

J.W.K. BURNSIDE A.O. Q.C.

30 June 2012

Dear Attorney

re: Julian Assange – request for information and assistance

I act for Julian Assange. I am in London at present trying to see what can be done to help him.

He is very concerned about what is likely to happen to him if he is extradited to Sweden. Given the circumstances, I think his fears are well-founded. Although you are probably familiar with some of the facts, let me set out the key facts which underpin Assange's concerns.

Likelihood of prosecution

1. A Grand Jury was convened in the USA in Alexandria, Virginia two years ago, and has sat since that time hearing evidence - its purpose apparently is that Assange be indicted. It is my understanding that there is now a sealed indictment in existence.
2. The issuing of an indictment by prosecutors in the USA appears to be a certainty.
3. Bradley Manning, who is alleged to have obtained the leaked material which was later uploaded onto the Wikileaks site, has been held in seriously damaging conditions for the past two years. During that time, he has been held in solitary confinement, much of the time naked "for his own protection". I understand that the US authorities have tried to have him implicate Assange in the original acquisition of the leaked material, but he insists that Assange had nothing to do with it.
4. The allegations being canvassed publicly by many senior figures in the USA include allegations of espionage, material support for terrorism, assistance to the enemy, and conspiracy with a serving military officer to carry out acts of computer fraud and abuse incorporated by the USA Patriot Act 2001 into a "Federal Crimes of Terrorism" list. The likely charges, the attitude of the US government towards Assange and the known circumstances of placement of individuals on comparable charges mean that he will, very likely, be imprisoned in conditions that mirror those experienced by Bradley Manning.
5. These circumstances, and others noted below, make it seem very likely that the USA will attempt to try Assange on whatever charges they can find. The defence which is plainly available to Assange is a First Amendment defence, established in the Pentagon Papers trial of Daniel Ellsberg.

Likely treatment in USA

6. Under Federal regulations, the Attorney General may authorize the Director of the Bureau of Prisons to implement Special Administrative Measures ("SAMs") for detaining individuals whose communications or contacts pose a substantial risk of death or bodily injury to persons, "or substantial damage to property that would entail the risk of death or serious bodily injury to persons." The attitude already taken publicly by the Administration is that the communications of WikiLeaks pose such a risk. Federal regulations allow the Attorney General to authorize SAMs that are "reasonably necessary to prevent disclosure of classified information" if such

AICKIN CHAMBERS:
LEVEL 30, 200 QUEEN ST,
MELBOURNE 3000
jb@julianburnside.com.au
www.julianburnside.com.au

POSTAL ADDRESS:
C/- CLERK G
205 WILLIAM ST MELBOURNE, 3000
PH: (03) 9225 7488
FAX: (03) 9225 7350

information “would pose a threat to the national security and there is a danger that the inmate will disclose such information.” 28 C.F.R. § 501.2(a).

7. Manning is being held in similarly restrictive conditions to those likely to be applied to Assange: he would be held in solitary confinement, confined 23 hours a day in a small single cell, with access to no other prisoner, and with only very restricted access to lawyers.
8. The Attorney General can order monitoring of a prisoner’s communications with his attorney if it is determined that such communications may be used to facilitate acts of terrorism, a term applied, however extravagantly and wrongly, by US officials in relation to Assange and to Wikileaks.
9. In the circumstances it is very likely, according to advice received by Assange from US lawyers, that the US Attorney General will take the position that he has the authority to impose SAMs conditions of detention on Assange. These detention conditions have been criticised by the United Nations Human Rights Committee and the Committee Against Torture.
10. It is highly likely that if taken to America Assange would be detained for a substantial time before a trial began. Although the Speedy Trial Act provides that a defendant is entitled to a trial within seventy days of indictment or first appearance, time may be (and routinely is) excluded from the Speedy Trial clock. Thus defendants routinely go many months and even several years before being tried and still have no recourse under the Act (or any Constitutional right to a speedy trial). Manning has been held for two years, and his trial has not begun.

