

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 THURSDAY, 23rd FEBRUARY 2017 - DAY 10

10

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1 THE HEARING RESUMED AS FOLLOWS ON THURSDAY, 23RD
2 FEBRUARY 2017

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

5 **REGISTRAR:** At hearing Commercial Court action, Data 11:05
6 Protection Commissioner, Plaintiff -v- Facebook Ireland
7 Ltd. and Maximilian Schrems as the Defendants.

8 **MS. HYLAND:** Good morning, Mr. Serwin.

9 **THE WITNESS:** Good morning.

10 **REGISTRAR:** You are still under oath, sir. 11:05

11
12 **MR. ANDREW SERWIN WAS FURTHER CROSS-EXAMINED BY**
13 **MS. HYLAND AS FOLLOWS:**

14
15 1 Q. **MS. HYLAND:** Can I ask you please to go back to your 11:05
16 report?

17 A. Yes.

18 2 Q. which I think is in Book 2 and there is just a
19 paragraph that I think I touched on yesterday but
20 I wanted to make sure that I understood it because it's 11:05
21 a paragraph the DPC has placed reliance on.

22
23 So if I could just ask you please to go to the
24 paragraph in respect of ECPA which can be found, the
25 topic ECPA starts at page 9 and I'm going to ask you to 11:05
26 look at page 10. Before I do that, can I just identify
27 that ECPA is a very, do you agree that ECPA is a very
28 important statute in respect of privacy generally?

29 A. It is an important and complicated one, yes.

1 3 Q. Are you aware of what the Court of Appeal, the Second
2 Circuit, said in the Microsoft -v- USA case? Sorry,
3 I should ask you first, are you aware of that case?
4 This is a case where Microsoft stored data in Ireland,
5 are you aware of that case? 11:06

6 A. I am.

7 4 Q. Yes. And are you aware of what the court said about
8 the Stored Communications Act in that case?

9 A. Well, there was an issue there about whether Microsoft
10 could be forced to import data to respond to a 11:06
11 government request and ultimately the Second Circuit
12 said they did not have to, that was the holding.

13 5 Q. Yes, exactly. In that case the court said that: "*The*
14 *Stored Communications Act was enacted to extend to*
15 *electronic records privacy protections analogous to* 11:06
16 *those provided by the Fourth Amendment.*"

17

18 Are you familiar with that statement?

19 A. I'm not familiar with that statement, but I wouldn't
20 dispute it. 11:06

21 6 Q. Yes. So it is a very important statute and the
22 protections are important, do you accept that?

23 A. Again I have listed it in the memo as being one of the
24 more relevant ones and I think it is.

25 7 Q. Absolutely. Can I just ask you then, in the first full 11:07
26 paragraph on page 10 you go through in some detail the
27 protections?

28 **MR. MURRAY:** I just wonder, insofar as Ms. Hyland is
29 referring to cases.

1 **MS. HYLAND:** Oh, I am sorry.

2 **MR. MURRAY:** It just might be of assistance if the
3 witness has them --

4 **MS. HYLAND:** Of course.

5 **MR. MURRAY:** -- and if we all have them, just in 11:07
6 fairness because I don't know if that's in the books.

7 **MS. HYLAND:** Yes, it's in the tablet, it is in the
8 additional materials so it's going to go on to the
9 tablet now so that may be an easier way for the witness
10 to get it. Yes, it's on the tablet. 11:07

11 **MS. JUSTICE COSTELLO:** The one day I left it charging
12 in my chambers.

13 **MS. HYLAND:** Of course, Judge. I have paper copies, we
14 can hand them in. I'll hand in paper copies now.

15 **MR. MURRAY:** Thank you, Judge. 11:07

16 **MS. HYLAND:** I have no difficulty about that. So I'm
17 going to move on so perhaps -- well, I'm happy for
18 Mr. Serwin to look at that passage and obviously the
19 court as well.

20 **MS. JUSTICE COSTELLO:** Sorry, did you say they were 11:07
21 analogous to the Third Or the Fourth Amendment?

22 **MS. HYLAND:** To the fourth, Judge, yes.

23 **MS. JUSTICE COSTELLO:** The Fourth.

24 8 Q. **MS. HYLAND:** Yes, the Fourth Amendment, the privacy
25 amendment. It's at page 206, Mr. Serwin, do you see 11:08
26 that?

27 A. Yes, under heading (c).

28 9 Q. Exactly, exactly. You'll see there: "*The FCA was*
29 *enacted to extend to electronic records, privacy*

1 *protections analogous to those provided by the Fourth*
2 *Amendment."*

3
4 And could you just identify what the Fourth Amendment
5 is? 11:08

6 A. It's the Fourth Amendment of the United States
7 Constitution which, I think of relevance here, deals
8 with unlawful search and seizure, restricts the
9 government from certain searches and seizures.

10 10 Q. Yes. If I could just ask you, just since we are on 11:08
11 this case, just to identify, can I please ask you to
12 turn to page, I suppose the first page just identifies
13 the facts of it. I think you have already identified
14 that a warrant was issued under the FCA authorising
15 search and seizure and the e-mail service moved to 11:08
16 quash the search warrant on the basis it directed the
17 operation to produce and contents stored in Ireland;
18 isn't that right?

19 A. I know there was a government request, I don't recall
20 if it was an actual warrant or if it was a different 11:09
21 type. There is certainly -- but there was definitely a
22 government request and I think the way you have
23 characterised the holding is accurate.

24 11 Q. Yes. In fact if one looks at page 200 that becomes 11:09
25 clear. You will see, just at page 200, the start of
26 the decision. You'll see there that the warrant was
27 issued under section 2703 of the Stored Communications
28 Act, that's 18 USC 2701, 2701, and holding Microsoft in
29 contempt for refusing to execute the warrant on the

1 government's behalf; isn't that right?

2 A. Yes.

3 12 Q. Yes. So with that in mind and with the importance of
4 this act in mind can I ask you to go back please to
5 page 10. You set out in the first full paragraph of 11:09
6 page 10: "*2712. A person who is aggrieved by any
7 wilful violation of the wiretap Act or the Stored
8 Communications Act may commence an action in the US
9 district court against the United States to recover
10 money damages.*" 11:10
11

12 Now that I think is very clear in its terms, isn't it?

13 A. I think it is.

14 13 Q. And who does it give a cause of action against?

15 A. The United States government. 11:10

16 14 Q. Yes. And is it for, is there an identification of any
17 particular violations or is it any, I think you'll
18 agree that it's any wilful violation; isn't that right?

19 A. As I read it, it was any wilful violation of the
20 Wiretap or SCA. 11:10

21 15 Q. Yes. Now can I ask you to go down then to the next
22 paragraph. You will see there that you say:
23
24 "*There is an uncertainty in the statutory language as
25 to whether government entities can be held liable for 11:10
26 violations of the wiretap Act because the definition of
27 a person under the Act does not include governmental
28 entities.*"
29

1 Now can you explain what you meant by that given the
2 clarity of the provisions of section 2712?

3 A. What I meant is that, aside from 2712, that under the
4 Wiretap Act itself other government agencies, which, as
5 I said, can include State, if you look at footnote 45. 11:11

6 16 Q. Yes.

7 A. On page 9, what I'm saying there is that definition
8 does not include government agencies. But it does
9 include, obviously as I say there, any employee or
10 agent of the United States or State political 11:11
11 subdivision thereof. And so ECPA can apply both to the
12 federal government and to other government agencies.
13

14 And so what, going back, I think, to your question
15 regarding the language, what I'm trying to convey there 11:11
16 is that under the wiretap Act itself, aside from 2712,
17 there is uncertainty as to whether there would be in
18 essence some liability for government agencies, the
19 courts have split on that. The definition had been
20 interpreted certain ways, but it's clear under 2712 11:11
21 there is liability. And then again in the paragraph
22 I do say that government officials can be liable under
23 ECPA in that paragraph.

24 17 Q. Yes. So in other words there's no ambiguity but that
25 the US government is liable for any wilful violation; 11:12
26 isn't that right, that's a black and white proposition?

27 A. Under 2712, that's correct.

28 18 Q. Under 2712, absolutely. Because when we come to look
29 at the DPC decision we see that she appears to have

1 misunderstood that and to have interpreted your
2 paragraph as a qualification of the outright, if you
3 like, entitlement that we see in 2712?

4 A. I would have to see the section you are referring to.

5 19 Q. Yes, and I will take you to that, but I just wanted to 11:12
6 identify clearly what you meant by that.

7
8 Can I ask you now please just to deal fairly briefly
9 with the topic of the APA. You will have seen that
10 Prof. Vladeck identifies that as a matter that ought to 11:12
11 have been dealt with in your first opinion; isn't that
12 right? Can I just ask you to look at your discussion
13 yesterday in response to Mr. Murray's questions, and
14 I wonder could a transcript be handed up to the witness
15 please of yesterday's. And, Judge, I don't know if the 11:12
16 court has a transcript, it may not?

17 **MS. JUSTICE COSTELLO:** It's in my chambers. It's all
18 right, Mr. Kavanagh will get and it I'll mark it up
19 then as we go.

20 **MS. HYLAND:** Very good, Judge. 11:13

21 **MS. JUSTICE COSTELLO:** I'm sort of boxed in enough
22 without bringing the...

23 **MS. HYLAND:** Yes, Judge. The papers are certainly
24 challenging in this case.

25 A. I have a hard copy now, I believe. 11:13

26 **MS. HYLAND:** Yes, thank you. I'll just...

27 **MS. JUSTICE COSTELLO:** Carry on.

28 20 Q. **MS. HYLAND:** Very good, Judge, thank you, yes. I think
29 at page 67 you refer to the APA and I think you

1 identify a number of cases; isn't that right, where the
2 APA was discussed? First of all, you identify ACLU -v-
3 Clapper, which obviously is a case where there is some
4 considerable discussion of the APA; isn't that right?
5 A. Yes. 11:14
6 21 Q. Yes. And I think you also make reference to Klayman;
7 isn't that right, as well?
8 A. Yes.
9 22 Q. Klayman -v- Obama, and again that was a case where
10 there was active consideration of the APA? 11:14
11 A. Yes.
12 23 Q. Yes. And I think you also refer to Jewel where again
13 there was consideration of the APA?
14 A. Yes.
15 24 Q. I think yesterday a little later on you discussed the 11:14
16 case of the ACLU -v- NSA where again I think there may
17 have been discussion about -- yes, indeed. This is,
18 I think, where you said the final agency action point,
19 you made a point about final agency action and in that
20 context you referred to that case? 11:14
21 A. Agency action, yes.
22 25 Q. Yes. So that's, I think, four cases that you
23 identified in your evidence which referred to the APA.
24 I think then after Prof. Vladeck identified the issue
25 in your supplemental paragraphs - I beg your pardon in 11:15
26 your supplemental report - you dealt with the APA and
27 you explained why in certain circumstances it wasn't
28 helpful or it wasn't available and you said it had a
29 *mixed* history, would you agree with that?

1 A. I did say that, yes.

2 26 Q. Yes. And I suppose, Mr. Serwin, I put it to you that,
3 given that you yourself identified, I think, four
4 important cases where it was an issue, sometimes
5 successful for the plaintiff, sometimes not, do you now 11:15
6 in hindsight think that it ought to have been included
7 in your first report?

8 A. I don't. I think I mean the cases, when you look at
9 those, I think it is fair to say that the history is a
10 bit - is mixed. I again focussed on what I thought 11:15
11 were the most probable remedies. And I saw the FISA
12 and ECPA remedies, as we talked about it being so
13 primary. Because of that the 2712 issue that is
14 identified in Second Circuit Clapper and in Jewel,
15 I saw that really as the primary remedy. So I would 11:16
16 not, even knowing what I know today, include it.

17 27 Q. But the DPC, as we said yesterday, is not an American
18 lawyer and equally you aren't making, as you told us,
19 you are not making the assessment of adequacy, that you
20 say is a matter for her; was she not entitled to know 11:16
21 the relevant statutes that might be applicable, even
22 though, as you say, they have a mixed history?

23 A. Again in my report I tried to focus on what I thought
24 would be the most relevant remedies. You know, there
25 were, I mean I'm sure I could come up with other 11:16
26 statutes. The APA is not a privacy statute, it's a
27 broader statute that has been used in the privacy
28 context. And so I think, you know, and I'm not saying
29 I'll bring this, but I could have, I guess, looked at

1 civil RICO or a variety of other statutes that borrow
2 other violations. I don't know that that would work.
3 But I didn't see the APA as a primary remedy, I saw
4 2712 remedy as really being the primary. And, given
5 what I did, I felt that was appropriate. 11:17

6 28 Q. Do you think that your perception may have been because
7 you don't generally at all practice in the national
8 surveillance sphere, because it seems to me that given
9 the cases we're been looking at it is important in the
10 context of *that* particular sphere? 11:17

11 A. No. Because I think again, my context was looking at
12 it in the, really if someone walked into my office and
13 I said 'I want to pursue a remedy' and I thought the
14 most fulsome remedies and the most likely remedies were
15 FISA, ECPA, depending on what happens with the Judicial 11:17
16 Redress Act, that certainly as well, where it certainly
17 has been used by individuals. But I think, you know
18 looking at wikimedia which I think we talked about
19 yesterday, looking at Second Circuit Clapper, that was
20 a programmatic challenge to the 215 programme, not an 11:17
21 individual coming in and seeking relief.

22
23 So I saw, overall Jewel was, I believe, an individual
24 seeking relief, they sought relief under ECPA and FISA.
25 And that's where the court said, you know, you have 11:18
26 those remedies, the United States does not wave
27 sovereign immunity under 2712 for injunctions and so
28 I felt on balance that it still wasn't a remedy that
29 I thought was primary, if you will.

1 29 Q. So you did think about it and discount its inclusion;
2 is that right?

3 A. I was aware of Second Circuit Clapper and that the APA
4 was used to challenge that programme. I did not
5 include it because again I did not see it within the 11:18
6 scope of what I thought would be the primary remedies.

7 30 Q. And did you not include it because of Jewel or did you
8 not include it because you didn't think it was
9 important?

10 A. I didn't include it again because, as I said in my 11:18
11 second report of the mixed history, I was aware of
12 Jewel, I was aware of the prior ACLU case which held
13 that in that case the distinction between conduct and
14 agency action. I saw the 2712 remedy as noted in
15 Second Circuit Clapper as being really the primary 11:18
16 remedy as the court said in Jewel. So I did not feel
17 it was one of the more likely remedies for the scenario
18 I was addressing.

19 31 Q. I just want to check, did you say 2712 in the context
20 of Clapper, is that what you said? 11:19

21 A. Second Circuit Clapper, yes. If you look at my report
22 I think there's a quote...

23 32 Q. I'm just not familiar. Perhaps I can ask you to look
24 at Clapper instead of talking about it in the abstract.
25 So it's Tab 15. 11:19

26 A. Actually it would help to, I think I have a quote from
27 Clapper in my report.

28 **MS. JUSTICE COSTELLO:** Did you say Tab 50?
29 **MS. HYLAND:** Tab 15, Judge, yes. Yes?

1 A. If you look at footnote 24.

2 33 Q. Are we talking about ACLU -v- Clapper, I am sorry to
3 interrupt you?

4 A. Yes, Second Circuit Clapper.

5 34 Q. Yes, Second Circuit. 11:19

6 A. So I quote there: "2712. Moreover - and this is
7 footnote 24 - explicitly withdraws the right to
8 challenge the specific government actions taken under
9 specific authorisation, in connection with extending an
10 explicit cause of action for monetary damages in 11:19
11 connection with such actions."

12 35 Q. I just lost, I'm sorry, just give me the footnote
13 again, sorry.

14 A. 24.

15 36 Q. 24. Of your first -- your second report, is it? 11:20

16 A. Second report.

17 37 Q. Yes, okay. Sorry, go ahead:

18 A. "2712 manifestly does not create a cause of action for
19 damages for 215, as it does with respect to those
20 statutes which it does preclude review under the APA." 11:20
21

22 So I read that as saying what I read Jewel as saying is
23 where the government created the right under 2712 and
24 did not provide injunctive relief, the APA would not
25 lie if the claim falls within 2712's relief because 11:20
26 they explicitly did not permit injunctive relief.

27 I think that's what Jewel holds. Again there is that
28 issue. I also saw the conduct versus agency action
29 issue which is in the ACLU case.

1 38 Q. And we might just deal with those two things
2 separately, if we could.

3 A. Yes.

4 39 Q. Can I just ask you to go to ACLU -v- Clapper.
5 **MS. JUSTICE COSTELLO:** Just a moment, Ms. Hyland. 11:20
6 **MS. HYLAND:** Yes. So this is at Tab 15, ACLU -v-
7 Clapper, and can I just ask you to go to the passage
8 where the court deals with the APA. And can I put it
9 to you that it doesn't reflect, if you like, your,
10 I suppose, decision, it doesn't direct - or your 11:21
11 characterisation of the APA as not important in this
12 sphere and in particular can I just ask --

13 A. I am sorry, what tab?

14 40 Q. I am sorry. So it's Tab 15, 1-5, and I think it should
15 be Book 14. 11:21
16 **MS. JUSTICE COSTELLO:** It's Book 1 of 5 of the US
17 material.

18 A. Yes, okay, I have the case now. Which page?

19 41 Q. **MS. HYLAND:** Very good. So page 803 of that decision.
20 Do you see there there's a heading Section 215 "*an* 11:21
21 *implied preclusion*", do you see that?

22 A. I do.

23 42 Q. Yes. And you see it says there that: "*The APA waives*
24 *sovereign immunity for suits against the US for relief*
25 *for other than money damages. Under the APA a person* 11:21
26 *suffering legal wrong because of agency action or*
27 *adversely affected or aggrieved by agency action within*
28 *the meaning of a relevant statute is entitled to*
29 *judicial review thereof and can bring suit in an action*

1 *in a court in the United States seeking relief for*
2 *other than money damages. The APA thus establishes a*
3 *broad right of judicial review of administrative*
4 *action. The APA does not apply where statutes preclude*
5 *judicial review."* 11:22

6
7 And then you see the court going on to say: "*In*
8 *determining whether judicial review is precluded under*
9 *a particular statute, we must begin with the strong*
10 *presumption that Congress intends judicial review of* 11:22
11 *administrative action."*

12
13 There is then a considerable discussion of the
14 application of the Act, it goes on until page 809 where
15 you see there there's a question as to whether or not 11:22
16 there is the implied preclusion, do you see that
17 heading there? This is the point I think that you were
18 dealing in your footnote and this is in relation to
19 2712, do you see that there?

20 A. I do. 11:22

21 43 Q. And there's a decision then on the second column about
22 six lines down: "*But 2712 does not deal in*
23 *particularity with section 215."*

24
25 And turning over the page at 810 you'll see there it 11:23
26 says: "*The government relies on bits and shards of*
27 *inapplicable statutes."*

28 **MS. JUSTICE COSTELLO:** Sorry, where are you quoting
29 from in page 10 because there is two columns?

1 MS. HYLAND: I am sorry, under the heading summary C,
2 I beg your pardon.

3 MS. JUSTICE COSTELLO: Thank you.

4 MS. HYLAND: Yes: *"In short the government relies on*
5 *bits and shards of inapplicable statutes, inclusive* 11:23
6 *legislative history and inferences of silence in an*
7 *effort to find an implied revocation of the APA's*
8 *authorisation of challenges. That is not enough to*
9 *overcome the strong presumption of the general command*
10 *of the APA against such implied preclusion. "* 11:23
11

12 And then at the bottom of that same column the court
13 holds that: *"The appellants have a right of action*
14 *under the APA"* and they go to the merits of the case.

15 11:23

16 Now did you read that passage or those passages before
17 you did your report?

18 A. I had read that case, yes.

19 44 Q. Yes. Did that not, as it were, identify for you that
20 it should be flagged to the DPC that this is an avenue, 11:23
21 it's an avenue, as you say, with a mixed history, but
22 nonetheless an avenue that, in this case for example,
23 was absolutely successful for the plaintiffs?

24 A. Again, no, because this is dealing with the 215
25 programme which does not have a remedy under 2712 and 11:24
26 that's the reason, one of the reasons the APA was
27 permitted. So what I saw as the most likely claims
28 were the FISA claims, as you noted earlier the
29 importance of ECPA, the ECPA claims, and I felt that

1 because those remedies existed under 2712 the fact that
2 there was a 215 case that didn't have a remedy under
3 2712 wasn't sufficient to sway me to say that it was
4 one of the more important remedies. I saw the 2712
5 remedies for FISA and ECPA as being the more important 11:24
6 remedies.

7 45 Q. So you made an active decision not to identify the APA;
8 is that right?

9 A. I made a decision. Obviously I could have, I mean
10 I made a decision about what I thought were the most 11:24
11 likely and helpful causes of action and I did not feel
12 that the APA was one of them.

13 46 Q. Yes. Because you also were asked to identify I think
14 the contours and the limitations or the restrictions on
15 the remedies. So in order to give a balanced view 11:25
16 wouldn't it have been fairer, if you like, to identify
17 a statute that sometimes has effect, sometimes doesn't,
18 but is undoubtedly a potential avenue for litigants?

19 A. Again I would say, given the scope of what I was doing
20 in looking at the primary remedies and what I thought 11:25
21 would be the most likely remedies again for an
22 individual, not challenging a programme as a whole but
23 certainly as an entity I did not feel that it was one
24 that would sort of make the cut, if you will, there.
25 And I again having spent time looking at it and 11:25
26 responding to Prof. Vladeck I still feel the same way.

27 47 Q. I see. And I suppose that is probably why at the
28 beginning of your report you identified to the DPC that
29 it was a non-exhaustive identification of remedies; is

1 that right, a non-exclusive, I think you said, a
2 non-exclusive overview; is that right?

3 A. I believe that's what the memo says, yes.

4 48 Q. Yes. Can I just ask you on one other point, and this 11:26
5 is final agency action, and again Mr. Murray asked you
6 about that yesterday. I think he said that the APA was
7 sometimes or in a particular case, I think the ACLU -v-
8 NSA, had been held not to be available to plaintiffs
9 because it was not final agency action; is that right?

10 A. It was not, in that case I think it was not *agency* 11:26
11 action.

12 49 Q. It was not agency action, I beg your pardon.

13 A. And so, not to get too deep in the weeds, but as I read
14 704, without it in front of me, I believe the APA says
15 there's, you can have a right of review force, agency 11:26
16 action made reviewable by statute or final agency
17 action. The ACLU -v- NSA case just simply says this is
18 not agency action, it's conduct. I used the phrase
19 "*final agency action*" in my supplemental report because
20 I did not see there being a judicial right of review 11:26
21 under a statute in the context I was dealing with it in
22 the national security context. But again I saw that as
23 the trigger. The point is I believe that conduct
24 versus agency action is the point that case makes.

25 50 Q. Yes. Can I just put it to you that this particular 11:27
26 case, in fact the one we're looking at, ACLU -v-
27 Clapper, actually is about a programme, it was exactly
28 about the same thing in fact that ACLU -v- NSA was
29 about, a different programme but a programme

1 nonetheless, as opposed to, if you like, a discrete
2 once-off act, but nonetheless the court here did not
3 preclude relief under the APA and can I just take you
4 to page 799 please of that judgment?

5 A. I am sorry, which one. 11:27

6 51 Q. 799.

7 A. Are we still in?

8 52 Q. The same one, yes, same judgment. Do you see there
9 under the heading "*procedural history*"?

10 A. Yes. 11:27

11 53 Q. And about half way down, you'll see it says: "*The
12 complaint asked the court to declare that the telephone
13 metadata program exceeds the authority granted by
14 Section 215 and violates the First and Fourth
15 Amendments to the Constitution.*" 11:28

16

17 Do you see that?

18 A. I do, yes.

19 54 Q. Yes. And then if I could ask you to go on to page 821
20 and the first column on page 821. Do you see about two 11:28
21 thirds of the way down, you see the court says:

22

23 "*we hold the text of 215 cannot bear the weight the
24 government asks us to assign to it and it does not
25 authorise the telephone metadata program.*" 11:28

26

27 Do you see that?

28 A. Yes.

29 55 Q. So would you accept that for whatever reason the

1 government did not raise the agency action issue in
2 respect of the application of APA there?

3 A. No, I did not. No, I don't believe they did.

4 56 Q. No. Does that, I suppose, modify your concerns about
5 the agency action point? 11:28

6 A. No. I mean again I think it's had a mixed history.
7 That case is, to my knowledge, the case I cite has not
8 been, it has no negative history. I've not seen a
9 contrary ruling. I don't know why the government did
10 or didn't raise the issue in this case and raised it in 11:29
11 that case, I can't speculate on that. But they
12 obviously, there are two cases dealing with similar
13 topics that come to vastly different conclusions based
14 on a different analysis.

15 57 Q. well, I think to give a complete picture it would 11:29
16 probably be necessary to identify both the cases to the
17 court, wouldn't it, rather than just one of the cases
18 as you did?

19 A. I think I identified both in my report.

20 58 Q. But on this point about agency action? 11:29

21 A. No, that's the ACLU case we've been talking about.

22 59 Q. The NSA. No, that's the ACLU -v- NSA case?

23 A. Correct, not Clapper -v- ACLU, right

24 60 Q. Exactly. To give a balanced view isn't it important to
25 also look at this case where it wasn't raised, where 11:29
26 the agency action point was not raised in this case?

27 A. No. Look I think again there are, as I said the cases
28 are mixed. One, the prior case, the 2007 case, does
29 raise the agency action. Obviously it was not raised

1 in Second Circuit Clapper. I can't speculate as to
2 why. It was raised in one and not raised in the other
3 and they reached different conclusions on different
4 programmes with different grounds.

5 61 Q. Yes.

11:30

6 **MS. JUSTICE COSTELLO:** The court is not obliged of its
7 own motion to deal with a point not raised by the
8 parties?

9 A. The only time I'm aware of that a court would have to
10 raise something sua sponte would be Article III
11 jurisdiction because it is jurisdictional. I don't
12 believe they would have to make the parties' arguments
13 for them. Again I can't speculate as to why it was
14 raised in one and not raised in the other, if they had
15 different programmes, I don't know.

11:30

11:30

16 62 Q. **MS. HYLAND:** Yes. Although the defendants, one was the
17 state, the NSA, and the other is Clapper who, as we
18 know, is an agent of the NSA; isn't that right?

19 A. No, he is not.

20 63 Q. Sorry.

11:30

21 A. Maybe it would help. Post 9/11 we gained something
22 called the ODNI which is the Office of Director of
23 National Intelligence. Mr. Clapper was the Director of
24 National Intelligence or the DNI. It was the entity
25 that was put in to try to coordinate, if you will,
26 intelligence gathering. So he is not part of the NSA,
27 the NSA is part of, I believe, DOD and subject to
28 either Title 10 or Title 50 of the United States code,
29 the CIA is the other one.

11:31

1 64 Q. Yes.

2 A. So, no, he is not part of the NSA. He has oversight
3 over parts of national intelligence, I don't know if he
4 has oversight over DOD, which is really where the NSA
5 is. But it would not be accurate to say he is part of 11:31
6 the NSA.

7 65 Q. Hmm, I am sorry.

8 **MS. JUSTICE COSTELLO:** Sorry, DOD stands for?
9 A. Department of Defence, I am sorry.

10 **MS. JUSTICE COSTELLO:** I get lost with acronyms. 11:31

11 A. Yes. To put this in, and this is not in my report,
12 I didn't cover this. I mean in blunt, in broad terms
13 you have the Federal Bureau of Investigation which is a
14 law enforcement agency that does do national security
15 in certain cases. You have the NSA which is, you'll 11:31
16 hear cyber command, you'll hear Department of Defence,
17 a variety of things, but it is part of the United
18 States military at its core. And then you have the CIA
19 which is really an intelligence gathering, I'd say more
20 human intelligence probably than anything. You have 11:32
21 the Department of Homeland Security which was created
22 post 9/11 to help try to coordinate these various
23 entities. And you have the ODNI, or Office of Director
24 of National Intelligence, that is supposed to supervise
25 pieces of that that I don't want to opine on here. But 11:32
26 that's kind of a rough overview.

27 66 Q. Can I ask you where does Bob Litt fit into all of that?

28 A. I believe, I'd have to look at the letter. I thought
29 he was part of the NSA, but I would have to, I don't

1 know his title off the top of my head.

2 67 Q. Yes. Can I ask you then just to go back please to ACLU
3 -v- Clapper again and can I ask you to look at a
4 different point. You heard, I think, Mr. Serwin, the
5 extended discussion about concrete harm, or at least 11:32
6 you may heard some of it, you may have been in court
7 for some of it?

8 A. I think I was here for all of it.

9 68 Q. You were here for all of it, good. Well, we're not
10 going to repeat that. 11:32

11 A. Thank you.

12 69 Q. But can I ask you to look at page 801, please. Can
13 I just put it to you that, at least in this context,
14 the position is fairly clear. Just looking at page 801
15 going down to the bottom of the first column, you will 11:33
16 see there that, starting with the words:
17
18 *"We think such collection is more appropriately*
19 *challenged, at least from a standing perspective, as a*
20 *seizure rather than a search."* 11:33
21

22 You'll see at the top --

23 A. I am sorry, I don't, where are you?

24 70 Q. I am sorry. So the left-hand column on page 801, you
25 see the number six, do you see that? 11:33

26 A. Yes, I do.

27 71 Q. Yes. So about, well I'll start a bit earlier, about a
28 third of the way down:
29

1 "As the district court observed it is not disputed that
2 the government collected telephone metadata associated
3 with the appellants' telephone calls. The Fourth
4 Amendment protects against unreasonable searches and
5 seizures. Appellants contend that the collection of 11:33
6 their metadata exceeds the scope of what is authorized
7 by 215 and constitutes a Fourth Amendment search. We
8 think such collection is more appropriately challenged,
9 at least from a standing perspective, as a seizure
10 rather than a search. Whether or not such claims 11:34
11 prevail on the merits, appellants surely have standing
12 to allege injury from the collection, and maintenance
13 in a government database, of records relating to them.
14 'A violation of the Fourth Amendment is fully
15 accomplished at the time of an unreasonable 11:34
16 governmental intrusion'. If the telephone metadata
17 program is unlawful, appellants have suffered a
18 concrete and particularised injury fairly traceable to
19 the challenged programme and redressable by a
20 favourable ruling." 11:34

21
22 Doesn't that make the position clear, as I say
23 certainly in the context of a claim under Section 215?

24 A. I think, no. Well, it goes back to what we talked
25 about yesterday. It is if you know you were surveilled 11:34
26 you would likely have standing. The difference with
27 215 is, 215 was alleged to be a bulk collection. So
28 the allegations were, we know everyone was in there
29 because everyone's metadata, at least every Verizon,

1 alleged Verizon customer whose metadata was in. So
2 I think it's more akin to the analogy we were talking
3 about yesterday with the criminal prosecution. If you
4 know your information is taken or seized or searched,
5 standing becomes a bit easier. So to me the issue 11:35
6 isn't whether it's a claim under an APA or not, it's
7 that the government was allegedly gathering all of the
8 metadata through the 215 programme. That was
9 disclosed, it was taken as, in a sense, a fact and that
10 gave people standing because that was out in the clear. 11:35

11 72 Q. Mr. Serwin, are you not conflating two different things
12 here? Isn't there a difference between this actual or
13 imminent part of the test, which is essentially did it
14 happen or will it happen, would you accept that that's
15 what that part of the test is talking about? 11:35

16 A. I think it's a temporal issue more than anything, yes.

17 73 Q. Well, can I just separate this out. So the actual and
18 imminent is one part of the injury-in-fact test, would
19 you accept that it's, if you like, a discrete part
20 separate from the concrete and particularised part? 11:35

21 A. Yes.

22 74 Q. Yes. So question one is: Did it happen or will it
23 happen and can I put to you that in Amnesty -v- Clapper
24 that's really what the court was looking at, will it
25 happen, would you agree with that? 11:36

26 A. Well, you know, it's interesting you say that. Because
27 thinking about Supreme Court Clapper, and our
28 discussion yesterday about the suing the day before
29 versus later. If imminent means anything I would think

1 it means the day before. Imminent seems to be, you
2 know, imminent. And so I think to me, thinking about
3 concrete and particularised, I have never thought of it
4 this way, but it's really probably goes to more the
5 quality or type of harm and I think actual or imminent 11:36
6 goes to more of a timing issue.

7
8 And so I think what you -- so I don't think, what I see
9 this is doing is saying (a) you have concrete and
10 particularised, it doesn't discuss that in the light of 11:36
11 Spokeo because Spokeo had not come out; but, second, we
12 know it has already happened because the 215 programme
13 was alleged to have gotten all of the metadata about
14 everyone who was a Verizon customer, therefore it was
15 actual, not even imminent. The same facts could go to 11:37
16 two different parts of standing.

17 75 Q. Yes.

18 A. But I think you could have a -- so I think the answer
19 is it goes to both in the 215 context would be my
20 reading. 11:37

21 76 Q. Yes. But isn't it the case that here, in this passage
22 I have identified to you, the court are looking at, if
23 you like, the concrete and particularised point
24 primarily in this passage. If you look in particular
25 at the second column where they say: "*If the telephone 11:37*
26 *metadata program is unlawful, appellants have suffered*
27 *a concrete and particularised injury fairly traceable*
28 *and redressable by a favourable ruling.*"

1 In other words, isn't the court saying there that the
2 mere fact of seizure is in and of itself concrete and
3 particularised and nothing more is required in respect
4 solely of, I'm talking now just about concrete and
5 particularised, isn't that what the court says in black 11:37
6 and white terms there?

7 A. For a US citizen that would be, you have a Fourth
8 Amendment right and that's what you are challenging
9 there. And I think that's not what you are dealing
10 with necessarily with ECPA or FISA, though I do note 11:38
11 again in my report that statutory violations can be
12 concrete and particularised, if you will.

13
14 I think, you know they go into -- I read that, again
15 I'm speculating here about what the court is doing, the 11:38
16 court obviously is not citing Spokeo because this case
17 came out --

18 **MS. JUSTICE COSTELLO:** Predates.

19 A. -- pre Spokeo and the first case they cite is Amnesty
20 International which is Clapper Supreme Court. 11:38

21 77 Q. Hmm.

22 A. So I can't, they say Amnesty International does not
23 hold otherwise, so it's hard for me to say where there.
24 I think the standing doctrine is a bit muddled at
25 times. So you could be right, they could be going to 11:38
26 concrete and particularised frankly, they could be
27 going to actual or imminent. Given what they are
28 citing I tend to think it is probably actual and
29 imminent, but I wouldn't have a basis to speculate

1 there.

2 78 Q. well haven't they already, hasn't the court already
3 said about six or eight lines down at paragraph 6,
4 which we all looked at: "*It is not disputed that they*
5 *collected them.*" So in this case the question did it 11:39
6 happen or did it not is not an issue in *this* case;
7 isn't that right, so the court doesn't need to trouble
8 itself with that in this case?

9 A. But that could mean it didn't need to look at any of
10 the elements of injury-in-fact because the same thing 11:39
11 could provide both concrete and particularised and
12 actual or imminent.

13 79 Q. well doesn't the court have to be satisfied of both?

14 A. It has to satisfy concrete and particularised and
15 either actual or imminent. 11:39

16 80 Q. Exactly, exactly. We know that actual has been
17 satisfied here, isn't the court looking at concrete and
18 particularised in this passage?

19 A. Again I can't say that because the first thing they do
20 is cite Supreme Court Clapper, so it's hard. I don't 11:39
21 see the words "*concrete and particularised*" in that
22 passage.

23 81 Q. So you don't see them?

24 A. I mean I may have misread it.

25 82 Q. They are just there at the top. Sorry, just when you 11:40
26 keep on going in the next column, when you go to the
27 next column, top of the page: "*If the telephone*
28 *metadata program is unlawful, appellants have suffered*
29 *a concrete and particularised injury*"?

1 A. They are hitting all three elements of standing there.
2 what they are saying is concrete and particularised
3 injury, then they are hitting causation and they are
4 hitting redressability.

5 83 Q. Yes, absolutely. 11:40

6 A. I think what they have done is kind of collapse the --
7 they are hitting all three elements of standing.
8 I will say they do not talk about actual or imminent in
9 that paragraph. There is three elements of standing.

10 84 Q. Yes. 11:40

11 A. There is injury-in-fact, causation and redressability.

12 85 Q. Yes.

13 A. At the end of that paragraph the reference there, if
14 they were just talking about concrete and
15 particularised there would be a period after injury, 11:40
16 I think.

17 86 Q. Well I think you are absolutely right that they are
18 talking about two other aspects, the last two aspects
19 of the test, but isn't it fairly clear that the
20 reference to concrete and particularised is a reference 11:40
21 to the injury-in-fact test, they don't have to worry
22 about actual because they know that has happened and
23 they are focussing on the concrete and particularised
24 and they are ticking that box; isn't that right?

25 A. I think they are probably ticking both boxes. 11:41

26 87 Q. Yes.

27 A. Because they talk about Amnesty International right
28 after.

29 88 Q. Very good. Can I just ask you to look please at --

1 sorry, just in relation to Spokeo, you said that Spokeo
2 hadn't yet been decided at that point in time, but
3 doesn't Spokeo say that you have to look at the
4 statutory context; isn't that right? That's what you
5 say in your report, I think very fairly; isn't that 11:41
6 right?

7 A. I think what I said is it's a fact specific analysis
8 that will have to go on after Spokeo. So I think
9 that's what I said in my report.

10 89 Q. Yes. And isn't it right that the court said you have 11:41
11 to look in any given individual case whether there's a
12 concrete harm; isn't that right?

13 A. I think that's, I think that's the issue exactly which
14 is a statutory violation in and of itself might not be
15 enough, you have to look at kind of the quality of the 11:41
16 actual injury you're dealing with to see if it's
17 concrete or particularised.

18 90 Q. Exactly. But here in this case hadn't the court held
19 that for a Section 215 breach, once it happens that is
20 concrete, it's sufficiently concrete, in this 11:42
21 particular Section 215 context, isn't that what that
22 passage means?

23 A. Pre Spokeo it is a case where there's no remedy
24 available to a US or an EU citizen directly under any
25 of the statutes that I cite. And I don't know if they 11:42
26 would, I don't know how this case would be decided post
27 Spokeo because you have a situation where you have a
28 statutory, arguably statutory violation with no other
29 remedy and the question is would a court say that there

1 is sufficient harm from a seizure to confer standing
2 and I don't know.

3 91 Q. I see. Can I ask you to look at a different case, this
4 is a case at Tab 22, a very recent case called valdez.
5 You will see that this is a case in respect of a 11:43
6 programme some considerable time ago?

7 A. Yes.

8 92 Q. And --

9 A. This is the Olympic case, if I'm not mistaken.

10 93 Q. Exactly, exactly. This is the winter Olympics in Salt 11:43
11 Lake City, that's right.

12 A. Yes.

13 94 Q. Are you familiar with this case?

14 A. Yes, I am.

15 95 Q. Yes. I think it's only just, I think it's as early as 11:43
16 10th January; is that right, of this year, 2017?

17 A. Looking at it, it looks like is filed -- yes.

18 96 Q. Yes. And it's a district court case; isn't that right?

19 A. Yes.

20 97 Q. Yes. And it's a motion to dismiss; isn't that right? 11:43
21 A. That is my recollection. But let me just -- yes, "*now*
22 *moves to dismiss*", yes.

23 98 Q. Yes. And you will see there that six individuals, I'm
24 just looking at the very first page of it:
25 11:43
26 "*who lived and worked in Salt Lake City during the 2002*
27 *Salt Lake Winter Olympics. They contended that the*
28 *NSA, acting at the direction of former President George*
29 *Bush and Vice-President Dick Cheney illegally engaged*

1 *in a sweeping warrantless surveillance programme during*
2 *the games and they monitored all electronic*
3 *communications in and around Salt Lake City and all*
4 *Olympic venues used. Because the plaintiffs used*
5 *e-mail, text and telephone, they contend that* 11:44
6 *communications and data were necessarily intercepted.*
7 *Plaintiffs alleged the NSA continues to store the*
8 *electronic data."*

9
10 And I just want you to look at this case, well first of 11:44
11 all are you aware of what the outcome of that motion to
12 dismiss was?

13 A. I think I believe the motion was granted, if I'm not
14 right. Let me look at the end. But I know I read the
15 case recently. 11:44

16 99 Q. Yes. If you look at page 20 I think it's the opposite.

17 A. Okay.

18 100 Q. It was denied. So, in other words, the motion to
19 dismiss was not successful?

20 A. That's right, I am sorry. wikimedia was granted, this 11:44
21 was denied.

22 101 Q. Yes, exactly.

23 A. Okay, I apologise, yes. I knew I had read the two
24 cases recently and I got the holdings flipped in my
25 head. 11:44

26 102 Q. Yes. Now can I just ask you to turn to page 4?

27 A. Mm hmm.

28 103 Q. And you'll see, for example, at page 4, on the third
29 line, second and third line, you will see that the APA

1 again is included as one of the potential remedies,
2 potential avenues, do you see that there?

3 A. I do.

4 104 Q. Yes. Then can I just ask you please to turn on to page
5 12, do you see page 12? 11:45

6 A. Yes.

7 105 Q. And you'll see there under the heading (ii)
8 "*allegations of injury*" and then you'll see the word:

9
10 "*To establish standing plaintiffs must show they have* 11:45
11 *suffered an injury-in-fact which is concrete and*
12 *particularised and actual or imminent. Plaintiffs*
13 *argue that they were injured because the NSA illegally*
14 *conducted warrantless surveillance of their*
15 *communications.*" 11:45

16
17 And you'll see then the next paragraph: "*The NSA does*
18 *not argue that warrantless surveillance of plaintiffs'*
19 *communications is an insufficient basis to establish*
20 *injury for standing purposes. Rather, they contend* 11:45
21 *that at the government intercepted their communications*
22 *during the 2002 Winter Olympics is based on a bare*
23 *assertion and the complaint contains no factual*
24 *enhancement to support this assertion. For this reason*
25 *under the plausibility standard of pleading these* 11:45
26 *allegations are not entitled to a presumption of*
27 *truth.*"

28
29 Now can I put it to you that here we see again the

1 difference between concrete and particularised on the
2 one hand and the actual test on the other, and I am
3 leaving aside imminence because this is something that
4 happened in the past so we need don't to worry about
5 the future here; but isn't it clear here that the NSA 11:46
6 is not saying that the mere fact of surveillance alone
7 would be insufficiently concrete?

8 A. Again I think we are dealing with this at the pleading
9 stage. And so what they are saying is if you plead
10 certain facts, they are trying to get behind and say 11:46
11 it's a bare assertion. And so this case to me, the
12 arguments that are being made are very familiar to what
13 we saw, and I will mispronounce it, the Schuchardt case
14 that both of us cite which is about the sort of simple
15 allegation that you were illegally monitored. 11:46

16
17 Under the well pleaded complaint rule basically in the
18 United States, you have to assume, and I don't know if
19 this is the same process here, but if you challenge a
20 complaint on a motion to dismiss, which is the context 11:47
21 of this, the court has to assume that all well pled
22 facts are true.

23 106 Q. Yes.

24 A. What they are saying here, if you look at that
25 sentence, the assertion that they intercepted is based 11:47
26 on a bare assertion and there's no facts to support it.
27 So what I think, as I read this, I have not read the
28 briefs, but reading this it looks to me like what was
29 going on here is the plaintiffs had pled, the NSA, you

1 know the bare assertion that the NSA had illegally
2 wiretapped them when they were in Salt Lake. What the
3 NSA is saying is that by itself might be sufficient if
4 there are facts to support it. The court didn't buy
5 that argument, but that's I think, again at the 11:47
6 pleading stage you're dealing with simply a plaintiff
7 saying 'here are the facts as I see them and the
8 government can't go behind that until they get to a
9 summary judgment or other fact motion'.

10 107 Q. Absolutely. But isn't the case that if it was the case 11:48
11 that the government was treating a mere collection and
12 retention, as happened here, as insufficiently concrete
13 to meet that part of the requirement, wouldn't it be
14 part of the motion to dismiss?

15 A. This motion, there's case called Iqbal, which is a 11:48
16 pleading case, and I'm just looking ahead. What they
17 are talking about is, is the bare assertion enough to
18 support standing. I don't.

19 108 Q. Isn't that in relation to whether it happened or not,
20 isn't that what we are talking about here? 11:48

21 A. I would have to see, I mean I have to look at this
22 case. I can't answer that it's concrete or
23 particularised or actual or imminent without seeing
24 where the court does the analysis to say --

25 109 Q. Can I ask you to look at page 17 then? 11:48

26 A. Yes.

27 110 Q. If you go on to page 17 that may assist. So half way
28 down page 17, a new paragraph:
29

1 *"while the NSA has not argued that plaintiffs'*
2 *allegations, if accepted as true, fail to show an*
3 *injury-in-fact, this court is 'required to consider the*
4 *issue sua sponte to ensure that there is an Article III*
5 *case of controversy'. At the motion to dismiss stage,* 11:49
6 *the court concludes that because plaintiffs' allegation*
7 *that their communications were intercepted must be*
8 *accepted as true, plaintiffs have plausibly alleged an*
9 *injury that is concrete, particularised and actual."*

10
11 Now can I put to you that at this point in time there
12 is no challenge to the motion that mere retention,
13 without any additional harm, without them saying 'I got
14 fired from my job' or 'my wife left me' or anything
15 like that, that is sufficiently concrete, so that there 11:49
16 was no challenge by the NSA on *that* basis, would you
17 agree with that, Mr. Serwin?

18 A. I wouldn't because -- so I think this case certainly,
19 this court is hitting concrete, particularised and
20 actual. I think the challenge is, you know, as I note 11:49
21 in my first report and the section on standing in lower
22 courts, I think there's times where a statutory
23 violation could be sufficient for concrete,
24 particularised, actual and imminent, I'm just going to
25 list them all. I think there are other times, and 11:50
26 I think Spokeo, this is sort of what we are dealing
27 with now. I think there is other times where a
28 statutory violation might not be and, given the number
29 of cases that are dealing with Spokeo, I can't draw a

1 bright-line rule at this point just given how recent
2 that case is. So you could be right, it may go a
3 different way.

4 111 Q. Hmm.

5 A. I think what the NSA is arguing here versus what it may 11:50
6 be arguing in a different case or a different
7 government agency, I can't -- the case says what it
8 says, and I'm not disputing that, but I can't draw a
9 general rule to say that would always be the case.

10 112 Q. I will just ask you one last question and I'll move off 11:50
11 it. Just to go back to page 12 the sentence that
12 I first asked to you look at. There is a specific
13 reference that the NSA does not argue that warrantless
14 surveillance is an insufficient basis to establish
15 *injury*, isn't that what we are talking about here, 11:50
16 injury? That he didn't need to do or the plaintiffs
17 didn't need to do anything else, once they showed
18 warrantless surveillance they had injury, that was
19 sufficient; isn't that right?

20 A. Hmm, no. Because if you look at the first paragraph, 11:51
21 so let's go back to page 1.

22 113 Q. Mm hmm?

23 A. What the plaintiffs allegation is "*the NSA unlawfully*
24 *intercepted, gathered and monitored*" in a sweeping
25 programme. And so I think that's the allegation, and 11:51
26 again I think it's analogous somewhat to -- so 215 was
27 metadata, this deals allegedly with contents of their
28 different things. But again you are dealing with at
29 least on its face what's alleged as a bulk collection

1 of a lot of material that arguably was completely
2 unlawful. And so I think in that context maybe you
3 have one answer, in the context where there's a
4 different statute and different harm I don't know.
5 I think it's, I would be hesitant in any case, even if 11:51
6 I completely agreed with your reading of it, to draw a
7 broad conclusion from one district court case.

8 114 Q. I see. I wonder can I ask you just to move on now
9 please to briefly look at 1881a which I know we have
10 looked at on a number of occasions. There is just one 11:52
11 aspect that I wanted to draw your intention to that
12 I don't think you have dealt with and it's at Tab 3 of
13 your book that you have and it should be Book 14 Tab 3.

14 A. Okay. which section?

15 115 Q. Yes. And the section I want you to look at is the 11:52
16 section in relation to a challenge by an electronic
17 communications body, whether given an order --

18 A. Do you mean an ECS?

19 **MS. JUSTICE COSTELLO:** Sorry, which section.

20 **MS. HYLAND:** It's 1881a (h). 11:52

21 A. I don't know what an electronic communications body is,
22 I am sorry.

23 116 Q. **MS. HYLAND:** I am sorry. Let me try and, I'll bring
24 you to the, that's my wording and I am sure that's
25 imprecise. But let me bring you to the particular 11:52
26 section. So if I could just ask you to look, I think
27 it's on page 250 and then 251. Do you see it there,
28 it's the bottom of page 250, (h), it's headed up
29 "*Directives and judicial review of Directives*" and the

1 first word is "authority", do you see that?

2 A. Yes, lower right column.

3 117 Q. Yes. And I'm sorry, I used the wrong term, it should
4 have been an "*electronic communications service*
5 *provider*" instead of an electronic communications body? 11:53

6 A. And I will try not to lapse into the acronym but if
7 I do it's an ECS, I believe.

8 118 Q. ECS?

9 A. Yes.

10 119 Q. Very good, thank you for that. I presume you're 11:53
11 familiar with this provision, are you?

12 A. I am.

13 120 Q. Yes. And could you just identify what it says?

14 A. (h) 1 says: "*with respect to an acquisition authorised*
15 *under subdivision (a) the Attorney General and the 11:53*
16 *Director of National Intelligence may direct in writing*
17 *to an electronic communications service provider to -*
18
19 *(A) immediately provide the Government with all*
20 *information, facilities, or assistance necessary to 11:53*
21 *accomplish the acquisition in a manner that will*
22 *protect the secrecy of the acquisition and produce a*
23 *minimum of interference with the services that such*
24 *electronic communication service provider is providing*
25 *to the target of the acquisition."* 11:54
26

27 And --

28 121 Q. Sorry, I meant to summarise. I don't think you need to
29 read it all out, I beg your pardon?

1 A. Okay, I am sorry.

2 122 Q. I think in summary terms it provides the entitlement of
3 the relevant, the Director of National Intelligence, to
4 direct an electronic communications service provider to
5 provide information; isn't that right? 11:54

6 A. Yes.

7 123 Q. Yes. Can I ask you then just to move down the column
8 to 4(a) and there is a specific entitlement, isn't
9 there, under the heading "*challenging of Directives*",
10 there's a specific entitlement to challenge such a 11:54
11 directive, do you see that there?

12 A. Yes.

13 124 Q. It says: "*An electronic communication service provider*
14 *receiving a directive may file a petition to modify or*
15 *set aside such directive with FISA,*" do you see that? 11:54

16 A. I do see that.

17 125 Q. And you are presumably familiar with the Yahoo case,
18 are you?

19 A. I am. Again I don't do as much in the FISA challenge
20 space, but I have read the Yahoo case, I don't recall 11:55
21 it off the top of my head.

22 126 Q. Yes. Can I just ask you to look at one or two things
23 that that court said, it's Tab 23. This was a
24 challenge by Yahoo, one doesn't see the name *Yahoo* on
25 this particular decision of the FISA court because it 11:55
26 was only later that name was released. And so you'll
27 see that the case is called, it's Tab 23, and it's
28 called In Re Directives?

29 A. Yes. This is the 2008 case?

1 127 Q. Exactly, exactly, that's right. And can I just ask you
2 please to look at page 1008. This was a response as to
3 whether or not there was an entitlement of Yahoo to
4 challenge this particular directive. They had been
5 issued, I think, with a directive in respect of the 11:55
6 provision of certain information and they were seeking
7 to challenge the particular directive pursuant to
8 which --

9 A. And I believe this is the case where standing was, they
10 were looking at, in essence, the damage or the issues 11:56
11 that *Yahoo* suffered itself.

12 128 Q. And why do you say that?

13 A. Hmm, if you look at standing in the bottom of page
14 1008.

15 129 Q. Hmm. 11:56

16 A. *"Here the petitioner easily exceeds the constitutional*
17 *threshold. It faces an injury in the nature of the*
18 *burden that it must shoulder to facilitate the*
19 *government's surveillance of its customers".*

20 130 Q. Yes. But if you look at the top of the column: *"The* 11:56
21 *FISC determined that the petitioner had standing to*
22 *mount a challenge to the legality of the directives*
23 *based on the Fourth Amendment rights of third-party*
24 *customers."*

25 11:56

26 Do you see that?

27 A. I do.

28 131 Q. Yes. And then we have the column, the passage that you
29 read out. And then turning over the page:

1 *"That brings us to the question of whether Congress has*
2 *provided that a party in the petitioner's position may*
3 *bring suit to enforce the rights of others. That*
4 *question demands an affirmative answer."*

11:57

5
6 Do you see that there?

7 A. I do.

8 132 Q. Yes. And isn't it the case there that the court is
9 clearly identifying that the reason, or certainly a
10 very large part of the reason, that standing was
11 permitted to the company was because of the rights of
12 the customers being infringed; isn't that right?

11:57

13 A. The customers in -- and I do not opine on the Fourth
14 Amendment here --

15 133 Q. Hmm.

11:57

16 A. -- in my report. But I don't think there are
17 constitutional rights that European citizens could
18 assert in that way, at least to my knowledge, and
19 I know others have talk about the Fourth Amendment. So
20 I think (a) this predates Clapper and Spokeo, (b)
21 I think you have the sort of mixed issue of, I do think
22 -- I remember reading this case, this is a case where
23 Yahoo itself asserted it was damaged because of all the
24 infrastructure it had to devote to helping the
25 government. It does deal with the Fourth Amendment,
26 and I think there is other cases that do talk about
27 this sort, asserting third party's rights in standing
28 actually not to bring in an unrelated matter. But
29 I believe the challenge to the executive order in the

11:57

11:57

1 United States dealing with immigration at some level
2 had that similar standing issue for the schools.

3
4 But I think it's, I don't think there is a Fourth
5 Amendment right a European could assert to assert 11:58
6 standing through this. I think Yahoo did assert that
7 it directly had standing. Again this is a 2008 case
8 out of the FISA court that predates both Spokeo and
9 Supreme Court Clapper, so I don't know how it would be
10 decided, if it would be decided differently today. 11:58

11 134 Q. Well, how could Spokeo affect this case, I mean this is
12 the case where the question was did they have
13 jurisdiction under FISC and the court has held that
14 they do?

15 A. I think there is two things. I think was there 11:58
16 standing or not, I think that's what we were talking
17 about.

18 135 Q. Yes, absolutely.

19 A. And so my point is only, when you have two different
20 Supreme Court cases come out post an opinion, I don't 11:58
21 want to pretend to get into the head of a circuit court
22 judge and say how it would or wouldn't. I do think,
23 Spokeo obviously has had an impact. I don't know how
24 it will play out. I think Clapper's obviously had an
25 impact, how that will play out again I think we'll see 11:59
26 in the national security context. But when you look at
27 cases such as Wikimedia versus Valdez it's hard for me
28 to say that there would be no impact on a case like
29 this necessarily on standing.

1 136 Q. But Clapper -v- Amnesty is about something totally
2 different which is did it happen or not, that is
3 clearly not an issue here because Yahoo received a
4 directive telling them to provide the information, so
5 there's no issue about that? 11:59

6 A. I think you are conflating -- there's two pieces.
7 Yahoo clearly had standing, and I don't know that, if
8 the allegation is we have actual injury that's concrete
9 and particularised because we have to pay, and I am
10 making numbers up, 10 million dollars a year to help 11:59
11 the government, that's one thing. But I think you are
12 also talking about the Fourth Amendment rights of third
13 parties and what I'm saying is I don't know that
14 Clapper and I don't know that Spokeo would necessarily
15 impact Yahoo's standing argument as Yahoo. I don't 12:00
16 want to say it is of no moment, but I think there is a
17 question to ask of, when they are asserting third party
18 rights either statutorily or constitutionally that
19 I don't think apply to Europeans, I can't say as a
20 general rule that this case would be decided the same 12:00
21 way given those two important cases.

22 137 Q. Well can I just put it to you, Mr. Serwin, and
23 I probably should have said this at the beginning, my
24 real point in identifying this is: is this not a remedy
25 that ought to have been included in your memorandum to 12:00
26 the DPC, because although it's not a direct right for
27 individuals, it's an indirect remedy; isn't that right?

28 A. No. Again I didn't cover indirect. And I don't think
29 this, I don't think the Europeans would be able to

1 assert a Fourth Amendment right. So I mean, I think
2 this is a programmatic challenge in essence. That was
3 not within the scope of what I was doing.

4 138 Q. Mr. Serwin, can I just --

5 **MS. JUSTICE COSTELLO:** Sorry, I think. 12:01

6 **MS. HYLAND:** I am so sorry. Mr. Serwin, I'm not
7 asserting that there could be a Fourth Amendment
8 challenge by EU citizens through this route, what I'm
9 saying is that it's a very important protection for EU
10 citizens that the companies who get the directives are 12:01
11 (A) entitled to challenge them and (B) are, as we've
12 seen from cases such as this and Microsoft, actively
13 challenging them. Isn't that a protection for EU
14 citizens?

15 A. Again, that wasn't within the scope of my opinions. My 12:01
16 opinions were really focused on the remedies, not what
17 the programmatic protections or oversight might be. So
18 I wouldn't want to opine on that.

19 139 Q. The Court of Justice of the European Communities
20 refers, in the context of remedies, to *indirect* 12:02
21 remedies as well as *direct* remedies; is it not relevant
22 in that context?

23 A. Honestly, I'm not an EU lawyer, so I'm don't know that
24 that's -- I'm not questioning you, but I can't opine on
25 law I don't know. 12:02

26 140 Q. Very good. Can I ask you to go onto the DPC decision,
27 finally? And this is at tab 18, please, of book one.

28 A. Yes.

29 141 Q. Do you have that there? And you might just keep your

1 own report open if you could --

2 A. Okay.

3 142 Q. -- because I'll just ask you to look at that as well. 12:02

4 And do you see -- if I can ask you to go to paragraph

5 47 of the DPC decision, which is where it is taken up, 12:02

6 the discussion on -- I'm sorry, it starts, I think, at

7 paragraph 45. And that's where, from 45 to 60 is where

8 the discussion is on US law. And at paragraph 46 the

9 remedies that you identified under 2712 are set out, as

10 well as 1810 and 1806. And then at paragraph 47 it's 12:03

11 stated they're "*subject to a number of important*

12 *limitations, material in their nature and extent.*" And

13 one of those is in respect of *willfulness*.

14

15 In your experience, where there's a right in damages 12:03

16 against the US Government, as there is under some of

17 these provisions, is it usual to have a willfulness

18 requirement which will condition the entitlement to

19 damages?

20 A. You know, I think it really depends. Because you have, 12:03

21 in the federal torts world there, I'm sure, are torts

22 that are strict liability, with the government acting

23 in certain capacities. I'm sure there are negligence

24 standards. I think willful, you know, is lower than

25 intentional, but obviously higher than negligence and 12:04

26 strict liability. So I think it'd be hard for me to

27 say that, given I'm sure the vast number of suits the

28 US Government has, that I could draw a conclusion to

29 say that "willful" was sort of the bare minimum. I

1 think there's probably a range.

2 143 Q. A range, I see. And I think you don't say anything in
3 your report about willful being, for example, a very
4 significant burden or material limitation. Because
5 you'll see at paragraph 47, the first line, it's 12:04
6 identified they're "*subject to important limitations,*
7 *material in their nature and extent.*" Did you address
8 the materiality or the importance of the willfulness
9 criteria?

10 A. I say on page three of my report, second full 12:04
11 paragraph: "*The requirement for a 'willful violation'*
12 *serves as a limitation to anyone, including an EU*
13 *citizen bringing a suit under this provision*", which is
14 2712. So I identify it as a limitation. I didn't try
15 to judge material or not, because I wasn't, I was not 12:05
16 an adequacy assessment, so I left that to the
17 Commissioner to determine what she thought about it.
18 So I do specifically call it out as limitation, yes.

19 144 Q. But you didn't, for example, in your video call
20 identify it as material, is that right, or very 12:05
21 important?

22 A. I don't remember what I said on the video call about
23 whether it was willful -- you know, whether that was
24 material or not. I certainly specifically call it out
25 as a limitation for anyone, including the EU citizen. 12:05
26 So I don't recall if I said "material" or not. I did
27 call it out specifically.

28 145 Q. Yes. Now, in relation then to minimisation, can I just
29 ask you to look at the next paragraph?

1 A. Mm hmm.

2 146 Q. There is a reference in subparagraph two in relation to
3 the minimisation procedures and Rule 1845. And I think
4 you've already identified yesterday in
5 cross-examination that you footnoted 1845, but that you 12:06
6 didn't actually identify what it was in relation to, is
7 that fair to say?

8 A. I didn't. Because if you look at my conclusion, I
9 believe I say that those differences were not material.

10 147 Q. Yes. So are you surprised by the conclusion that those 12:06
11 differences in respect of subparagraph two were
12 material in their nature and extent and important
13 limitations, given your conclusion that you've just
14 mentioned?

15 A. I don't -- again, it wasn't up to me to make that 12:06
16 ultimate judgment. Obviously my report says what it
17 says. And again, the Data Protection Commissioner had
18 discretion, obviously her discretion to determine
19 whether she felt that was or was not.

20 148 Q. And do you know whether she had any other US material 12:06
21 which would've assisted her in identifying whether the
22 sections were material in their nature and extent?

23 A. I don't know.

24 149 Q. I see. Can I ask you then to look at 1810 please? And
25 this was an important, this is an important right, 12:07
26 because it's a right to damages where there's been
27 unauthorised surveillance or information disclosed,
28 isn't that right?

29 A. It's one of the important rights, yes.

1 150 Q. Yeah. And I think you yesterday said that -- and maybe
2 I can just ask you to look at that part of your report,
3 it's at page three. I think we've already been looking
4 at it and I already asked you about the point about it
5 not operating as a waiver of sovereign immunity. Do 12:07
6 you see that? This is the last line of your paragraph
7 on 1810.

8 A. Yeah. And actually I'm glad you brought this up,
9 because I think, you know, it is one of the, I think,
10 the questions you asked me was was this too implicit? 12:07

11 151 Q. Hmm.

12 A. And I would actually point you, now that I have the
13 decision in front of me, that it obviously wasn't.
14 Because as you note, I don't say anywhere here that
15 individual officers are liable under 1810, though I say 12:07
16 that in the beginning. But obviously the Data
17 Protection Commissioner understood that, because I did
18 not draw a conclusion about the efficacy of pursuing
19 individual officers, but she obviously understood that
20 an officer suit was possible. Because if you look at 12:08
21 what you're pointing me to, paragraph three, she talks
22 about the utility of pursuing individual officers may
23 be questionable. So she obviously understood that
24 there was a claim that could be brought against
25 individual officers from what I said about 1810. 12:08

26 152 Q. But I think, very importantly, she goes on to say the
27 utility may be quest -- in fact what it says is "*may is*
28 *questionable*". Do you see that: "*The utility of*
29 *pursuing individual officers*" --

1 A. Yeah, I do see that.

2 153 Q. -- "*may is questionable.*" Now, did that come from you?

3 A. That is not in my report, so I don't know the basis of

4 that.

5 154 Q. I see. Because I think what you said yesterday was you 12:08

6 said "*I assumed everybody would be directly liable when*

7 *I wrote this report*".

8 A. I'm sorry?

9 155 Q. Sorry, yesterday, I beg your pardon, when I asked you

10 about this, you said "*I assumed everybody would be* 12:08

11 *directly liable when I wrote this report*".

12 A. I'd have to have -- what I was saying is the

13 individuals would be liable.

14 156 Q. Yes.

15 A. And again, as we talked about yesterday, I think that 12:09

16 is more questionable than I thought to some degree

17 because of the Jewel case.

18 157 Q. I see.

19 A. And other cases.

20 158 Q. Can I ask you then to go on please the Computer Fraud 12:09

21 Act, which is at page 22, paragraph 49? And can I just

22 ask you to look at what is said in the DPC decision?

23 You'll see under 49(1) there's a reference to the

24 Computer Fraud Abuse Act, there's a reference to it

25 affording a remedy in damages and/or injunctive relief 12:09

26 and there's then, there's a reference to limitations:

27

28 "*Some US courts have held that federal government*

29 *agencies and officials are immune from suit... Courts*

1 *are also split as to whether plaintiffs must allege*
2 *both damage and loss in order to have a stateable*
3 *claim... albeit that some courts have concluded that*
4 *alleging costs reasonably occurred responding to an*
5 *alleged offence under the legislation may suffice."*
6

7 Now, would you agree that just reading that paragraph,
8 it's been treated as if there are a number of
9 limitations in the Computer Fraud Abuse Act?

10 A. I think it describes limitations, yes. 12:10

11 159 Q. Yes. And can I go back to your paragraph on it, which
12 I would put to you, Mr. Serwin, doesn't in fact focus
13 on the limitations, in fact I'll put it to you that it
14 is, if you like, a *positive* summary from a remedies
15 point of view. And if I could ask you please to look 12:10
16 at it, it's some way on in your...

17 A. I would disagree with that. I think, you know, if I
18 had to pick two of the most confusing laws in the
19 United States to try to deal with in litigation, it's
20 ECPA, which I believe there's actually cases that say 12:10
21 it's infamous, or famous or infamous for its lack of
22 clarity, 18 USC 1030 is a law that is also very
23 complicated, and so you have a variety of issues. And
24 so I would certainly say that it was possible to state
25 a claim under it. There is a case I don't cite, which 12:11
26 I don't think matters, it's a Ninth Circuit case that
27 allows a claim in this type of private circumstance
28 where someone tries to get e-mails and they sanction a
29 law firm for doing it.

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But I would not -- again, I didn't come into this saying I was going to say this is a bad or good cause of action. I would not say that my description of 1030 is overly positive - I certainly didn't see it as a throw-away - I think there are a number of issues; the damage versus loss issue, there are these circuit splits that I believe I referred to on --

12:11

160 Q. Can I ask you to look at your paragraph --

A. Yeah.

12:11

161 Q. -- that might be a quicker way. Page 11, "*Computer Fraud and Abuse Act*". Do you see that?

A. Right. So you have -- yes, I mean, so the second sentence, it makes it a crime for anyone to intentionally access. So you have a higher level of intent, you have then a crime that is a knowing violation with the intent to defraud if you access a protected computer and anything of value is obtained. Then you have another prong which requires both damage and loss. And one of the challenges with loss, there's a variety of different courts that have held that loss is not as we would think of it, it has to relate to what is known, unfortunately, as an interruption in service. And so there are a variety of issues that arise with this where, in certain courts if you don't have -- if your computer doesn't stop working or it doesn't slow down, you may not be able to establish loss.

12:11

12:12

12:12

1 So I am familiar with the paragraph, obviously I know
2 the CFAA well. I would not say this is a rose coloured
3 glass type summary; I think I see a lot of issues
4 there.

5 162 Q. Mr. Serwin, can I just bring you back a little bit? 12:12
6 what I'm asking you really is this: when you read your
7 report and when you read the DPC's summary, what I'm
8 putting to you is that it doesn't in fact reflect the
9 balanced view that you have given. And in particular
10 could I just ask you to look at page 12? Do you see the 12:13
11 top of page 12 there? There's a reference to
12 "*Injunctions, including temporary restraining orders,*
13 *are often the most immediate and effective relief.*" Do
14 you see that?

15 A. I do. 12:13

16 163 Q. Then do you also see there, do you see in relation to
17 the damage and loss, do you see there that: "*However,*
18 *some courts have concluded that a plaintiff can satisfy*
19 *the CFAA's definition of 'loss' by alleging costs*
20 *reasonably incurred in responding*"? Then at footnote 12:13
21 70 you refer to a number of cases there and
22 you identify there --

23 A. Right. But, see, here's the rub of this: The scenario
24 that I was looking at was an EU citizen complaining
25 about illegal wire tapping. If we look at loss, I 12:13
26 don't know how a plaintiff would establish that in *my*
27 context, because *their* computers are not being
28 accessed, it's a third party's. So I don't agree with
29 the characterisation I think you're making that that's

1 a non-issue at all, I think it *is* a large issue.
2 Because the language there is "protected computer", and
3 so it's a computer used in inter-state commerce
4 basically. And so you'd have to have loss if you
5 believe, if you accept the circuit split and say that 12:14
6 you need both loss and damage.

7
8 Loss could be difficult - and I'm sorry, I'm probably
9 making this confusing - but loss could be difficult,
10 because you would have to show a protected computer was 12:14
11 interfered with in some way.

12 164 Q. **MS. JUSTICE COSTELLO:** You're saying it's directed
13 toward the computer rather than the data?

14 A. Correct. And so if the computer is a third party,
15 which I think would be the case here, because I think 12:14
16 most of the wire tapping we're talking about would be
17 someone going to an ECS, not the plaintiff directly, I
18 don't know how they'd know that.

19 165 Q. **MS. HYLAND:** Yes. That's not something you say though,
20 is it, in this report? That's not, for example, 12:15
21 something that the DPC averts to?

22 A. Well, again, I talk about loss and I do, as you pointed
23 out, talk about remediation costs. So what remediation
24 costs would a plaintiff have if their information was
25 gathered from Yahoo? None. 12:15

26 166 Q. Yes.

27 A. And so I think I *am* saying that there. And I think the
28 DPC probably picked up on it.

29 167 Q. Well, I think you're saying it now, I don't think you

1 said it there, isn't that right?

2 A. No, no, I think I do say the remediation costs in the
3 footnote.

4 168 Q. You do. Oh, yes, you do. But the point you're making
5 now. 12:15

6 A. Yeah. And so that's, again the point is, again, in the
7 context I was looking at this in, which is an
8 individual, I don't know what remediation costs they
9 could have, unless their computer was hacked by the
10 NSA. 12:15

11 **MS. HYLAND:** Yes. Yes. Very good, thank you,
12 Mr. Serwin.

13

14

15 **MR. ANDREW SERWIN WAS RE-EXAMINED BY MR. MURRAY AS** 12:15
16 **FOLLOWS:**

17

18 169 Q. **MR. MURRAY:** Just very briefly, Mr. Serwin. While
19 we're looking at the draft DPC decision - tab 18 - you
20 were asked a number of questions about this yesterday 12:16
21 and I think, I hope it's fair to say they were directed
22 in some sense to the fairness of the process leading to
23 the production of the report and what might or might
24 not have been in it or might or might not have been
25 taken account of in preparing it. Can I ask you to go 12:16
26 to the very first page of it?

27 A. Yes.

28 170 Q. And you will observe, Mr. Serwin, that this is
29 described as a *draft* decision, isn't that correct?

1 A. That is the first word, yes.

2 171 Q. And if you turn over to page two, at the very top of
3 that page, (b), it says:

4

5 *"While my investigation remains ongoing, I have formed* 12:16
6 *a view on a draft basis and pending receipt of such*
7 *further submissions as the Complainant and/or Facebook*
8 *may wish to submit that a legal remedy compatible*
9 *with."*

10

12:16

11 And she continues, isn't that correct?

12 A. That is what it says, correct.

13 172 Q. And I think if you turn over the page again, she
14 explains why the decision is draft in nature and says
15 the following:

12:17

16

17 *"This decision is issued in 'draft' format to preserve*
18 *the right of the Complainant and/or Facebook to make*
19 *such further submissions as they may wish to make in*
20 *relation to its terms, and to allow me to give full*
21 *consideration to such submissions in due course. For*
22 *the reasons outlined above, however, and in*
23 *circumstances where (a) it is my intention to join the*
24 *Complainant and Facebook to the proceedings before the*
25 *national Court; (b) I am presently bound to comply with*
26 *the terms of the SCC Decisions as a matter of both*
27 *national and EU law; (c) my investigation to date has*
28 *resulted in my having concluded, subject to further*
29 *submissions, that there are well-founded objections to*

1 *the SCC Decisions and doubts as to their compatibility*
2 *with Article 47...; and (d) I consider that I cannot*
3 *conclude my investigation without obtaining a ruling of*
4 *the CJEU."*

5
6 And she then proceeds to explain why she has taken the
7 course of action she has, isn't that right?

8 A. That is right.

9 173 Q. Then finally, if you turn to page 31, paragraph 64, she
10 explains that she's formed the view *pending* receipt of
11 such further submissions as the Complainant or Facebook
12 may wish to submit. And she then continues.

12:18

13 A. Yes, that is correct.

14 174 Q. Now, secondly, a number of questions were directed to
15 you yesterday regarding criminal prosecutions as a
16 potential "remedy" for those whose data may be
17 unlawfully accessed. And you may not understand this,
18 Mr. Serwin, but in this jurisdiction the prosecution
19 authorities, the bodies who decide whether to bring
20 criminal prosecutions, are an independent statutory
21 body completely divorced from the executive. And I'd
22 like you to explain, under the federal law of the
23 United States, who it is - now, accepting that there
24 are circumstances in which I'm sure identified
25 regulatory agencies, the FCC perhaps, can bring
26 criminal prosecutions - but insofar as the type of
27 provisions with which we're concerned here go, who is
28 the prosecuting body or the prosecuting authority?

12:18

12:18

12:19

29 A. It would be the Department of Justice, the Attorney

1 General of the United States.

2 175 Q. