happened. But how can these affidavits be evidence if the authors cannot be cross-examined on them? One of the defence counsel told me on Friday that Kromberg will not be made available for cross-examination, as though they had just been told of that. It is not right that an affidavit full of highly dodgy statements and propositions should be accepted as evidence if the author cannot be challenged. The whole question of "evidence" in this case needs a fundamental rethink.

On another point, I was very pleased Nicky Hager testified under oath that in the cables he redacted "strictly protect" designation of names was used to prevent political

embarrassment, as the prosecution has repeatedly claimed that the 134,000 unclassified and/or redacted cables in the original limited mass cable release by Wikileaks included names marked “strictly protect”. This is not a security classification. As someone who operated the near identical UK system for over 20 years and held the very highest levels of security clearance, and frequently in that period read American material, let me explain to you. Any material which contained the name of someone who would be at risk of death if published, or which would create real and acute danger to the national interest, would by very definition have been classified “Secret” or “Top Secret”, the latter generally relating to intelligence material. All of the Chelsea Manning material was at a level of classification below that.

Furthermore as Daniel Ellsberg pointed out, and I was very well used to, there exists separately to the classification a distribution system which limits who actually gets the material. The Manning material was unlimited in distribution and therefore available literally to tens of thousands of people. That again could not have happened if it contained the dangers now claimed.

“Strictly protect” is nothing to do with security classification, which is what protects national security information. As Hager said, its normal use is to prevent political embarrassment. As in Australasia, it is a term largely used to protect their secret political assets. Here is an example from a Wikileaks cable which I believe is one of those in the specific release which the prosecution is citing.

> 5. (C/NF) Perhaps most damaging of all, however, Smeargate effectively ended what may have been Brown's plan to call a general election this spring, based on the rise in the polls he received following his solid performance at the G-20. Labour Prospective Parliamentary Candidate for Burton Ruth Smeeth (strictly protect) told us April 20 that Brown had intended to announce the elections on May 12, and hold them after a very short (matter of weeks) campaign season. Labour

As you can see, nothing whatsoever to do with the safety of informants in Afghanistan. Much more to do with other objectives.

I am very glad Hager did raise the real use of “strictly protect”, because I have been waiting for the right moment to explain all that.

So that is my account of Friday, published on Monday. It is perhaps fortunate that normally I don’t have the luxury of time in publishing the reports. Otherwise they might all ramble on at this length.

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