Unusual circumstances of Swedish extradition request

11. Assange has not been charged with any offence in Sweden.
12. He visited Sweden at the invitation of a Swedish political party dedicated to the free provision of information. Whilst there, he had a brief physical involvement with two women at different times, which was (and has always been said by all concerned, to have been) consensual. Thereafter one of the women contacted a police officer to ask whether Assange could be required to be checked to ensure that he did not have any communicable disease. Instead, the police officer notified a duty prosecutor of an allegation of rape on the basis that a brief interlude of unprotected sex during a consensual sexual encounter constituted a criminal offence. A second allegation was added some days later when the second woman was spoken to by police. Assange presented himself to a police officer in Sweden and answered all the questions asked of him.
13. Despite the prohibition in Sweden for a prosecutor to publicly name a suspect, an intention to charge Assange with rape was broadcast in the media. Thereafter a senior prosecutor countermanded the charge, which was withdrawn. She said publicly “I consider there are no grounds for suspecting he has committed rape.”
14. The inquiries were made of Assange were unusual. He offered his testimony and was interrogated in relation to the lesser offences. After an appeal by the complainants’ lawyer (in which Assange was not provided an opportunity to make submissions) the “minor rape” allegation was reinstated. Assange remained in Sweden for more than a month to answer further questions in relation to this investigation. Then, through his lawyer, he sought and received the prosecutor’s permission to leave Sweden. Subsequently, and despite his willingness to be

questioned further by the prosecutor in the UK, the prosecutor issued a European Arrest Warrant insisting that Assange be extradited to Sweden where he would be detained in prison for questioning.

15. In summary, the Swedish allegations emerged in very unusual circumstances; Assange was given permission to leave Sweden without being questioned and without charge; then the Swedish prosecutor sought to extradite him *in order to question him*, despite his offer to answer questions in the UK where he was based.

Political atmosphere in USA

16. It is a matter of notoriety that senior political and media figures in USA have publicly called for Assange to be assassinated, and he has been publicly described as a high-tech terrorist: an expression calculated to alienate American public opinion, thus making it more likely that imprisoning him and (one way or another) destroying him will be seen as a politically desirable goal.
17. I have set out in the appendix to this letter just some of the many statements made by senior figures in the US. They underscore my belief that the allegations levelled against Assange in the USA are founded on political reactions and motivations rather than on any certain legal basis. There are wild and ever changing public statements, including demands to bring in new laws if necessary to ensure Assange is neutralised, to categorise WikiLeaks as a foreign terrorist organisation and to eliminate Assange by any means including assassination.
18. If the US adopts a similar strategy in relation to charges against Assange, it is obvious that holding him in harsh conditions and ‘over-charging’ him would be two devices designed to hold him for a prolonged time in order to break him.
19. The National Fair Trial Jury Project in the USA has commented on the inappropriateness of the federal judicial venue reportedly selected for Assange’s case and in which the Grand Jury sits. Of all the 94 federal judicial districts in the United States, the Department of Justice selected a district which is uniquely inappropriate: the Eastern District of Virginia is drawn from a district that has the highest density of government and military contractors in the United States. For that reason espionage trials are conducted there. Grand juries are handpicked from the local area by prosecutors with no screening for bias. Within that relatively small jury catchment area are housed the following federal institutions:

The Pentagon, The Headquarters of the CIA, The United States Department of Homeland Security, The Office of the Director of National Intelligence, The National Counterterrorism Center, The National Geospatial Intelligence Agency, The National Reconnaissance Office, The Quantico Marine Corp Base (with over 8,000 civilian employees). Other major employers in the district servicing the military include Lockheed Martin, General Dynamics, Northrup Gruman, Boeing, and BAE Systems.
20. The combination of all of the above factors makes the concept of a fair trial difficult to imagine. The following is a report of a pre-trial hearing in Manning’s case:

“During the December pre-trial hearing in the case against Bradley Manning, Manning's defense lawyer, David Coombs, claimed that the government was vastly overcharging his client in an attempt to force Manning into making a plea deal and turning evidence against Assange.

Manning's attorney David E. Coombs opened the morning stating that the Army was overcharging his disturbed but idealistic client and exaggerating the impact of the leaks in order to strong-arm Manning.

Coombs said the government wants to force his client into making a plea deal and turning evidence against Assange, whom the Justice Department is investigating in a criminal case stemming from the leaks allegedly provided by Manning.

Coombs asked the court's Investigating Officer to drop the charge accusing Manning of aiding the enemy and to consolidate some of the charges, saying that many were redundant and that Manning shouldn't be facing 100 to 150 years in prison.

