STATEMENT OF WITNESS

(Criminal Justice Act 1967, ss 2,9/M.C. Rules, 1968, r.58)

Statement of :	Robert J. Boyle
Age of witness (if over 18 enter 'over 18') :	Over 18
Occupation of witness :	Attorney
Address :	277 Broadway, Suite 1501 New York, N.Y. 10007

This statement, consisting of 26 pages, is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true.

1. I am an attorney admitted to the bar in New York State in 1981. In addition to the New York State bar, I am a member in good standing of the bars of the United States District Courts for the Southern, Eastern, Northern and Western Districts of New York, the United States Courts of Appeal for the Second, Third and Fourth Circuits and the Supreme Court of the United States. I received a Juris Doctor Degree from Brooklyn Law School in 1980.

2. I have been a member of the Criminal Justice Act Panel of the United States Court of Appeals for the Second Circuit since 1991 and in that capacity have represented well over one hundred defendant-appellants before that court.

3. From 1982 to 1984 I was employed as a staff attorney at the Grand Jury Project, Inc. That organization sought to educate the public on the use and misuse of Federal Grand Juries.

4. I am the author of the Third Edition of the treatise Representation of Witnesses Before Federal Grand Juries published by the Clark Boardman Company (now West Publishing). I also prepared yearly updates for four years following publication of the Third Edition.

5. Throughout my career, I have lectured attorneys, law students and members of the general public on grand jury issues. I have also regularly consulted with attorneys representing individuals subpoenaed to testify before grand juries, particularly those grand juries believed to be investigating political movements.

6. I have read Part 19 of the Criminal Procedure Rules relating to Expert Evidence and believe that my advice is compliant with the rules.

7. I have been provided with portions of the Court Martial Proceedings conducted in the case of Chelsea Manning including Manning's Guilty Plea Allocution.

8. I have also reviewed all of the publicly available legal pleadings filed in connection with the subpoena requiring that Manning appear and testify before a grand jury in the Eastern District of Virginia.

9. I have also reviewed a copy of the superseding indictment filed in the Eastern District of Virginia charging Julian Assange with a variety of federal crimes including violations of the Espionage Act.

10. I have been asked by the attorneys for Mr Assange to provide an opinion concerning the law surrounding subpoenas to testify before federal grand juries in the United States and how those laws have been applied in the case of Chelsea Manning.

The Military Court Martial Proceedings

a. The Arrest and Charges

11. Former United States Army Private First Class Chelsea Manning entered training for active duty in the United States Army in October 2007. She became an intelligence analyst and was deployed to Eastern Baghdad, Iraq. In May 2010 Manning was arrested and charged with violating Articles 92 and 134 of the Uniform Code of Military Justice. It was alleged that Manning disclosed to the website, WikiLeaks, Guantanamo Detainee Assessment Briefs, 251,287 United States diplomatic cables and over 400,000 army classified reports relating to Iraq and Afghanistan.It was also alleged that Manning disclosed to WikiLeaks a video of a July 12, 2007 United States airstrike on the city of Baghdad, dubbed the

"Collateral Murder" video. The video depicts United States soldiers in a helicopter gunship shooting and killing unarmed Iraqi civilians, including two Reuters journalists. Following her arrest Manning was imprisoned in solitary confinement pending adjudication of the charges in a military court martial. Manning's treatment was ruled as cruel, inhumane and degrading by the United Nations Special Rapporteur on Torture, who stated in a report that 'imposing seriously punitive conditions of detention on someone who has not been found guilty of any crime is a violation of his (sic) right to physical and psychological integrity as well as the presumption of innocence' (**Exhibit 1**).

12. On March 11, 2011 the military lodged superseding charges. The 22 specifications now included aiding the enemy, wrongfully causing intelligence to be published on the internet knowing that it was accessible to the enemy, theft of public property or records and transmitting defense information. If convicted of the most serious charge, aiding the enemy, Manning faced the death penalty.

13. Between 2010 and 2013, Manning, through counsel, filed several motions to dismiss. All were denied by the presiding Military Judge.

b. Manning's Guilty Plea and Allocution

14. On February 28, 2013 Manning pleaded guilty to 10 of the 22 specified charges. She did so without the benefit of a plea agreement. She did not plead guilty to aiding the enemy. Under the Rules for Courts-Martial, Manning was required to

state, under oath, the facts surrounding her disclosure of the classified information. She was also required to answer any questions posed to her by the presiding Judge including those suggested by the prosecutor.

