

THE HIGH COURT - COURT 29

COMMERCIAL

Case No. 2016/4809P

THE DATA PROTECTION COMMISSIONER

PLAINTIFF

and

FACEBOOK IRELAND LTD.

AND

DEFENDANTS

MAXIMILLIAN SCHREMS

HEARING HEARD BEFORE BY MS. JUSTICE COSTELLO

ON WEDNESDAY, 1st MARCH 2017 - DAY 13

13

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1 THE HEARING RESUMED AS FOLLOWS ON WEDNESDAY, 1ST MARCH
2 2017

3
4 **MS. JUSTICE COSTELLO:** Good morning.

5 **REGISTRAR:** In the matter of Data Protection 11:05
6 Commissioner -v- Facebook Ireland Ltd.

7 **MR. GALLAGHER:** Judge, before Prof. Vladeck resumes,
8 and this may not suit the court and it will be
9 perfectly understood if it doesn't, he is hoping to
10 catch a flight at four and if we were close to 11:05
11 finishing his examination at one o'clock would it be
12 possible to sit on for 15 minutes, maybe the court has
13 another commitment at that stage and, if so, that's
14 perfectly understood.

15 **MS. JUSTICE COSTELLO:** well, we'll see how we go. 11:05

16 **MR. GALLAGHER:** Exactly.

17 **MS. JUSTICE COSTELLO:** My other commitment can move.

18 **MR. GALLAGHER:** well, sorry, nobody wants to interfere
19 with that. we'll see how we go. Thank you, Judge.

20 **MS. HYLAND:** Prof. Vladeck, please. 11:05

21
22 **PROF. VLADECK, WAS CROSS-EXAMINED BY MR. MURRAY AS**
23 **FOLLOWS:**

24
25 **MR. MURRAY:** Now we'll try professor to move this along 11:05
26 and get you out. To that end can I ask you please to
27 look at your report at page 23 paragraph 79.

28 **MS. JUSTICE COSTELLO:** Sorry, Mr. Murray, these have
29 been put in the wrong place, just give me a second.

1 1 Q. **MR. MURRAY:** Certainly, Judge. Professor, in this part
2 of your report you proceed to identify aspects of the
3 DPC Draft Decision with which you take issue in various
4 different ways; isn't that right?

5 A. Indeed. 11:06

6 2 Q. And you identify *eight* points over the following nine
7 pages of the report; isn't that correct?

8 A. That's correct.

9 3 Q. These were the only eight, and I use the word
10 *criticisms* in the most general way for the moment, and 11:06
11 we'll look at them in detail, but these were the only
12 eight criticisms you had of the DPC report; isn't that
13 correct?

14 A. In my report these were the eight I focussed on. My
15 instructions, as I think I mentioned yesterday, were to 11:07
16 focus on the discussion in the DPC report of remedies
17 and standing and the like. So I did not pay nearly as
18 close attention to the discussion, for example, of
19 European law, Mr. Murray.

20 4 Q. No, of course. 11:07

21 A. Yes.

22 5 Q. Absolutely.

23 A. Yes.

24 6 Q. But these are the eight criticisms you have of the
25 DPC's consideration -- 11:07

26 A. Quite.

27 7 Q. -- of the adequacy of remedies in US law; isn't that
28 correct?

29 A. That's correct.

1 8 Q. Okay. And indeed this is what you were asked to do?
2 A. Quite.

3 9 Q. Your brief was to take, read, consider and critique the
4 DPC's report, is that fair?
5 A. And amplify it where possible. 11:07

6 10 Q. Correct, okay. Now I want to look at these points,
7 many of them we have considered and we can move through
8 very quickly, many of them are very brief?
9 A. Hmm.

10 11 Q. But before I do that can I just ask you this question: 11:07
11 Professor, as we know, and as you found out on Friday
12 and we found out the night before last, the US
13 government made comments on a draft of your report?
14 A. Mm hmm.

15 12 Q. Facebook have already given us comments on, some 11:08
16 comments from the US government on the report, do you
17 personally, subject to Facebook, have any difficulty
18 with our seeing the comments of the US government on
19 your report?
20 A. As long as I'm not speaking for counsel, on my behalf, 11:08
21 no.

22 13 Q. On your own personal behalf, and it's a matter
23 obviously for Facebook through their counsel to adopt a
24 position on that?
25 A. But if it was just up to me, Judge, I would be fine. 11:08

26 14 Q. Of course. Just before I leave that can I ask you this
27 question: Yesterday when we were discussing the
28 comments of Carrie Cordero as recorded in your report,
29 you were, if you don't mind me saying so, quite

1 emphatic that in your report you had alerted the reader
2 to the fact that you had elsewhere made critical
3 comments of what Ms. Cordero had said; isn't that
4 right?

5 A. I had, although, as you quite rightly pointed out, 11:08
6 Mr. Murray, I was misremembering my report.

7 15 Q. Well, no, you were misremembering, but you were
8 actually pretty sure that you had it in your report to
9 the extent that at lunch you went, as you told us, to
10 find them and they weren't there and I think you were a 11:09
11 bit surprised they weren't there?

12 A. Yes, although if what you are insinuating, Mr. Murray,
13 is that they were in an earlier draft and were deleted,
14 that's not correct.

15 16 Q. I see. Do you have any other explanation as to how you 11:09
16 thought they were there and were not?

17 A. I guess I had just mistakenly thought that in my more
18 general comments about my scepticism, Judge, that I had
19 included a note on the intelligence committees.

20 17 Q. Yes. And, just to be clear, and I'm sure you didn't 11:09
21 mean it in this sense, the word *insinuating* is perhaps
22 a derogatory one I was about to --

23 A. Oh, I am sorry, I did not mean it pejoratively.

24 18 Q. I was about to ask you had they been in an earlier
25 version but you were absolutely certain that they were 11:09
26 not?

27 A. I'm positive.

28 19 Q. So you never even recorded in any version of your
29 report the fact that you had made these adverse

1 comments of Ms. Cordero's comment which in turn is
2 without qualification recorded in your report?

3 A. Indeed. I mean, Mr. Murray, if they had been in the
4 earlier draft they would have been in the final draft.
5 It was my omission from the beginning. 11:09

6 20 Q. I see. Now can we move on then to look at the eight
7 points that you make, Professor, and thank you for
8 that.

9
10 So in paragraph 79 you refer to the substantial 11:10
11 oversight and accountability mechanisms described
12 above, and I think we discussed at that some length
13 yesterday. "US law", you say:

14
15 *"Provides an array of remedies for abuses of government 11:10*
16 *surveillance authorities. In the DPC Draft Decision,*
17 *Commissioner Dixon concluded that 'remedial mechanisms*
18 *available under U.S. law' are 'not complete,' and that*
19 *the 'standing' doctrine 'operate as a constraint on all*
20 *forms of relief available.' This conclusion was based 11:10*
21 *on the Morrison Foerster memo."*

22
23 Then you say this: *"On closer inspection, although*
24 *there are defects in the existing remedial scheme - and*
25 *you helped us yesterday identify those defects - it 11:10*
26 *fails to take account, the DPC Draft Decision, for*
27 *several of its key features while misinterpreting*
28 *several others and, as a result, presents a rather*
29 *incomplete version of contemporary law."*

1 And that's your verdict on the DPC report; isn't that
2 correct?

3 A. It is, that's correct.

4 21 Q. And the first of them is the criminal remedy or the
5 facility for criminal prosecution provided for by 11:10
6 section 1809; isn't that right?

7 A. Yeah.

8 22 Q. Yes. And I don't think, and please correct me if I'm
9 wrong, Professor, but I don't think you are for a
10 moment suggesting that this is a judicial remedy to 11:11
11 which a person affected by unlawful surveillance can
12 have resort in the manner in which you advocate
13 remedies in your papers?

14 A. Not at all.

15 23 Q. No. 11:11

16 A. I think it was there only as part of the larger
17 conversation in my report and elsewhere of
18 opportunities for courts to reach the merits of these
19 questions.

20 24 Q. Fair enough. But of course, as you I'm sure will be 11:11
21 the first to acknowledge, this institution of criminal
22 proceedings is dependent on a decision of the
23 government to prosecute?

24 A. Quite.

25 25 Q. The government may have good reasons for not doing so. 11:11
26 Am I also correct in thinking that this offence is
27 subject to a *defence*?

28 A. It could be subject to a defence. I mean I think we,
29 as you know, Mr. Murray, there have not been cases

1 under section 1809 and so we don't have good case law.
2 I would not want to --

3 26 Q. **MS. JUSTICE COSTELLO:** Sorry, when you say there is no
4 cases, do you mean none at all?

5 A. I am unaware, Judge, of prosecutions under section 11:12
6 1809.

7 **MR. MURRAY:** Exactly.

8 A. I think the reason why it is held out by people like me
9 frankly as a relevant part of the scheme is because the
10 hope is that it's a deterrent, right, that having this 11:12
11 criminal penalty on the books is actually having some
12 salutary effect on the conduct of government officers.
13 We don't, as Mr. Murray I think is about to point out,
14 have examples of it.

15 27 Q. No. There are a number of interpretations one can 11:12
16 pursuit on the fact that there have been no
17 prosecutions, is that fair?

18 A. I agree.

19 28 Q. All right. But from your knowledge of the criminal
20 law, insofar as relevant to this area, would it 11:12
21 surprise you if the offence had a defence applicable
22 where the officer was acting in good faith under a
23 warrant?

24 A. It would only, Mr. Murray, because it requires a wilful
25 or intentional breach. And so it would seem to me that 11:12
26 in that circumstance it would be difficult for an
27 officer to mount a good faith defence. But again, you
28 know, we haven't seen this play out in practice, so I'm
29 only speculating.

1 29 Q. But it is an offence, as with all criminal offences of
2 course, which would require mens rea?
3 A. Quite.
4 30 Q. Yes. And the offence arises where a person engages in
5 electronic surveillance under cover of law, except as 11:13
6 authorised?
7 A. Which would mean, for example, Judge, that I as a
8 private citizen could not violate this, even if
9 I surreptitiously recorded a conversation that would
10 otherwise trigger the definition. 11:13
11 31 Q. Yes. And the statutory defence, because there is one,
12 is that:
13
14 *"It's a defence to a prosecution under the subsection*
15 *that the defendant was a law enforcement investigative 11:13*
16 *officer engaged in the course of his official duties*
17 *and the electronic surveillance was authorised and*
18 *conducted pursuant to a search warrant or court order".*
19 A. Yes, and that's what the statute says. I guess,
20 Mr. Murray, I am allowing for the possibility that the 11:13
21 warrant itself was obtained through bad faith.
22 32 Q. I see.
23 A. And we have, not in the FISA context, but in the
24 ordinary law enforcement context, Judge, there are
25 examples where a warrant who is obtained through 11:14
26 knowing and intentional misrepresentations by law
27 enforcement officers can still be the basis for some
28 kind of after the fact liability.
29 33 Q. Well I think we can move from it because I think you

1 accept it's an observation you make on the report --

2 A. Yes, quite.

3 34 Q. -- fully understood but not in fact an error nor in
4 fact a new judicial remedy of the kind which we all
5 agree should be present. 11:14

6
7 Now, the second point you make relates to APA, and we
8 discussed this again yesterday, and maybe if we can
9 just, Professor, clarify precisely the issue in
10 relation to APA and the scope of the section. A lot of 11:14
11 this is what we have already said and what you said in
12 your report but just to be absolutely clear.

13
14 Provision creates a remedy, not a substantive cause of
15 action, the remedy is declaratory and injunctive 11:14
16 relief, not damages; declaratory relief itself is a
17 remedy of limited resort, you explained yesterday, the
18 limitations arising that it will not be granted in
19 respect of something which is purely historical, as
20 I understood you to say it, and will only be granted in 11:15
21 relation to something in the future if there is a
22 likelihood of that event recurring in the future, is
23 that a fair summary?

24 A. And ongoing of course.

25 35 Q. Yes. 11:15

26 A. I don't mean to miss that.

27 36 Q. No, of course. And obviously that present, actual or
28 likely future event is similarly a precondition to the
29 grant of injunctive relief?

1 A. That's right.

2 37 Q. Yes. It does not -- it can be ousted, APA?

3 A. Yeah. Just the doctrinal term is *precluded*.

4 38 Q. Okay, fair enough. It can be precluded obviously 11:15
5 expressly but also by implication and that implication
6 has been held to arise where there are other remedies
7 provided by Congress meaning that it is the waiver of
8 sovereign immunity through the grant of those remedies
9 which governs the statutory provision rather than the
10 more general one under APA? 11:15

11 A. That's right. I might just tweak that explanation one
12 iota which is just to say: In that context I think the
13 assumption is that the more specific remedy will trump
14 the more general remedy, right. And so that if
15 Congress has thought to occupy a more specific field, 11:16
16 that will be held to displace the APA.

17

18 Again, as we have seen in the Second Circuit Clapper
19 decision, the courts require a fairly specific showing
20 of an intent to preclude because of this background 11:16
21 presumption of judicial review.

22 39 Q. All right. Now, in Jewel -v- NSA, a decision you are
23 familiar with, it was held that the APA was ousted in
24 respect of claims under the SCA and Wiretap Act; is
25 that correct? 11:16

26 A. That's my understanding.

27 40 Q. Yes. Well is that correct?

28 A. Yes, that's correct.

29 41 Q. And that is because there was a claim for damages under

1 section 2712 or, as it is otherwise described, section
2 223 of the PATRIOT Act; is that right?

3 A. That's correct.

4 42 Q. Okay.

5 A. And, if I may, and because, Judge, 2712(d) has an 11:16
6 express exclusivity provision, right, that makes quite
7 clear Congress's intent that that remedy for damages
8 against the government be the exclusive remedy in that
9 context.

10 43 Q. And if I wish to claim damages under FISA what is the 11:17
11 statutory provision that gives me that entitlement?

12 A. 1810.

13 44 Q. And what is the effect of section 2712 on FISA damages
14 claims?

15 A. So 2712 allows three kinds of FISA damages claim, 11:17
16 Judge. In 2712(a) it refers to three provisions of
17 FISA. These are the minimisation requirements of
18 classic FISA, Title 1, of the pen and register and of
19 the trap and trace authorities. So those can also be
20 encompassed, Mr. Murray, within 2712. 11:17

21 45 Q. Yes. And it would seem to follow from Jewel -v- NSA
22 that APA would be ousted in respect of or precluded in
23 respect of those also?

24 A. I believe that would follow for those three very
25 specific provisions of FISA. Now, importantly, the 11:17
26 courts have read, Judge, 2712(a)'s reference to those
27 three provisions of FISA as quite deliberate on
28 Congress's part and so have not read 2712 to preclude
29 claims arising under *other* parts of FISA. For example,

1 as Mr. Murray knows, in the section, pardon me in the
2 Second Circuit ACLU -v- Clapper case, the government
3 argued that those same provisions in 2712 preclude an
4 APA claim to challenge the phone records programme and
5 the Court of Appeal said, no, because that's not one of 11:18
6 those three specific provisions of FISA, we don't find
7 preclusion here.

8 46 Q. Yes. But certainly aspects of the FISA régime are also
9 clearly precluded as well as the SCA and the wiretap
10 Act? 11:18

11 A. I agree.

12 47 Q. Yes.

13 A. I agree. The three specific aspects that are cited by
14 section in 2712(a).

15 48 Q. Yes. We had a discussion yesterday about ACLU -v- NSA, 11:18
16 that's also a preclusion case, you seem to think it was
17 a standing case?

18 A. I had always understood it as a standing case,
19 Mr. Murray. The problem from the Sixth Circuit's
20 perspective was that the allegations were 11:18
21 unsubstantiated and so it was impossible to show that
22 the allegedly unlawful warrantless wiretapping was the
23 kind of final agency action necessary to trigger the
24 APA.

25 49 Q. I am sorry because I'm getting ahead of myself, just to 11:19
26 close off preclusion first: It is clear that,
27 certainly in relation to a number of the circumstances
28 with which the court is concerned, APA is precluded?

29 A. Hmm, I would say certainly in the circumstances

1 specifically mentioned in 2712(a) there would be a
2 strong argument for preclusion. I wouldn't feel
3 comfortable saying beyond that, that it's clear that it
4 would be precluded.

5 50 Q. And ACLU -v- Clapper, a substantial part of the claim 11:19
6 was of course directed to a challenge to the
7 constitutional validity of the programme?

8 A. And also the statutory. I mean the case went up on the
9 statutory validity as well, that's indeed how it was
10 decided. And because 215 itself, the source of the 11:19
11 phone records programme, wasn't one of the provisions
12 covered in 2712, I think that was very central to the
13 Court of Appeals explanation for why that challenge
14 wasn't precluded.

15 51 Q. Yes. But that was a case about the 215 programme -- 11:19

16 A. Correct.

17 52 Q. -- which is no longer live?

18 A. That's right.

19 53 Q. Yes. Now you obviously, aside from those limitations
20 on APA which we have discussed, again just to be clear, 11:20
21 you have to establish Article III standing, you have to
22 establish prudential standing?

23 A. Which as I think we briefly discussed yesterday means
24 there is something called the zone of interest test,
25 that you are one of those in the zone of interest that 11:20
26 the statute was meant to protect.

27 54 Q. And you've to establish final agency action?

28 A. Correct.

29 55 Q. And it was final agency action, and if we can give the

1 professor Tab 31 in Book 1 or 2 of the authorities, it
2 was the final agency action which featured in ACLU -v-
3 NSA which you appear to categorise yesterday as a
4 standing case?

5 **MS. JUSTICE COSTELLO:** Sorry which tab again, 11:20
6 Mr. Murray?

7 **MR. MURRAY:** Tab 31, Judge.

8 **MS. JUSTICE COSTELLO:** Thank you. (SAME HANDED TO THE
9 WITNESS)

10 A. Thank you. 11:21

11 56 Q. I think we will find in this case, will we not,
12 Professor, a fairly extensive discussion of final
13 agency action. You recall what this case was about?

14 A. I do.

15 57 Q. Yes. And here, in bringing a challenge, civil 11:21
16 liberties organisations sought relief for declaratory
17 judgments against the NSA challenging the terrorist
18 surveillance program of data mining and warrantless
19 interception; isn't that right?

20 A. That's correct. 11:21

21 58 Q. What provisions was that done under?

22 A. The allegation was that there was actually no statutory
23 authority for the TSP and that it was conducted by the
24 President, Judge, pursuant to his inherent
25 constitutional authority under Article 2 of the US 11:21
26 Constitution.

27 59 Q. Yes. And if we go to page 26, Professor?

28 A. Of the printout?

29 60 Q. Of the printout, yes, please, the numbers are on the

1 bottom right-hand corner of the page.

2 A. Mm hmm.

3 61 Q. We see the definition of agency action?

4 A. Mm hmm.

5 62 Q. *"The whole or part of an agency rule, order, license, 11:22*
6 *sanction, relief or the equivalent or denial thereof,*
7 *or failure to act. This definition is divided into*
8 *three parts beginning with the list of five categories,*
9 *decisions made or outcomes implemented by an agency."*

10

11:22

11 And then it's explained, by reference to authority:
12 *"That all of these categories involve circumscribed*
13 *discrete agency actions as their definitions make*
14 *clear, an agency statement of future effect designed to*
15 *implement, interpret, or prescribe law or policy, final 11:22*
16 *disposition in a matter other than rule making, permit*
17 *or other form of permission, prohibition or taking of*
18 *other compulsory or restrictive action or a grant of*
19 *money assistance and so forth."*

20

11:22

21 They then proceed: *"The second part of the agency*
22 *action definition, the equivalent or denial thereof,*
23 *must be a discrete action or a denial of a discrete*
24 *action, otherwise it would not be equivalent to the*
25 *five listed categories."* 11:22

26

27 And the final part of the definition: *"A failure to*
28 *act is properly understood as a failure to take an*
29 *agency action. Under Supreme Court precedent classic*

1 *examples of agency action include the issuance of an*
2 *agency opinion."*

3
4 And then they said: "*Here, however, the plaintiffs are*
5 *not complaining of 'agency action' as defined in APA,* 11:23
6 *and the record contains no evidence that would support*
7 *such a finding. The plaintiffs challenge the NSA's*
8 *warrantless interception of overseas communications,*
9 *the NSA's failure to comply with FISA's warrant*
10 *requirements."* 11:23

11
12 So it wasn't, it was also a failure to comply with the
13 *FISA order; isn't that right?*

14 A. As alleged in the complaint. I mean there is so much
15 secrecy -- 11:23

16 63 Q. I didn't understand you to mention that, but that was
17 an aspect of the complaint, you remember that now?

18 A. I did not remember that until you brought this passage
19 back to my attention.

20 64 Q. Oh, I see. Sorry, I had understood from your evidence 11:23
21 yesterday that this was a judgment you had recently
22 reviewed and were well familiar with?

23 A. It was. I had not re-read the complaint.

24 65 Q. I see. Well this is not the complaint, this is the
25 judgment? 11:23

26 A. I know.

27 66 Q. "*The plaintiffs challenge the NSA's warrantless*
28 *interception of overseas communications, the NSA's*
29 *failure to comply with FISA's warrant requirements, and*

1 *the NSA's presumed failure to comply with FISA's*
2 *minimization procedures. This is conduct, not 'agency*
3 *action'. Furthermore, there is no authority to support*
4 *the invocation of the APA to challenge generalised*
5 *conduct."* 11:24

6
7 Do you agree with that?

8 A. So I would just make two quick points, if I may,
9 Mr. Murray. The first is, I might draw the court's
10 attention to the very first paragraph of the opinion on 11:24
11 page 2 where Judge Batchelder says:

12
13 *"Because we cannot find that any of the Plaintiffs have*
14 *standing for any of their claims, we must vacate the*
15 *district court's order."* 11:24

16
17 So this is part of why I had always assumed that this
18 was a standing case.

19 67 Q. Oh, I understand that, Professor.

20 A. But, if I may, the second point, Judge, is I think it's 11:24
21 important to stress the difference in the programmes
22 that were being challenged. The TSP, as I have just
23 tried to explain, was alleged to have been a completely
24 unilateral programme carried out without statutory
25 authority, right. The contrast in my mind, and I think 11:24
26 the contrast between this decision and the Second
27 Circuit's analysis in ACLU -v- Clapper, is where
28 Congress is by statute authorising concrete actions by
29 particular agencies. I think that comes much closer to

1 satisfying the test for agency action and I think
2 that's why you see the difference between these two
3 cases.

4 68 Q. Let's test those comments against what the court said:

5
6 *"Looking at the 'five categories' of enumerated 'agency*
7 *action', the NSA's surveillance activities, as*
8 *described by the three facts of record, do not*
9 *constitute, nor are they conducted to any agency rule,*
10 *order, license, sanction or relief."*

11:25

11:25

11
12 Do you see that?

13 A. Mm hmm.

14 69 Q. *"Although the Plaintiffs labelled the NSA's*
15 *surveillance activities as 'the Program' and the*
16 *district court labeled it the 'TSP', the NSA's*
17 *wiretapping is actually just general conduct given a*
18 *label for the purpose of abbreviated reference. The*
19 *plaintiffs do not complain of any NSA rule or order,*
20 *but merely the generalized practice, which – so far as*
21 *has been admitted or disclosed – was not formally*
22 *enacted pursuant to strictures of the APA, but merely*
23 *authorised by the President (albeit repeatedly, and*
24 *possibly informally). Nor do the plaintiffs challenge*
25 *any license, sanction, or relief issued by the NSA."*

11:25

11:25

11:25

26
27 You see that?

28 A. I do.

29 70 Q. *"The plaintiffs do not complain of anything equivalent*

1 to agency action, which also requires some discrete
2 action by the NSA. The plaintiffs are not challenging
3 any sort of 'circumscribed, discrete' action on the
4 part of the NSA, but are seeking to invalidate or alter
5 the NSA's generalised practice of wiretapping certain 11:26
6 overseas communications without warrants."

7
8 You see that?

9 A. I do.

10 71 Q. And then he continues, and if you look at the last 11:26
11 sentence in that?

12 A. She, sorry.

13 72 Q. I am terribly sorry, thank you for that. The last
14 sentence in that paragraph:

15
16 "Even assuming, arguendo, that the warrant requirement
17 and minimization procedures are discrete agency
18 actions, those procedures are replete with
19 discretionary considerations, thus disqualifying them
20 from this definition of agency action under the APA." 11:26

21
22 And if you just go over the column there is a quotation
23 just above the reference to Title 3 and the last three
24 sentences of that, after the highlighted quote to 117,
25 Supreme Court 1154 says: 11:26

26
27 "Because the NSA's surveillance activities do not
28 constitute 'agency action', the analysis of whether
29 they are final agency action is strained and awkward.

1 *It nevertheless is clear the NSA's wiretapping does not*
2 *consummate any sort of agency decisionmaking process*
3 *nor does it purport to determine the rights or*
4 *obligations of others."*

11:26

6 Is that a reasonable encapsulation of the test of
7 agency action in your opinion?

8 A. I think it is.

9 73 Q. Yes.

10 A. I think it is an encapsulation that was being applied
11 to a very different fact pattern, and I think that the
12 difference in fact pattern is relevant.

11:27

13 74 Q. But it does show that in the very type of situation
14 with which the court is concerned, the final agency
15 action requirement under the APA itself can be a
16 preclusion on the invocation of that remedy, I don't
17 think you disagree with that?

11:27

18 A. Or an obstacle. I wouldn't say, preclusion is when
19 Congress has over --

20 75 Q. I am sorry.

11:27

21 A. Yes.

22 76 Q. I know you are using that term as a term of art, it is
23 a substantial, if not fatal obstacle in certain
24 complaints?

25 A. If, Judge, and I want to be as clear on this as
26 I possibly can. If we had another circumstance where
27 we had a similar challenge to a surveillance programme,
28 not where you had the kind of detailed statutory
29 authorisation and statutory procedures that we see, for

11:27

1 example, with Section 215 and with Section 702 of FISA,
2 but with the programme like the TSP where the whole, if
3 you'll forgive me, sort of gestalt of the programme is
4 that the government is conducting it through the
5 unilateral auspices of the President's authority. And 11:28
6 part of the issue is that there's not a lot of
7 definition in that context.

8 77 Q. **MS. JUSTICE COSTELLO:** And how does that differ from an
9 executive order?

10 A. So executive orders are more policy dictates, right, 11:28
11 they are not actually the programmes themselves. And
12 so an executive order would be the President saying
13 'here is how I understand my authorities'. There is
14 presumably, or at least there was presumably, an
15 executive order underlying the terrorist surveillance 11:28
16 programme, the TSP. In contrast to the far more, if
17 I can say, crowded legal régime for the programmes
18 we're more familiar with today, for the phone records
19 programmes, for 702, for PRISM and Upstream.

20 78 Q. But nonetheless - sorry, in Klayman -v- Obama as well 11:28
21 it was found that the APA had been impliedly precluded;
22 isn't that right?

23 A. Yes, although I think, as we discussed yesterday,
24 I think that analysis is both deeply vulnerable and in
25 any event no longer on the books. 11:29

26 79 Q. Yes. And what challenge was that to, what was that a
27 challenge to?

28 A. To the phone records programme.

29 80 Q. Yes. The Bangura case that you refer to, that really

1 was a very unusual case. That was a case of a married
2 woman wishing to assert or to obtain a marital
3 immigration visa. Her husband was a naturalised US
4 citizen, she was not and the issue was whether she was
5 within the zone of interest for the purposes of the 11:29
6 prudential standards part of the test; isn't that
7 right?