"If the Department of Justice got their way, they would get a plea in this case, and get my client to be named as one of the witnesses to go after Julian Assange and Wikileaks.""

Likelihood of USA seeking to transfer Assange to America

21. It is clear from the evidence being disclosed in the Bradley Manning proceedings that there is an active, ongoing criminal investigation into Assange for his publishing activities with WikiLeaks. This has included material which states that the founder and manager of WikiLeaks is a subject of the grand jury; that there is a connected Department of Justice investigation into WikiLeaks and Assange; and comments by Bradley Manning's own counsel that the way in which his client has been treated is designed to pressure him to implicate Assange.
22. We also know from the Bradley Manning proceedings that the FBI investigation material into WikiLeaks runs into more than 45,000 pages.
23. WikiLeaks volunteers and supporters have had their Twitter accounts subpoenaed.
24. Birgitta Jonsdottir, an Icelandic MP, has been subpoenaed by the US authorities in relation to her association with Assange and WikiLeaks and has been advised by the Icelandic State Department not to travel to the US because she would be subject to arrest.
25. Others associated with WikiLeaks have been detained or otherwise harassed while travelling in and out of the US and elsewhere.
26. The political atmosphere which the matters above demonstrate make it overwhelmingly likely that the US authorities will try to get Assange into America in order to put him on trial, regardless of the evidence and regardless of the prospects of success. This raises two distinct concerns:
 - 1) the fairness of any trial to which he might be subjected, and
 - 2) (equally important) the way he is likely to be treated pending any charge or trial.
27. On any view, to be held in conditions equivalent to those being suffered by Bradley Manning would be, in itself, very serious punishment even if Assange were tried and acquitted. In short, while Assange maintains his innocence of any possible American charge, his innocence would not spare him the treatment which Manning has suffered and which Assange would very likely suffer.

28. The US and Sweden are parties to a bilateral treaty which provides for the “temporary surrender” of prisoners between those countries. The US/Sweden bilateral treaty has a "temporary surrender" clause which can be used for onward transfer to the US, circumventing the safeguards of a formal extradition. Given the highly unusual circumstances surrounding the Swedish case against Assange, it is difficult to resist the conclusion that the principal reason for Sweden seeking to extradite Assange for questioning is to facilitate his transfer to the US without the need for extradition proceedings.
29. The Swedish Prime Minister's chief political adviser is Karl Rove, previously adviser to George Bush and an associate of Swedish Foreign Minister Carl Bildt, (revealed as a US informant in a State Department cable from the 1970s).
30. There is no reason to think that the American government will treat Assange leniently if once they have him in custody.

Questions and request for help

31. On behalf of Assange, I ask you the following questions:
 - 1) Has Australia asked the US authorities:
 - a) whether the FBI or any other US authority has investigated or is investigating B? And if so has it concluded its investigations?
 - b) whether a grand jury has been convened to consider charges against Assange and (if so) whether it has concluded its deliberations?
 - c) whether a grand jury has found that Assange should be charged with any and what offence?
 - d) whether an indictment of Assange has been prepared?
 - e) whether it intends to seek to have Assange transferred from Sweden to the USA?
 - f) whether the US authorities have considered ways in which Assange may be transferred to the US?
 - 2) Australia has asked the US authorities any of these questions, what reply did Australia receive?
 - 3) If Australia has not asked the US authorities these questions, will you ask the US authorities the questions in para 1)?
 - 4) Will you seek assurances from the US authorities that, if they seek to move Assange from Sweden to the USA (whether by transfer, extradition or any other means):
 - a) they will give you advance notice of their intention to get Assange into the USA?
 - b) they will give you an opportunity to consider whether the proposal to move Assange to the USA is justifiable in the circumstances?
 - c) they will give you a reasonable opportunity to oppose the proposed move?
32. As you are aware, Mr Assange has made previous requests for information about the USA’s intentions and Australia’s enquiries about those intentions. These requests date

back to January 2011. I note that you wrote to Ms Robinson, Mr Assange's legal advisor, on 29 May 2012 in response to the concerns she had raised directly with you, but I am concerned that Assange's questions of the Australian authorities have not been answered except in an oblique way: a fact which arouses legitimate concern about what Australia knows. On 25 May 2012, Gareth Pierce, solicitor for Assange, wrote to you via the UK Consul seeking advice and information. That letter remains unanswered.