15. The February 28, 2013 proceedings began with Manning reading a prepared statement. The statement covers fifty (50) pages of the double-spaced plea transcript (**Exhibit 2**).[1] In it, she acknowledges her guilt and sets forth, in great detail, what she did on each of the occasions when she disclosed information to Wikileaks.

Manning's Plea Allocution Statement

16. Manning's statement set out the following: Manning explained that due to her position as an intelligence analyst, she had access to information about United States military activities in Iraq. Some of those activities contradicted the stated goals of U.S. policy. She told the court

> [the United States military] became obsessed with capturing/killing targets on lists and being suspicious and avoiding cooperation with our host nation partners and ignoring the second and third order effects of accomplishing short-term goals and missions.
>
> I believe that if the general public, especially the American public, had access to the information...this could spark a domestic debate on the role of the military and our foreign policy, in general, as well as it related to Iraq and Afghanistan.

[1] The entire plea allocution covers approximately 98 double-spaced transcript pages. Exhibit 2 contains only Manning's oral presentation of her written statement.

(**Exhibit 2**, p. 6757-58, hereinafter referenced by the page number)

17. In early 2010, she transferred classified information onto a secure memory card. She took that card with her when she left Iraq and went on mid-tour leave to her aunt's home in Maryland. It was her intention to disclose that information to the press and general public. (6755). While on leave, Manning contacted *The Washington Post,* speaking briefly with a reporter. She then left messages at *The New York Times* and Bloomberg News that were not returned. (6759). A participant in an online chat pointed Manning to WikiLeaks' online submission system. Manning was somewhat familiar with WikiLeaks. In her view the organization "seemed to be dedicated to exposing illegal activities and corruption [and had] received numerous awards and recognition for its reporting activities." (6751-52).

18. On February 3, 2010 Manning visited the WikiLeaks website. Through an "Onion Router", also known as TOR, she anonymously uploaded the CIDNE-I and CIDNE-A SignActs, also known as the Iraq War log Logs and the Afghan War Diary, to WikiLeaks. (6760). Upon doing so Manning felt that she had accomplished something that allowed her "to have a clear conscience based upon what I had seen and read about and knew were happening in Iraq and Afghanistan every day." (6761). Manning admitted that she made additional disclosures to Wikileaks. These included the Reykjavik 13 Cable regarding certain diplomatic efforts concerning Iceland that were published by WikiLeaks within hours (6763). This prompted her to upload to Wikileaks the July 12, 2007 'Collateral Murder'

video depicting an aerial attack in Baghdad that left the two Reuters reporters and others dead. It was released by Wikileaks on April 5, 2010. (6769-70). Addressing that video, Manning told the court that she "wanted the American public to know that not everyone in Iraq and Afghanistan were targets that needed to be neutralized, but rather people who were struggling to live in the pressure cooker environment of what we call asymmetric warfare." (6769).

19. Following the publication of the video, Manning began conversing online with a person she came to believe was an "important" part of Wikileaks. Identifying information was not exchanged. However, Manning assumed that the person, to whom she gave the name "Nathaniel", was either Julian Assange, Daniel Schmidt or one of their representatives (6770). Over the course of the next few months Manning conversed generally with that person on a variety of topics.

20. At about the same time Manning was called upon by her military superiors to investigate claims by the Iraqi government that 15 individuals detained by the Iraqi police were part of a terrorist militia and had been distributing anti-Iraqi literature. She determined, by comparing the Federal Police's report on the allegations to an interpreters transcript of the original documents, that contrary to the Iraqi government's claims, the detained individuals had no connections to terrorism and were, in her view, citizens who were critical of their government. When she brought that fact to the attention of her superiors she was told to "drop it" and to instead assist the Iraqi police. Shocked, Manning decided to disseminate her report to Wikileaks. To her disappointment, however, Wikileaks declined to

publish it absent additional corroboration. (6772-6777). Manning made one other disclosure to Wikileaks, on March 8, 2010. (6778).