8 A. That's correct.

9 81 Q. Yes. And it was found she had no standing, actually;
10 isn't that right? 11:29

11 A. On the facts of that case.

12 82 Q. Yes. I'm not sure by --

13 A. But not simply by dint of the fact that she was a
14 non-citizen.

15 83 Q. Yes. So I think we can agree, Professor, insofar as 11:29
16 this second observation you make about the DPC's
17 decision is concerned, the Administrative Procedure Act
18 remedy is one which has very many limitations attached
19 to it of relevance to the matters with which the court
20 is concerned? 11:30

21 A. It certainly has limitations. I think we might quibble
22 over the adjectives.

23 84 Q. Okay. It's not something which we have been able to
24 detect in certainly the writings that we have put to
25 you which address remedies? 11:30

26 A. Well, again I mean, Judge, as I said yesterday, I'm not
27 aware of a piece I have written in my career that tried
28 to offer the kind of assessment of all of the available
29 remedies in this context. I'd be happy to furnish the

1 court with a copy of my core syllabus where I spent two
2 days in federal courts on the APA and associated
3 remedies.

4 85 Q. All right. And that's a general federal court remedy?
5 A. Quite. 11:30

6 86 Q. And Prof. Swire, as you will have noticed, made no
7 reference to it either?
8 A. Indeed.

9 87 Q. Okay. Now the third point, Professor, if I can ask you
10 to return to your report. 11:30
11 A. Please.

12 88 Q. The third comment you make about the DPC Draft Decision
13 relates to the remedy provided under section 1810?
14 A. Mm hmm.

15 89 Q. And if we can just look at what you say about this. 11:31
16 You say:
17
18 *"With regard to damages the DPC Draft Decision, like*
19 *the Morrison & Foerster, is sceptical of the remedy*
20 *because, as it correctly notes, 'this provision does* 11:31
21 *not operate as a waiver of sovereign immunity which*
22 *means the US cannot be held liable under the section'."*
23

24 You see that?
25 A. I do. 11:31

26 90 Q. Okay. You quote the Al-Haramain Islamic Fund case and
27 you say:
28
29 *"But the DPC Draft Decision proceeds to suggest 'that*

1 *the utility of pursuing individual officers may is*
2 *[sic] questionable', without providing any*
3 *substantiation."*

4
5 And then you see use this phrase: "'Officer suits'
6 *have always been the most common mechanism for*
7 *obtaining discharges under US law when suing government*
8 *official within their official capacity - entirely*
9 *because of sovereign immunity concerns."*

11:31

10
11 Isn't that so? [No audible answer]

11:32

12
13 Then over the page: "*There is nothing untoward about*
14 *the specter of suing an individual officer - for*
15 *example the Director of National Intelligence - for*
16 *unlawful surveillance, under section 10."*

11:32

17
18 Now, is that correct? Does the Director of National
19 Intelligence not have *official* immunity?

20 A. So again I don't, we haven't had a lot of cases to test
21 out this proposition. Official immunity, Judge, is a
22 doctrine that's usually available at common law and so
23 there would be a question under section 1810, if the
24 fact that Congress had provided an express cause of
25 action for damages for intentional or wilful misconduct
26 was consistent with what has at common law been a good
27 faith defence.

11:32

11:32

28
29 I can't answer that one way or the other because there

1 hasn't been a case specifically reaching that question.

2 91 Q. Is this not a problem you have highlighted and
3 considered in your writing?

4 A. It is. I mean official immunity, Judge, as I mentioned
5 yesterday, is a problem that comes up in many cases 11:32
6 seeking damages against government officers. Even when
7 sovereign immunity is not a problem, official immunity,
8 the test the Supreme Court has articulated is that it
9 must -- I am sorry. The officer must have violated
10 clearly established law, that's the term in the case 11:33
11 law, of which a reasonable officer would have known, so
12 it's an objective test.

13

14 And I guess the only question I have, Mr. Murray, is in
15 1810. If you have a knowing and intentional violation, 11:33
16 a context in which there is only liability if the
17 officer has knowingly and intentionally violated FISA,
18 it's not clear to me that defence would be
19 automatically available.

20 92 Q. I mean you're talking about suing here the *director*. 11:33
21 I mean the director isn't out implementing warrants, is
22 he? What's his individual or her individual
23 culpability?

24 A. I mean I think the question would simply be what is the
25 violation? Is the violation a rogue officer on the 11:33
26 line who has simply implemented his authority in a
27 manner that's unlawful in which case obviously he or
28 she would be the proper defendant, or is the challenge
29 in fact to a larger programme that is itself being

1 enforced in a manner that is intentionally in violation
2 of FISA, where, for example, some of the allegations
3 against the Bush Administration were that the
4 government was conducting these programmes knowing they
5 were violating the statute based on a claim that the 11:34
6 statute could not rein in the President's
7 constitutional authority.

8 93 Q. Okay. Sorry, maybe I have misunderstood this,
9 Professor, and please forgive me. You can have a range
10 of different possible defendants? 11:34

11 A. Quite.

12 94 Q. You can start off at the top with the United States of
13 America, that is --

14 A. So under 1810, not for damages, that's Al-Haramain.

15 95 Q. Precisely, because of sovereign immunity? 11:34

16 A. Correct.

17 96 Q. All right. You can go down the line, we'll say you
18 will sue the director of the Central Intelligence
19 Agency because this occurred on his watch?

20 A. Mm hmm. 11:34

21 97 Q. He will have, will he not, official immunity unless he
22 is personally implicated in the wrongdoing of which you
23 complain?

24 A. That's correct.

25 98 Q. Okay. So similarly the Director of National 11:34
26 Intelligence is going to, who is the example *you* give
27 in your report?

28 A. Hmm.

29 99 Q. Is going to have *official* immunity, save and insofar as

1 he or she is personally culpable for the actions of
2 which the litigant complains; isn't that correct?

3 A. Yes, I agree.

4 100 Q. Okay. And then you come down the line again to the
5 individual law enforcement officer who fails to execute 11:35
6 the warrant properly or doesn't have a warrant or
7 should know that the warrant is defective et cetera et
8 cetera?

9 A. Or more realistically, Judge, in this context the
10 operator at the National Security Agency who is 11:35
11 knowingly violating perhaps the minimisation rule.

12 101 Q. Yes. So what are the circumstances in which the
13 example *you* have chosen to give of the Director of
14 National Intelligence going to be a defendant?

15 A. I mean I think it would be a context, Judge, where you 11:35
16 had a programmatic allegation, that the government was
17 not just collecting my data unlawfully but that the
18 entire programme was being carried out in a way that
19 was wilfully without regard to the relevant legal
20 constraints. 11:36

21 102 Q. But in that circumstance a significant issue, on which
22 you have written at some length, would arise as to the
23 ability of the Director of National Intelligence to
24 rely upon official immunity would arise?

25 A. That's right. 11:36

26 103 Q. Yes.

27 A. So Justice Kennedy has suggested in the context of
28 **Bivens**, which we discussed yesterday, damages suits
29 directly under the Constitution, that senior national

1 security officials might be especially entitled to
2 defences in the context of these kinds of programmes
3 unless you could show personal culpability. But again
4 I mean personal culpability is a *merits* trigger to 1810
5 in the first place, right. You would have to show 11:36
6 intentional and wilful conduct to even get in the court
7 in the first place.

8 104 Q. Well, can we agree on this: Obviously none of this is
9 relevant except insofar as you're talking about damages
10 claims, the damages claims themselves are available, 11:36
11 and I think you agree with the DPC evidence in this
12 regard for wilful violations?

13 A. Mm hmm.

14 105 Q. And, even if you overcome that, you are going to
15 potentially face issues with sovereign immunity and 11:36
16 official immunity, depending on the nature of your
17 claim, which may themselves present substantial
18 obstacles to obtaining relief, would you agree with
19 that?

20 A. I agree with all that. 11:37

21 106 Q. Okay. You say, incidentally, at paragraph 85 that:

22
23 *"In virtually every case in which section 1810 could*
24 *apply the federal court government would almost*
25 *certainly indemnify the officer defendant."* 11:37
26

27 And you referred, if I understood your evidence
28 correctly yesterday, to provisions in contracts, have
29 you seen these contracts?

1 A. I've seen one. They are often referred to in
2 literature and in scholarship. I have heard government
3 officials refer to them in public. They are not
4 generally publicised, Mr. Murray.

5 107 Q. And what do they say? 11:37

6 A. My understanding is that, the one I saw, and which
7 I understood to be representative, is that the
8 government holds harmless their officers for misconduct
9 for damages liability that they incur. The term is
10 within the scope of their employment. 11:37

11 108 Q. Yes. So an officer who, for example, decides to, to go
12 back to the example that the judge or an analogous
13 example you gave during the hearing, an officer who
14 decides to obtain information or place surveillance on
15 a person or disseminate information on a person for 11:38
16 entirely malicious and personal reasons is unlikely,
17 I would suggest, to be acting within the scope of their
18 employment even having regard to the broader definition
19 of that term to which you referred yesterday, would you
20 agree? 11:38

21 A. Maybe. I mean we discussed the torture example
22 yesterday, Judge. I don't know the answer to that
23 question. But I should just say, if we get to a point
24 where we are outside the scope of the indemnification
25 cause, we may also be outside the scope of any official 11:38
26 immunity defence, if at that point the officer has
27 acted so wantonly conducted and recklessly as to have
28 basically deprived himself of the cloak of official
29 protection.

1 109 Q. But the obvious consideration that it depends on having
2 an officer who is worth suing?

3 A. Indeed. I mean I assume, Mr. Murray, you would,
4 I hope, Mr. Murray, you would agree with me that, even
5 if the damages judgment is relatively minimal, the 11:39
6 precedent it would set would be useful.

7 110 Q. Well, I have yet to meet the litigant who is interested
8 in setting precedent.

9 A. Without regard to the bottom line.

10 111 Q. Can we move on to your fourth criticism which is the 11:39
11 utility of the suppression remedy. And I think you
12 agree with the DPC that this is really not something
13 that affects her calculus at all, this is not a remedy
14 that a person can voluntarily assume and agitate in the
15 courts? 11:39

16 A. I agree with that, and I think I said that quite
17 transparently in paragraph 86. I think, Judge, the
18 point that I was trying to make here and frankly
19 yesterday is that it seems like a consideration of
20 whether US courts are in a position to provide remedies 11:39
21 ought to at least account for, not give undue weight
22 to, but at least account for circumstances in which the
23 legality of the surveillance programmes are in fact
24 being fully aired.

25 112 Q. All right. 11:40

26 A. And fully ventilated.

27 113 Q. Well maybe if we look at it this way: If you were
28 providing for an academic audience and setting out to
29 provide a comprehensive account of all possible

1 remedies which might enable clarification of the law,
2 striking down of statutory provisions, invalidation of
3 programmes, you would want to include these. You would
4 want to include your criminal prosecutions, you would
5 want to include your suppression remedy because, as we 11:40
6 have seen in the Mohamud case, that can operate as a
7 vehicle by which the law is determined?

8 A. And the internal remedies within FISA, the adversarial
9 review that we saw in the Yahoo case, for example.

10 114 Q. Yes. Which I thought you thought might itself fall 11:40
11 short of Article III because it doesn't go far enough
12 in terms of creating a case or controversy?

13 A. Oh, I am sorry, no. When you actually have a
14 meaningful adversary, Mr. Murray, I don't think there
15 is any Article III problem. 11:40

16 115 Q. But anyway we'll stay on track, as it were.

17 A. I'm sorry.

18 116 Q. But you might include that in your academic commentary,
19 but of course you understand the DPC was concerned with
20 something else, which is the remedies available to an 11:41
21 individual European who did not want to be prosecuted
22 before they had the right to go to court and to that
23 extent perhaps the suppression remedy is, as you
24 describe it yourself, of limited use, you agree with
25 all of that? 11:41

26 A. I do.

27 117 Q. Yes, okay. Let's move on then, the fifth point.
28 I don't know that this is a criticism or omission, it's
29 more an observation and it relates to Executive Order

1 12333. what you say here is that:

2

3 *"The DPC suggests existing remedies provide no basis*
4 *for challenging the collection of data under*
5 *non-statutory authorities such as EO 12333. 'It is not* 11:41
6 *possible, the DPC concludes, to assess whether or not*
7 *the remedies outlined above are sufficient to address*
8 *the full extent of the activities of the intelligence*
9 *authorities in question'. But, as described above, the*
10 *non-statutory collection of authorities in question* 11:41
11 *simply do not apply to EU citizen data held by US*
12 *companies within the United States."*

13

14 Is that absolutely true?

15 A. So if you are referring to the Transit Authority 11:42
16 discussions?

17 118 Q. Yes.

18 A. I think that is well covered by the expert document,
19 Judge. I think that statement, Mr. Murray, is true,
20 right. That if the data is physically held by US 11:42
21 companies in the United States, that's not a Transit
22 Authority situation.

23 119 Q. Okay. But certainly, insofar as transit intrudes, so
24 does Executive Order 12333?

25 A. And I think you have, and I join without any hesitation 11:42
26 the expert document discussion of Transit Authority in
27 that regard.

28 120 Q. And also, I think, join without any hesitation in
29 comment on the absence of any effect of judicial

1 remedies over the executive order?

2 A. True.

3 121 Q. Yes. Do you think the Privacy Shield provides a
4 bulwark against surveillance under Executive Order
5 12333? 11:42

6 A. I think it's better than nothing.

7 122 Q. Very good. Okay, thank you.

8 A. I think -- you know I, as you pointed out yesterday,
9 Mr. Murray, I have more faith in judicial remedies in
10 this context. 11:43

11 123 Q. Yes, very well and it doesn't provide one full stop.
12 Can we move on to your sixth point which is Article III
13 standing and we addressed this --

14 A. We haven't discussed this nearly enough.

15 124 Q. We addressed this yesterday and for the very reason 11:43
16 suggested by your comment, Professor, with which
17 I suspect *nobody* in court will disagree --

18 A. That's a first.

19 125 Q. -- we're going to very briefly, only very briefly just
20 reprise on this before we move on to your seventh 11:43
21 criticism. Because I think at the end of the day, and
22 please disagree with me if you do, that at the end of
23 the day the difference between you and the DPC might
24 not unfairly be characterised as one of emphasis?

25 A. I think emphasis may undersell it a little bit, if 11:43
26 you'll give me one moment to elaborate.

27 126 Q. Of course.

28 A. The problem that I had with the DPC's discussion,
29 Judge, and I hope this comes through in my report, is

1 that it's not that standing isn't a consideration, it's
2 that we have to be very specific about which part of
3 standing doctrine is the problem. You heard a lot of
4 discussion yesterday about the actual or imminent prong
5 versus the concrete and particularised prong. It seems 11:44
6 to me that the special focus of the DPC draft was the
7 former, was the actual or imminent prong, where again
8 I think the critical point is how that would play out
9 in the different stages of litigation. Then we had the
10 additional questions about concreteness raised largely 11:44
11 by the November memo by Mr. Serwin and by the expert
12 report by Mr. Richards - sorry, Prof. Richards, I don't
13 mean to demote him - where I think that's a related but
14 distinct concern.

15
16 And so it's not just point of emphasis, if I may. 11:44
17 I think it is understanding the different work that the
18 concerns that folks like I share right in this field,
19 how that cashes out when you get to a real case with
20 standing. 11:45

21 127 Q. And we agree, clearly as we all must, Clapper governs,
22 we know what the test is, certainly impending. You
23 used a formula yesterday "*has or will shortly survey*",
24 that test, could I respectfully submit to you or
25 suggest to you, were it the test would have resulted in 11:45
26 a different outcome in the wikimedia case, and
27 I suspect you are arguing that the wikimedia case was
28 wrong for that reason, but in fact, and the court has
29 heard of the wikimedia case, again probably too often

1 at this stage, but certainly the district court
2 decision is not consistent with your formula?

3 A. I completely agree with that. And if I may, Judge,
4 just to make this as concrete as I can, I don't mean
5 that in the standing sense. The flaw in the district 11:45
6 court decision in the wikimedia case is missing the
7 distinction that we have adverted to between the motion
8 to dismiss stage and the summary judgment stage. The
9 district court in the wikimedia case was very troubled
10 by the plaintiff's inability to demonstrate various 11:45
11 points that at the motion to dismiss stage they really
12 only have to allege, right, and quoted Clapper where,
13 because it was at the summary judgment stage, that was
14 a proper concern.

15 11:46
16 So this is part of why I think we could get a very,
17 frankly limited, reversal by the Court of Appeals, not
18 holding that the plaintiffs have standing, but, as in
19 valdez and Schuchardt, holding that they at least had
20 enough to survive a motion to dismiss and then, per our 11:46
21 discussion yesterday, we would get to discovery.

22 128 Q. In any event, Professor, as you said we have discussed
23 it at length, but we come to this point of agreement
24 which is that it's a substantial obstacle?

25 A. Quite. 11:46

26 129 Q. I just want to draw your attention to one decision
27 really for the sake of completeness because, you may be
28 aware of this, that the United States district court in
29 eastern district of Pennsylvania has very recently, as

1 in the last couple of weeks, adopted a different
2 conclusion to that adopted in the **Microsoft** case
3 regarding the implication of electronically
4 transferring data from a server in a foreign country,
5 I just want to draw your attention very quickly to 11:47
6 one --

7 A. Thank you.

8 130 Q. -- passage in it which is, if you turn to - sorry this
9 is a search warrant and the number is given to Google.
10 If you turn to page 20 of that, hoping that your 11:47
11 version is the same as mine, you should have a page
12 that begins "*electronically transferring data*"?

13 A. I do.

14 131 Q. And this follows a consideration of the **Microsoft** case:

15 11:47
16 "*Electronically transferring data from a server in a*
17 *foreign country to Google's data centre in California*
18 *does not amount to a seizure - obviously under the*
19 *Fourth Amendment - because there is no meaningful*
20 *interference with the account holder's possessory* 11:47
21 *interest in the user data.*"

22
23 You recognise that language, Professor, and you will
24 understand jurisprudentially where it comes from and
25 why that is used? 11:47

26 A. I do.

27 132 Q. "*Indeed according to the stipulation entered by Google*
28 *and the government, Google regularly transfers user*
29 *data from one data centre to another without the*

1 *customer's knowledge. Such transfers do not interfere*
2 *with the customer's access or possessory interest in*
3 *the user data. Even if the transfer interferes with*
4 *the account owner's control over his information, this*
5 *interference is de minimis and temporary."*

11:48

6
7 And I just draw that to your attention, conscious
8 obviously that the **Microsoft** case posited a different
9 conclusion, but perhaps with a view to getting your, to
10 getting you to agree at least with this: That there
11 is, around issues such as retention, around issues such
12 as transfer as opposed to access certainly questions as
13 to the extent to which these are, and I know this is,
14 you would say, a merits rather than a standing issue,
15 these are cognisable harm, would you agree with that?

11:48

11:48

16 A. With the caveat you just mentioned, then I think that's
17 a question of the merits of the Fourth Amendment
18 concern, Judge, and not an obstacle to allege of a
19 violation sufficient to allow a court to reach the
20 merits. Yes, of course. These are, as I think
21 I mentioned yesterday, there are, the academic in me
22 would say fascinating and the litigator in me would say
23 troubling open questions about how the Fourth Amendment
24 applies here, but I really do think it's important to
25 stressing that those are merits questions.

11:48

11:49

26 133 Q. Your seventh point, which is forward at page 96,
27 because we discussed the various decisions to which you
28 refer, your seventh point is about Rule 11. And
29 I think you do understand the point which Mr. Serwin is

1 making here, he elaborated upon it in the course of his
2 evidence, that it's, I suppose, a chilling effect, as
3 he sees it, for attorneys. If someone comes to you and
4 says 'I have an objectively reasonable apprehension
5 that I am being surveyed' and you say 'well, have you 11:49
6 anything more' and I say 'no', then perhaps some
7 attorneys might say 'well there's a Supreme Court case
8 that says that won't work and I'm not putting my name
9 or my personal assets on the line to sign your writ'?

10 A. Mr. Murray, I don't know doubt that there is some 11:49
11 attorney that will say something, of anything of that
12 sort. The point I was just trying to make about
13 rule 11 is I have never heard it referred to by an
14 attorney in this context, I have never seen it invoked
15 in a court in this context and so it struck me as an 11:50
16 odd point of emphasis for the DPC.

17 134 Q. All right. Then, finally, your eighth and final point
18 relates to the Judicial Redress Act and the Privacy
19 Act. I don't think you disagree with the substantive
20 conclusion posited by DPC, you simply make an 11:50
21 observation that perhaps there's a confusion between
22 merits, harm and standing?

23 A. And if I may just add one piece to that and that
24 perhaps the DPC in focussing on the difficulties that
25 plaintiffs will have under FAA -v- Cooper establishing 11:50
26 damages, assume that that would also be a difficulty to
27 injunctive or declaratory relief.

28 135 Q. Certainly. But you certainly and don't for a moment
29 dispute the difficulty of obtaining damages because of

1 those decisions?

2 A. After **Cooper**, certainly.

3 136 Q. That really seems, Professor, to take us to the
4 following points of conclusion on your eight points:
5 Two of them are matters in which we appear to agree, 11:51
6 subject to the proviso you have just made in relation
7 to your interpretation of the DPC's interpretation of
8 **Cooper**, but we appear to agree in fact on 12333 and the
9 JRA and Privacy Act; isn't that right, that's two of
10 them? 11:51

11 A. I think so.

12 137 Q. That leaves six. Two of them relates to provisions
13 which are not judicial remedies of general application
14 at all, the criminal prosecution and the suppression
15 remedy, okay, that so leaves us with four; one relates 11:51
16 to standing, which we agree is a substantial obstacle,
17 one relates to the APA, which you agree has limitations
18 and I don't think you disagree significant limitations
19 attached to it?

20 A. Again I don't know about the adjective. I think we can 11:51
21 certainly agree on limitations.

22 138 Q. Well, the court has heard all of the limitations?

23 A. Indeed. They certainly *can* be significant.

24 139 Q. Yes, and I'm going to submit to you that they are
25 significant. One relates to immunity and damages which 11:52
26 are hard to get anyway, we agree with that, and the
27 last one relates to Rule 11?

28 A. Mm hmm.

29 **MS. HYLAND:** I think there might have been a question

1 there that Prof. Vladeck didn't get an opportunity to
2 answer. I think he was asked in relation to,
3 Mr. Murray said one relates to immunity and damages
4 which are hard to get anyway, we agree with that.

5 **MR. MURRAY:** And he nodded. 11:52

6 **MS. HYLAND:** And the last one relates -- well...

7 A. I did not, I'm sorry. Yes, I mean I think that our
8 colloquy articulated why I think they are hard to
9 obtain but not impossible.

10

11 And if I can just, if you don't mind my just making one
12 reflection. The point I think is perhaps that
13 Mr. Murray, and I don't think there is as much daylight
14 as it seems, but I would have liked to have seen all of
15 these points articulated by the DPC, that is to say 11:52
16 'yes, perhaps these remedies aren't as robust as
17 I would like them to be', 'yes perhaps the obstacles
18 that Mr. Murray is worried about are still present'.
19 It struck me that the DPC Draft Decision that I read
20 didn't walk down any of these paths in nearly 11:53
21 sufficient detail to explain exactly where the real
22 problems are, Mr. Murray, and where I think it is
23 overgeneralising in ways that are unhelpful.

24 140 Q. **MR. MURRAY:** Yes. well, you bring a particular
25 perspective to those questions -- 11:53

26 A. I do.

27 141 Q. -- and look at it from a particular perspective, but
28 the one thing we do agree upon, although we may use the
29 words in different ways, is that the remedies are not

1 adequate, and you said that yesterday?

2 A. They are not adequate to my taste.

3 142 Q. Thank you.

4 A. I will leave to the court whether they are adequate for
5 relevant purposes. 11:53

6 **MR. MURRAY:** Thank you, Professor.

7 A. Thank you.

8

9 **PROF. VLADECK, WAS CROSS-EXAMINED BY MR. McCULLOUGH AS**
10 **FOLLOWS:**

11

12 143 Q. **MR. McCULLOUGH:** Professor, you divide your report into
13 three parts, one dealing with US collection
14 authorities, one dealing with constraints on those
15 authorities and then, thirdly, remedies for abuses? 11:53

16 A. Mm hmm.

17 144 Q. I don't want to ask any questions about the third, you
18 and Mr. Murray have covered that in some detail, and
19 I have just a few questions about the first and second.

20 A. Please. 11:54

21 145 Q. The main US collection authorities you summarise at
22 paragraph 52 of your report, that's section 2703(d)
23 orders under the Stored Communications Act, National
24 Security letters, FISA warrants and Section 702 of
25 FISA? 11:54

26 A. Just to clarify, Judge. As the introductory text of
27 that paragraph suggests I was referring to the key
28 authorities for data of EU citizens that would be held
29 by US companies within the US. There are of course

1 other authorities relevant to other contexts.

2 146 Q. And the main extant authority that you discuss in your
3 report that is used to collect intelligence on non-US
4 persons by electronic surveillance is really
5 Section 702? 11:54

6 A. 702 of the data is in the United States, certainly.

7 147 Q. All right. I just want to look very briefly at the
8 structure of that to see if we agree, and I don't think
9 there is any disagreement here, Professor. Section
10 1881(a) sets out a very basic structure? 11:55

11 A. Would you mind if I just got it in front of me?

12 148 Q. Sure, yes.

13 A. Can you point me to where in the authorities it is.

14 149 Q. Yes.

15 A. I just don't want to mess anything up. 11:55

16 **MR. MCCULLOUGH:** I'm going to have it in a different
17 place to you now, Professor, so you'll just have to
18 wait for a moment.

19 **MS. JUSTICE COSTELLO:** I think it's Tab 3 of Book 1 of
20 the US authorities. 11:55

21 A. Thank you very much. I am sorry. Thank you, Judge.
22 Okay, yes, I'm there. It's page 249 on my copy.

23 **MS. JUSTICE COSTELLO:** Hmm.

24 150 Q. **MR. MCCULLOUGH:** All right. And the basic structure
25 permits surveillance on any person reasonably believed 11:55
26 to be a non-US person as long as a significant purpose
27 is to obtain foreign intelligence?

28 A. That's correct.

29 151 Q. All right. And there are two programmes under

1 section 702 the extent of which we are aware; isn't
2 that correct?

3 A. Yeah.

4 152 Q. And it follows that there may be more?

5 A. I don't know that it follows, Judge. I think there are 11:56
6 two programmes which we are aware. I have some faith
7 that if there were additional programmes, we have
8 benefitted from many leaks in US law in the last five,
9 six, seven years, so I am cautiously optimistic that if
10 there was a third programme we would have heard about 11:56
11 it. But obviously I'm not in a position to answer that
12 definitively.

13 153 Q. And certainly we can't know whether more aren't going
14 to be created in the future?

15 A. Of course. 11:56

16 154 Q. And it's quite likely that a feature of further
17 programmes if they are created is that we won't be told
18 about them?

19 A. Maybe, although it is worth stressing in this regard
20 that my concerns about the USA FREEDOM Act, 11:57
21 notwithstanding there were a couple of salutary
22 developments for transparency, and that there may in
23 fact be at least some marginal pressure to publicise
24 more about these developments going forward given the
25 consequences we have seen from the secrecy that 11:57
26 surrounded these programme previously.

27 155 Q. We only know about PRISM and Upstream because
28 Mr. Snowden told us about them really; isn't that
29 right?

1 A. We only know about Upstream because of Snowden.
2 I think we knew that there was something like PRISM.
3 I mean after all Clapper -v- Amnesty International was
4 predicated on the notion that there was a programme
5 like PRISM, we just didn't know what it was called. 11:57

6 156 Q. Sure. If you just look at what you said in your 2014
7 article that you were given yesterday, and I don't know
8 if you still have a copy of that. I will just read out
9 what you said at page 569?