33. In this letter to you I have posed four clear questions. I trust that I will receive four clear answers. Failing clear answers to the questions in this letter, I will be forced to one of two conclusions:
- 1) that Australia is aware of American plans from which Assange needs protection; or
 - 2) that Australia has suspicions about American plans and prefers to turn a blind eye.
34. Neither of these conclusions is consistent with Australia's obligations to one of its citizens. I look forward to your reply.

Yours sincerely

A handwritten signature in grey ink, appearing to read 'Julian Burnside', with a long horizontal stroke extending to the right.

Julian Burnside

Appendix: public statements in the USA

19 December 2010

Vice President Joseph Biden

Asked whether Mr. Assange was a high-tech terrorist or a whistleblower akin to those who released the Pentagon Papers, Mr. Biden stated: "I would argue that it's closer to being a high-tech terrorist." "This guy has done things and put in jeopardy the lives and occupations of people in other parts of the world," Biden said. "He's made it difficult to conduct our business with our allies and our friends. . . . It has done damage."

5 December 2010

U.S. Senator Mitch McConnell ((R-KY), Senate Minority Leader)

"I think the man is a high-tech terrorist. He's done an enormous damage to our country, and I think he needs to be prosecuted to the fullest extent of the law. And if that becomes a problem, we need to change the law."

30 November 2010

Tom Flanagan Prof., Univ. of Calgary, and fmr. Chief of Staff to Prime Minister Stephen Harper

In an edition of CBC's Power & Politics with Evan Solomon, Mr. Flanagan said U.S. President Barack Obama "should put out a contract and maybe use a drone or something" on Assange.

"I think Assange should be assassinated, actually," Flanagan said with a laugh. When asked to expand on his answer, he added that he "wouldn't be unhappy" if Assange "disappeared."

3 August 2010

Marc Thiessen (political commentator and fmr. Speech writer to President George W. Bush)

"Let's be clear: WikiLeaks is not a news organization; it is a criminal enterprise. Its reason for existence is to obtain classified national security information and disseminate it as widely as possible -- including to the United States' enemies. These actions are likely a violation of the Espionage Act, and they arguably constitute material support for terrorism."

30 November 2010

Bill Kristol (well known conservative columnist)

"Why can't we act forcefully against WikiLeaks? Why can't we use our various assets to harass, snatch or neutralize Julian Assange and his collaborators, wherever they are? Why can't we disrupt and destroy WikiLeaks in both cyberspace and physical space, to the extent possible? Why can't we warn others of repercussions from assisting this criminal enterprise hostile to the United States?"

30 November 2010

Kathleen McFarland (Fox News national security analyst; served in national security posts in the Nixon, Ford and Reagan administrations)

“WikiLeaks founder Julian Assange isn’t some well-meaning, anti-war protestor leaking documents in hopes of ending an unpopular war. He’s waging cyber war on the United States and the global world order. Mr. Assange and his fellow hackers are terrorists and should be prosecuted as such.”

“The President needs to get on the phone with the Australians (who are eagerly awaiting our call) and ask them to pull WikiLeaks founder Julian Assange’s passport. Once he’s cornered and can no longer travel, they can find him and charge him with espionage. Then the president can ask the country he’s hiding in to extradite him to the United States and try him in a military tribunal.”

2 December 2010

Jeffrey Kuhner (Washington Times columnist)

“Julian Assange poses a clear and present danger to American national security. The WikiLeaks founder is more than a reckless provocateur. He is aiding and abetting terrorists in their war against America. The administration must take care of the problem - effectively and permanently.”

5 December 2010

Newt Gingrich (Former Speaker of U.S. House of Reps)

“Julian Assange is engaged in warfare. Information terrorism, which leads to people getting killed is terrorism. And Julian Assange is engaged in terrorism.” As such, Gingrich suggested, “He should be treated as an enemy combatant and WikiLeaks should be closed down permanently and decisively.”

29 November 2010

U.S. Rep. Peter King, (chairman of the House homeland Security Committee)

Regarding labelling WikiLeaks a terrorist organization: “The benefit of that is, we would be able to seize their assets and we would be able to stop anyone from helping them in any way,” King said, appearing on MSNBC.

“I don’t think we should write it off that quickly and say we can’t do it. They are assisting in terrorist activity. The information they are giving is being used by al Qaeda, it’s being used by our enemies,” he said.