21. Manning's online conversations with Nathaniel continued. Manning stressed to the court that at no time did Nathaniel, or anyone else associated with Wikileaks, solicit or otherwise pressure Manning into disclosing any information:

> Although I stopped sending documents to WLO, no one associated with the WLO pressured me into giving more information. The decisions I made to send documents and information to WLO and website were my own decisions and I take full responsibility for my actions. (6779).

c. The Trial and Sentence

22. After Manning entered her guilty plea, the military prosecutors elected to proceed with the remaining, and more serious, charges. That trial began on June 3, 2013 at Fort Meade, Maryland. On July 30, 2013 presiding Judge Lind issued her findings (**Exhibit 3**). The court acquitted Manning of aiding the enemy but found her guilty of the remaining charges. On August 21, 2013 Manning was sentenced to 35 years in prison and remanded to an all-male military prison.

d. Petition for Commutation of Sentence

23. On or about September 3, 2013 Manning, through counsel, filed a petition for commutation of sentence to the Secretary of the Army and, via the United States Department of Justice, to former President Barack Obama. On January 17, 2017, one of his last days in office, President Obama commuted Manning's sentence to a total of 7 years. In one of his first "tweets" after taking office, President Donald

Trump called Manning a "traitor who should never have been released from prison" (**Exhibit 4**). As a result of the commutation, Manning was released from prison on May 17, 2017.

The Grand Jury Proceedings

a. Historical The Role of the Grand Jury Under United States Law

24. In January 2019, Manning was served through counsel with a subpoena to testify before a federal grand jury sitting in the United States District Court for the Eastern District of Virginia. One of the questions I have been asked to comment upon is the application of the grand jury processes in this case. Before addressing whether the grand jury process has been abused in Manning's case, a brief history of the role of the grand jury in the United States criminal justice system is necessary.

25. The grand jury is an institution that began in England in the 12th century. It was carried over into American law and incorporated into the Fifth Amendment to the United States Constitution. That provision provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury…" In theory, the Grand Jury serves as a "buffer between the government and its people."[2] Because of that historical role, grand juries operate without adherence to the technical and evidentiary rules of criminal trials.[3] Its investigatory power is, therefore, "necessarily broad".[4] It can act on

[2] *United States v. Williams*, 504 U.S. 36, 47 (1992)
[3] *Id.* at 66-67.
[4] *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972)

unsubstantiated tips and rumors.[5] A subpoena to testify can be challenged on relevance grounds only if there is no reasonable "possibility" that the information sought will produce relevant information. The law "presumes" that the grand jury acts within its lawful authority.[6]

26. Over the years the traditional function of the grand jury as a "buffer" has shifted. Its broad powers have been usurped by the government and more specifically the United States Attorney Offices. The United States Attorney for each federal district acts as the grand jury's "legal advisor".[7] It is the prosecution that directs which witnesses the grand jury hears and which defendants the grand jury is asked to indict.[8] As the United States Court of Appeals for the Ninth Circuit has acknowledged,

> Currently grand jurors no longer perform any other function but to investigate crimes and screen indictments and then tend to indict on the overwhelming number of cases brought by prosecutors. Because of this, many criticize the modern grand jury as no more than a "rubber stamp" for the prosecutor. Beale et al Grand Jury Law and Practice supra § 1.1 (2d Ed. 2001) Day in and day out the grand jury affirms what the prosecutor calls upon it to affirm – investigating as it is led, ignoring what it is never advised to notice, failing to indict or indicting as the prosecutor "submits" that it should. Frankel and Naftalis, The Grand Jury: An Institution on Trial (2d Ed. 1977) at 22. Or as the Supreme Court of New York so colorfully put it, "[m]any lawyers and judges have expressed skepticism concerning the power of the grand jury. This skepticism was best summarized by the Chief Judge of [New York] State in 1985 when he

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[5] *United States v. Dionisio*, 410 U.S. 1, 15 (1973)
[6] *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 300-301 (1991).
[7] *United States v. Fisher*, 225 F.Supp.3d 151, 162 (W.D.N.Y. 2016) citing United States v. Hogan 712 F.2d 757, 759 (2d Cir. 1983).
[8] *Id.*

publicly stated that a Grand Jury would indict a ham sandwich.[9]

27. The confluence of the enormous investigatory powers accorded to grand juries due to their former role as a "buffer" and the *de facto* appropriation of those powers by law enforcement has created fertile ground for prosecutorial abuse of the grand jury process. People in the United States have no obligation to cooperate with law enforcement.[10] But a prosecutor desiring to coerce a prospective witness into cooperating can simply issue a grand jury subpoena without any judicial scrutiny. While a grand jury witness may challenge the lawfulness of a subpoena on several statutory or constitutional grounds, because of the presumption of regularity that courts attach to grand jury proceedings together with its judicially recognized broad investigatory powers, it is extremely rare for a court to quash or even limit the scope of a grand jury subpoena. A few illustrations will make this clear.

Abuse of the Grand Jury Process

Prosecutorial Abuse

28. It is the "universal rule" that prosecutors cannot use the grand jury process for the purpose of gathering evidence for use at a subsequent criminal trial. Thus, where the grand jury had already returned an indictment (as it has done here with respect to Julian Assange, discussed further *infra*.) the government cannot use the grand jury to improve its case, by locking in a witness's testimony, pressuring potential

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[9] *United States v. Navarro-Vargas*, 408 F.3d 1184, 1195 (9th Cir. 2005).

[10] For example, the Federal Bureau of Investigation (FBI) does not have subpoena power.

trial witnesses or getting discovery.[11] However, exceptions, including the legal standards applied by courts have all but swallowed up this "universal rule". A subpoena will be enforced, notwithstanding that an indictment has been returned, unless it is shown that the "sole or dominant purpose" of the subpoena is to prepare for trial on an already pending indictment.[12] Because of the presumption that the grand jury acts within the law, it is the witness, or the defendant, who bears the burden of showing that preparation for trial is the sole or dominant purpose of the subpoena.[13] So long as the sought-after testimony is relevant a subpoena will be deemed proper even if the government might use the information gathered as a means of discovery.[14] Needless to say, because of the secrecy that attaches to grand jury proceedings witnesses and/or already indicted defendants will ordinarily lack proof that a subpoena was issued for an improper purpose. Courts have held that absent such proof "a court has to take at face value that the dominant purpose of the grand jury is proper."[15] So long as the government simply asserts that it is investigating whether additional crimes have been committed, the subpoena will be upheld even if the information sought might also help the government's case at trial.[16]

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[11] *United States v. Alvarado*, 840 F.3d 184, 189 (4th Cir. 2016). *See also United States v. Merril*, 685 F.3d 1002, 1013 (11th Cir. 2012); *United States v. Moss*, 756 F.2d 329 (4th Cir. 1985).
[12] *United States v. Alvarado, supra*. 840 F.3d at 189.
[13] *Id.* at 189-190 citing *United States v. Dionisio*, 410 U.S. 1, 16-18 (1973) (A court should not intervene absent "compelling evidence of grand jury abuse…and burden is on the defendant to prove such abuse"); *See also United States v. Breitkreutz*, 977 F.2d 214, 217 (6th Cir. 1992); *United States v. Bin Laden*, 116 F.Supp.2d 489, 492 (S.D.N.Y. 2000) (presumption grand jury acts appropriately)
[14] *United States v. (Under Seal)*, 714 F.2d 347 (4th Cir. 1983)("even if we assume the government sought the subpoena for an improper purpose, the finding that it was also sought for a legitimate purpose renders the subpoena enforceable.").
[15] *United States v. Dardi*, 330 F.2d 316, 335 (2d Cir. 1964).
[16] *United States v Moss, supra*., at 332 ("a good faith inquiry into other charges…is not prohibited even if it uncovers further evidence against an indicted person."); *See also United States v. Furrow*, 125 F.Supp.2d 1170, 1175 (C.D. Cal. 2000)(after indictment returned, friends and family of defendant

29. A grand jury subpoena cannot be used to discourage a witness from testifying for the defense at trial or to otherwise interfere with the defense.[17] However, this prohibition also falls under the "sole or dominant" purpose test to which the presumption of regularity attaches. The extent to which courts have sanctioned such subpoenas even in the face of overwhelming evidence of abuse is vividly illustrated by *United States v. (Under Seal)*, 714 F.2d 347 (4th Cir. 1983). In that case, the government subpoenaed family members of the indicted defendant. The witnesses asserted that they would risk being jailed for contempt rather than testifying against a loved one. The government conceded that the subpoenas would be dropped if the indicted family member pled guilty. The subpoena was quashed by the lower court. The government appealed and the Court of Appeals reversed. The appellate court held that so long as the testimony that was sought was proper it mattered not that the subpoena was otherwise being used for an improper purpose.

Violation of Prohibition of Privilege Against Self-Incrimination

30. The Fifth Amendment to the United States Constitution provides in part that "no person…shall be compelled in any criminal case to be a witness against himself…". A witness subpoenaed to testify before a grand jury may assert the Fifth Amendment's privilege against self-incrimination as a basis for resisting the

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subpoenaed to testify, court sustains subpoena ruling that grand jury may inquire into affirmative defenses).

[17] *United States v. Williams*, 205 F.3d 23, 29 (2d Cir. 2000); *United States v. Vayages*, 151 F.3d 1185, 1189 (9th Cir. 1998).

subpoena.[18] However, the government has an available tool which enables it to nullify the privilege and force compliance Once the witness asserts, or states that he or she intends to assert the privilege against self incrimination the government can make an application for an order conferring "use immunity" on the witness. Under 18 U.S.C. § 6002 and § 6003 once a judge signs an immunity order any grand jury testimony or evidence derived from that testimony cannot be used against the witness in a subsequent criminal proceeding. The Fifth Amendment can no longer be used as a basis for a refusal to comply. Notably, "use immunity" does not prevent the government from prosecuting the witness for crimes discussed during the witness's testimony. It only prohibits the use of that testimony, and evidence that may be derived from it, during a subsequent criminal trial of the defendant-witness. It also does not prohibit the witness from being charged with perjury or false statement that the government later asserts were made during the course of the grand jury testimony. The United States Supreme Court has held that "use immunity" satisfies the Fifth Amendment.[19]

Violation of Freedom of Speech, Association and the Press

31. The First Amendment to the United States Constitution provides that "Congress shall make no law...abridging freedom of speech, or of the press; or the right of the people to peaceably assemble and to petition the government for redress of

[18] *Blau v. United States*, 340 U.S. 159 (1950).
[19] *Kastigar v. United States*, 406 U.S. 441 (1972)

grievances." The United States Supreme Court has held that grand juries must operate within the parameters of the First Amendment.[20] However, to successfully challenge a subpoena on First Amendment grounds a witness must show that the infringement on First Amendment rights is the very object of the grand jury subpoena. The subpoena will therefore be upheld even if an "incidental effect" of the subpoena results in an infringement on First Amendment rights.[21]

32. The First Amendment does protect beliefs whether popular or unpopular.[22] Therefore, inquiry into the truth or falsity of one's political philosophy is prohibited.[23] However, witnesses cannot base a refusal to testify on their moral or political beliefs or their belief that the grand jury investigation is being used to disrupt legal political dissent.[24]

33. History has shown that the grand jury's broad powers and the almost unlimited discretion accorded to the government in grand jury proceedings has enabled it to become an effective tool to repress lawful political movements. As a consequence of grand jury secrecy, neither the courts, nor Congress nor, most importantly, the general public can gauge how the institution is being used – or abused.[25] Recognizing that the grand jury has often been used to gather intelligence that

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[20] *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972)
[21] *Employment Div. Dept. of Human Services v. Smith*, 444 U.S. 872, 877 (1990)
[22] *Bond v. Floyd*, 385 U.S. 116 (1966)
[23] *Ealy v. Littlejohn*, 569 F.2d 219 (5th Cir. 1979).
[24] *Matter of Credido*, 759 F.2d 589 (7th Cir. 1985); In *re Sunni-Ali*, 565 F.Supp. 1035 (S.D.N.Y. 1983).
[25] Marvin E. Frankel & Gary P. Naftalis, *The Grand Jury An Institution on Trial* (1977).

would then be used to harass and disrupt political movements many activists have refused to cooperate and been jailed for contempt.

34. Historically the grand jury system was used to indict and incarcerate outspoken opponents of slavery for sedition and harass African-Americans during post-civil war Reconstruction seeking the right to vote.[26] In the mid-20th century the grand jury system was improperly used to frame labor organizers and union leaders.[27] During the administration of President Richard M. Nixon over one thousand political activists were subpoenaed to more than 100 grand juries investigating lawful anti-war, women's rights and Black activist movements.[28] In the 1970s and 1980s activists from the Puerto Rican Independence Movement were subpoenaed. Upon their refusal to cooperate on moral and political grounds many were jailed for both civil and criminal contempt.[29] In the 1980s numerous subpoenas were served upon activists in the Black liberation movement under the guise of "investigating" a series of robberies even though those activists were not suspects. When they refused to testify claiming that the investigation was an improper attempt to gather intelligence on their movement, they, too, were jailed for contempt.[30]