10 A. Mm hmm. 11:57

11 157 Q. And you were talking about a Clapper fix. This was a
12 legislative proposal that you put in your article
13 whereby the problem in Clapper might be fixed?

14 A. Yeah.

15 158 Q. And you continued: *"Ultimately the larger problems 11:57*
16 *with such a Clapper fix are not legal but practical.*
17 *For starters there is little reason to believe*
18 *disclosure of the programme such as PRISM are going to*
19 *become a recurring feature of American public*
20 *discourse, or even that we now know about all of the 11:58*
21 *potentially unlawful secret surveillance to which US*
22 *persons are currently being subjected."*

23 A. That's right. Judge, the only thing I would say is
24 I wrote that before the USA FREEDOM Act which, as
25 I mentioned in my colloquy with Mr. Murray, I have been 11:58
26 critical that it didn't go far enough. But I think
27 that there are some beneficial reforms that Congress
28 has adopted that I hope but obviously can't say with
29 confidence will lead to more public awareness of future

1 programmes.

2 159 Q. All right. And one of the risks to which you pointed
3 in your article there is the possibility that the
4 future of such programmes might be created on the basis
5 of statutory authority less clear than Section 702? 11:58

6 A. Which we saw with the phone records programme.
7 I mean the real controversy about the phone records
8 programme wasn't the underlying conduct because it was
9 metadata, it wasn't content. The controversy was that
10 it was so difficult to interpret the statute the way 11:59
11 that the government apparently did. And so at least
12 among lawyers the real objection to the 215 programme
13 was the legal interpretation. This is why there has
14 been so much attention to increasing adversarial
15 litigation before the FISA court to make sure that 11:59
16 there is meaningful opportunity for the judges to
17 receive contrary interpretations of the same text.

18 160 Q. Let's just be clear: Section 702 doesn't forbid the
19 creation of future programmes; isn't that correct?

20 A. That's right. 11:59

21 161 Q. Different programmes?

22 A. That -- I mean nothing in 702 says you cannot have
23 another programme called Downstream.

24 162 Q. Exactly.

25 A. Right? The key is whether the judicial review, I don't 11:59
26 mean that as a term of art, whether the role of the
27 FISA court in supervising this new programme would be
28 aided materially by the new amicus, by the new
29 transparency rules or whether we could have a repeat of

1 what happened with the phone records programme.

2 163 Q. And, as you say in your 2014 article, there is also a
3 risk that programmes will be created otherwise than
4 under section 702?

5 A. Of course there's a risk. 12:00

6 164 Q. Yes. As you say, I'll just read it out: *"And to the
7 extent"* --

8 **MS. JUSTICE COSTELLO:** Sorry, what page are you on
9 again, please, Mr. McCullough?

10 **MR. MCCULLOUGH:** Page 569, Judge, of the 2014 article. 12:00

11 **MS. JUSTICE COSTELLO:** Thank you.

12 A. This is the standing and secret surveillance?

13 **MR. MCCULLOUGH:** Standing and secret surveillance. The
14 foot of that page, Judge.

15 **MS. JUSTICE COSTELLO:** Yes. 12:00

16 **MR. MCCULLOUGH:** *"And to the extent that current or
17 future programmes are based upon statutes not remotely
18 as clear in their potential scope as section 702, the
19 absence of such disclosures would likely be fatal to
20 the ability of plaintiffs to satisfy even the lower
21 standing threshold proposed above"*. 12:00

22

23 And what you had in mind there was (a) that there might
24 be future programmes created otherwise than under
25 section 702, (b) that you might never hear about them? 12:00

26 A. Mm hmm.

27 165 Q. And (c) that naturally that means that you would never
28 achieve standing; isn't that right?

29 A. Certainly I think it would be very difficult, Judge,

1 contra my colloquy with Mr. Murray where I think in a
2 702 Upstream case now we know enough to easily survive
3 a motion to dismiss. I do think it would be much
4 harder to survive a motion to dismiss if my allegation
5 was simply that I believed that my communications were 12:01
6 being collected pursuant to a completely secret
7 programme no one had ever heard of.

8
9 Now without slamming the door on that, though, I would
10 like to refer the court back to the valdez case. The 12:01
11 claim in the valdez case is, to my mind, somewhat
12 fantastical, right, but that the National Security
13 Agency was engaged in a comprehensive domestic
14 surveillance programme in and around Salt Lake City in
15 the run-up to and during the 2002 winter Olympics. 12:01
16 There is *no* public data to support that claim and yet
17 even those allegations survived a motion to dismiss.

18
19 So I think the question would simply be whether there
20 is enough plausibility given the history to survive 12:01
21 motion to dismiss and then we would get, Judge, back to
22 discovery where we have the same question about the
23 ability to discover the information. Just to finish
24 the thread, it's possible then that state secrets would
25 become a larger issue in the context of a completely 12:02
26 secret programme versus in the context of 702 and
27 PRISM.

28 166 Q. I don't want to go back over all the territory with
29 Mr. Murray?

1 A. I am sorry.

2 167 Q. That's all subject to all the discussion about standing
3 that you have already heard; isn't that correct?

4 A. Correct, quite.

5 168 Q. Just look then at the two programmes of which we do 12:02
6 know.

7 A. Mm hmm.

8 **MR. MCCULLOUGH:** You describe those as paragraphs 45 of
9 your report.

10 **MS. JUSTICE COSTELLO:** I think we just need to change 12:02
11 stenographer.

12 169 Q. **MR. MCCULLOUGH:** Yes. At paragraph 44 and 45 of your
13 report. At paragraph 44 you discuss PRISM. And that's
14 a programme under which the government sends a
15 selector, such as an e-mail address, to a United States 12:03
16 electronic communications service provider and the
17 provider is compelled to give the communication
18 relating to that selector back to the NSA, isn't that
19 correct?

20 A. Mm hmm. 12:03

21 170 Q. Then there's Upstream, that you describe at paragraph
22 45. As I understand Upstream, again just to, I
23 suppose, reduce it to shorthand, Upstream has two
24 phases; first, there's a phase at which *a11* the
25 internet traffic passing over a particular internet 12:03
26 point is analysed so as to extract the material, is
27 that correct?

28 A. That's my understanding of it.

29 171 Q. And then secondly, the extracted material is then

1 retained by the NSA for further analysis?

2 A. Subject to the targeting and minimisation rules, yes.

3 172 Q. Subject to the targeting and minimisation rules, to
4 which I'll come. But they are largely designed to
5 protect US persons, isn't that correct? 12:03

6 A. They are.

7 173 Q. All right. And we'll just look at what you say about
8 what *is* collected under Upstream. There's "to" and
9 "from", isn't that correct?

10 A. Indeed. 12:04

11 174 Q. And then there's "about". And the PCLOB report says
12 that an "about" communication is one in which the
13 selector of a targeted person is contained within the
14 communication but the targeted person is not
15 necessarily a participant in the communications. 12:04
16 That's "about", is it?

17 A. Yeah.

18 175 Q. Then what's an MCT?

19 A. So an MCT is a multiple communication transaction. I
20 think Prof. Swire talked about this a bit, Judge. Just 12:04
21 the way internet traffic is routed, you'll have a
22 number of items bundled together, right, a number of
23 e-mails or chats or whatever. And so in an MCT, it's
24 not possible at the moment of collection to segregate
25 the individual items, that you collect the packet and 12:04
26 then extract from the packet the relevant triggered
27 material.

28 176 Q. All right. And in addition to those that you mention
29 in your report, I think you agree with Mr. Murray that

1 E012333 also *does* have a relevance?

2 A. Only in the context of the transit authority, Judge,
3 which I think the experts' document talks about. And I
4 think it's just worth stressing, transit authority is,
5 for lack of a better word, transitory, right, that if 12:05
6 the issue is about the actual collection off of servers
7 in the US, I think we're really talking about 702, not
8 12333.

9 177 Q. Well, let's just look at what you say in your report
10 about 12333. You mention it at paragraph 38, but 12:05
11 perhaps more again at 88.

12 A. Mm hmm.

13 178 Q. At paragraph 88 you're setting out one of your seven
14 criticisms of the DPC's draft decision, and you say:
15
16 *"But as described above, the non-statutory collection*
17 *authorities in question simply do not apply to EU*
18 *citizen data held by US companies within the United*
19 *States."* 12:05

20
21 You've modified *that*, I think, in the expert report,
22 isn't that correct? 12:06

23 A. So, Judge --

24 179 Q. Or the joint experts' report.

25 A. -- I hope I was clear before, but just to take one more 12:06
26 shot at it. I think this sentence is still correct,
27 right? That is to say, if the data is physically held
28 by technology firms, by Facebook, by other service
29 providers in the US, that's not transit authority,

1 right, that's 702. The transit authority issue is
2 while the data is physically in transit. And so I
3 think the expert report helpfully explains that that is
4 also a relevant consideration. I don't think that
5 changes the voracity of the statement. 12:06

6 180 Q. I understand that. But 12333 is relevant to the issues
7 under discussion in this case, because it's relevant to
8 electronic surveillance of EU citizens' data in the US?
9 A. So, I would just say it is relevant of EU citizens'
10 data en route to the US. Once it's in the US, I think 12:06
11 there's no question, Judge, that 702 applies.

12 181 Q. We'll just look at what the joint experts' report says
13 about that on page nine, item six. You're talking
14 about the relevance of E012333.

15 A. Yes. 12:07

16 182 Q. And the agreed position, I think, is that that
17 programme is generally conducted outside of the US, it
18 is *not* conducted within the US, with the exceptions for
19 transit authority and certain radio collection
20 discussed elsewhere in the chart. 12:07

21 A. That's right.

22 183 Q. All right. So just tell me what you know about the
23 transit authority and the radio communications?
24 A. So I mean, this is, I should confess, Judge, this is
25 more Prof. Swire's bailiwick than mine, so I have more 12:07
26 of an amateur knowledge. But the transit authority is
27 the ability of the government, while information is
28 literally en route across fibre optic cables, while
29 it's physically outside the United States, to at least

1 attempt to collect some of it while you might have --
2 and it's sort of tied to radio communications, because
3 you might be intercepting over-the-air radio signals,
4 back in the day where we still used those.

12:07

5
6 So these are certainly *relevant* to the conversation. I
7 think they're -- part of why I think they're not at the
8 heart of *my* report is because I think the general fear
9 in the context of data transfer is that it's going to
10 be when the government goes to the firm to acquire the 12:08
11 data that the issues are going to arise, not -- we're
12 not aware, to my knowledge, of transit authority being
13 used in this manner.

14 184 Q. But you get it directly from firms?

15 A. To get it directly from firms.

12:08

16 185 Q. Sure. Just look at what is said at page 12 as well,
17 item 12.

18 A. Mm hmm.

19 186 Q. The agreed position is:

20
21 *"The experts agree that Transit Authority under E012333*
22 *is an exception to the general rule that E012333*
23 *applies to collection only outside of the US. The*
24 *experts' understanding is that transit authority would*
25 *apply, for instance, to an e-mail that went from a*
26 *foreign origin, across the telecommunications network*
27 *within the US without having a US destination, and then*
28 *went to a foreign destination. Transit authority would*
29 *likely not apply to the e-mail if its destination was a*

1 *corporate server in the US that forwarded the e-mail to*
2 *a destination outside the US".*

3 A. Mm hmm.

4 187 Q. So we're talking about traffic that goes across the US,
5 intending to be routed out of the US. 12:09

6 A. And never really lands in the US, if I can use that
7 metaphor.

8 188 Q. All right. And as I understand it - and you may or may
9 not know about this - it could easily *be* the case that
10 as far as *I'm* concerned, I'm sending a communication 12:09
11 from here to somebody else in Dublin, but in fact it
12 may go across the US?

13 A. Indeed. And I think I -- I don't remember if I cite
14 this in my report or not, but there's a very good
15 article called "The Unterritoriality of Data" that I 12:09
16 think has a very useful discussion of this problem.

17 189 Q. All right. So a lot of data that appears to the
18 ordinary person never to go near the US may *in fact* go
19 through the US and then be subject to 12333?

20 A. Well, yes. Although, Judge, just to be clear, I mean, 12:09
21 if a Russian national is communicating with another
22 Russian national, it's the same regime either way,
23 right? So let me just elaborate. Two Russian friends,
24 one in Moscow, one in St. Petersburg e-mailing with
25 each other, they may know/they may *not* know that the 12:10
26 nature of the servers they use routes the traffic
27 through the US or not. I think everyone would agree
28 that if the material never went through the US in the
29 first place, the relevant US surveillance regime would

1 be 12333 - we have non-US persons outside the United
2 States communicating only with each other through
3 non-US media.
4

5 And so I think in that regard, transit authority is 12:10
6 simply accounting for the interoperability of modern
7 data transfer, where if it's unbeknownst to those two
8 Russian citizens the data is routed through the US en
9 route from Moscow to St. Petersburg, 12333 is still the
10 relevant regime. So in other words, the fact that it's 12:10
11 routed through the US, transit authority fills the gap
12 in that regard, it doesn't create a new problem from my
13 perspective.

14 190 Q. And I think you agree, as you said to Mr. Murray, that
15 there's no effective legal remedy in relation to 12333? 12:10

16 A. Certainly.

17 191 Q. All right. Then in the second part of your report you
18 talk about certain constraints. I just want to look
19 very briefly at them. At paragraphs 55 and 56 --

20 A. Sure. 12:11

21 192 Q. -- you talk about the Fourth Amendment.

22 A. Mm hmm.

23 193 Q. And in essence, the Fourth Amendment is unlikely to
24 play any role in the discussion that is in issue in
25 this court, I think, isn't that correct? 12:11

26 A. I'm not sure. I mean, Judge, I hope I've been clear
27 that there's an open question about whether, if the
28 data is held in the US and, if I may, *known* to be held
29 in the by a non-US person where the Fourth Amendment

1 might still apply, that's an open question in the
2 courts. Certainly I mentioned the Hernandez case a
3 couple of times, Judge, where there's an open question
4 about whether the Supreme Court is still going to
5 follow the brightline on/off switch at the border for 12:11
6 Fourth Amendment protections. What I hope was clear
7 from my colloquy with Mr. Murray is that certainly the
8 precedent *right now* would seem to disfavour application
9 of the Fourth Amendment to a non-US person in that
10 context, but that the law is evolving. And I want to 12:11
11 hopefully not hide the ball on how it is evolving.

12 194 Q. And you cover that in paragraph 55. You say in the
13 context of the data -- context of data of EU citizens
14 held by US companies, the Fourth Amendment is *less*
15 likely to play a role. 12:12

16 A. Mm hmm. Quite.

17 195 Q. And that's precisely *because* of authorities such as
18 Verdugo, isn't that correct?

19 A. Indeed.

20 196 Q. Then in the final sentence of that paragraph you say 12:12
21 the Supreme Court hasn't addressed whether the Fourth
22 Amendment might apply to searches of these individuals'
23 data for data located within the United States. The
24 prevailing assumption is the answer is no. And if the
25 answer is no, well, then the Fourth Amendment really 12:12
26 doesn't play any part, isn't that right?

27 A. If the answer is no. You know, I'm cautiously
28 optimistic that the Supreme Court won't be able to take
29 such a, if you'll forgive me, westphalian approach to

1 data, because I think data poses challenges to that
2 very traditional sovereignty driven model.

3 197 Q. Certainly we can agree that the prevailing authority --
4 A. Yeah, quite.

5 198 Q. -- the Supreme Court authority, suggests the answer is 12:12
6 no?
7 A. I agree.

8 199 Q. All right. And then you deal with constraints on
9 Section 702.
10 A. Mm hmm. 12:13

11 200 Q. Now, Section 702 in itself, I think, contains a few
12 protections for non-US persons?
13 A. That's correct.

14 201 Q. It's designed primarily, insofar as it *has* protections,
15 to protect US persons, isn't that right? 12:13
16 A. That's correct.

17 202 Q. And you say at paragraph 62 that that is so, but that
18 one of the central reforms of PPD-28 is to expand the
19 application of those principles to collection of non-US
20 person data as well. And you refer to section 2 of 12:13
21 PPD-28 and then below that you refer to section 4 of
22 PPD-28.
23 A. Mm hmm.

24 203 Q. And I just want to talk about that for a moment, if I
25 may? You'll find PPD-28 in book three, tab 43. 12:13
26 A. I think I have it. Just give me one moment.

27 **MS. JUSTICE COSTELLO:** what's the tab again, sorry?
28 A. Tab forty --
29 **MR. MCCULLOUGH:** Tab 43, Judge.

1 A. 43. Yeah, I see it.

2 204 Q. **MR. MCCULLOUGH:** Just before we look at the parts of it
3 to which you refer, it's a Presidential Policy
4 Directive.

5 A. That's correct. 12:14

6 205 Q. What's the difference between a PPD and an EO?

7 A. Formally, there's not that much of a difference. A PPD
8 tends to be more targeted towards a very particular
9 substantive field. It tends to be -- as its language
10 suggests, it's a directive to agencies that this is how 12:14
11 they're supposed to comport themselves going forward.
12 And so it has the same force as an Executive Order. I
13 think, Judge, if anything it's just a little more
14 targeted and specific.

15 206 Q. It's not a legislative act? 12:14

16 A. No.

17 207 Q. And it's open to be changed tomorrow by the President,
18 if he so wishes?

19 A. Certainly.

20 208 Q. All right. And the first part of PPD-28 to which you 12:15
21 refer is section 2.

22 A. Mm hmm.

23 209 Q. And the first paragraph of section 2 says that the US
24 must collect signals intelligence in bulk in certain
25 circumstances. 12:15

26 A. Mm hmm.

27 210 Q. Then it's the next paragraph I think to which you refer
28 in your report.

29 A. Yeah.

1 211 Q. *"In particular, when the US collects non-publicly*
2 *available signals intelligence in bulk, it shall use*
3 *that data only for the purpose of detecting and*
4 *countering."*

12:15

5
6 And then it gives six purposes for which bulk
7 signals -- sorry, signal intelligence collected in bulk
8 may be used.

9 A. Mm hmm.

10 212 Q. Now, in fact I think as far as the US Government is
11 concerned, neither PRISM nor Upstream fall within this
12 category, isn't that correct?

12:15

13 A. Fall within the category of PPD-28.

14 213 Q. Yes, fall within the category that is protected by
15 section 2?

12:16

16 A. So the US Government does take a strange definition of
17 what "bulk" is. But I had always understood the
18 government to nevertheless believe that it had to
19 ascribe to the same purposes when collecting under
20 PRISM -- that it couldn't collect for arbitrary reasons
21 under PRISM and Upstream.

12:16

22 214 Q. Well, PRISM, at least as far as the US Government is
23 concerned, is targeted, isn't that correct?

24 A. Yes.

25 215 Q. All right. So it doesn't --

12:16

26 A. Through the selectors.

27 216 Q. -- it doesn't appear to fall within the definition of
28 bulk collection, isn't that correct?

29 A. Not the way the government defines it, no.

1 217 Q. Yes. And do you see footnote five is referenced in the
2 first paragraph of section 2?

3 A. Yeah.

4 218 Q. If you look at footnote five, if you wouldn't mind
5 turning to that?

12:16

6 A. On page 12? Yeah.

7 219 Q. Page 12, yeah.

8

9 *"The limitations contained in this section do not apply*
10 *to signals intelligence data that is temporarily*
11 *acquired to facilitate targeted collection. Reference*
12 *to the signal intelligence collected in bulk means the*
13 *authorised collection of large quantities of signals*
14 *intelligence data which, due to technical operational*
15 *considerations, is acquired with any use of*
16 *discriminants, that is specific identifier selection*
17 *terms."*

12:16

12:16

18

19 So the first sentence, *"The limitations contained in*
20 *this section do not apply to signals intelligence data*
21 *that is temporarily acquired to facilitate targeted*
22 *collection"*, that looks as if - at least as far as the
23 government is concerned - section 2 doesn't apply to
24 upstream either, isn't that right?

12:17

25 A. It may not. Although I guess, you know, in that regard
26 it's important that I think section 4 doesn't have the
27 same caveats.

12:17

28 220 Q. All right. Well, let's just look at section 4 then.
29 The parts of section 4 to which you referred are under

1 policies and procedures.

2 A. Yeah.

3 221 Q. That's 4(a)(i), "Minimisation". And there's two bullet
4 points on page seven. I think they're the ones you
5 were referring to in particular, is that right? 12:17

6 A. Mm hmm.

7 222 Q. And they provide for certain protections for the
8 dissemination and retention of material for non-US
9 persons. I think that's what you were referring to in
10 your report, is that right? 12:17

11 A. It was, that's right.

12 223 Q. So these say that:

13

14 *"Dissemination. Personal information shall be*
15 *disseminated only if the dissemination of comparable* 12:17
16 *information concerning US persons would be permitted*
17 *under section 2.3 of Executive Order 12333.*

18

19 *Retention. Personal information shall retained only if*
20 *the retention of comparable information concerning US* 12:18
21 *persons would be permitted under section 2.3 of*
22 *Executive Order 12.3 and shall be subject to the same*
23 *retention period as is applied to comparable*
24 *information concerning US persons. Information on*
25 *which no such determination has been made shall not be* 12:18
26 *retained for more than five years unless the DNI*
27 *expressly determines that continued retention is in the*
28 *national security interests of the US."*

29

1 Let's just deal with retention for a moment, if I may?

2 A. Please.

3 224 Q. As I read that, Professor, it's suggesting that you get
4 the same -- PPD-28 says you should get the same
5 protections for a non-US person as section 2.3 of 12:18
6 Executive Order 12333 provides?

7 A. That's how I read it.

8 225 Q. All right. But it appears also to be saying that at
9 least as far as retention is concerned, if no
10 determination in that regard is made in favour of the 12:18
11 non-US person, you can still retain it for five years,
12 is that right?

13 A. So, you know, I guess I've always wondered what that
14 sentence meant in this context. I think it's certainly
15 true that it seems to suggest that there are some 12:19
16 categories of such information. But I guess it's not
17 clear to me what the determination that that sentence
18 is referring to is.

19 226 Q. Well, on the face of it, Professor, it appears to be
20 referring to the determination made above, that's to 12:19
21 say whether you are, if you like, entitled to the
22 protection for which section 2.3 of 12333 provides.

23 A. Oh, I see, if it was entitled to the same -- right.
24 And "*no such determination has been made shall not be*
25 *retained for more than five years.*" So I guess I had 12:18
26 understood this language to be setting basically a
27 default destruction rule, that whatever else, whatever
28 other authorities there were for retaining that
29 information, once you reach five years there is no

1 continuing justification. And then the question
2 becomes whether there's still a reason at that point,
3 and the DNI has to certify.

4 227 Q. All right. So it looks as if *anything* can be retained
5 for five years, or *longer* if the DNI thinks so, is that 12:20
6 right?

7 A. I mean, I think retained perhaps, but with the caveats
8 that section 2.3 of 12333 require.

9 228 Q. Sure. All right. Can I just then look at the
10 protections for which -- 12:20

11 A. Sorry, Judge, just to be clear, part of we're talking
12 about here is not just retention. It's easy enough to
13 put the data on a server and lock it away until the
14 five-year clock runs. The question is who's going to
15 have access to that data during this time period and 12:20
16 for what purposes? And those are the subjects that, if
17 memory serves, section 2.3 are at least trying to
18 address.

19 229 Q. Well --

20 A. I'm sorry, I didn't mean to go on a tangent. 12:20

21 230 Q. No, no, not at all. Can we look at 12333 then? And
22 you'll find that at tab 45.

23 **MS. BARRINGTON:** Judge, I wonder if I might just
24 intervene at this stage to say that it has come to *our*
25 attention that the version of 12333 which is in the 12:20
26 documentation is an old version. It has been amended
27 on a number of occasions and we have the up to date
28 version in court that we can hand in, Judge.

29 **MR. MCCULLOUGH:** All right. Well, let's hope it's not

1 very different, Judge, because I've certainly been
2 working off the old one.

3 **MS. JUSTICE COSTELLO:** I take it the parties have no
4 difficulty --

5 **MR. MURRAY:** well, subject to seeing it, Judge, 12:21
6 certainly. But it can be handed up and we'll --

7 **MR. GALLAGHER:** No, it says December 4, 1981. And
8 there have been later versions.

9 **MS. BARRINGTON:** Yes, it was amended most recently in
10 2008. And the version we have, Judge, is the amended 12:21
11 version.

12 **MS. JUSTICE COSTELLO:** Very good, thank you.

13

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15

16 231 Q. **MR. MCCULLOUGH:** so let's just summarise -- 12:21

17 **MS. JUSTICE COSTELLO:** Sorry, the witness hasn't got it
18 yet.

19 232 Q. **MR. MCCULLOUGH:** sorry, my apologies (Same Handed). So
20 let's just summarise where we are. 12:22

21 A. Yeah.

22 233 Q. The impression that one *might* have gained from your
23 report is that the effect of PPD-28 is to give non-US
24 persons the same protections as those for which FISA
25 otherwise provides. 12:22

26 A. Mm hmm.

27 234 Q. whereas in fact the effect of PPD-28 is to give non-US
28 persons the same protections as those for which section
29 2.3 of Executive Order 12333 provides, isn't that

1 correct?

2 A. So I mean, I guess, Judge, I don't -- looking at my
3 report, I don't think I said they were the same. And I
4 think there are important distinctions, as
5 Mr. McCullough has pointed out. I think the key to 12:22
6 PPD-28 is that prior to its promulgation there were, to
7 my knowledge, *no* comparable minimisation requirements
8 of any kind for non-US person data. And so what I
9 tried to do in my report in paragraphs 61 through 64
10 was to spell out how there are new protections, that 12:23
11 may or may not be commensurate - I mean, I think
12 they're *not* commensurate.

13 235 Q. But they're not. Exactly. And that's what we need to
14 look at, Professor, just to make it quite clear that
15 they're not at all commensurate. If we look at 2.3 - 12:23
16 and I don't think this is different in the new version,
17 in the time that I've had to compare them. 2.3 is the
18 relevant part of it. This isn't paginated, I'm afraid,
19 so we'll just have to find the page. Section 2.3 is
20 the part to which reference is made in PPD-28, isn't 12:23
21 that correct?

22 A. Quite, yeah.

23 236 Q. So 2.3 provides:
24
25 *"Elements of the Intelligence Community are authorised 12:23*
26 *to collect, retain or disseminate information*
27 *concerning United States persons only in accordance*
28 *with procedures established by the head of the*
29 *Intelligence Community element concerned or the head of*

1 a department containing such element and approved by
2 the Attorney General, consistent with the authorities
3 provided by Part 1 of this Order, after consultation
4 with the Director. These procedures shall permit
5 collection, retention and dissemination of the
6 following types of information." 12:23

7
8 And then it sets out (a) to (j).

9 A. Yeah.

10 237 Q. So (a), for instance, is: 12:24

11
12 "Information that is publicly available or collected
13 with the consent of the person concerned;

14
15 (b) Information constituting foreign intelligence or
16 counterintelligence, including such information
17 concerning corporations or other commercial
18 organisations."

19
20 Can we can just pause for a moment, Professor, and if 12:24
21 you wouldn't mind moving forward to the definitions?

22 A. Sure. In the Executive Order?

23 238 Q. In the Executive Order. which you'll find some pages
24 forward. Three pages forward, I think.

25 A. Yeah, 3.5. 12:24

26 239 Q. Do you see the definition of foreign intelligence?

27 A. I do.

28 240 Q. This is, I think, a wider definition even than you find
29 in FISA?

1 A. It is.

2 241 Q. It says:

3

4 "(e) Foreign intelligence means information relating to
5 the capabilities, intentions and activities of foreign
6 governments or elements thereof, foreign organisations,
7 foreign persons, or international terrorists."

8

9 So at its minimum, foreign intelligence means
10 information relating to the activities of foreign
11 persons. That's foreign intelligence.

12:25

12 A. As the Executive Order defines it, Judge. The only
13 point I would make is there are agency specific
14 minimisation procedures, several of which I reference
15 if my report, that are in some cases narrower. But
16 yes, the Executive Order does define it very broadly.

12:25

17 242 Q. Well, the PPD merely requires that you comply with
18 section 2.3.

19 A. Mm hmm, that's correct.

20 243 Q. 2.3 requires you to comply with procedures. And the
21 procedures must at least do *this*, isn't that right?

12:25

22 A. Yes.

23 244 Q. And the least that the procedures must do is ensure
24 that collection, retention and dissemination of the
25 following types of information is permitted, that's
26 information constituting, inter alia, foreign
27 intelligence. And we know that that means information
28 relating, for instance, or by example, to the
29 activities of a foreign person?

12:25

1 A. At least as it's defined.

2 245 Q. All right. So if that's so, that means that all that
3 12333 provides is that you have procedures that permit
4 you to retain information of, information relating to
5 the activities of a foreign person? 12:26

6 A. So I still -- I mean, my understanding, Judge, is that
7 there's still a requirement that there be some
8 legitimate purpose - I believe the Executive Order uses
9 the word "legitimate" - that it can't just be because
10 we can. And if I recall President Obama's speech about 12:26
11 PPD-28, I think he said something to similar effect,
12 that there has to be *some* legitimate reason for the
13 collection. Now, I assume that reason could be very
14 broad, but that it can't just be 'we have the ability
15 to do it, therefore we *will* do it'. 12:26

16 246 Q. No, in fairness, we can go back to look at PPD-28.
17 There are limitations on PPD-28 as well.

18 A. (Pause to Read).

19 247 Q. So if you look at section 1.

20 A. Mm hmm. 12:27

21 248 Q. The part that you may have had in mind was (d):
22 "*signals intelligence shall be as tailored as*
23 *feasible*"?

24 A. Yeah.

25 249 Q. But nobody could claim that's a very strict standard or 12:27
26 a very well defined standard, could they?

27 A. I agree. And I didn't hear myself to say it was
28 strict.

29 250 Q. No, no, you didn't. All right. So that appears to be

1 the extent of the protection for which PPD-28 -- that
2 PPD-28 provides must be provided for non-US persons, is
3 that correct?

4 A. Mm hmm.

5 251 Q. All right. And then that's all I want to ask you about 12:28
6 that, Professor. You also deal in your report with the
7 Privacy Act and the Judicial Redress Act.

8 A. Indeed.

9 252 Q. And you've discussed this with Mr. Murray. But I think
10 the net upshot of what you say in your report at 12:28
11 paragraph 68...

12 A. Mm hmm.

13 253 Q. ... is that the Privacy Act doesn't apply to the NSA?
14 A. Just to be technically correct, that the NSA has
15 availed itself of its statutory authority to exempt 12:28
16 itself.

17 254 Q. Yes, exactly. All right. And these programmes that
18 we're talking about are, of course, conducted by the
19 NSA, aren't they?

20 A. For the most part. 12:28

21 255 Q. Yes, all right. And that really means that the Privacy
22 Act is not of any particular relevance to the
23 discussion that we're having, isn't that correct?

24 A. I mean, as I hope my report makes clear, I have not
25 seen and do not see the Privacy Act as a key feature of 12:29
26 the remedial regime in this respect.

27 256 Q. And the same thing applies to the Judicial Redress Act?
28 A. Indeed.

29 257 Q. The Judicial Redress Act can only provide whatever the

1 Privacy Act can provide?

2 A. That's right. Although if I may just take one moment
3 to tie things together, Judge? That's part of why I
4 disagree rather firmly with Mr. Serwin's suggestion
5 that the Judicial Redress Act has some bearing on the 12:29
6 APA, right - just to help keep things in perspective -
7 because of its narrowness in this context.

8 258 Q. All right. And indeed the Judicial Redress Act
9 specifically provides for designated agencies. And the
10 NSA is *not*, in fact, a designated agency -- 12:29

11 A. Not yet.

12 259 Q. Not yet, all right. Under the Judicial Redress Act.
13 And then in the remaining part of your report from 68
14 onwards you really deal with a series of administrative
15 procedures, I think, isn't that correct -- 12:29

16 A. Yeah.

17 260 Q. -- which are constraints? But you've made it clear
18 that --

19 A. And if I may?

20 261 Q. Of course. 12:29

21 A. *And*, just to be complete, *and* the internal review
22 within the FISA court, which I wouldn't call
23 administrative.

24 262 Q. All right. It's the internal review, which I don't
25 want to ask you anything about, the judge knows all 12:30
26 about that I think. And the rest of what you talk
27 about are administrative procedures. And you've made
28 it clear that as far as you're concerned, they simply
29 aren't adequate?

1 A. I wouldn't make it at that level of generalisation. I
2 think certainly the oversight procedures, Judge, are
3 not sufficiently robust to my mind. You know, the
4 internal procedures, I guess the question is -- I don't
5 think I said I believe that the interpretations are, by 12:30
6 themselves, inadequate; I think I would like to see
7 more robust oversight and accountability. Because
8 internal procedures may be as adequate as they can be,
9 Judge - I still, at the end of the day, want at least
10 someone on the outside. 12:30

11 263 Q. All right. Your more fundamental point is that they're
12 not adequate by definition, judicial redress is what
13 one looks for in order to assess adequacy?

14 A. Certainly they're not adequate on their own, right,
15 that it's part of a larger puzzle that has a larger 12:30
16 future, as a larger series of measures.

17 **MR. MCCULLOUGH:** Thank you.

18 A. Thank you.

19

20 **PROF. VLADECK WAS RE-EXAMINED BY MS. HYLAND AS FOLLOWS:** 12:31

21

22 264 Q. **MS. HYLAND:** Prof. Vladeck, can I just ask you to deal
23 with a few things that were raised this morning and
24 yesterday? Can I ask you first just to look at a case
25 or two that were handed up to you? 12:31

26 A. Please.

27 265 Q. In particular can I ask you to look at the case of
28 Google that was just handed up this morning, about, I
29 think, 11:45 by Mr. Murray?

1 A. Yeah, I have it.

2 266 Q. And you'll recall that Mr. Murray identified page 20
3 for you and he identified, I think, the statement that
4 electronically transferring data from a server in a
5 foreign country to Google's data centre in California 12:31
6 does not amount to a seizure, because there is no
7 meaningful interference. And I wonder, could I just
8 ask you to look at some other aspects of that case and
9 please comment on the case as a whole in respect of its
10 implications for privacy? And in particular can I ask 12:31
11 you to start please at page 18 -- first of all, can I
12 ask you have you read this case before? So you're just
13 looking at it for the first time, so I'm conscious
14 you're at some disadvantage in that respect. But if I
15 could just perhaps ask you to look at a number of 12:32
16 points?

17 A. Sure.

18 267 Q. So page 18. Do you see there that there's a reference
19 to the **Microsoft** case? And we spoke about that before.

20 A. Quite. 12:32

21 268 Q. And you'll see there that the court is holding that:
22
23 *"The disclosure by Google of the electronic data*
24 *relevant to the warrants at issue here constitutes*
25 *neither a 'seizure' nor a 'search'."*
26
27 And you'll see the court says it:
28
29 *"... agrees with the Second Circuit's reliance upon*

1 *Fourth Amendment principles, but respectfully disagrees*
2 *with the Second Circuit's analysis regarding the*
3 *location of the seizure and the invasion of privacy.*
4 *The crux of the issue before the court is as follows:*
5 *Assuming the focus of the Act is on privacy concerns,*
6 *where do the invasions of privacy take place?"*

7
8 Then you'll see page 20 -- well, sorry, I should
9 continue with that sentence:

10
11 *"To make that determination, the court must analyze*
12 *where the seizures, if any, occur and where the*
13 *searches of user data take place. This requires the*
14 *court to examine relevant Fourth Amendment precedent.*
15 *The court recognizes that the cases discussed below*
16 *address seizures and searches of physical property.*
17 *However, these cases are instructive, and binding."*

18
19 Then we go on to page 20 that you've already been asked
20 to look at by Mr. Murray. And then if I could just ask 12:33
21 you to go on please to page 22?

22 A. Mm hmm.

23 269 Q. And just where you take up the passage:

24
25 *"The court's Fourth Amendment analysis does not end*
26 *there, however, for the court also must examine the*
27 *location of the searches in the instant cases. As*
28 *noted supra, pursuant to Fourth Amendment precedent, a*
29 *'search occurs when the government violates a*

1 *Subjective expectation of privacy that society*
2 *recognizes as reasonable'... when Google produces the*
3 *electronic data in accordance with the search warrants*
4 *and the Government views it, the actual invasion of the*
5 *account holders' privacy - the searches - will occur in*
6 *the United States".*

7 A. Mm hmm.

8 270 Q. Then turning over the page: "*Under the facts before*
9 *this court, the conduct relevant to the SCA's focus" -*
10 and I think that is the Stored Communications Act,
11 isn't it?

12:33

12 A. It is, yeah.

13 271 Q. "*will occur in the United States. That is, the*
14 *invasions of privacy will occur in the United States;*
15 *the searches of the electronic data disclosed by*
16 *Google" --*

17 A. Ah.

18 272 Q. -- "*pursuant to the warrants will occur in the United*
19 *States when the FBI reviews the copies of the requested*
20 *data in Pennsylvania. These cases, therefore, involve*
21 *a permissible domestic application of the SCA, even if*
22 *other conduct... occurs abroad."*

23
24 And I wonder could you just comment on those parts of
25 the case, I suppose, having regard in particular to
26 concreteness and also privacy as a right protected?

12:34

27 A. Sure. So I am coming to this fresh, Judge, so forgive
28 me if I'm not as rehearsed as I would've like to have
29 been. My reaction to this is that what the court is

1 effectively saying -- the problem in this case is the
2 same as in the Microsoft case; you have data that is
3 initially stored on a server overseas - usually here in
4 Ireland - and the data, the variable is why it's moved,
5 but it's moved to a server in the United States, at 12:34
6 which point the government accesses it, right?

7
8 I take the District Court to be saying here that it's
9 not the movement of the data that creates a privacy
10 interest, because that's just Google, right, internally 12:34
11 transferring data from one server to another - it may
12 be without my, the Google user's knowledge - that the
13 privacy interest accrues at the moment the government
14 seeks it, right? And so this was critical here, because
15 the Stored Communications Act has a domestic hook, 12:35
16 right, it requires that the order be executed in the
17 United States. The problem in the Microsoft Ireland
18 case was that Microsoft had not yet moved the data.
19 And what the government was seeking was to compel
20 Microsoft to move the data from Ireland to the United 12:35
21 States so it could be searched.

22
23 My understanding from my very quick perusal of this
24 case, Judge, is that Google *had* moved the data and that
25 it was once it was *in* the United States that the 12:35
26 government was seeking to search it. That's why the
27 Stored Communications Act analysis came out
28 differently, right? Because the court *has* the power to
29 go to Google and say 'This data is here in the United

1 States, produce it to the government'. And the Second
2 Circuit in the Microsoft case said 'The data is still
3 in Ireland. The court does not have the power to
4 compel Microsoft to move the data from Ireland into the
5 United States'. I hope that distinction makes sense. 12:36

6
7 So my reaction to this is it's actually, I think,
8 deeply consistent with my colloquy with Mr. Murray
9 about how there's a question about a private company's
10 pure movement and retention of data and whether that 12:36
11 would be a concrete injury which Google moving data
12 from Ireland into the United States the court says may
13 not be here, but that once the government comes into
14 play, there's no concreteness concern, right? Once the
15 government is requesting the data, regardless of where 12:36
16 it is, that's the point at which, from a concreteness
17 perspective, the privacy harm has occurred.

18 273 Q. Just picking up on that point, do you think in
19 principle there's a difference between a user
20 consenting to have its data transferred to, let's say, 12:36
21 its phone company and a user having data given to the
22 phone company, *then* taken by the US Government, in
23 principle?

24 A. I do. So I think we talked yesterday briefly, Judge,
25 about the third party doctrine and this is an open 12:36
26 problem in US jurisprudence; the Supreme Court has
27 held, albeit in cases older than I am, that once I give
28 data to a third party - to my phone company - I no
29 longer have any expectation of privacy in what the

1 phone company does with that data. But some of the
2 more modern cases have resisted that - we talk about
3 the Jones case and the GPS tracker, the cell site
4 location information cases. I actually believe, and I
5 have written previously, that there is a different 12:37
6 expectation of privacy once the government comes into
7 play, because the government is in a unique position
8 not just to take data from one firm, but from many
9 firms, right, that the government has the ability to,
10 as I think I said yesterday, aggregate across the data 12:37
11 streams in ways that Microsoft may not, in ways that my
12 phone company may not.

13 274 Q. Thank you. Now, can I ask you to take - do you
14 remember you got a yellow book yesterday --

15 A. Mm hmm. 12:37

16 275 Q. -- from Mr. Murray with some cases?

17 A. Yeah.

18 276 Q. And I think they were being handed to you to seek to
19 demonstrate in some way that Spokeo had changed the law
20 or was a seismic change or something of that nature. 12:38
21 Can I just ask you to look at tab five please?

22 A. Mm hmm.

23 277 Q. That's a case of Kama1. And can I just ask you please
24 to look at page two of that? And you'll see there under
25 the heading "Discussion" there's a reference there to 12:38
26 Article III and there's a reference to the Lujan test.

27 A. Yeah.

28 278 Q. Do you see that?

29 A. I do.

1 279 Q. Then do you see under the heading "Governing Caselaw"
2 there's a reference to the fact that the action was
3 stayed in December 2015 pending the Supreme Court's
4 decision in Spokeo -v- Robins. The decision confirmed
5 that an injury-in-fact must be concrete, even where 12:38
6 Congress has authorised a private cause of action. And
7 then do you see the next line, Spokeo did not disturb
8 the circuit's standing jurisprudence and there's a
9 reference to In Re Nickelodeon?

10 A. Yeah. 12:38

11 280 Q. Would you agree with that?

12 A. I would. And we also, Judge, talked about the Horizon
13 case, which was also a Third Circuit case.

14 281 Q. Yes.

15 A. You know, I think what's interesting to me, Judge, 12:39
16 about all of this is I think this is a lot of fighting
17 over a really not important point. Whatever affect
18 Spokeo had, everyone agrees that there is a
19 concreteness inquiry and that the concreteness inquiry
20 is going to depend to some degree on the nature of the 12:39
21 privacy harm and on the status of the violator - that
22 is to say, is the violator a private defendant or is
23 the violator the government, is the nature of the
24 privacy harm something that looks analogous to
25 something at common law, or is it something that 12:39
26 Congress invented by statute? I believe that was clear
27 in the case law before Spokeo. Either way, we end up
28 in the same place, which is with the same understanding
29 of concreteness.

1 282 Q. Yes. And can I ask you just to turn over the page then
2 and you'll see there the first full paragraph:
3
4 "As the defendants argue, the alleged injury here
5 entails increased risk of suffering fraud or identity 12:39
6 theft sometime in the future, not a manifest violation
7 of a traditional privacy interest."
8
9 And there is a reference there to Reilly and
10 Nickelodeon. 12:40
11 A. Mm hmm.
12 283 Q. Then it goes on to say: "*The purpose of credit card*
13 *truncation*" - and that means, I think, only giving,
14 let's say, five numbers on your credit card, as opposed
15 to all the numbers on your credit card. 12:40
16 A. Yeah.
17 284 Q. "*Is to limit incremental risk of fraud or identity*
18 *theft, not safeguard one's freedom from injurious*
19 *disclosure as to private matters or intrusion upon the*
20 *domestic circle or some other traditional privacy* 12:40
21 *interest.*"
22
23 And there you see cited the very famous Warren and
24 Brandeis article which I think in fact Prof. Richards,
25 in his book, his non-legal book, places great emphasis 12:40
26 on as the birth of privacy, isn't that right?
27 A. Certainly the birth of modern privacy law in the United
28 States.
29 285 Q. Yes. Then the court goes on to say:

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"The essential question is whether, in light of Congress' decision to authorise private suits under FACTA, printing ten, rather than five credit card digits on a sales receipt elevates the risk of fraud enough to work a concrete injury. If the harm is not concrete, the court lacks subject matter jurisdiction and must dismiss the case".

12:40

A. And so, Judge, just to walk through it, right? So note the two steps of the analysis, right? First is to say this is not a traditional common law privacy harm, right, printing of ten digits versus five digits. And second, the second Spokeo or Lujan question, however you want to frame it - did Congress nevertheless have the ability to make this a concrete injury simply because of the *risk* of identity theft? And it's because the court discredits, right, that risk in the context of ten digits versus five digits that they find no concreteness here because of the specific way that statute operated. Again I think this would be a very different case if it were the government holding onto more data than it was supposed to.

12:40

12:41

12:41

286 Q. Yes, thank you. Can I just go back then to some of the matters discussed this morning?

A. Please.

12:41

287 Q. There was, I think, a discussion of the APA. And can I ask you whether, in your view, the APA could potentially apply where there's a breach of Section 702?

1 A. I don't think there's any question. And so Mr. Murray
2 is right to identify that one of the questions a court
3 would have to ask in that context include whether the
4 Plaintiff is in a zone of interest, include whether the
5 challenged action is final agency action and include 12:42
6 whether there is preclusion. I actually think, Judge,
7 there's no question how the preclusion analysis comes
8 out; there *is* no alternative remedy that I think could
9 be argued to override the APA in the context of 702,
10 with the possible exception, Judge, of a recipient of a 12:42
11 directive, right? If I'm Yahoo, I actually have an
12 express remedy in the statute. And so that's the one
13 context where I could see a court saying 'You have this
14 express remedy', right, 'React to the directive, go to
15 the FISA court. Therefore, we're not going to give you 12:42
16 the APA'. For everybody else, I don't think preclusion
17 would be the issue, it would just be those zone of
18 interest and final agency action questions.

19 288 Q. And just talking about agency action and final agency
20 action, in your view, would a directive or a 12:42
21 certificate under Section 702 likely come within the
22 definition of agency action?

23 A. So I think we discussed this yesterday, Judge. I think
24 there's no question a directive would. And I would
25 point to the Second Circuit's discussion in ACLU -v- 12:42
26 Clapper of a production order as a comparable example
27 of what final agency action is. On the certificate or
28 the certification, you know, Judge, I think the
29 question is just the timing, right? That is to say, has

1 the agency actually acted pursuant to the
2 certification? And so to my mind, the easier case would
3 be to challenge the Directive. And the certification
4 would be harder simply because there might not have
5 been a concrete step the agency took pursuant to the 12:43
6 certification. The certification is very much the
7 jumping off point.

8 289 Q. Thank you. Now, I think in this -- I'm going to quote
9 something you said this morning and I think it was in
10 contradistinction to the legal regime where the 12:43
11 terrorist surveillance programme was at issue - I think
12 that was in ACLU -v- NSA. And you went on to say that
13 in respect of the APA application, it would be
14 potentially different in a "crowded legal regime" for
15 Section 702 and phone records. What did you mean by a 12:43
16 "crowded legal regime"?

17 A. So I think, Judge, the sensitivity courts have in the
18 APA context is that they don't want to look like the
19 APA is allowing them to review exercises of executive
20 branch discretion where the field is not occupied with 12:44
21 a clear set of rules and procedures, where it looks
22 like the President and/or his subordinates are
23 exercising authority where there's a lot of, if you'll
24 forgive the idiom, wiggle room, where there's a lot of
25 flexibility. The APA is not a great remedy in those 12:44
26 contexts, because it's not clear what the specific crux
27 of the claim is going to be.

28
29 The reason why I both feel more confident about 702 and

1 215 and why the courts *have* been more confident is
2 because Congress has provided far more guidance on what
3 the relevant authorities are, on how they are to be
4 used, on what the procedural and substantive
5 requirements are, and indeed on other avenues of 12:44
6 judicial review. And all of those things, I think,
7 would weigh in favour of a court looking at
8 surveillance under these far more statutorily fleshed
9 out programmes as the kind of reviewable agency action
10 that is the heart of the APA. 12:44

11
12 If you'll forgive a sort of crude analogy -
13 immigration; the President's decision whether to deport
14 or not deport a particular group of individuals is not
15 something the APA is going to be interested in. 12:45
16 whether the immigration authorities have provided the
17 statutorily protected review and the statutorily
18 protected assessments of the individual immigrants *is*
19 something the APA is going to be interested in. And I
20 think in this context, because of how much Congress has 12:45
21 done to demarcate the relevant lines of authority, as
22 the ACLU -v- Clapper case shows, there's much more room
23 for the APA to have a rule.

24 290 Q. So the detailed statutory framework makes a difference?

25 A. It does. Now, that can go too far, Judge - that's 12:45
26 where the preclusion issues comes up; if Congress has
27 done so much, have they actually manifested an intent
28 to crowd out the APA? But we have a very strong
29 judicial presumption in favour of judicial review, and

1 so we require, usually, some clear indicia that
2 Congress met for the APA to not be available, once we
3 have a regime where Congress has acted at all. In the
4 ACLU -v- NSA case where you have the TSP, where there
5 was no statute, it was hard to figure out what Congress 12:46
6 wanted in that situation.

7 291 Q. And I think the presumption of judicial review is
8 identified in Clapper -v- ACLU?

9 A. Indeed.

10 292 Q. Can I move on to the declaration point? I think 12:46
11 Mr. Murray and yourself had a debate about when a
12 declaration would or not be granted. Can I ask you,
13 *can* it be granted even when the violation has ended? Is
14 it possible as a matter of law?

15 A. It *is* possible. I think I said this yesterday and if I 12:46
16 was inartful, I apologise; declaratory relief is
17 usually about ongoing illegality, it *can* cover
18 completed illegality if the plaintiff can show some
19 reason to believe that the conduct is likely to recur.
20 So that's to say it will not frustrate the court's 12:46
21 ability to issue the declaration just because for the
22 moment the complained of conduct has ceased if there's
23 some reason to believe that it might resume in the near
24 future, right? So it's not a categorical backward
25 looking/forward looking, it's more a subjective 12:47
26 assessment of what is likely to happen now.

27 293 Q. Thank you. Just then coming to sovereign immunity. I
28 think you distinguish between, for example, what you
29 described as a rogue officer and where the violation

1 might be in respect of a larger programme. Can I just
2 ask you to look, physically look at the case, although
3 I know we've all seen it many times, of ACLU -v-
4 Clapper, just with a view to identifying who the
5 defendants were in that case? 12:47

6 A. Would you mind directing me to that?

7 294 Q. Sorry, it's tab 15 of your book of US law, or US
8 materials.

9 A. Book one?

10 295 Q. Yes. 12:47

11 A. Thank you.

12 296 Q. And you'll see there that the defendants were James
13 Clapper, in his official capacity as Director of
14 National Intelligence; Michael Rogers, in his official
15 capacity as Director of NSA and Chief of the Central 12:47
16 Security Service; Ashton Carter, in his official
17 capacity as Secretary of Defence; Loretta E. Lynch, in
18 her official capacity as Attorney General; and James
19 Comey, in his official capacity as Director of the FBI.

20 12:48
21 And I think at page 799 we see there that one of the
22 allegations, apart from the constitutional one, was in
23 respect, if you look at the second column under the
24 heading "Procedural History" and you look about
25 two-thirds of the way down, you see there's a reference 12:48
26 there: "*The Complaint asks the court to declare that*
27 *the telephone meta-data programme exceeds the authority*
28 *granted by section 215*", and the constitutional claim
29 as well. I wonder could you comment on those

1 defendants in the context of the sovereign immunity
2 discussion you had earlier please?

3 A. Sure. So I hope this came through, Judge, but just to
4 try to tie it all together, sovereign immunity is *never*
5 an issue, categorically *never* an issue if the claim is 12:48
6 not seeking damages, right? And that's because of the
7 APA - the APA has expressly waived the sovereign
8 immunity of the United States Government in any claim
9 for relief other than damages. What that means in
10 practice is that in a case like this one where the 12:48
11 plaintiffs are seeking declaratory and/or injunctive
12 relief and not damages, Judge, they're free to name any
13 and all relevant government officials in their official
14 capacity without running into sovereign immunity. And
15 if the question is why is there no sovereign immunity, 12:49
16 the answer is Congress waived it in the APA.

17 297 Q. Yes. And in the 1810 context, is there a case deciding
18 the question that you identified this morning, i.e. in
19 relation to a programmatic, if you like, breach
20 where -- 12:49

21 A. I'm not aware of such a case.

22 298 Q. I was going to ask whether or not it's official, a
23 person in their official capacity can be sued or in
24 their personal capacity?

25 A. I mean, the problem is we just haven't had a lot of 12:49
26 1810 cases.

27 299 Q. Yes.

28 A. Right? I mean, Jewel, I think, alleges an 1810
29 violation, if my memory serves, Al-Haramain does, we

1 just, we haven't gotten a full judgment. But on the
2 sovereign immunity point, Judge, I mean, the key is if
3 it's not damages, there's no sovereign immunity
4 problem. If it *is* damages, we look to see is the
5 defendant either the United States itself or a federal 12:49
6 officer in his or her official capacity? And if so,
7 then we look to see whether Congress has waived that
8 sovereign immunity. Al-Haramain says that in 1810
9 Congress has *not*. In 2712, in contrast, Congress *has*.
10 So that's the steps of the analysis. 12:50

11 300 Q. Thank you. Just coming to the PPD point, I think it
12 was put to you that PPD-28 did not cover bulk
13 collection. And could I just ask you to look please at
14 the Litt letter? And you'll find that at, I think it
15 will be book 13, the first book 13, tab 13 as well. 12:50

16 A. Book 13, tab 13?

17 301 Q. I think so. I hope so.

18 **MS. JUSTICE COSTELLO:** Sorry, did you say book one, tab
19 13?

20 **MS. HYLAND:** Oh, sorry, yes, Judge. 12:50

21 A. Okay, thank you.

22 302 Q. **MS. HYLAND:** Book one of 13, yes, Judge. I think those
23 books are headed "Agreed EU-Irish Authorities".
24 (To witness) Prof. Vladeck, do you see that there? And
25 so I'm going to ask you to look then internally at page 12:51
26 91. It's annex six.

27 A. One moment please.

28 303 Q. Yeah. It's quite near the end.

29 **MS. JUSTICE COSTELLO:** Do you mean book one of the EU

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MS. HYLAND: I'm sorry, I should've said that. I'm sorry, Judge, you got book one generally, I mean of the EU-Irish authorities.

A. Ah, yes. Okay, I have it. Sorry. 12:51

304 Q. **MS. HYLAND:** Do you see there Prof. Vladeck there is, under the heading "PPD-28", then the second paragraph, you'll see there's a reference to the application of PPD-28. And it states that it sets out a series of principles and requirements that apply to all US signals intelligence activities and for all people regardless of nationality or location. I wonder could you comment on the applicability, if any, of that to the bulk collection issue? 12:51

A. So I had understood Mr. Litt's letter, and it's part of why my report referred - I mean, I had actually relied on Mr. Litt's letter in drafting my report - that the language of PPD-28 in exempting bulk collection does not mean that there's no consideration given to these minimisation rules, and indeed that Mr. Litt represents in this letter that these concerns are very much applied and taken seriously in the context of minimisation, the language of PPD-28 notwithstanding. 12:51

305 Q. Yes, thank you. Now, can I just turn to yesterday, the topics that were discussed yesterday? And just in relation to **Bivens**, just so there's no misunderstanding, can you just very briefly describe to the court what exactly the **Bivens** doctrine is and where does it apply? 12:52

1 A. Certainly. So the **Bivens** doctrine is a very narrow
2 doctrine. The basic idea, Judge, is Congress has never
3 provided a stand-alone cause of action for a victim of
4 a federal constitutional violation by a federal
5 officer. So if the FBI breaks into my house without a 12:52
6 warrant, there's no statutory cause of action for me to
7 sue the relevant FBI officers for damages. There is if
8 they are state police, right? So this is a weird
9 disconnect in American law.

10
11 The **Bivens** case is a 1971 Supreme Court decision that 12:53
12 basically says that there *will* be circumstances where,
13 even without Congress, the courts themselves should
14 recognise what is, in effect, a common law cause of
15 action for damages, because otherwise it would be 12:53
16 impossible to fully vindicate the underlying
17 constitutional interest. The **Bivens** doctrine is very
18 specific, it is only about damages claims against
19 federal officers for federal constitutional violations.
20 And it has been controversial in the United States as 12:53
21 many of our Supreme Court justices have become more
22 skeptical of common law causes of action, of judge-made
23 remedies. It's still there - I mean the **Hernandez** case
24 we've talked about, one of the questions is: 'Should
25 there be a **Bivens** remedy in this context?' 12:53
26

27 It is subject to two critical exceptions, and that's
28 where almost all of the work is today. The first
29 exception, which Mr. Murray alluded to - actually

1 referred to directly, I don't mean to misstate - is
2 special factors; are there special reasons why courts
3 should stay their hand before recognising a cause of
4 action in this context? And in the Supreme Court we've
5 seen that most often when the plaintiff is in our 12:54
6 military, where the courts have said it's not really
7 the courts' job to resolve internecine disputes within
8 the military, that that's a special factor. The lower
9 courts have gone further, but the Supreme Court has
10 not. Then the other sort of caveat is if Congress has 12:54
11 provided an alternative - the idea being that courts
12 should not jump over a statutory remedy Congress has
13 provided.

14
15 In the fourth -- 12:54

16 306 Q. Prof. Vladeck, I'm so sorry to interrupt you, but I'm
17 just wondering - and I know I asked you - but for this
18 purpose, the EU citizen, is it relevant to the EU
19 citizen?

20 A. So I'm sorry, I didn't mean to belabour the point. I 12:54
21 don't believe it is, as my report suggests, because an
22 EU citizens with no voluntary connection to the United
23 States, as we've discussed, probably doesn't have
24 Fourth Amendment rights. The only point I was trying
25 to make in my report on this front, Judge, is that I 12:55
26 don't see that as a critical difference between an EU
27 citizens and a similarly situated US person because of
28 how hard it's been even for a US person to avail
29 themselves of **Bivens** in this context. That was the --

1 I didn't mean to overexaggerate the importance.

2 307 Q. Yes. But in the context of what we're looking at here,
3 the EU citizen, I think unless Hernandez changes the
4 law about reliance on the Fourth Amendment, I think it
5 has no application, is that right? 12:55

6 A. I agree. The only thing I would say is again, Judge,
7 as a merits defect, not a standing defect.

8 308 Q. Yes. Now, can I just ask you to look at paragraph 78 -
9 you don't have to go back to it - but paragraph 78 of
10 your report? I think there was some criticism of you by 12:55
11 Mr. Murray in respect of the reference to the external
12 oversight by the House's Senate Intelligence and
13 Judiciary Committees yesterday. And can I just ask
14 you, I think when I was examining you, you did indeed
15 make specific reference to the Judiciary Committee and 12:55
16 you said it was important. Can you just very briefly
17 explain why you think that is important?

18 A. Certainly. So, Judge, we mentioned this a bit
19 yesterday, but the Judiciary Committees, by tradition -
20 and they've been around much longer than the 12:56
21 Intelligence Committees - I think it's safe to say are
22 much more aggressive in the exercise of their oversight
23 function, that they tend to be much more rigorous in
24 policing perceived abuses by the government and that
25 they are much more zealous in protecting what they view 12:56
26 as their obligation to the Constitution, in ways that I
27 think have not been true of the Intelligence
28 Committees.
29

1 And so one of the, to me, points that may have gotten
2 lost in my colloquy with Mr. Murray is that my
3 critiques of the Intelligence Committees are *not* also
4 of the Judiciary committees. I actually think that
5 most of the useful things Congress has done in this 12:56
6 field have been spearheaded by the Judiciary Committees
7 - indeed one of the proposals has been to increase
8 beyond where it even is now the role of the Judiciary
9 Committees in oversight of the Intelligence Community.

10 309 Q. Yes, thank you. So this article that was identified to 12:57
11 you yesterday (**INDICATING**), that, I think, is it fair
12 to say it's *not* about the Judiciary Committee?

13 A. At all.

14 310 Q. I see. Can I just then go on please to the state
15 secrets doctrine? 12:57

16 A. Mm hmm.

17 311 Q. And I think you have identified that if an individual
18 is making a claim under Section 702, there would be a
19 good argument the government would *not* be able to
20 invoke the state secrets privilege - I think you say it 12:57
21 in the last paragraphs of your report. Just for the
22 sake of clarity, can you just identify why you say that
23 there would be that argument?

24 A. So the argument - and we've actually seen this to some
25 degree already in the Jewel case, Judge - is that it 12:57
26 would have been -- let me just back up one step, I'm
27 sorry. The state secrets privilege is generally viewed
28 as a common law evidentiary privilege, much like
29 spousal privilege or priest/penitent or what have you,

1 the idea being that as a common law privilege, it is
2 subject to statutory modification and indeed perhaps
3 abrogation. Just to be clear, Judge, there are some
4 who argue it's actually constitutionally grounded and
5 so would *not* be subject to such statutory override. 12:58
6 That's the minority view. It's quite, I think, the
7 prevailing view that it's a common law privilege.

8
9 Then the argument is that when Congress creates express
10 remedies for violations of a statute like FISA, where 12:58
11 the entire subject matter is going to be inextricably
12 bound up with national security secrets, one cannot
13 reconcile leaving the state secrets privilege intact
14 with Congress' intent that these remedies go forward,
15 right? And so the argument that has been made - and at 12:58
16 least so far accepted by the District Court in Jewel -
17 is that Congress' decision to provide at least some
18 remedies for violations of FISA should be taken as
19 overriding the state secrets privilege as applied to
20 those contexts. 12:58

21 312 Q. Yes, thank you. Now, just one short sentence;
22 Mr. Murray said yesterday he was hypothesising a
23 situation and he said "If I get discovery and I do not
24 discover that I'm under surveillance, I will not
25 survive a motion for summary judgment." Can I ask you 12:59
26 just to comment on, I suppose, whether that's a
27 reasonable position for a court to take or what's your
28 view of that?

29 A. Yes, I mean, I think at that point, Judge, there's no

1 merit, right? That is to say, if we've gone through
2 discovery and if I actually cannot adduce any evidence
3 substantiating my claim that my rights have been
4 violated, I would very much hope that the court would
5 dismiss the case at that point, because there's no leg 12:59
6 to stand on. And so the key that I was trying to
7 communicate, Judge, is that's not a standing problem,
8 that is a merits problem, that is that the plaintiff
9 has utterly failed to make his or her case.

10 313 Q. Yes. 12:59

11 A. which I imagine in all circumstances we should want a
12 court to say 'Thank you and have a nice day'.
13 **MS. HYLAND:** Yes. Judge, I'm conscious it's just
14 coming up to one o'clock. I'm not going to be more
15 than ten minutes, but I don't know whether the court -- 12:59

16 **MS. JUSTICE COSTELLO:** No, no, fine.
17 **MS. HYLAND:** Very good.

18 A. Thank you, Judge. I appreciate it.
19 **MS. JUSTICE COSTELLO:** There's a flight to be caught.

20 314 Q. **MS. HYLAND:** Thank you, Judge, I appreciate that. 12:59
21 (To witness) So there was a reference, I think, to
22 footnote 26 of your report yesterday, the Neiman Marcus
23 case - and this was a case in respect of fraudulent
24 transactions on credit cards following a hacking - and
25 Mr. Murray said that you omitted one detail, which is 13:00
26 that the plaintiffs had transactions placed on their
27 credit cards - in other words, because of the
28 fraudulent activity - and he said that's not an
29 insignificant detail perhaps. And he went on to say it

1 would've been surprising if your credit card bill
2 increased as a result of a data breach and you *didn't*
3 have standing to complain. But in fact, when one looks
4 at the case, it's quite clear that the plaintiffs had
5 been reimbursed before they brought the proceedings -- 13:00

6 A. Ah.

7 315 Q. At page 692 they say: "*The plaintiffs concede they were*
8 *later reimbursed and they allege standing based on two*
9 *imminent injuries.*" Because if you remember, your
10 footnote was about Clapper and immanence. And the two 13:00
11 imminent injuries were the increased risk of breach of
12 fraudulent charges and the greater susceptibility to
13 identity theft. And ultimately the court upheld their
14 standing claim in respect of imminent injuries because
15 the District Court had interpreted Clapper to say that 13:01
16 no future injuries could be relied upon. And in that
17 context, I wonder could you comment on the passage that
18 you chose to put in the footnote for which you were
19 criticised?

20 A. So I mean, the passage, I think, Judge, is just there 13:01
21 to say, right, that there's still the possibility that
22 future harm of itself will suffice to satisfy the
23 actual or imminent harm requirement of the
24 injury-in-fact requirement. I didn't mean to take a
25 broader position on the case and I think that came 13:01
26 through in my colloquy with Mr. Murray. But just
27 insofar as that, to me, clarifies again what was my
28 animating purpose all along, which was just to give
29 context to the DPC draft report, right, that the DPC

1 draft decision, I think, takes too glum a view of
2 future harm as a possible basis for establishing an
3 injury-in-fact.
4

5 I take the Seventh Circuit decision, as I take many 13:01
6 other post-Clapper decisions, as actually being quite
7 clear: No, future harm is still very much a possible
8 trigger, it just requires the kind of allegations that
9 we've seen in these cases.

10 316 Q. Yes. And then I think Mr. Murray posited again a 13:02
11 hypothetical question to you about remedies and he said
12 "where the breach has occurred and it has stopped in a
13 retention context, what would the remedy be?" And I
14 suppose I'll ask you to consider whether -- what *is* the
15 wrongdoing, if any? In other words, there's an 13:02
16 allegation of unlawful retention, the breach has
17 stopped, by which I take it to mean there is no longer
18 unlawful retention; *is* there a wrongdoing there, in
19 your view, and if so, is there a necessity for a
20 remedy? 13:02

21 A. So if the retention has ceased, right, if there
22 literally is no data in the government's continuing
23 possession at that point, it's not clear to me what a
24 prospective remedy *could* accomplish in that context.
25 what I tried to suggest, again perhaps inelegantly, 13:02
26 yesterday was that we've seen claims in this context
27 for prospective relief for discharge of *any* records the
28 government might still have of the wrongfully obtained
29 data in the first place.

1 317 Q. **MS. JUSTICE COSTELLO:** In "discharged", you mean
2 erasure, or...

3 A. Erasure, any other -- erasure or destruction, however
4 it works. I'll leave it to the technical experts to
5 sort that out. So just to be clear, I had taken 13:03
6 Mr. Murray's question to be if we are past that, if
7 there is literally nothing more in the government's
8 possession, can there be a forward looking remedy? At
9 that point, no, because I don't think there's anything
10 in the future at that point to remedy. 13:03

11 318 Q. **MS. HYLAND:** Yes. Can I just ask you, finally, to look
12 at your two articles please, the 2014 article and the
13 2016 article?

14 A. Mm hmm.

15 319 Q. I think the 2012 article -- well, I should just ask you 13:03
16 to confirm, I think the 2012 article, insofar as it was
17 identified as relevant by Mr. Murray, it was in respect
18 of the **Bivens** doctrine, isn't that right?

19 A. Mm hmm. I will say this is the most, I think, anyone
20 has ever read my scholarship. 13:03

21 320 Q. So the 2014 article, can I just ask you to comment on a
22 number of points in there? And I think just a small
23 point, but in respect of the quote about the death
24 knell for standing, can I just ask you to turn to page
25 566 please? 13:04

26 A. Yeah.

27 321 Q. Because in fact I think what you said was, you said --
28 so I'm looking at page 566, under the heading "After
29 Clapper (and Snowden)". You say:

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"The Supreme Court's decision in Clapper may well have sounded the death knell for suits challenging secret surveillance (if not all secret governmental programmes), but for the disclosures by former NSA employee Edward Snowden."

13:04

I think you may not have mentioned that that was the actual quote.

A. I'm sorry, I didn't mean to leave that part out.

13:04

322 Q. Yes. And then can I just --

A. Although I think -- I mean, Judge, I hope the gist came through anyway, that it was the disclosures and the subsequent declassifications that I think changed the landscape.

13:04

323 Q. Yes. Then can I then ask you to turn over the page to page 567 and can I just ask you to go down to the bottom of the page and starting with the words:

"At the same time, one of the more underappreciated features of FISA is the cause of action it already provides for an 'aggrieved person' 'other than a foreign power or an agent of a foreign power [as Defined by FISA], who has been subjected to an electronic surveillance.' FISA proceeds to define 'electronic surveillance' somewhat convolutedly, but it nevertheless manifests Congress's intent, from the inception of FISA, to allow those whose communications are unlawfully obtained under FISA to bring private

1 *suits to challenge such surveillance. Simply put,*
2 *Congress has already created a private cause of action*
3 *for FISA suits; it has just never clarified how*
4 *putative plaintiffs can demonstrate that they are, in*
5 *fact, 'aggrieved persons'."*

6
7 And how I read that, Prof. Vladeck, is that what you're
8 identifying there is that --

9 **MR. MURRAY:** well, this sound like a leading question
10 on the way, Judge. 13:05

11 **MS. HYLAND:** well, very good, I will try --

12 **MR. MURRAY:** I mean, Prof. Vladeck can say what he
13 meant.

14 324 Q. **MS. HYLAND:** Yes. Well, very good. Perhaps,
15 Prof. Vladeck, you would then say in summary what are 13:05
16 you distinguishing between there as, if you like, the
17 problem?

18 A. Sure. I mean, I guess all I was trying to suggest in
19 that context was that Congress had already taken a step
20 toward opening the door to the kinds of suits that 13:05
21 **Clapper**, that the Supreme Court **Clapper** seemed to be
22 disfavouring. And so what I was trying to suggest was
23 that this is a very relevant part of understanding the
24 remedial scheme, because it makes it, if you'll forgive
25 me, a less of a heavy lift for Congress to then perhaps 13:06
26 make it even easier for plaintiffs to establish
27 standing in this context going forward, given that
28 they've already created an express cause of action.

29 325 Q. Yes. Then can I ask you to turn to page 570? And

1 there's a footnote there, just going back to the point
2 about the state secrets privilege. You'll see there
3 footnote 88, you refer to a case in respect of, I
4 suppose, the thesis that you've been advancing as to
5 whether state secrets privilege applies in a cause of 13:06
6 action provided by FISA. Can you just comment on that
7 case please?

8 A. Sure. I mean, I cite there, Judge, I think a case
9 that's related to the Jewel litigation in that footnote
10 where we've had multiple district courts all in San 13:06
11 Francisco in the Northern District of California accept
12 the argument that I was just referring to that in the
13 context of claims under FISA itself there's an argument
14 that the state secrets privilege has indeed been
15 abrogated and that the government is not entitled to 13:06
16 invoke it as a basis for getting rid of these claims.

17 326 Q. Yes. And can I just ask you then about, if you like,
18 the notification issue and can I ask you to turn to
19 page 578? I'm interested in just for you to respond to
20 the importance or not of the notification issue in the 13:07
21 context of national surveillance. If you see the last
22 paragraph on 578: "*But if nothing else is clear*"; do
23 you see that?

24 A. Yeah.

25 327 Q. And you go on to say: 13:07

26
27 "*It should hopefully be obvious that a truly*
28 *comprehensive scheme for adversarial judicial review of*
29 *secret surveillance programs may in fact be*

1 *unobtainable, at least without sacrificing the very*
2 *secrecy that arguably enables the success of such*
3 *governmental foreign intelligence activities. That is*
4 *to say, absent some meaningful shift in the Supreme*
5 *Court's understanding of the... Article III*
6 *case-or-controversy requirement imposes upon the*
7 *adjudicatory power of the federal courts, or far*
8 *greater (if not mandatory) participation in the FISA*
9 *process by those entities that receive production*
10 *orders and intelligence directives under the statute,*
11 *it may not in fact be constitutionally possible to*
12 *provide in all or even most cases for meaningful*
13 *adversarial review."*

14
15 Can I just ask you to comment on your passage, having 13:07
16 regard to this issue you've identified of notification
17 in this sphere?

- 18 A. So I mean, I think notification - and I hope this has
19 come through - is an obstacle that manifests itself in
20 a very particular place, right? And this, I think, ties 13:08
21 together with Prof. Swire's discussion of the hostile
22 actor problem. We don't want to notify the actual
23 proper targets of foreign intelligence surveillance
24 that they have been in fact been subjected to foreign
25 intelligence surveillance. Indeed, Judge, remember 13:08
26 yesterday I referred to the grand bargain, right? Part
27 of the concern the government had was preserving its
28 ability to not compromise its intelligence sources and
29 methods by subjecting these activities to review.

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That's why I think complete fully-throated adversarial review is not actually going to be possible in this space, because we're never actually going to want to give the target a lawyer and an opportunity to go before the judge and say 'No, you shouldn't be able to spy on me.' And so the question is: what's the second best solution? And my hope is that the remedies we've discussed - and if I ever got my wish, some of the proposals I've advanced - get us as close as we can.

13:08
13:09

Mr. Murray made a big deal out of my use of the word "adequate". And he's right - I mean, I don't think that from my perspective the remedies are as adequate as they could be. I think what I was trying to say in this article is that I don't think they could *ever* be completely adequate in the colloquial sense of the word if we actually take seriously the government's legitimate interest in conducting foreign intelligence surveillance.

13:09
13:09

MR. MURRAY: And the final part of that passage might be opened as well, Judge, on page 579, just so the whole piece is before the court.

MS. HYLAND: Yes. I had actually moved on to another article, but I am very happy for the court to read that.

13:09

A. I'll read it. I mean, I can just read it out.

328 Q. **MS. HYLAND:** Yes, very good. So can I just then ask you please to move on to your 2016 article?

1 A. Yeah.

2 329 Q. And just to identify, I think at one point in this
3 article you state that disputes over counterterrorism
4 policy ought to be left to resolution by the political
5 branches. I think that's 1038. And can I just ask you 13:10
6 what you mean by "counterterrorism policy" in this
7 context and also how it sits with what you told the
8 court yesterday about your view of the importance of
9 the judiciary in this sphere?

10 A. I'm sorry, can you just point me to the specific 13:10
11 passage?

12 330 Q. Sorry, it's at page 1038.

13 A. Yeah. Which paragraph?

14 331 Q. It's the second paragraph and it's about the fourth
15 line down. So you see the words "*More fundamentally*"? 13:10
16 Do you see that?

17 A. Yes. So I mean, what I was just saying there was it's
18 my view, Judge, of one of the sort of downsides of the
19 absence of merits-based adjudication, especially
20 outside of the surveillance sphere - so I talk about 13:10
21 detainee treatment, extraordinary rendition, target
22 killing as the three, I think, most prominent examples
23 - is that it leaves the perception that the courts have
24 nothing to say on these matters. That *hasn't* been true
25 in the surveillance context, right? I mean, we know 13:11
26 enough to know that we have meaningful, fully, you
27 know, adversarial legal decisions about the legality of
28 most of the most important US surveillance programmes
29 that have been carried out since September 11th.

1 That's always why I thought there was a meaningful
2 distinction to be drawn between the surveillance
3 context and these other contexts.

4 332 Q. Yes. And I think on page 1037 in fact there's two
5 other government actions, interrogation and 13:11
6 watchlisting, as well which you list, isn't that right?

7 A. Indeed. I'm sorry, I treat interrogation as being
8 under the umbrella of treatment.

9 333 Q. Thank you, yes. Then I wonder can I just ask you to
10 look at footnote 28? 13:11

11 A. In the same article?

12 334 Q. In the same article, exactly, yeah.

13 A. Page 1044?

14 335 Q. Exactly. Page 1044, exactly. And the sentence there,
15 that it's referable to -- you talk about, you're 13:11
16 talking about a different case, the National Defence
17 Authorisation Act and then you go on to say there was a
18 far more compelling argument the plaintiffs in that
19 case had been directly affected, and you refer to
20 Klayman -v- Obama. 13:12

21 A. Mm hmm.

22 336 Q. And in fact, I think after that article was written,
23 there was a third Obama, isn't that right? And I wonder
24 could you briefly just address that?

25 A. We've talked a little bit, Judge, about this case. It 13:12
26 started in the District Court, where the District Court
27 had -- this was the same case where the District Court
28 said the APA claim was precluded, but then went to
29 reach the merits of the Fourth Amendment challenge to

1 the phone records programme, held that it was
2 unconstitutional. On appeal to the DC Circuit, the
3 Court of Appeals held that the plaintiffs couldn't
4 demonstrate standing, at least at that very preliminary
5 threshold, because of the nature of the claim at that 13:12
6 point. And my report talks a bit about why I think
7 that's not a convincing holding and why no one's
8 followed it; it was a fractured opinion, there was no
9 majority opinion.

10
11 But what's interesting is, even with the Court of
12 Appeals expressing scepticism about standing, when that
13 case went back to the District Court, the District
14 Court once again said 'No, there is standing'. And so
15 the sort of the final word, because the programme soon 13:13
16 ended and so the cases were dismissed, but the final
17 word of the courts was that that case could've gone
18 forward because those plaintiffs *had* satisfied all of
19 the elements of standing doctrine.

20 337 Q. Yes. And I think in fact an injunction was granted in 13:13
21 that case and it required the government -- sorry,
22 there was an injunction restraining the government from
23 collecting data *and* there was a requirement for the
24 government to aggregate -- I beg your pardon, to
25 segregate any meta-data. That's at the very last page 13:13
26 of Klayman -v- Obama. Are you familiar with those --

27 A. I am.

28 338 Q. Can I just finish please, Prof. Vladeck, just by making
29 reference to what was put to you yesterday? There was a

1 reference to a tweet that you - I'm not sure what the
2 verb is - "did" - that probably isn't right.

3 A. "Sent" maybe.

4 339 Q. "Sent", yes. In December. And I think in the text of
5 that tweet you also said that the PCLOB provided an 13:14
6 important oversight, isn't that right? Do you remember
7 that?

8 A. I do.

9 **MS. HYLAND:** Yes, very good. Thank you Prof. Vladeck.

10 A. Thank you. Thank you, Judge.

11

12 **PROF. VLADECK WAS FURTHER CROSS-EXAMINED BY MR. MURRAY**
13 **AS FOLLOWS:**

14

15 340 Q. **MR. MURRAY:** Sorry, Judge, just one question arising 13:14
16 from that. I'm trying to get a copy of it, but am I
17 not correct in saying, Professor, that in the third
18 Klayman -v- Obama case it was held that only *one* of the
19 categories of plaintiffs had standing?

20 A. That's correct. 13:14

21 341 Q. That one of the categories of plaintiffs fell precisely
22 within the Clapper formulation because of the fact that
23 they could do no more than say that they were Verizon
24 customers, but they could not establish that there was
25 surveillance occurring over Verizon customers at the 13:14
26 time they *were* customers, whereas if the second
27 category, the Little plaintiffs I think they were - not
28 in terms of a description of their size, but instead
29 their names - the plaintiffs who were called Little

1 were entitled, *did* have standing because they could
2 establish that they were customers in a three month
3 period within which there was in fact surveillance?
4 A. That's right.
5 342 Q. Isn't that a correct distinction? 13:15
6 A. Because the order we were aware of, Judge, the order
7 that became public was a three month authorisation.
8 And so the issue was could you show that that you were
9 a Verizon customers during those three months?
10 **MS. JUSTICE COSTELLO:** That period, yes. 13:15
11 343 Q. **MR. MURRAY:** Yes. But the other plaintiffs could not
12 surmount the Clapper hurdle, isn't that right?
13 A. At least in the very preliminary posture of that case,
14 Judge. But what I should stress is, as I've said in my
15 report, that case had such a strange posture that I 13:15
16 wouldn't put too much weight onto any one piece of it.
17 344 Q. I think you've criticised every one of the decisions in
18 it in fact.
19 A. I did.
20 **MR. MURRAY:** Yeah. Thank you. 13:15
21 **MS. HYLAND:** well, just on that point, Judge, there's a
22 number of important, I think --
23 **MS. JUSTICE COSTELLO:** There's a plane to be caught.
24 But okay.
25
26 **PROF. VLADECK WAS FURTHER RE-EXAMINED BY MS. HYLAND AS**
27 **FOLLOWS:**
28
29 345 Q. **MS. HYLAND:** Just to finish off on that though, because

1 I think there is some importance just on that very
2 point Mr. Murray was identifying. I wonder could you
3 look at page 186, if you have the decision? I'm sorry,
4 it's tab 33 in the book of US law. Because in fact I
5 think it's important the basis upon which those
6 plaintiffs were given standing. And I'm sorry to ask
7 you to go and look at one last case, Prof. Vladeck.

13:16

8 A. Tab 33?

9 346 Q. Yes, it's tab 33 of your US law books. Because I think
10 it's quite clear there the plaintiffs who were given
11 standing had not *actually*, I think, established that
12 their record were collected, isn't that right? Because
13 I'll ask you just to look at the passage. Page 106,
14 second column -- 186, second column. You'll see there
15 just down the bottom of that column the word "*Because*":
16 "*Because the government has acknowledged that the VBNS*
17 *subscribers*" --

13:16

13:16

18 A. That's Verizon business. Sorry, just...

19 347 Q. I'm sorry, say that again, Prof. Vladeck?

20 A. VBNS is Verizon business. I was just --

13:16

21 348 Q. Very good, yes.

22
23 *"... VBNS subscribers' call records were collected*
24 *during a three month window in which the Little*
25 *plaintiffs were themselves VBNS subscribers, barring*
26 *some unimaginable circumstances, it is overwhelmingly*
27 *likely that their telephone metadata was indeed*
28 *warehoused by the NSA. The Little plaintiffs, then,*
29 *have pled facts wholly unlike those in Clapper. There*

1 *is no need to speculate that their metadata was*
2 *targeted for collection, that the challenged Program*
3 *was used to effectuate the metadata collection, that*
4 *the FISC approved these actions, or that VBNS*
5 *subscriber call records were indeed collected. simply*
6 *stated, Clapper's 'speculative chain of possibilities'*
7 *is, in this context, a reality."*

8
9 And I think it's fair to say there that the court was
10 willing to make an assumption given -- is that correct? 13:17

11 A. I think that's right.

12 **MS. HYLAND:** Yes. Thank you very much.

13 A. Thank you for your patience, Judge.

14 **MS. JUSTICE COSTELLO:** Thank you very much. And bon
15 voyage. 13:17

16 A. Thank you.

17 **MS. HYLAND:** Judge, I appreciate the court sitting
18 late.

19 **MS. JUSTICE COSTELLO:** I think we might take it up at
20 quarter past two. 13:17

21 **MR. GALLAGHER:** Thank you, Judge.