28 November 2010

U.S. Rep. Peter King

“Moreover, the repeated releases of classified information from WikiLeaks, which have garnered international attention, manifests Mr Assange’s purposeful intent to damage not only our national interests in fighting the war on terror, but also undermines the very safety of coalition forces in Iraq and Afghanistan. As the Department of Defence has explicitly recognized, WikiLeaks’ dissemination of classified US military and diplomatic documents affords material support to terrorist organizations, including Al Qaeda, Tehrik-e-Taliban Pakistan (TTP) and Al Shabaab.”

“Given Mr Assange’s active role in encouraging the theft and distribution of classified material, he should be held liable pursuant to section 793(g), which

provides that if more than one person conspire to violate any section of the Espionage Act and perform an act to the conspiracy, then “each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.” In addition, Mr Assange should be chargeable for obtaining classified documents pertaining to national defence initially acquired in violation of the Espionage Act and for wilfully retaining such documents with the knowledge that he was not entitled to receive them. There should be no misconception that Mr Assange passively operates a forum for others to exploit their misappropriation of classified information. He actively encourages and solicits

The leaking of national defence information. He pursues a malicious agenda, for which he remains totally immune to the consequences of his actions.”

7 December 2010

U.S. Sen. Dianne Feinstein (D-CA), Chair of the Select Committee on Intelligence

“When WikiLeaks founder Julian Assange released his latest document trove—more than 250,000 secret State Department cables—he intentionally harmed the U.S. government. The release of these documents damages our national interests and puts innocent lives at risk. He should be vigorously prosecuted for espionage.”

1 December 2010

Robert Gibbs (White House Press Secretary)

Referred to Mr. Assange as an “accomplice.”

6 December 2007

Robert Beckel (Fox News Analyst and Deputy Asst. Sec. of State in Carter Administration)

“A dead man can’t leak stuff. This guy’s a traitor, a treasonist [sic], and he has broken every law of the United States. And I’m not for the death penalty, so . . . there’s only one way to do it: Illegally shoot the son of a bitch.”

29 November 2010

Sen. Kit Bond (R-MO)

“It is critical that the perpetrator who betrayed his country be brought to justice for this deliberate treason that jeopardizes our national security.”

[Date unknown – approx 2 Dec, 2010]

Sen. Charles Schumer (D-NY)

“This man has put his own ego above the safety of millions of innocents,” Sen. Charles Schumer (D-NY) said in a statement. “He should be extradited, tried for espionage, and given the most severe penalty possible.”

2 December 2010

Dianne Feinstein (D-CA), Chair of the Select Committee on Intelligence

Letter to Attorney General Eric Holder.

“We respectfully urge the Department of Justice (DOJ) to take action to bring criminal charges against WikiLeaks founder Julian Assange and any all of his possible accomplices involved in the unauthorised possession and distribution of vast quantities of classified and unclassified material from the US government. The unauthorised release of this information, including the recent release of approximately 250,000 State Department documents, is a serious breach of national security and could be used to severely harm the United States and its worldwide interests.”

We appreciate your statement earlier this week that DOJ has an “active, ongoing, criminal investigation” with regard to the WikiLeaks matter. We also understand that Private First Class Bradley E Manning – who may have been involved in disclosing the most recent set of documents provided to WikiLeaks – has already been charged in military court with eight violations of federal criminal law, including unauthorised computer access and transmitting classified information to an unauthorised third party in violation of a section of the Espionage Act, 18 U.S.C. 793(e).

If Mr Assange and his possible accomplices cannot be charged under the Espionage Act (or any other applicable statute), please know that we stand ready and willing to support your efforts “to close those gaps” in the law, as you also mentioned this week. Thank you very much for your attention to this matter.”

29 November 2010

U.S. Rep. Peter King, (chairman of the House homeland Security Committee)

Letter to US Attorney General “I urge you to criminally charge WikiLeaks activist Julian Assange under the Espionage Act”.

29 November 2010

U.S. Rep. Peter King, (chairman of the House homeland Security Committee)

Letter to US Secretary of State Hillary Clinton “I request you undertake an immediate review to determine whether WikiLeaks could be designated a foreign terrorist organisation in accordance with section 21D of the Immigration and Nationality Act”.