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[26] Richard D. Younger *The People's Panel: The Grand Jury in the United States*, 163-1974, 85-133 (1963).
[27] Michael Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J.Crim.L. & Criminology 1159 (1984), at 1171-73, 1175-78.
[28] *Id.* at 1179
[29] *See, e.g. United States v. Rosado* 728 F.2d 89 (2d Cir. 1984).
[30] *See e.g. Matter of Fula*, 672 F.2d 279 (2d Cir. 1982).

35. These activities continue today. For example, in 2012, the FBI issued 14 grand jury subpoenas to activists after the 2008 Republican convention in Minneapolis, MN. The activists were questioned yet no indictments were returned. That same year, a grand jury ostensibly investigating property damage at a demonstration asked an activist more than 50 questions about people's political beliefs and their relationships. No questions were posed about any alleged criminal conduct.

36. As a further example, in 2013, 23-year old Gerald Koch was summoned before a grand jury on the purported basis that he *might have* overheard a discussion about high-profile property damage that occurred in 2008. He refused to testify, asserting that the "investigation" was a political witch-hunt. His eight-month confinement for criminal contempt was recognized as casting a palpable chill over the political activities of New York City activists.

37. In sum, frequently when the United States government has shown hostility toward political activists, especially people of color and those on the left, it has attempted to utilize the grand jury system to disrupt political activities and to criminalize political movements. The unwillingness of the federal courts to intervene in grand jury matters, even in the face of overwhelming evidence of prosecutorial abuse has only served to sanction, and encourage, further violations of First Amendment protected constitutional rights.

Sanctions for Non-Compliance with Order to Testify

Civil Contempt

38. 28 U.S.C. §1826 provides that

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of--
> (1) the court proceeding, or
> (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

39. The confinement authorized by 18 U.S.C. § 1826 has been deemed "coercive" (which is permissible) and not punitive (which is not). Accordingly, the recalcitrant witness is not entitled to the due process protections contained in the Fifth Amendment including the right to a jury trial.[31] In addition, a court has the discretion to impose a coercive fine in addition to, or as the alternative to, incarceration.[32]

40. A witness held in civil contempt and jailed until the term of that grand jury expires can lawfully be re-subpoenaed to appear before another grand jury, asked the same questions and, upon refusal, held in contempt and re-incarcerated.[33]

Criminal Contempt

[31] *Shillitani v. United States*, 384 U.S.264 (1966) (contemnor "has keys to their prison in their own pockets")
[32] *See, e.g. United States v. United States Mine Workers*, 330 U.S. 258 (1946)
[33] *Shillitani v. United States, supra.* at 372, n.8; *United States v. Duncan*, 456 F.2d 1401 (9th Cir. 1972).

41. The criminal contempt statute, 18 U.S.C. § 401 provides that

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other as...
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> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or demand.

42. Should the government seek a sentence of more that six months, the witness is entitled to a jury trial and other due process protections accorded by the Fifth Amendment.[34] However, while the witness may be accorded more procedural protections than a civil contempt proceeding, the potential sanctions are more dangerous. The potential penalty faced by a recalcitrant witness has no upper limit. The absence of an upper limit does not render the statute unconstitutional.[35] Moreover, a recalcitrant witness may be charged with criminal contempt after being imprisoned for civil contempt arising out of the same refusal to testify.[36]

The Application of Grand Jury Caselaw in the Case Of Chelsea Manning.

43. On March 6, 2018 a grand jury sitting in the United States District Court for the Eastern District of Virginia issued a sealed indictment against Julian Assange. It charged him with conspiracy with Chelsea Manning to commit computer intrusion, a relatively minor crime that carries a maximum of five years imprisonment. In November 2018, the evidence of an indictment against Assange was inadvertently made public when its reference was included in a filing in an unrelated case

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[34] *Chef v. Schnackenberg*, 384 U.S. 373 (1966).
[35] *United States v. Garcia*
[36] *Yates v. United States,* 355 U.S. 66 (1957).

(**Exhibit 5**). The January 2019 subpoena to Chelsea Manning was therefore served after the government had already secured its first indictment against Assange.

44. The appearance required by the January 2019 subpoena was adjourned to March 2019. In the interim, the District Court entered a compulsion order pursuant to 18 U.S.C. § 6003 requiring Manning's testimony and conferring use and derivative use immunity on her thereby precluding Manning from arguing that compliance would violate the Fifth Amendment's privilege against self- incrimination.

45. Manning, through counsel, filed a motion to quash the subpoena on March 1, 2019 (**Exhibit 6**). In it she argued that the subpoena was improper in that it was an effort by the government to punish her for the release of the information to WikiLeaks. Manning also pointed out that the government had available to it her exhaustive sworn statement before the Military Court that was given at the time of her guilty plea and which truthfully set forth the full extent of her knowledge, including but not limited to her contacts with WikiLeaks. Manning asserted that compliance with the subpoena would also enable the government to set a "perjury trap". Should there be inconsistencies, even minor inconsistencies between her court martial testimony and grand jury testimony she could be criminally charged with committing perjury. A prosecution for perjury is permitted under the terms of the immunity order. The government filed a response opposing Chelsea Manning's motion to quash the grand jury subpoena on March 4, 2019 (**Exhibit 7**).

46. During sealed proceeding on March 5, 2019, the District Court denied Manning's motion to quash. Applying the presumption of regularity applicable to the grand jury, the court held that Manning's substantive arguments, including improper motive, were "premature and speculative".[37]

47. On March 8, 2019, following what the government has characterized as a "recalcitrant" appearance in the grand jury room, the District Court held a hearing to determine whether Manning should be adjudicated in civil contempt. The district court found that Manning was "in contempt of [its] order requiring [her] to testify before the grand jury." The court ordered that she "be committed to the custody of the Attorney General until such time as [she] either purge[s] [herself of the contempt or for the life of th[e] grand jury."[38]

48. Following the contempt adjudication, Manning was imprisoned at the Alexandria Detention Center in Alexandria, Virginia. Her subsequent court submissions filed on her behalf record that once there (**Exhibit 8)**, she was placed in solitary confinement "despite the stated concerns regarding the effects of prolonged isolation [that compound[ed] the trauma I suffered from my previous time of confinement." Manning remained in isolation for 28 days, an experience that

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[37] The hearing on the motion to quash is under seal. The quoted material appears in the unsealed portion of the government's brief to the United States Court of Appeals for the Fourth Circuit in opposition to Manning's appeal of the contempt order. See Docket 19-1287, USCA Fourth Circuit, Document 20.
[38] *Id.* at p. 16

caused her "extraordinary pain"[39]. On one occasion she became nauseated during a non-contact visit and vomited on the floor. It was only through public outcry that Manning was released from solitary and placed in general population. Notwithstanding these draconian conditions Manning has stated that

> I can – without any hesitation – state that nothing will convince me to testify before this or any other grand jury for that matter. This experience so far only proves my long held belief that grand juries are simply outdated tools used by the federal government to harass and disrupt political opponents and activists in fishing expeditions. Without committing a federal crime, and after exhaustive testimony at a trial several years ago, I am again ripped from my life by a vindictive and politically motivated investigation and prosecution.
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> ...
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> I understand that this grand jury [is] related to my disclosures of classified and unclassified information and records in 2010. I acted alone in these disclosures. The government is still preoccupied with punishing me, despite a court martial, sentence and presidential commutation nearly two years ago...[40]

49. The term of the grand jury expired on May 9, 2019. Pursuant to the contempt order Manning was released from prison on that date. However, the day before her release, Manning was served, through counsel with a subpoena to appear before another grand jury. A new compulsion order was executed and Manning was again conferred with use and derivative use immunity.

50. On May 15, 2019 Manning filed a motion to quash the new subpoena. (**Exhibit 9**) In addition to arguments raised in the first motion, Manning now additionally

[39] Chelsea Manning Declaration in Grand Jury Subpoena, Exhibit 8, para. 3
[40] Chelsea Manning Declaration in Grand Jury Subpoena, Exhibit 8, para. 6 and 8

argued that the subpoena was abuse of the grand jury process in that it was being used to gather evidence that would be used in the trial of the already-indicted Julian Assange (having now been arrested in the United Kingdom). In response to that argument the government submitted a pleading that apparently asserted that Manning's testimony was necessary for an on-going investigation. (**Exhibit 10**) The word "apparently" is used because the government filed its pleading *ex parte*. Neither Manning nor her attorneys were permitted to see it and therefore they could not rebut any of the assertions contained in it. On May 16, 2019 the court denied Manning's motion to quash. Manning had told the court that she was refusing to testify on principle and that no imprisonment would compel her to do so. The court found Manning to be in contempt and again ordered her jailed for the life of the grand jury but in no event to exceed 18 months. Additionally, the court ordered Manning to pay $500 per day after 30 days from issuance of the order and if Manning still had not complied with the subpoena after 60 days the fine would increase to $1000 per day (**Exhibit 11**).

51. On May 23, 2019 a superseding indictment was returned against Julian Assange. The indictment included 17 new charges of violations of the Espionage Act 1917. Most of the new charges concern the receipt by Assange of information submitted to WikiLeaks by Chelsea Manning in 2010. Prompted in part by the superseding indictment of Assange, Manning filed a motion for release on May 31, 2019. (**Exhibit 12**) In it she argued, *inter alia*, that the superseding indictment rendered her grand jury testimony unnecessary. It was now clear that the "sole and dominant purpose" of her subpoena was to gather evidence for use at Assange's

trial or to otherwise interfere with Assange's defense. As Manning herself has stated "I suspect that [the government] [is] simply interested in previewing my potential testimony as a defense witness, and attempting to undermine my testimony... This justifies my theory that participating in this investigation functions simply to abuse the justice system for political ends.[41]"

52. The government opposed release. It asserted that notwithstanding the superseding indictment against Assange "Manning's testimony remains relevant and essential to an on-going investigation." (**Exhibit 13**) The government once again based that claim on the *ex parte* pleading submitted to the Judge. Relying on *United States Alvarado* and *United States v. Moss*, discussed *supra*. the government asserted that Manning's claims of abuse were "speculative" and could not overcome the presumption of regularity attached to grand jury proceedings. On August 5, 2019 the court denied Manning's motion to reconsider sanctions and for release (**Exhibit 14**). It did not specifically address her claim that Assange's superseding indictment demonstrated that the subpoena was being used to aid the government's case at Assange's trial.

53. As of the date of this report, Chelsea Manning remains incarcerated and is incurring a fine of $1000 per day.

Conclusions

[41] Chelsea Manning Declaration in Grand Jury Subpoena, Exhibit 8, para. 10

54. Under United States law, the purpose of civil contempt is to coerce a recalcitrant witness to comply with a court order. If it is clear that imprisonment and/or other sanction will not alter the witness's position the incarceration has become punitive and the civil contempt sanction must be lifted.[42]

55. Except for a few days in May 2019, Chelsea Manning has been imprisoned since March 2019 pursuant to a civil contempt adjudication arising out of her refusal to testify before a federal grand jury in the Eastern District of Virginia. She has stated that her decision is based upon political principles, i.e. that the grand jury is being used to quell lawful political dissent and to further punish her for her 2010 disclosure of classified information. Manning has maintained this position despite being imprisoned under onerous conditions and being subject to a $1000 per day fine. Notwithstanding the foregoing, the government has strenuously opposed her release and the court has sanctioned her continued confinement. It is reasonable to conclude that her continued confinement is now punitive and consequently has become an abuse of the grand jury process, which further will likely adversely affect the defense of Julian Assange. A superseding indictment has been returned that contains 18 counts, including 17 violations of the Espionage Act. The government was able to secure this indictment without Manning's testimony. The inescapable conclusion is that the Manning subpoena is being used to gather evidence for use at Assange's criminal trial and/or to get a preview of Manning's trial testimony, should she be called as a defense witness. This is a violation of

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[42] *Simkiin v. United States* , 715 F.2d 34 (2d Cir. 1983); *In re Grand Jury Investigation (Braun)*, 600 F.2d 420, 428 (3d Cir. 1979).

the alleged "universal rule" that the grand jury may not be used to gather evidence for the trial of an existing indictment. However, as set forth *supra*, so long as the government simply asserts that the subpoena was issued for a proper purpose, courts will uphold the subpoena. Accordingly, should Assange file a motion alleging grand jury abuse arising from the Manning subpoena, it will almost certainly fail.

Dated the 17th **day of** December, 2019

Signed ______________________
ROBERT J. BOYLE

Signature witnessed by ______________________
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