22
23 **(LUNCHEON ADJOURNMENT)**

24
25 13:17
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29

1 THE HEARING RESUMED AFTER THE LUNCHEON ADJOURNMENT AS
2 FOLLOWS

3
4 **MS. JUSTICE COSTELLO:** Good afternoon.

5 **REGISTRAR:** Data Protection Commissioner -v- Facebook 14:16
6 Ireland Ltd. and another.

7 **MR. O'DWYER:** Thank you, Judge.
8

9 **SUBMISSION BY MR. MURRAY:**

10 14:17
11 **MR. MURRAY:** Judge, just before Mr. O'Dwyer addresses
12 you I have just been explaining to Mr. Gallagher that
13 I wanted very quickly to update you, Judge, on an issue
14 which you will recall from last week where we furnished
15 you with correspondence we had sent to Mason Hayes 14:17
16 regarding Prof. Swire's evidence.

17
18 Just to again to remind you, Judge, that Prof. Swire
19 disclosed on Thursday that changes had been suggested
20 to his report. They had been suggested to Gibson Dunn, 14:17
21 the US attorneys, who had passed them on to him and he
22 has accepted some of them and not others. You will
23 recall that it began off as a number, a small number,
24 and the following day 20 to 40 and the following
25 afternoon it was 70 changes. we wrote looking for 14:17
26 those changes and we got a response, in fairness, from
27 Mason Hayes Curran in the form of a table, which we
28 will hand up to you, with the suggestions and those
29 which have been accepted and those which have not.

1 Insofar as anything turns on that, I'll return to that
2 when we make our submissions.

3
4 We were a little troubled by this for the reasons that
5 I adverted to in the course of my cross-examination of 14:18
6 Prof. Swire. Because we think that, first of all, this
7 should have been disclosed to the court, and, secondly,
8 we're, I suppose, puzzled by the role of the US
9 government which has presented itself as an amicus to
10 the court but it appears now, without disclosure to 14:18
11 anybody, was receiving Facebook's expert evidence in
12 draft form and was making suggestions in relation to
13 it.

14
15 So for that reason we wrote to Mason Hayes Curran 14:18
16 asking them whether by chance any other experts had
17 undergone a similar process. And they responded to us
18 on Monday night, and the letter I hope has been handed
19 up to you, and in the course of that letter they
20 explain that in fact for all but one of their experts 14:18
21 the reports were sent to the US government in draft
22 form, and that in the case of all but one of the
23 experts whose reports were sent to the US government
24 suggestions were passed on via Gibson Dunn to the
25 experts, although, as you will have gathered from 14:19
26 Prof. Vladeck's evidence, the experts did not know
27 where the comments had come from. They were presented
28 as comments of Gibson Dunn, but they were in fact in
29 part informed by comments from the US government. So

1 that's what we have been told occurred.

2
3 we believe that it is appropriate that the court have
4 full disclosure in relation to these matters and we
5 think it should have been disclosed at the outset. 14:19
6 These people are being presented to you, Judge, as
7 independent experts. I'm not for a moment reflecting
8 on anybody's integrity or otherwise when I say this,
9 but it's a matter that one in my respectful submission
10 the court is entitled to know that in fact suggestions 14:19
11 have been made in relation to their reports by a third
12 party with an interest in the case.

13
14 So what we propose to do is to write to, and I have
15 just explained this to Mr. Gallagher but only as you 14:20
16 will have seen us coming in a very brief few
17 moments ago, we propose to write to Mason Hayes Curran
18 and ask them will the person in Gibson Dunn who was
19 involved in this process swear an affidavit confirming
20 what the comments received from the US government were 14:20
21 and what were passed on. In the event that that's
22 acceded to the court will have all of the information;
23 if it isn't then well have to consider what
24 application, if any, we bring. We believe it's a
25 matter that the court should have been told in the 14:20
26 first instance, it wasn't and we believe the
27 information should be put before the court.

28
29 So that's the position. You have the correspondence,

1 Judge, and we will mention the matter again following
2 the...

3 **MS. JUSTICE COSTELLO:** I have two questions for you:
4 One, what impact, if any, do you say this may have in
5 relation to the evidence adduced by Facebook; and, two, 14:20
6 what impact, if any, this has on the role of the United
7 States as an amicus?

8 **MR. MURRAY:** well, it's very difficult to answer the
9 first of those without knowing exactly what the
10 information was. We know it in relation to 14:21
11 Prof. Swire. It certainly discloses that there were a
12 large number of inaccuracies in the first version of
13 his report which was sent to the US government,
14 something that we did not obviously know, and wouldn't
15 in normal course be entitled to know. Of course in 14:21
16 fairness draft reports are privileged and I'm conscious
17 of that and indeed comments of counsel and solicitor
18 are privileged and we're conscious of that as well, but
19 this is a somewhat unusual situation where a third
20 party has become involved. 14:21

21
22 Insofar as the US government is concerned we are not,
23 and I emphasise this, we will not be asking you to
24 exclude anybody from the proceedings or to take any
25 step of that kind. I will not be asking you to exclude 14:21
26 anybody's evidence from the proceedings, nor will I be
27 taking any step of that kind. But I will be asking
28 you, depending on what the responses are, to have
29 regard to them as you consider the weight of the

1 evidence which is put before you. And can I just
2 remind you of this, Judge.

3
4 Mr. Gallagher elicited from Prof. Swire that these
5 changes had been made and he did that because he 14:22
6 believed it was something that the court should have
7 been told. There was no other reason for eliciting it.
8 We think he was right about that, but a large number of
9 Facebook's witness have never been the subject of
10 notice to cross-examine and it's only because we wrote 14:22
11 last week that we found out that this had occurred.
12 I don't want to overstate it. That's why I emphasise
13 we not seeking to strike anybody out, all we want to
14 know is exactly what occurred in relation to the basis.
15 Thank you, Judge. 14:22

16
17 **SUBMISSION BY MR. GALLAGHER:**

18
19 **MR. GALLAGHER:** Could I respond, Judge. I have to say
20 we're taken aback by the position of the DPC in respect 14:22
21 of this matter. We have written a letter, Judge, and
22 I would like you to refer to it, if you would be kind
23 enough, setting out the position.

24
25 Firstly, we made it quite clear that these 14:22
26 communications are privileged, and that's a matter that
27 we can elaborate on if necessary. Mr. Murray states
28 and accepts that communications to an expert on the
29 basis of draft reports from counsel and solicitors and

1 observations are privileged and entirely proper.
2 In the particular case there were two reports that were
3 part of the process of declassification. Prof. Swire's
4 was part of the process of declassification and for
5 completeness, not because in truth there was an 14:23
6 obligation, but because the footnote did say that it
7 had been sent for classification, we thought it
8 appropriate to tell the court that comments had been
9 made that were outside the declassification process,
10 lest there be any misunderstanding. It was done out of 14:23
11 an abundance of caution.

12
13 Mr. DeLong's report in paragraphs 9 and 14 sets out
14 precisely what the position was and that he took on
15 board comments by other parties, but all of the report 14:23
16 was his own.

17
18 You have heard Prof. Swire who confirmed that and was
19 punctilious about it to the extent that, on his own
20 initiative, he corrected the number of corrections. 14:24
21

22 With regard to the other reports, they were sent to the
23 US government that had an interest in this matter. We
24 say it's covered (a) by litigation privilege and (b) by
25 common interest privilege. They wish to know whether 14:24
26 they needed to adduce evidence in this case. Of course
27 any adduction of evidence was going to be subject to
28 the court's ruling as to whether it was admissible.
29

1 Comments were made, not to the witnesses, the other
2 witnesses, they were made to Gibson Dunn and Gibson
3 Dunn took comments from various people, including
4 counsel in the case, and passed on comments to the
5 experts that were not identified as comments by the US 14:24
6 government for the very reason set out in the letter.
7 It was desired so the witness wouldn't feel under any
8 pressure in relation to that. They never had any
9 dealings with the US government so they were passed on
10 as comments on the report in the normal way. 14:25

11

12 You heard professor --

13 **MS. JUSTICE COSTELLO:** Well I'm not quite sure if the
14 normal way applies in this case, Mr. Gallagher. Surely
15 it's unusual where solicitors who are acting for a 14:25
16 party --

17 **MR. GALLAGHER:** Yes.

18 **MS. JUSTICE COSTELLO:** -- in proceedings, and as far as
19 I know it's Facebook Ireland who is the party in the
20 proceedings here, not Facebook Inc. 14:25

21 **MR. GALLAGHER:** Yes.

22 **MS. JUSTICE COSTELLO:** So let's assume that the
23 attorneys of Facebook Inc. are acting as Facebook
24 Ireland's attorneys.

25 **MR. GALLAGHER:** Yes. 14:25

26 **MS. JUSTICE COSTELLO:** But they are passing on material
27 in a case to the third party.

28 **MR. GALLAGHER:** Yes, but that's done, Judge -- oh,
29 sorry.

1 **MS. JUSTICE COSTELLO:** Now, I am sure they are entitled
2 to do that if they wish.

3 **MR. GALLAGHER:** Yes, absolutely.

4 **MS. JUSTICE COSTELLO:** But it's hardly in the normal
5 way. 14:25

6 **MR. GALLAGHER:** No, it's not in the normal way but this
7 isn't a case in the normal way. Firstly, the DPC was,
8 from the very beginning, saying this wasn't an
9 adversarial proceedings, they were putting the position
10 up. Secondly, these were matters of great significance 14:25
11 both obviously to Facebook and to the US government and
12 in particular that they would have an opportunity of
13 considering whether they needed to call any evidence.
14 That's the classic case of common interest privilege
15 where both parties have an interest in the outcome. 14:26
16 Reports are frequently shared in litigation between
17 parties with a common interest in order to ascertain
18 whether they have any comments.

19
20 In the case of Prof. Swire he was gone through the 14:26
21 declassification process and comments were made but, as
22 it turned out, and as he explained, that they weren't
23 part of declassification, so to avoid any
24 misunderstanding having regard to his report he
25 clarified that. 14:26

26
27 In the case of Prof. Vladeck, he received comments, as
28 the letter says, from Gibson Dunn. They were just
29 comments generally in his report seeking clarification,

1 as he said, and expanding matters. So there was
2 nothing unusual about that. He wasn't aware about it
3 and neither he nor the other witnesses were told for
4 the reasons stated in the letter that it was to come as
5 asking him whether matters required clarification 14:26
6 rather than any impression that the US government was
7 suggesting particular changes. It was felt that that
8 was the more appropriate way to do it so that he
9 wouldn't be affected in any way by the source of these
10 suggestions and that is set out in the letter. 14:27

11
12 In respect of the three other witnesses, Ms. - Herr
13 Ratzel's [sic] report was sent and there were no
14 comments made; in the case of Mr. Robertson, his report
15 was sent, a comment was made but it was not passed on, 14:27
16 it wasn't deemed necessary to get the clarification
17 required; and in the case of Prof. Clarke, sorry
18 Prof. Clarke's report wasn't sent to the US government
19 as has been made clear.

20 14:27
21 So all that has happened, Judge, is that comments were
22 passed on to the witnesses in respect of their reports,
23 which is permissible to do. In the case of the two
24 witnesses that had an interaction with the US
25 government, it was clear that these were comments by 14:27
26 the US government and there was no issue in respect of
27 that. In respect of the others, they weren't so
28 informed but it was just passed on as general comments
29 that were sent to the witnesses in the normal way.

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Now, two things arise, Judge. Firstly, comments from counsel, and these were vetted by counsel and decided whether it was appropriate to pass on, are privileged as Mr. Murray acknowledges. That is a fundamental part of litigation privilege and there is no entitlement to enquire into or examine those in any way. 14:28

Then the only other issue is the issue that you raised with me: Is that privilege affected by the fact that somebody else commented on the report? The law is clear on that, it's not affected. But, separately, there is common interest privilege and it is common in litigation where a party has a common interest with another party, another person, that doesn't actually have to be a party to the proceedings, that they obtain comments or views of that person if they might have anything relevant to contribute. That does not destroy the privilege in the draft report, and of course those comments can be passed on; in the same way very often that counsel or solicitor will seek comments from some other person who might have something relevant to say in relation to the substance of the report, whether to correct something or to add other information that might be relevant. 14:28 14:29

That's what was done, we can of course swear to it. What we have done, Judge, is we have said we are not waiving privilege because we think this is an

1 inappropriate inquiry, but, in the case of Prof. Swire,
2 he did say that on Thursday night his team had put
3 together a document identifying for him what changes
4 were made and he did refer to that. Entirely without
5 prejudice to our privilege we made that available to 14:29
6 the other side, and we would be inviting you to look at
7 it to see the sort of comment that was made.

8
9 So, for example, to give one example, Prof. Swire said
10 something about the scope of the Judicial Redress Act 14:30
11 and the comment was 'actually the point you make is too
12 broad, it has a narrower scope'; in other words, it was
13 making sure that the position wasn't put in a more
14 robust fashion than was actually justified.

15 14:30
16 So those are the sort of comments, they are all set out
17 there for you to see to show that there was absolutely
18 nothing inappropriate involved in that at all. But the
19 United States government has not made any secret of the
20 importance of this case and of its concern in relation 14:30
21 to the matters in this case.

22
23 This involves an attack on the adequacy of the US legal
24 system and it would be surprising if the evidence put
25 forward with regard to the US legal system in response 14:30
26 to the DPC, that they wouldn't have some opportunity of
27 seeing that and making a decision as to whether or not
28 they required evidence to address the matter.
29

1 That is particularly so, Judge, given the Commission
2 finding of adequacy in the context of the Privacy
3 Shield and any upsetting of that finding, any casting
4 doubt on that finding as we submitted could have very
5 serious consequences indeed. So that is the position 14:31
6 and we reject absolutely and vehemently any suggestion
7 that there was anything untoward or that there was a
8 requirement to disclose.

9
10 A witness does not in the normal way disclose the 14:31
11 comments that are made on his or her report by anybody,
12 that's part of the privilege. As I say Prof. Vladeck
13 wasn't even aware of the source of some of those
14 comments and it was put to him today rather
15 surprisingly that he somehow might have changed his 14:31
16 report in some way which he, as you saw, absolutely and
17 utterly rejected and of course it's a matter for you to
18 assess all of these witnesses, but he made it quite
19 clear that that was so.

20 14:32
21 But in the case, as I say, of Prof. DeLong it was made
22 absolutely clear, in the case of Prof. Swire, to avoid
23 any possibility of any misapprehension on the part of
24 the court in the light of the terms of his footnote,
25 that was made clear to the court and it was made clear 14:32
26 at the outset of the evidence.

27
28 But as I say entirely without prejudice to our position
29 we will swear an affidavit, but we do reject vehemently

1 this criticism of the approach that has been taken,
2 Judge.

3
4 **SUBMISSION BY MS. BARRINGTON:**

5
6 **MS. BARRINGTON:** I wonder if I might say, Judge, at
7 this stage that I think it's regrettable that it should
8 have been suggested that there was something untoward
9 in the role that the United States has played in these
10 proceedings and in particular in relation to this 14:32
11 issue. I've seen, Judge, a copy of the letter from
12 Mason Hayes & Curran, we haven't seen until just now
13 the enclosure outlining the changes that were proposed
14 by Gibson Dunn to Prof. Swire. So that's something we
15 have only just become aware of. 14:33

16
17 But I can say to the court that the position as
18 outlined in the Mason Hayes & Curran letter is entirely
19 correct and as outlined by Mr. Gallagher. It was quite
20 clear when we applied to join these proceedings, Judge, 14:33
21 that the reason we were applying to join as an amicus
22 was because of our central significance and importance
23 in these proceedings, the proceedings are about the
24 adequacy of our law. And, accordingly, Judge, it was
25 indicated to McGovern J that we were extremely anxious 14:33
26 to ensure that the court had an absolutely complete and
27 correct picture before it of what US law provided for,
28 in particular in the event that the matter were to go
29 to the Court of Justice, that the Court of Justice

1 would be provided with a description of the full
2 panoply of oversight provided for by US law and not
3 just judicial remedies.
4

5 In those circumstances it was indicated to McGovern J 14:34
6 that the United States might wish to adduce its own
7 evidence in relation to the description of the laws in
8 the event that it perceived any inadequacy in the
9 evidence that was before the court. Perhaps I could
10 just remind the court of the chronology of events 14:34
11 because the court may recall that the orders made by
12 McGovern J provided for a tight timeline in that
13 Facebook was to provide its affidavits by, I think,
14 4th November and the amici were to put in their
15 affidavits within two weeks by 18th November. 14:34
16

17 That was obviously a tight timeline within which the
18 United States would have had to determine whether it
19 was adducing any evidence. So it needed to know what
20 evidence was going to be adduced describing American 14:34
21 law. That was a perfectly legitimate and valid concern
22 for it to have and the affidavits were provided to the
23 US government on a confidential basis with a view to
24 permitting the US government to determine the extent to
25 which it did or did not decide to adduce evidence. 14:35
26

27 Ultimately it decided not to adduce evidence, conscious
28 of the concerns also that might exist in relation to
29 the role of the amici adducing evidence. And we have
seen, insofar as EPIC was concerned, that unnecessary

1 work was carried out in putting in affidavits seeking
2 to in effect duplicate the work that was done. So that
3 was a perfectly legitimate and valid concern.
4

5 And, secondly, of course as the court will realise in 14:35
6 respect of two of the witnesses, there were
7 classification or declassification considerations that
8 had to be taken into account, and I don't think anybody
9 is suggesting that that was anything other than
10 entirely appropriate. 14:35

11
12 And for those reasons, Judge, I support entirely what
13 Mr. Gallagher says on this issue and would submit to
14 the court that all the contact, which was contact
15 directly with Gibson Dunn, what happened thereafter my 14:36
16 client isn't aware of, but it's apparent from
17 Prof. Vladeck's evidence that he wasn't aware of the
18 source of the comments made to him that corrected
19 factual issues in relation to the reports. And that
20 contact with Gibson Dunn, Judge, in my submission was 14:36
21 entirely appropriate.
22

23 **SUBMISSION BY MR. MURRAY:**

24
25 **MR. MURRAY:** Judge, the one thing that neither 14:36
26 Ms. Barrington nor Mr. Gallagher have told you is why
27 was nobody told that these communications were taking
28 place. Mr. Gallagher gives evidence telling you 'oh,
29 this is very common', this is not very common. This is

1 not common at all. This is not a situation of two
2 defendants exchanging information. This is a
3 circumstance in which a defendant is in communication
4 with an amicus with a view, we had understood, and if
5 I have heard what has just been said correctly, it 14:37
6 appears that the information was given to allow the US
7 government to decide whether to put in its own
8 evidence, but in fact I don't know that that's evident
9 in the letter from Mason Hayes & Curran.

10
11 whichever way it is, the US government responded with
12 its comments and in our respectful submission the one
13 thing that is absolutely clear - clear let it be said
14 from Mr. Gallagher's own vigorous cross-examinations of
15 both Ms. Gorski and Prof. Richards - is that counsel 14:37
16 are entitled to interrogate the independence of
17 witnesses, of expert witnesses, and the court is
18 entitled to be given and parties are obliged to give to
19 the court all information relevant to its assessment of
20 the independence of the witnesses, and the proof of the 14:37
21 pudding is in the eating.

22
23 Because if you had been told, in respect of some or all
24 of these witnesses, that their evidence had been
25 changed consequent upon the intervention of the United 14:38
26 States government, the first question the court would
27 ask, and to which it would be entitled to an answer, is
28 where did the changes occur, what were they? That's
29 all we asked for and it's all we ask for, that the

1 information be given.
2 Mr. Gallagher's and indeed Ms. Barrington's criticism
3 of me for raising the question speaks volumes. All we
4 want to know is what occurred and what exchanges were
5 there, not between counsel and witness, not between 14:38
6 solicitor and witness but between an entirely different
7 third party and those witnesses with the consequence of
8 those communications making their way into their
9 reports. Hopefully Mr. Gallagher will provide us with
10 the information in the form which we will be seeking 14:38
11 this afternoon and that I hope will be the end of the
12 matter, Judge.
13 **MR. GALLAGHER:** Judge, sorry, I want to make -- excuse
14 me.
15 14:39
16 **SUBMISSION BY MR. O'SULLIVAN:**
17
18 **MS. HYLAND:** On behalf of Mr. Schrems I should say that
19 obviously we were very taken by surprise by this
20 particular disclosure and we are quite concerned by it. 14:39
21 That said, we haven't engaged in the correspondence
22 between Philip Lee and Mason Hayes & Curran, nor have
23 we adopted any formal position as of yet. I say it's
24 very surprising in circumstances where McGovern J, as
25 the court will have seen from his judgment in relation 14:39
26 to the admission of the various amici, EPIC were barred
27 from communicating with us and us with them because we
28 were seen as too closely aligned, but that's a matter
29 that the court can consider for itself.

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We are reserving our right to address the matter, whether by way of correspondence, which of course we share with the court and with the other sides, or by way of our submissions in due course to the court. Obviously if it's considered necessary or appropriate following consultation between Mr. McCullough, Mr. Doherty and myself, our solicitor and our client that we will participate in any application that Mr. Murray would make in due course then that will be done, but I am reserving my position in relation to setting out a formal stance on this in due course.

14:39

14:39

MS. JUSTICE COSTELLO: Thank you.

SUBMISSION BY MR. GALLAGHER:

14:40

MR. GALLAGHER: Sorry, I just wanted to clarify one thing in case there was any misunderstanding, Judge. The affidavit that we are doing is going to confirm the contents of the letter. The comments are the subject of privilege and those are not going to be identified for the reasons that I have already said, in the same way that comments made by Prof. Richards' assistants and anybody else are not disclosed or by solicitors or counsel on behalf of the DPC or anybody else.

14:40

14:40

Of course independence is an issue, but this is a separate matter. Comments on the reports that are by way of observations mediated through counsel are not

1 matters that require disclosure and are not matters
2 that need be put before the court. So the affidavit
3 will confirm the position as set out in the affidavit.
4 **MS. JUSTICE COSTELLO:** In the letter, I haven't read
5 the letter. But we'll await the outcome. I have heard 14:40
6 all your observations and comments and no doubt we will
7 be hearing more in relation to it one way or the other,
8 but certainly the affidavit is to be provided when.
9 **MR. MURRAY:** well, and we didn't know Mr. Gallagher was
10 going to provide an affidavit, so we can discuss that 14:41
11 with him.
12 **MR. GALLAGHER:** well, sorry, I think it was requested.
13 So I said we would provide it.
14 **MR. MURRAY:** Yes.
15 **MR. GALLAGHER:** I'll have to take instructions with 14:41
16 regard to the mechanics of it.
17 **MS. JUSTICE COSTELLO:** Very good.
18 **MR. MURRAY:** Thank you, Judge.
19 **MS. JUSTICE COSTELLO:** well we'll leave it at that.
20 **MR. MURRAY:** Thank you, Judge. 14:41
21
22 **SUBMISSION BY MR. O'DWYER:**
23
24 **MR. O'DWYER:** I don't really want to get involved in
25 the controversy, but I just might point out, because 14:41
26 I suppose it is relevant, that when EPIC applied to be
27 an amicus, one of the points raised, actually, as far
28 as I remember, by Facebook was that we weren't
29 independent of a party, being Mr. Schrems, because

1 Mr. Schrems is on an advisory board which, I can't
2 remember how many members, many academics from around
3 the world on it, as far as I know 30 or 40 people, and
4 on that basis we had to provide - this is from memory,
5 I didn't realise this was going to come up - but an 14:41
6 undertaking that we wouldn't have any contact with the
7 party, being Mr. Schrems, because we were an amicus and
8 because of our position as an amicus. The court can
9 make of that what it wishes, but that was the basis
10 upon which we were joined. 14:42

11
12 Sorry, Judge, I suppose, if I may, I'll move on to what
13 we were actually going to submit.

14 **MS. JUSTICE COSTELLO:** Yes.

15 **MR. O'DWYER:** Judge, I intended to use the tablet, if 14:42
16 possible.

17 **MS. JUSTICE COSTELLO:** I have it.

18 **MR. O'DWYER:** And I'm going to, I suppose because of
19 the restrictions in respect of us giving evidence, I'm
20 going to rely very much on the amended submissions and 14:42
21 they are, if the court want to look at those.

22 **MS. JUSTICE COSTELLO:** I have those in hard copy.

23 **MR. O'DWYER:** Or on paper, they are at A12-0 on the
24 e-book. I intend to stick fairly closely to those, not
25 quite read them out, but certainly to run through them. 14:43
26 There's a number of quotations and I hope the court
27 will accept that they are accurate quotations from the
28 various reports and I won't have to open, go back on
29 the tab to the reports etc. There is really only one

1 case I want to open very briefly and I'll do that at
2 the beginning and I'll point out where that is on the
3 tab.

4
5 Sorry, Judge as I have already indicated to the court 14:43
6 I think on the last occasion we were directly involved,
7 EPIC is an independent US - or, sorry, I should say of
8 course that I'm appearing with Gráinne Gilmore
9 instructed by, well Sinéad Lucey solicitor with the
10 Free Legal Advice Clinic (FLAC). EPIC itself is a US 14:43
11 based public interest research and educational
12 organisation which was established to focus public
13 attention on emerging privacy and civil liberties
14 issues in the information age.

15 14:44
16 It served as amicus in many data privacy cases in the
17 US, including, I suppose particularly relevant to this
18 case, Clapper -v- Amnesty, which is what's been
19 referred to as the Supreme Court Clapper, Spokeo and
20 indeed the Nickelodeon case which came up in the course 14:44
21 of some of the expert testimony.

22
23 We were accepted as an amicus, as you can see from the
24 decision of McGovern J, we were accepted because of,
25 I suppose, the particular expertise in surveillance and 14:44
26 privacy law in the US and also, as the judge said, to
27 offer a counterbalancing perspective from the US
28 government on the position in the United States with
29 respect to privacy protection.

1
2 So, Judge, while it's not, I suppose arising from that,
3 it's not really the role of EPIC to compare
4 surveillance and data privacy laws of the EU with those
5 in the US, but I think, just to give a little bit of 14:45
6 context, I might just touch upon EU law to begin with
7 as I say just to give us a context to look at what we
8 are dealing with in respect of or when we are
9 considering US law in practice.

10
11 Judge, the Plaintiff Commissioner has highlighted in
12 her statement of claim that the standard contractual
13 clause, the SCCs, associated with data transfers from
14 the EU, in particular Ireland in this case, to the US
15 could conflict with the fundamental rights enshrined in 14:45
16 Articles 7, 8 and 47 of the Charter.

17
18 Article 7 of the Charter provides that everyone has the
19 right to respect for his or her private life, family
20 life, home and communications. Article 8 provides for 14:45
21 the right to:

22
23 *"Protection of personal data and specifically provides*
24 *that, one, everyone has the right to protection of*
25 *personal data concerning him or her, such data must be 14:45*
26 *processed fairly for specific purposes and on the basis*
27 *of the consent of the person concerned or some other*
28 *legitimate basis laid down in law, but everyone has the*
29 *right to access to data which has been collected*

1 *concerning him or her and the right to that rectified.*
2 *Compliance with these rules shall be subject to the*
3 *control by an independent authority", in this case*
4 *being the Data Protection Commissioner.*

5
6 Article 47 provides: "*Everyone whose rights and*
7 *freedoms guaranteed by the law of the Union are*
8 *violated has the right to an effective remedy and this*
9 *shall be to an independent and impartial tribunal*
10 *previously established by law."*

11
12 And, Judge, in respect of those provisions, we submit
13 that the recent decision, the very recent decision of
14 the court in Watson, may be of considerable assistance
15 to the court in respect of how these provisions are 14:46
16 interpreted by the CJEU. I'm just going to open that
17 decision, if I may, Judge, and really at the end,
18 I want to go to the very end of it and what the
19 findings of the court were and I might open those
20 briefly to the Court. In the tab it's A13 Tab - sorry 14:47
21 in the electronic tablet it's A13 Tab 37B. I'm dealing
22 with the very last page, Judge, containing the findings
23 of the or, I suppose, the answers to the questions from
24 the court in that case because I think they are
25 particularly germane to this case. 14:47

26
27 Judge, the case in general terms concerned the
28 compatibility of data retention of non-content, and
29 I'll go into this in a little bit more detail later on,

1 but of non-content data such as location data, which is
2 obviously an issue relevant to Facebook and many other
3 data processors who now will keep information or have
4 information about where one is located, when we're
5 using, for example, Facebook, where are we and possibly 14:48
6 through the maps applications but there is other ways
7 as well in which they might know where we are. It
8 might not be classified as personal data as such and
9 certainly in the US, but can certainly have or we might
10 consider it to be relevant to our privacy, that 14:48
11 somebody knows where we are at any given time, what
12 shops we're in, what restaurants we're in.
13 **MS. JUSTICE COSTELLO:** You're meant to be down in the
14 Four Courts and somebody finds that you might not be.
15 **MR. O'DWYER:** Exactly. 14:48
16 **MS. JUSTICE COSTELLO:** It might be a court that's near
17 a golf course for example.
18 **MR. O'DWYER:** Exactly, Judge, that's the very point;
19 that even though one might refer to it as non-content
20 it's certainly very important to people and may in 14:48
21 fact, or certainly the European court has considered go
22 to the very heart of privacy.
23
24 So, Judge, sorry, that's what the Watson case was
25 dealing with. There was data retention I think in the 14:48
26 UK for, I think in Sweden it was for six months and in
27 the UK it was for potentially twelve months. And the
28 reason the data was to be retained by the
29 telecommunications service providers was that the

1 national authorities could examine it later on if they
2 needed to, well in general terms for anti-terrorism
3 purposes or, I suppose, serious crime, for
4 investigating serious crimes and then obviously they
5 could check by location data, and we have seen it in 14:49
6 this jurisdiction to a certain extent, they can
7 sometimes check where people were, were they made phone
8 calls from, if they were there. I mean there is an
9 obvious example in Ireland of where, through the use of
10 triangulation et cetera, they are able to work out 14:49
11 where somebody was and whether he or she was somewhere
12 at a particular time. So that was the general purpose
13 of it and the data was meant to be retained for that so
14 that the authorities could look into it.

15
16 And what the court found, the Court of Justice in
17 probably a quite far-reaching decision only in December
18 was that, you can see at No. 1, in answer to the first
19 question, the court dealing with the Data Retention
20 Directive says that: 14:50

21
22 *"Both the Directive itself and the provisions of the*
23 *Charter must be interpreted as precluding national*
24 *legislation which for the purpose of fighting crime*
25 *provides for general and indiscriminate retention of* 14:50
26 *all traffic and location data of all subscribers and*
27 *registered users relating to all means of electronic*
28 *communication."*
29

1 And then the second finding or the second answer --

2 **MS. JUSTICE COSTELLO:** Sorry, just before you go
3 further, we're not on the right page on the receiving
4 page as far as I can see. Oh, sorry, you're dealing
5 with paragraph 134, is that it, the rulings? 14:51

6 **MR. O'DWYER:** Yes, the rulings. And I am really
7 dealing, well on paper, sorry, Judge.

8 **MS. JUSTICE COSTELLO:** No, no, it's okay, we have it
9 now.

10 **MR. O'DWYER:** For myself I'm using the paper but it is 14:51
11 the final page 31, 32. I think there is just a list of
12 the judges following that.

13 **MS. JUSTICE COSTELLO:** Thank you, we are on it now. We
14 were on a second, a heading that had "*second issue*" or
15 "*second question*". 14:51

16 **MR. O'DWYER:** The second finding is that: "*Access of*
17 *the competent national authorities to the retained data*
18 *for the objective pursued by that access, in the*
19 *context of fighting crime, is not restricted solely to*
20 *fighting serious crime, where access is not subject to* 14:51
21 *prior review by a court or an independent*
22 *administrative authority, and where there is no*
23 *requirement that the data concerned should be retained*
24 *within the European Union.*"

25 14:51
26 So, Judge, without wanting to go too much into European
27 Union law, you can see the direct relevance
28 particularly of the second finding to everything that
29 we have heard over the past couple of weeks; access not

1 being subject to a prior review by a court or an
2 independent administrative authority, obviously being a
3 key issue.

4
5 So that's really where, I suppose, one might say the 14:52
6 Court of Justice, and given this is a case that may end
7 up with a reference to the Court of Justice, that would
8 seem to be the most, I suppose, up to date statement on
9 the position of the Court of Justice in respect of
10 these issues and the, I suppose, proportionality of 14:52
11 national security or foreign intelligence type
12 surveillance.

13
14 The court will be familiar with or more than familiar
15 at this stage with Schrems 1, but in that the court 14:52
16 held that, and I quote:

17
18 *"Legislation permitting the public authorities to have*
19 *access on a generalised basis to the content of*
20 *electronic communications must be regarded as* 14:52
21 *compromising the essence of the fundamental right to*
22 *respect for private life, as guaranteed by Article 7."*

23
24 To move on to the position in the United States in
25 respect of surveillance in privacy law, Judge. As we 14:53
26 already heard from several of the experts, there are
27 concerns about the adequacy and fragmented nature of
28 privacy protections in the US. Prof. Richards
29 explained in his report - and where I have included the

1 quote I have the footnote in the submissions, Judge -
2 he said that:

3
4 *"Unlike the EU and virtually all industrialised western*
5 *democracies, the US does not have a comprehensive data* 14:53
6 *protection statute."*

7
8 Furthermore, Judge, we say that, unlike under the
9 Charter or indeed the European Convention on Human
10 Rights, there is no explicit right to privacy under the 14:53
11 United States Constitution. The US Supreme Court has
12 to date declined to recognise the constitutional right
13 to information or privacy. There is, therefore, no
14 equivalent of Article 8 of the Charter within the US
15 Constitution. 14:54

16
17 The Fourth Amendment to the US Constitution does
18 provide protection against unreasonable searches and
19 seizures by the government. This protection is subject
20 to numerous exceptions. One of the most significant 14:54
21 exceptions is the so-called third party doctrine which
22 limits the protection of data shared with a third party
23 such as a service provider and in particular
24 non-content data. And I'll deal with that in a little
25 more detail later on, Judge. 14:54

26
27 In respect of government access to personal data
28 transferred to the US, EPIC submits that when a US
29 citizen's personal data or private communications are

1 transferred from the EU to a data processor such as
2 Facebook in the United States, the data can be accessed
3 by the US government. EU citizen's personal data and
4 private communications are also subject to lesser
5 protections than apply to the personal data and 14:55
6 communications of US persons. Section 702, which we
7 have heard so much about, being one obvious example of
8 where non-US persons are treated differently than US
9 persons.

10
11 The US government can gain access to the personal data 14:55
12 and communications from a data processor such as
13 Facebook within the US through several different
14 mechanisms. These mechanisms include formal request as
15 well as administrative subpoenas, court orders and 14:55
16 mandatory directives issued under Section 702.
17 Alternatively, the US government can gain access to the
18 data transferred to and from the US directly and
19 without the data processor's cooperation or knowledge
20 by intercepting the data en route. This can include 14:55
21 compelling the assistance of internet backbone
22 providers to assist in intercepting data streams. The
23 interception of data en route can occur in the US under
24 Section 702, the Upstream programme, or at or outside
25 the US border pursuant to Executive Order 12333. 14:56
26

27 The Foreign Intelligence Surveillance Act of 1978, I'll
28 move on to deal with. The Foreign Intelligence
29 Surveillance Act was enacted to authorise and regulate

1 certain governmental electronic surveillance of
2 communications for foreign intelligence purposes. As
3 we have heard, Judge, the traditional or what's known
4 as the Title I FISA provisions require the government
5 to follow certain procedures when conducting electronic 14:56
6 surveillance, including obtaining a FISA warrant in
7 most cases from the Foreign Intelligence Surveillance
8 Court, the FISC. In 2008 Congress added new provisions
9 authorising access to international electronic
10 communications to enable the targeting of non-US 14:57
11 persons located outside of the US. This is what we now
12 know as Section 702 of the FISA.

13
14 In essence Section 702(a) empowers the Attorney General
15 and the Director of National Intelligence to jointly 14:57
16 authorise the targeting of any persons who are not US
17 persons, who are reasonably believed to be located
18 outside the US with the compelled assistance of an
19 electronic communications service provider in order to
20 acquire foreign intelligence information. 14:57

21
22 The US government is thereby authorised under 702 to
23 obtain or scan international communications even those
24 involving US persons without a warrant, though
25 significantly Section 702 directives are not subject to 14:57
26 any prior approval by the FISC. There's no warrant
27 requirement or prior judicial review of the targeting
28 or scanning.

29

1 The Attorney General and the Director of National
2 Intelligence need only certify that they have submitted
3 to the FISC for approval targeting procedures and
4 minimisation procedures that satisfy the FISA
5 requirements. 14:58

6
7 Section 702 provides that: "*The FISC shall have the*
8 *jurisdiction only to review the certification, the*
9 *certification submitted.*" The FISC order approving the
10 annual certification does not involve the establishment 14:58
11 of probable cause or involve a review of whether any
12 target is an agent of a foreign power or engaged in
13 criminal activity, nor does the government have to
14 identify to the FISC the specific facilities or places
15 at which the electronic surveillance is to be directed. 14:58

16
17 The government can collect or scan communications under
18 Section 702 after issuing directives to communications
19 providers. The providers are legally obligated to:

20 14:58
21 "*Immediately provide the government with all*
22 *information, facilities or assistance necessary to*
23 *accomplish the acquisition of the data or the private*
24 *communications.*"

25 14:59
26 The providers are required to comply with these
27 directives in secret and are not allowed to notify the
28 users. They also face civil contempt charges if they
29 refuse to comply.

1
2 There is two known or main programmes under
3 Section 702, the first of which is PRISM. PRISM was
4 the subject of review following the Snowden
5 revelations. Under this programme the government sends 14:59
6 a selector such as an e-mail address or possibly a
7 phone number to a United States based electronic
8 communications service provider and that provider must
9 return communications sent to and from the selector
10 back to the government. Even individuals who are not 14:59
11 associated with the selector can have their
12 communications collected by the US government if they
13 are sending messages to the target or have received
14 messages from the target.

15 15:00
16 The experts agree, and we have heard this, that the
17 precise technological means by which the government
18 transmits selectors to the providers and the providers
19 send them the data or communicate the data back to them
20 has not been made public. None of the experts, 15:00
21 however, dispute the description in the Privacy and
22 Civil Liberties Oversight Board, the PCLOB, 702 report
23 to which I think Mr. Gallagher referred to several
24 times. This describes how the tasking process works
25 using a hypothetical USA ISP company. 15:00
26

27 So we include a quote from the report, Judge. But the
28 NSA applies its targeting procedures and tasks, and
29 there's an example of an e-mail, johntarget@usa.com, to

1 section 702 acquisition for the purpose of acquiring
2 information about John Target's involvement in
3 international terrorism. The FBI would then contact
4 the internet service provider. The company has
5 previously been sent a 702 Directive and instruct the 15:01
6 ISP to provide the government all communications to and
7 from that particular e-mail address. The acquisition
8 continues until the government detasks
9 johntarget@usa.com.

10
11 If I could pause there for a second, Judge. One of the 15:01
12 things that arises from that is that while there was
13 some play on the fact that it wouldn't be a *name* or
14 that there may not be necessarily key words used for
15 this searching as the selector, one can see - and 15:01
16 I know even from my own e-mail address that very often
17 of course the e-mail addresses are the person's name.
18 That's the case for me and I am sure many other people
19 have either their full name or some version of the
20 name. So while they are not searching for the name by 15:01
21 putting in the e-mail, obviously the name is revealed.

22 **MS. JUSTICE COSTELLO:** Hmm.

23 **MR. O'DWYER:** But that's how effectively it's done.

24
25 Two things are clear from that description of the PRISM 15:02
26 process. First, the tasking of the selector occurs
27 after the company had been served the 702 Directive;
28 second, tasking is an ongoing process. And I think in
29 fairness several of the experts have said that,

1 including the experts for Facebook.

2 The fact that it's an ongoing process implies that it
3 involves some form of technological communication.

4 I think Prof. Richards spoke at length about this, that
5 there needs to be some technological connection for 15:02
6 this information to be passed to and from the data
7 processors. Whether this process can fairly be
8 characterised as direct access to the company's servers
9 is clearly a matter of some dispute between the experts
10 and the others working in the area. 15:02

11
12 In addition to the PRISM programme the Upstream
13 programme, which is the second programme that we know
14 about, is also conducted under 702. This involves the
15 interception of communications without knowledge or 15:03
16 assistance of what are termed the *downstream* data
17 processors. So a company such as Facebook wouldn't
18 necessarily know anything about this, even though it
19 might be data that's going between Facebook Ireland and
20 Facebook in the United States. But neither end may 15:03
21 necessarily know about this at all because Upstream
22 deals with the internet backbone, so otherwise the
23 fibre optic cables in general that are crossing the
24 Atlantic and are obviously coming on land in the United
25 States. 15:03

26
27 And, as I said earlier, Judge, if it's on land, if it's
28 within the territory of the United States then we would
29 be looking at Upstream; but if it's offshore or

1 possibly even, but certainly could potentially be at
2 sea or at junction points that arise on land that may
3 not be quite, may not be US, United States territory.

4 **MS. JUSTICE COSTELLO:** Hmm.

5 **MR. O'DWYER:** But there is certainly the possibility 15:04
6 that it's intercepted en route but that is outside the
7 US so that's covered by EO 12333 because it's outside
8 the United States.

9
10 So the access to private communications on the Upstream 15:04
11 programme is significantly broader than under the PRISM
12 programme because Upstream involves scanning all
13 messages over a particular network, including so-called
14 multiple communications transactions, in order to
15 conduct searches for what are termed *about* 15:04
16 communications. As explained by the PCLOB, an *about*
17 communication is one in which the selector of a
18 targeted person such as that person's e-mail address is
19 contained *within* the communication but the targeted
20 person is not necessarily a participant in the 15:04
21 communication.

22
23 The important point about *about* communications, as
24 I think several of the experts were at pains to point
25 out, Judge, is that this involves a consideration of 15:05
26 the content of messages. Because it's going, it by its
27 nature is a search or a trawl or a scan through the
28 message. It's not just to and from a particular e-mail
29 address, it's whether that message contains the

1 selector at all or a reference to the selector. So if
2 the e-mail address is in the body of the message or if
3 it happens to be a phone number, if that's in the body
4 of the message obviously to find that you have to
5 search the messages. And this I suppose really is the 15:05
6 crux of the matter and I think this is something that,
7 there was a reason there was so much emphasis on this
8 with Ms. Gorski. Because this does involve clearly
9 searching through large numbers of messages and
10 searching through their contents. 15:06

11
12 One of the other, I suppose, by-products of this type
13 of searching or scanning is that what may be taken from
14 the data stream as such can be an MCT, and I don't
15 think we need to go through that all again. 15:06

16 **MS. JUSTICE COSTELLO:** Hmm.

17 **MR. O'DWYER:** But I think the court is alive to the
18 nature of an MCT, but it turns out that there could be
19 several other communications connected to the
20 communications that are found either by way - I think 15:06
21 Prof. Swire gave the relatively innocuous example of a
22 chain of e-mails, but there may also be other types of
23 communications connected to the communications they are
24 taking from the data flows so that they found the
25 particular selector in because of the nature of 15:06
26 alternate transmission and packets. I am certainly
27 informed that it can be more than just chain e-mails,
28 that there can be other communications attached to the
29 particular communications that are taken out with the

1 particular communications that happen to be about.

2 **MS. JUSTICE COSTELLO:** So you are saying it's wider
3 than a mere change of e-mails?

4 **MR. O'DWYER:** It's wider. That is a perfectly
5 legitimate example and an easy example for us to
6 understand, but it's a little bit more complicated than
7 that I suppose... 15:07

8 **MS. JUSTICE COSTELLO:** I think it was Prof. Swire but
9 it may have been one of the others who said that it's
10 like the envelope and then you open up the envelope and
11 like inside the envelope you have got your chain of 15:07
12 e-mails, but if you are opening it up you're then
13 looking at the contents of it. But are you saying
14 there might be something else in the envelope?

15 **MR. O'DWYER:** There can be other things, that's 15:07
16 certainly my, I'm not an expert technologist. I am
17 instructed that it goes, it certainly can go beyond
18 simple chain e-mails.

19
20 But, Judge, I suppose, I was going to give that example 15:07
21 just to try and explain the difference between Upstream
22 and PRISM. It's a very good example or a very good way
23 for many of us to conceptualise what's actually
24 happening here if one is to compare the situation with
25 letters. 15:08

26
27 I mean even the thought that all letters going over to
28 the United States or a very large number of the letters
29 could be opened and the contents of the letter

1 examined, even if it's by a computer, if the computer
2 is scanning it and picking out would be something that
3 most of us would be alarmed about. And that really is
4 a good example because that is what is happening.
5 These are the equivalent. I mean e-mails are only one 15:08
6 part of the data that's involved, but, if we take that
7 as a simple example, most of us would think that an
8 e-mail is something akin to a letter, you are sending
9 it to someone, you assume it's private. You may be
10 writing about private matters of course and the e-mail 15:08
11 goes.

12
13 what happens in relation to Upstream and EO 12333 is
14 that that letter is opened and something, in this case
15 a computer, looks at it, scans it and sees if there is 15:09
16 anything that they think is relevant based on these
17 selectors. But even the thought of that, I think from
18 certainly a European point of view, is disturbing.
19 Whereas in America one of the things that arises is
20 that they don't generally, and we make this point later 15:09
21 in the submission, they don't generally consider the
22 scanning by a computer to be any form of real
23 interference with the data.

24
25 They only, it's only when a human engages with it, 15:09
26 otherwise when an agent comes to look at all of the
27 communications that have been picked out of the flow or
28 the data flow as such, that really there might be an
29 issue. Whereas we in Europe would probably consider,

1 I think, that a computer examining all of our mails,
2 scanning them for particular references, something that
3 could be very wide. If one thinks about, depending on
4 whose e-mail address they put in as the target or whose
5 phone number, it could actually be a very wide trawl to 15:10
6 get this information and it could generate a lot of
7 information, and that's what's taken out, so that's
8 after the scanning is done.

9
10 But I think Ms. Gorski first used the letters as a 15:10
11 direct comparator and it's a good example of or it's
12 certainly of assistance in conceptualising what's
13 actually happening. The FISC itself has recognised --
14 Judge, I am sorry, I should have said I'm really
15 referring to two documents and we're quoting from two 15:10
16 documents that are both on the file.

17
18 The first is the PCLOB report on 702 and the second is
19 the FISC opinion from 2011, also in respect of
20 Section 702, if the court wished to look at those in 15:11
21 more detail later on, but they are...

22 **MS. JUSTICE COSTELLO:** You have them in your footnote?

23 **MR. O'DWYER:** Yes, they are in. And in fact I think
24 Mr. Gallagher referred certainly to the PCLOB report on
25 several occasions with the experts. 15:11

26 **MS. JUSTICE COSTELLO:** We might just change the
27 stenographers.

28 **MR. O'DWYER:** Judge, the FISC itself has recognised
29 that the US Government's collection of "about" type

1 communications is fundamentally different than other
2 types of 702 surveillance. In 2011, attorneys
3 representing the US Intelligence Community revealed to
4 the FISA court that "*acquisition of internet*
5 *communications through the Upstream collection under* 15:12
6 *702 was accomplished by acquiring internet transactions*
7 *which may contain a single discrete communication or*
8 *multiple discrete communications, including*
9 *communications that are neither to, from, nor about*
10 *targeted facilities.*" 15:12

11
12 The FISC found that - and the particular, the location
13 of these quotations is in the footnotes, Judge - the
14 FISC found that the "*NSA's Upstream internet collection*
15 *devices are generally incapable of distinguishing* 15:12
16 *between transactions containing only a single discrete*
17 *communication to, from or about a task selector and*
18 *transactions containing multiple discrete*
19 *communications, not all of which may be to, from or*
20 *about a task selector.*" 15:12

21
22 The FISC emphasised that "*as a practical matter, this*
23 *means that NSA's Upstream collection devices acquire*
24 *any internet transaction transiting the device if the*
25 *transaction contains a targeted selector anywhere* 15:13
26 *within it.*"

27
28 The PCLOB report on 702 concluded that the surveillance
29 technique used by the NSA to conduct "about"

1 communications searches operates in such a way that "A
2 *person's communication will have been acquired because*
3 *the government's collection devices examined the*
4 *contents of the communication without the government*
5 *having held any prior suspicion regarding that* 15:13
6 *communication."*

7
8 In simple terms, in order to identify communications
9 *about* a selector, the NSA device must necessarily scan
10 *all* communications transmitted over that facility, 15:13
11 although the PCLOB notes in the 702 report that the NSA
12 first filters the communications. So the first
13 filtering is to eliminate purely domestic
14 communications, which clearly have nothing to do with
15 EU nationals. Thus, the US Government has access to 15:14
16 and is scanning e-mails and other electronic
17 communications en masse at the internet backbone level
18 in order to identify and intercept certain target
19 communications based on their contents.

20
21 The PCLOB notes in the 702 report "*nothing comparable*
22 *is permitted as a legal matter or possible as a*
23 *practical matter with respect to analogous but more*
24 *traditional forms of communication"* - and this is the
25 point about the letters, Judge - "*The government cannot* 15:14
26 *listen to a telephone conversation without probable*
27 *cause about one of the callers or about the telephone*
28 *in order to keep recordings of those conversations that*
29 *contain particular content."*

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So in this case they're comparing it to telephone conversations.

The FISC found - and I know there does appear to be some dispute about the *scale* of this operation, but I think this seems to be a figure that's repeated quite often by the experts - the FISC found in 2011 that the NSA acquires more than 250 *million* internet communications each year pursuant to Section 702. So this idea that this is some sort of small scale operation and that there's only a handful of people being checked, if that's correct we're talking millions and millions and millions of communications. And they're the ones, Judge, I think, in relation to the Upstream programme, I mean obviously they're the ones that they've *taken*. That's *not* including the possibly, the exponential number of communications they've actually *searched*. That isn't even *considered*. This is the communications they *acquire*.

So quite straightforward -- well, reasonably straightforward under PRISM; communications to and from, all of those communications, they acquire. Under Upstream, these are all the ones to, from and about. And that comes, it seems, to 250 million in a year.

I suppose, I mean, to put it in context, I know there was some effort to try and minimise this as if it was

1 only, you know, it was a very minor operation on the
2 basis of the numbers, but, Judge, I respectfully submit
3 the court would want to look very carefully at those
4 numbers. Because this seems to be the highlight
5 figure, or the main figure. To talk about how many 15:16
6 actual users might have been targeted in a six-month
7 period as a proportion of the vast number of users - I
8 think it was about 1.8, even of Facebook I think
9 there's 1.8 *billion* users - so even a very, a tiny
10 percentage, if they were targeted through PRISM, if 15:17
11 it's 0.001 that's still a large number. If that's
12 47,000 in six months, it's 90 odd thousand in 12
13 months. And that's the users.

14
15 But you've got to remember the users is not the key 15:17
16 figure. The selector is not -- I mean, you might have
17 X number of users that have been, I suppose, or that
18 they're tracking or who are targets through 702. But
19 then you're collecting all, even through PRISM, you're
20 collecting all messages to and from them. So obviously 15:17
21 that's going to explode up into a very large number
22 very quickly, which I think this figure of 250 million
23 probably reveals.

24
25 Judge, the only statutory limitations on surveillance 15:17
26 under 702 are the acquisition limits the targeting
27 procedures and the minimisation procedures refer to in
28 the section. There are five acquisition limits. The
29 first four limitations are based -- are aimed, sorry,

1 at limiting the intentional targeting of US person
2 communications. The fifth limitation requires that the
3 acquisition be conducted consistent with the Fourth
4 Amendment. The Fourth Amendment, as *all* of the experts
5 have now agreed, does not protect non-US citizens, or 15:18
6 non-US persons should I say, with no substantial
7 voluntary connections to the United States. These
8 limitations do not, therefore, protect EU citizens
9 outside of the US for surveillance conducted under
10 Section 702. 15:18

11
12 The Attorney General, in consultation with the Director
13 of National Intelligence, must also adopt both
14 targeting and minimisation procedures under 702. These
15 procedures are subject to judicial review for their 15:18
16 compliance with statutory requirements. It is notable
17 though that neither the targeting nor the minimisation
18 procedures about which we've had so much discussion in
19 702 provide *any* specific protections for non-US
20 persons. Indeed, Section 702 clearly discriminates 15:19
21 between US and, by its nature, non-US persons and
22 imposes restrictions primarily, or what restrictions
23 there are relate primarily to collection, use and
24 dissemination of US persons' communications and
25 information. 15:19

26
27 I've already mentioned, Judge, Executive Order 12333.
28 This sets out -- it's a little by bit wider, in our
29 submission, that perhaps Ms. Gorski indicated. This

1 sets out -- this is quite an all-encompassing Executive
2 Order. And it *is* only that; this is an important point
3 about both PPD-28 and Executive Order 12333, that these
4 are just Executive Orders, these are almost -- these
5 are policies, they don't have the -- they're not 15:19
6 statutes and they can change --

7 **MS. JUSTICE COSTELLO:** well, what do you say to the
8 fact that they've been, if you like, they're part of
9 the Privacy Shield Decision and that while, yes, as a
10 matter of strict law and power the President could 15:20
11 revoke either or both tomorrow --

12 **MR. O'DWYER:** Yes. And in secret.

13 **MS. JUSTICE COSTELLO:** -- this would have implications
14 for the agreement in Privacy Shield, as an example?

15 **MR. O'DWYER:** Yes, I mean, that could certainly -- I 15:20
16 mean, I don't think there could be any dispute about
17 that. But one thing, Judge, that maybe hasn't come
18 across in the evidence so clearly is that not only can
19 they be changed tomorrow, and given there *are* a number
20 of Executive Orders that *are* being changed under their 15:20
21 current -- under the new President, there is another
22 point that I think Prof. Swire mentioned briefly but
23 perhaps didn't go into in any detail about; he said
24 that he would *imagine* that such changes would be made
25 public, but the point being that they don't *have* to be. 15:20
26

27 So both Executive Orders, or certainly my instructions
28 are that both Executive Orders and these directions or
29 policy directions can be changed, they could be changed

1 in secret, so nobody knows they've been changed except
2 the people, except --

3 **MS. JUSTICE COSTELLO:** Directly concerned.

4 **MR. O'DWYER:** Directly concerned. So we might not know
5 anything about that and certainly we, as ordinary users 15:21
6 of the particular service, may know nothing at all
7 about that. They could be changed *now* for all we know.

8
9 Now, I'm sure Mr. Gallagher was correct that obviously
10 the Commission is going to look at these things in a 15:21
11 review and it really will cause problems, I mean, if
12 the United States Government were not to reveal that
13 they'd changed these. But that's a different issue.
14 We don't *know* what's going to happen about that. I
15 mean, I think that review is in the summer, isn't it, I 15:21
16 think, the next review, or even after the summer. So
17 we have to deal with the situation as it is now.

18
19 But yes, but I mean, I think the important point is
20 that we're aware that these can be changed like that 15:22
21 tomorrow and that they can be changed in secret, they
22 don't have -- they're not even the equivalent of
23 statutory instruments in Ireland, which at least are
24 recorded and, you know, there's a process through which
25 they're changed and people are notified, or, well, at 15:22
26 least you can find out that they've been changed. This
27 is not the same thing at all.

28
29 But returning to 12333. This is quite an

1 all-encompassing order, dealing with a little bit more
2 - I don't think Ms. Gorski intended anything by
3 possibly limiting it to surveillance, it actually cover
4 -- or particular types of surveillance. But it's
5 actually the President's rules governing the activity 15:22
6 of the entire US Intelligence Community. The Director
7 of the NSA is authorised, through the order, to collect
8 "*including through clandestine means, process, analyse,*
9 *produce and disseminate signals intelligence,*
10 *information and data for foreign intelligence and* 15:23
11 *counterintelligence purposes to support national and*
12 *departmental missions."*

13
14 The order grants broad authority to members of the US
15 Intelligence Community to collect all forms of 15:23
16 intelligence. The only collection limits imposed under
17 the order are outlined in sections 2 and 3 -- or,
18 sorry, 2.3 and 2.4. Under the order, "intelligence"
19 includes foreign intelligence and counter intelligence.
20 Foreign intelligence is defined broadly as information 15:23
21 relating - this is under the E012333- foreign --
22 **MS. JUSTICE COSTELLO:** Yes, we had this this morning.
23 **MR. O'DWYER:** Oh, you had? So I won't go in into it.
24 But so you can see that was very broad. Foreign
25 persons is -- information about foreign persons *is* 15:23
26 foreign intelligence. So there's, I suppose, a
27 particularly wide and permissive definition.

28
29 Section 2.3 limits the collection, retention and

1 dissemination of information concerning United States
2 persons by requiring that the Intelligence Community
3 adopt procedures to limit the types of information
4 collected to those specified in 2.3. Section 2.4 also
5 imposes a general restriction on collection by 15:24
6 requiring that members of the US community shall use
7 the least intrusive collection techniques feasible
8 within the United States or directed against United
9 States persons abroad.

10
11 As Prof. Vladeck explains in his expert report, E012333
12 imposes fairly strict limits on surveillance within the
13 United States, because as Ms. Gorski pointed out, it
14 isn't *just* necessarily surveillance *outside* the US,
15 there are certain circumstances in which there can be - 15:24
16 this issue about transit and data transiting the US -
17 there *can* be circumstances where it's applied *within*
18 the US. But what Prof. Vladeck said in his expert
19 report for Facebook was that E012333 imposes fairly
20 strict limits on surveillance *within* the US or directed 15:25
21 against US persons abroad, leaving surveillance
22 directed against non-US persons abroad subject only to
23 more general collection restrictions.

24
25 Then, Judge, to move on to PPD-28. And this is 15:25
26 Presidential Policy Directive 28. And again the
27 comments I made in respect of the EOs applies to even
28 greater extent to these policy directives, that they
29 can be changed. But this was adopted by President

1 Obama and it does impose certain restrictions on US
2 signal intelligence activities involving personal
3 information *regardless* of the person's nationality or
4 location.

5
6 The first section of the PPD-28 outlines four
7 principles that are framed as *general* limits - so it's
8 more of a general overarching limitation - general
9 limits on signals intelligence collection.

10
11 The first principle requires that the collection be
12 authorised by law or Executive Order and undertaken in
13 a lawful manner. The court will probably be familiar
14 with that there'll be something familiar to Article 8,
15 European Convention on Human Rights might be applied,
16 you know, in accordance with law. So the first test is
17 that if, for example, a deportation order is made, is
18 it made in accordance with law? And then we might move
19 on to consider the proportionality of that. But the
20 first point, that it's authorised by law and undertaken
21 in a lawful manner. The second principle states that
22 privacy and civil liberties shall be integral
23 considerations in the planning of signals intelligence
24 activities and prohibits collection for specified
25 *improper* purposes. But I don't think they're
26 particularly relevant in this case. The third
27 principle prohibits the collection of foreign private
28 commercial information or trade secrets in order to
29 afford a competitive advantage to US companies. And

1 the fourth and final principle requires the collection
2 be tailored as feasible.

3
4 So they're quite general in nature, that it isn't
5 unlawful. And I'll move on to that, because there *is* 15:27
6 an issue that we feel hasn't perhaps been developed to
7 a great extent before the court so far, which is the
8 idea of authorised and unauthorised and how important
9 that is and what remedies you might have available.

10 Because if it's authorised, so if it's under, for 15:27
11 example, 702, the surveillance, if that goes through
12 the procedures that Prof. Swire described, the in-house
13 procedures shall we call them, it's *authorised*, it's
14 allowed, there is a statutory provision under which
15 it's allowed, there is various administrative -- 15:27

16 **MS. JUSTICE COSTELLO:** Just as the data retention in
17 Watson was authorised by Sweden and the UK in --

18 **MR. O'DWYER:** Exactly, Judge. But that's the key
19 point, that's why I felt it was important to open that
20 case. This seems to be a really key difference between 15:27
21 the two jurisdictions, that where it isn't -- that
22 under EU law, clearly Mr. Schrems and Mr. Watson and
23 Mr. Davis and all of these other people that were
24 involved in these cases were able to challenge what is
25 effectively *authorised*, *lawful* - lawful in the sense of 15:28
26 it's permitted by law - surveillance or data retention,
27 whereas that creates all sorts of difficulties with
28 whatever limited protections they have in the US,
29 nearly all of them we'll find - and this just hasn't

1 really been dealt with in detail by the experts,
2 although they've mentioned it in passing - it requires
3 that the surveillance is *unauthorised*.

4
5 The real difficulty is what do you do if you want to 15:28
6 challenge it on a, I suppose, facial basis, if you want
7 to say 'This is not' -- 'This is unconstitutional, they
8 can't do' -- 'Even though it's lawful, it's provided
9 for in the Act, they can't do this because this is a
10 fundamental interference with my private life rights'? 15:28
11 And that's a *real* issue, and it's definitely a point of
12 difference between the EU --

13 **MS. JUSTICE COSTELLO:** And do you make the point that,
14 of coupling, if you like, this authorised challenges,
15 if I can put it that way, or challenges to authorised 15:29
16 acts in the context of the scope of what can be
17 authorised?

18 **MR. O'DWYER:** Yes.

19 **MS. JUSTICE COSTELLO:** I just want to make sure I
20 understand your argument. 15:29

21 **MR. O'DWYER:** And that makes it very difficult -- well,
22 we do actually deal with it in a little bit more detail
23 in the submissions. But effectively, many of the, or I
24 think in fact *all* of the types of secondary private,
25 the legislation that's been referred to by the experts, 15:29
26 certainly Prof. Butler has produced an analysis -
27 unfortunately we're not able to, we're not providing
28 evidence as such - but *all* of them apply to, the idea
29 is that they apply to *unauthorised*.

1
2 I mean, if you want to challenge face-on 702 because
3 you believe simply that your data shouldn't have been
4 interfered, it shouldn't have been copied, it shouldn't
5 have been scanned, whatever it might be, you run into 15:30
6 very different problems, primarily the problem that
7 non-US -- or non-EU citizens can't, effectively, sue
8 under the Fourth Amendment, so otherwise the
9 constitutional right doesn't apply. Even if -- and
10 there's a number of reasons it doesn't apply. But just 15:30
11 as a non -- we've seen that, you have to have this
12 connection to the United States.

13
14 And that's another key difference between the
15 different, between the EU and the US, that you require 15:30
16 that and, therefore, you're simply not able to bring
17 that type of -- actually at a fundamental level. And I
18 think in the end, even Prof. Swire accepted eventually
19 in cross-examination by Mr. Murray that an EU national
20 based in the EU, living in the EU, not living in 15:30
21 America, can't have a Fourth Amendment type challenge
22 in the United States, because they don't have the
23 connection that's necessary. And that's a key
24 stumbling, or a key, I suppose, stumbling block or
25 whatever you want to call it, a key issue for EU 15:31
26 nationals were we to *try* and get some form of remedy or
27 something done about this type of surveillance.

28
29 So I was just, I was explaining about the fourth and

1 final principle, which *might* be seen as advantageous
2 for everyone, really requires that collection be
3 tailored as feasible. But in that context, Judge, the
4 Director of National Intelligence has explained that
5 "*Pursuant to the fourth principle, the Intelligence 15:31*
6 *Community takes steps to ensure that even when we*
7 *cannot use specific identifiers to target collection,*
8 *the data to be collected is likely to contain foreign*
9 *intelligence that will be responsive to requirements*
10 *articulated by US policy makers pursuant to the process 15:32*
11 *explained in my earlier letter and minimises the amount*
12 *of non-pertinent information that is collected.*"

13
14 I suppose what's particularly significant about that
15 statement is, Judge, that you can see that the Director 15:32
16 of National Intelligence is saying that they do in fact
17 engage in - we assume under E012333 - that they do
18 engage in, effectively, mass surveillance without
19 discriminants.

20 15:32
21 Then, Judge, just lest there be any doubt about that,
22 we know that section 2 of PPD-28 deals with bulk
23 collection. So there can't legitimately be any claim
24 that bulk collection *doesn't* take place. The only
25 issue of real contention raised with Ms. Gorski, I 15:33
26 think, was whether what happens under Upstream could be
27 described as bulk collection, as opposed to bulk
28 scanning. And to a certain extent, we would submit,
29 certainly from a European point of view, that the

1 difference is quite subtle and wouldn't necessarily
2 apply in Europe. So this idea that they're only
3 scanned, as opposed to collected - and you may remember
4 there was some debate about whether they were actually
5 copied.

15:33

6 **MS. JUSTICE COSTELLO:** Mm hmm.

7 **MR. O'DWYER:** To a certain extent, I think that
8 technologists would agree that there has to be *some*
9 form of, even however brief, of copying, even in terms
10 of cash. But whether there is something longer than
11 that, as Ms. Gorski was -- people simply don't know
12 when they're doing Upstream. So otherwise, do they
13 copy massive amounts of data for a very short period
14 for the purposes of this scanning? What doesn't seem to
15 be quite possible - and I think this is what she was
16 saying - was to literally pick it up as it passes by.
17 So otherwise --

15:34

15:34

18 **MS. JUSTICE COSTELLO:** I think she said it would slow
19 down the flow.

20 **MR. O'DWYER:** It would slow down the flow. But I mean,
21 nobody --

15:34

22 **MS. JUSTICE COSTELLO:** Well, she wasn't a technology
23 expert, yes.

24 **MR. O'DWYER:** -- nobody here certainly knows exactly
25 how it happens. But certainly it's more likely than
26 not that it does involve some form of copying it on the
27 mass scale, so copying that to allow them to do that.
28 Now, that's certainly, that *is* what we would describe
29 as bulk collection. That does seem to be permitted and

15:34

1 it's specifically referred to under PPD-28. But
2 whether that's relating back to Upstream or whether
3 it's just to the offshore or non-US collection isn't
4 entirely clear.

5
6 Finally, Judge, in respect of PPD-28 - and I know, I've
7 been told you heard a lot about this this morning, so
8 perhaps I won't dwell on it - but that it extended
9 EO12333's limits on dissemination and retention of
10 personal information, but did not extend the collection 15:35
11 limits. And we include quotes, just what it says in
12 respect of dissemination and retention. So otherwise,
13 PPD didn't change the collection or didn't limit
14 collection of data, but rather dissemination and
15 retention of personal information, so otherwise *after* 15:36
16 it's collected.

17
18 Then, Judge, if I move on to safeguards for EU
19 citizens. It's submitted that US law fails to ensure
20 an adequate level of protection for the personal data 15:36
21 and private communications of EU citizens outside of
22 the US. This is because -- and we've really three
23 points in respect of this. First of all, the scope of
24 application of privacy protections and the definitional
25 scope of personal information in the US law are 15:36
26 restrictive. And if I could deal with that first. US
27 privacy law is characterised by particularly narrow
28 conceptions of privacy and personal data, which in turn
29 limits the scope of relevant constitutional statutory

1 and regulatory privacy protections.

2
3 Judge, I mentioned earlier about non-content, and we
4 refer to a case called Smith -v- Maryland where the
5 Supreme Court considered the use of a pen register 15:37
6 device to record telephone numbers dialled by a
7 criminal suspect but not the content of the calls. The
8 court held that "*a person has no legitimate expectation*
9 *of privacy in information he voluntarily turns over to*
10 *third parties, such as telephone companies.*" 15:37

11
12 So that would at first, on a superficial level, would
13 appear to mean they're just saying 'If you hand it over
14 to Facebook or whoever it might be, hard luck, you've
15 done it, you must have known that there'd be something 15:37
16 involved with that'. Now, to be fair, that case is an
17 old case related to non-content, but -- and as we point
18 out, the practice in the US Department of Justice has
19 been to *get* a warrant when seeking to obtain content of
20 US persons' e-mail communications that are stored on 15:38
21 third party servers in accordance with the decision in
22 a lower, in one of the circuits - and I think this case
23 has been referred to several times - warshak. So even
24 though the Supreme Court itself hasn't dealt with this
25 issue or directly with the issue of content of e-mails 15:38
26 and whether they are protected under the Fourth
27 Amendment or not for US citizens or anyone else,
28 certainly one can take it that warshak *might* be the
29 position that would be adopted. And I think that's the

1 general view even of the, even among the experts here.

2 **MS. JUSTICE COSTELLO:** And the practice of the
3 government is to apply it?

4 **MR. O'DWYER:** Yes, and the government has in fact,
5 seems to effectively apply Warshak. This is in respect 15:38
6 of US citizens. But the point about third parties
7 though certainly --

8 **MS. JUSTICE COSTELLO:** And that's the Fourth Amendment
9 point?

10 **MR. O'DWYER:** That's the Fourth Amendment point. But 15:39
11 certainly the point, it is a very important point, that
12 we're very much restricted to -- we're looking only at
13 content then rather than non-content type data.
14 Clearly, any reading of the Smith -v- Maryland case
15 *doesn't* apply, the Fourth Amendment *doesn't* apply to 15:39
16 non-content data. And indeed that's another point of
17 very obvious comparison with Watson.

18
19 Even in cases where personal information and
20 communications transferred from the EU *are* subject to 15:39
21 protections in the US, these protections may not attach
22 until the data is viewed, reviewed or disseminated by a
23 government agent. I've made this point earlier on,
24 Judge, and in fact there's a footnote to where we've
25 included that with a quote from Robert Litt, who I 15:40
26 believe was --

27 **MS. JUSTICE COSTELLO:** Is that the same Mr. Litt that
28 we've had?

29 **MR. O'DWYER:** Yes. A very senior figure. And he said

1 - sorry, this is just in our footnote - but "*If the*
2 *government electronically scans electronic*
3 *communications, even the content of those*
4 *communications, to identify those it is lawfully*
5 *entitled to collect and no one ever sees a* 15:40
6 *non-responsive communication or knows that it exists,*
7 *where is the actual harm?"*

8
9 So otherwise, if it's scanned by a computer, where is
10 the harm? whereas I think we would take a very 15:40
11 different view in Europe to --

12 **MS. JUSTICE COSTELLO:** we haven't read the article, but
13 possibly he's looking at all the stuff we've been
14 debating over the last few days about having to
15 establish that you've suffered a harm. 15:40

16 **MR. O'DWYER:** Yes. But I mean, he is, he does seem --
17 I mean, I *think* what he is saying is, and I don't mean
18 to try and interpret it from an Irish point of view as
19 such, but I mean, he seems to be saying that where is
20 the actual harm if no human views it? So otherwise this 15:41
21 scanning that goes on, that that's done by computer.

22
23 The second point, Judge, point (b), is that personal
24 data communications of non-US persons are excluded from
25 important US privacy safeguards. Many of the privacy 15:41
26 safeguard under US law in fact operate to the *exclusion*
27 of EU citizens situated outside the United States.
28 Firstly, it's submitted, as we already said, that the
29 Fourth Amendment does not protect the privacy of EU

1 citizens outside the US. The experts in the case have
2 *agreed* that the protections of the Fourth Amendment do
3 *not* extend to individuals who have no "*substantial*
4 *voluntary connections to the US*", such as physical
5 presence in the country. US courts have found that the 15:41
6 Fourth Amendment "*does not apply to searches and*
7 *seizures by the United States Government against a*
8 *non-resident alien in a foreign country.*" So there
9 can't *really* be any dispute but that we are excluded,
10 we, as EU citizens, are excluded in that way. 15:42

11
12 Secondly, US surveillance laws authorise the collection
13 of foreign communications without the requirement of
14 individualised suspicion or probable cause and in the
15 absence of judicial oversight. Obviously we're 15:42
16 referring back to section 702. Section 702
17 specifically authorises broad scale surveillance of
18 non-US communications without a warrant. The key
19 limitations on 702 surveillance - namely, the
20 acquisition limits, targeting procedures, minimisation 15:42
21 procedures - effectively exclude non-US persons'
22 communications from protection.

23
24 It *is* true that some limitations on 702 apply
25 regardless of whether the target is a US person. For 15:42
26 instance, collection is required to be conducted to the
27 greatest extent feasible to minimise the acquisition of
28 information not relevant to the unauthorised foreign
29 intelligence purpose. However, the caveat of

1 reasonable feasibility is important. Even information
2 that was *not* relevant to foreign intelligence could be
3 lawfully captured in circumstances where it is not
4 reasonably feasible to focus collection on relevant
5 information because of technological or intelligence 15:43
6 restraints. In any event, the relevance threshold is
7 particularly low. It is noteworthy that there's no
8 requirement for information to be *necessary* to the
9 authorised purpose.

10
11 In addition, the US has, under Section 702, gained
12 access to international communications in bulk and
13 scanned or processed these communications without
14 individualised suspicion or judicial oversight in order
15 to target certain selectors. 15:43

16
17 (c), the third point in respect of that, Judge, is that
18 many privacy rules are subject to executive branch
19 modification or rescission. We submit, and I think
20 I've already made this point, but that many of the 15:43
21 rules and restrictions discussed in the expert reports
22 submitted by various experts are not enshrined in law
23 and can be modified or rescinded by the US executive at
24 any time after discretion. This is a significant
25 limitation on the long-term violability of these rules, 15:44
26 especially during a change in administration such as is
27 happening now.

28
29 Moving on to the redress for EU citizens, which I know

1 is a key issue, Judge. It's submitted that US law does
2 not provide an effective means for EU citizens to seek
3 redress for claims related to surveillance carried out
4 in violation of their rights under Articles 7 and 8 of
5 the Charter. Firstly, EU citizens with no substantial 15:44
6 voluntary connections to the US have no mechanism to
7 challenge authorised surveillance programmes that could
8 violate their fundamental rights. Second, even
9 challenges to *unauthorised* surveillance have severely
10 restricted remedies. Thirdly, data protection remedies 15:44
11 of access and correction are also restricted. Finally,
12 the standing and state secrets doctrines are structural
13 barriers that significantly restrict all forms of
14 judicial redress in privacy cases.

15
16 I suppose, Judge, rather than go into too much detail
17 on this, I'd say that EPIC, having both read the
18 reports of Mr. Serwin and Prof. Richards and had the
19 chance to hear their evidence, we would submit that
20 their reports and their evidence provide a detailed and 15:45
21 accurate account of the limitations of civil remedies
22 available under US law.

23
24 Judge, we make the point after that that maybe hasn't
25 been drawn out so much by the experts that US law does 15:45
26 not provide EU citizens with effective redress for
27 violations of their Charter rights arising from
28 authorised surveillance. And we go through a number of
29 the statutes that have been referred to by different

1 experts.

2
3 Judge, I just would highlight in respect of that from
4 the submissions in respect of this point that we do
5 have in the submissions that the Privacy Shield 15:46
6 Ombudsman mechanism, actually the submissions say *does*
7 provide a mechanism to seek judicial redress and what
8 was meant to be said was that it does *not*.

9 **MS. JUSTICE COSTELLO:** well, the version I got has the
10 "not" in it. If you're quoting from paragraph 91? 15:46

11 **MR. O'DWYER:** I think it is, that would be correct,
12 Judge. Let me just check...

13 **MS. JUSTICE COSTELLO:** Oh, I see what you mean. It's
14 at the beginning of the paragraph it doesn't have a
15 "not", but at the end of the paragraph it does. 15:47

16 **MR. O'DWYER:** Yes, Judge, it does go on. But just to
17 make sure that the amicus isn't saying that it does.
18 And indeed what we say about the Privacy Shield
19 Ombudsman mechanism which *might* be available to EU
20 citizens requires that EU citizens submitting inquiries 15:47
21 regarding access to their personal data for national
22 security purposes must allege a violation of law or
23 other misconduct to merit referral of their complaint
24 to an appropriate US Government body. Even then, the
25 only reassurance that the Ombudsman can provide to an 15:47
26 EU citizens is that their complaint has been properly
27 investigated and, two, any noncompliance with US
28 lawyers, statutes, executive orders, presidential
29 directives or agency policies has been remedied.

1
2 The Privacy Shield framework thus does not provide --
3 Ombudsman framework should I say, does not provide any
4 means to challenge *authorised* surveillance and
5 contravenes -- that might contravene Charter rights. 15:48

6
7 And I don't want to over emphasise this point, Judge,
8 but I think it's important the court sees, and you may
9 when you're going through the evidence about the
10 various statutes, you'll note - and we've gone into it 15:48
11 in some detail in the submissions - that they
12 repeatedly refer to the idea of unauthorised. And to
13 take the classic example, that's what we might term
14 rogue agents. So otherwise, if somebody goes outside,
15 does some surveillance, uses the various computer 15:48
16 systems to check up on somebody or to do something that
17 hasn't gone through, I suppose, the various procedures
18 that Prof. Swire in particular detailed and aren't
19 really acting under, be it section 702 or E012333, that
20 they're doing something outside of that, something, I 15:48
21 suppose, of their own volition or off their own bat.
22 And for the reasons outlined, Judge, we say that the
23 remedies that permit challenges to *unauthorised*
24 surveillance are effectively untenable.

25 15:49
26 In respect of... We say that the US remedies available
27 for *unauthorised* surveillance are so restrictive as to
28 be untenable, as I said. The doctrine of sovereign
29 immunity may entirely *bar* claims against the US

1 Government or agencies or government employees acting
2 in their official capacity. As a result, 1810 only
3 provides a means to seek redress against individual
4 government agents acting ultra vires - again this idea
5 of unauthorised for electronic surveillance. 15:50

6
7 We go through a number of the different statutes, as
8 I've explained, Judge. And then, Judge, finally, if I
9 could refer you to the more general points, which are
10 the overarching barriers to redress likely to preclude 15:50
11 EU citizen claims involving US surveillance. And
12 these, Judge, are the ones that even US persons will
13 struggle, will very much struggle with. And I suppose
14 I can put it fairly simply, that there are three major
15 difficulties, or overarching difficulties that *anyone* 15:50
16 trying to challenge surveillance will have in the --
17 well, particularly at a facial level will have in the
18 US courts. And those three are standing, state secrets
19 and, of course, notice, which is a key issue, having
20 been identified by Mr. Murray originally. 15:51

21
22 The problems about standing, the court has -- has been
23 rehearsed before the court over several days, but I'd
24 ask the court to consider Clapper -v- Amnesty, to look
25 carefully at Spokeo and consider the knock-on effect of 15:51
26 that and where that leaves standing.

27
28 I think the state secrets doctrine has been already
29 opened by the experts and perhaps the court might

1 review that, the evidence that's been given in respect
2 of that. But that's another difficulty that *anyone*
3 will experience trying to challenge surveillance in the
4 United States court.

5
6 Then finally and probably most significantly, the
7 notice, that how one is supposed to *ever* be able to
8 challenge something under the United States standing
9 doctrine when you have no notice that it's occurred or
10 might occur and you can't find out, it becomes almost 15:52
11 impossible to launch such a challenge. And that's a
12 really key point, in our submission.

13
14 And when you think of these cases, Amnesty and
15 Clapper -- or, sorry, Amnesty and Spokeo, these 15:52
16 involved *US* citizens and *they* couldn't establish - or
17 bodies based in the US in the case of Amnesty - and
18 *they* couldn't establish standing for a number of
19 different reasons, primarily because they hadn't got
20 notice of proof that they were going to be -- 15:52

21 **MS. JUSTICE COSTELLO:** well, I think Spokeo certainly
22 had notice of what had gone wrong in his credit report.

23 **MR. O'DWYER:** Spokeo had. But Spokeo was a different
24 point. But I know the court - I mean, I've been here
25 most of the time - I know the court has heard endless 15:53
26 evidence in respect of Spokeo. I can say that I
27 suppose we have some particular knowledge of it because
28 we were an amicus in the case, but I think in general
29 terms we would certainly be, if it's a matter of

1 aligning ourselves - and I don't mean, as an amicus, to
2 say that we are aligning with a particular party - but
3 certainly the evidence, I think, of Prof. Richards in
4 respect of Spokeo was probably what we would regard as
5 the most accurate.

15:53

6
7 Judge, so they're really our final points, the
8 standing, state secrets and notice. If I could just, I
9 suppose, in conclusion and to summarise, if I can make
10 the following three points. That there were a number
11 of general deficiencies in US privacy law; it's
12 fragmented and many of the laws are subject to
13 significant exceptions; that there's no constitutional
14 right to informational privacy, the equivalent of the
15 Article 8 that we've seen, it's very clear.

15:54

15:54

16
17 Secondly, that there's differential protection for
18 non-US persons. It's clear that 702 differentiates
19 between US persons and non-US persons; that the
20 remedies that *might* be available are not effective;
21 that most of the remedies, or in fact *all* of the
22 remedies that have been referred to, apart from the
23 facial challenges, relate, in our respectful
24 submission, to unauthorised type surveillance; that if
25 one were to try and launch a face-on challenge to -- if
26 one were to try to launch a face-on challenge to the
27 authorised, so therefore the one -- to surveillance
28 that *has* passed through the relevant procedures and *is*
29 permitted under Section 702 or E012333, that one will

15:54

15:55

1 face, well, the obvious difficulty that as an EU
2 citizen you can't rely upon the Fourth Amendment,
3 because you don't have the necessary connection with
4 the state. And even the provisions that might assist a
5 person if they're trying to challenge unauthorised 15:55
6 surveillance, that one comes across the what I've
7 termed the overarching problems, the three I've
8 identified: Standing, state secrets and notice.

9
10 They are my submissions. 15:56

11 **MS. JUSTICE COSTELLO:** Thank you very much.

12 **MR. O'DWYER:** Thank you, Judge.

13 **MS. JUSTICE COSTELLO:** Mr. Cush, would you like to
14 start, or would you want to leave it until tomorrow?

15 **MR. CUSH:** well, I'm certainly happy to start, I'm 15:56
16 entirely in the court's hands. I was just going to ask
17 for one favour, as it were, Judge. I will be quite
18 short, in or about an hour, but if the court would
19 accommodate me by not sitting before 11:15 tomorrow,
20 I'd be very grateful. If that's possible? 15:56

21 **MS. JUSTICE COSTELLO:** Oh, no, absolutely. If you were
22 going to ask me to sit earlier, it might've been an
23 issue. But certainly. And we can sit through until
24 quarter past one, just to make up the time.

25 **MR. CUSH:** well, I certainly won't take it that far, 15:56
26 Judge.

27 **MS. JUSTICE COSTELLO:** well, very good, 11:15 then.

28 **MR. CUSH:** I'm very grateful.
29

THE HEARING WAS THEN ADJOURNED UNTIL THURSDAY, 2ND
MARCH AT 11:15

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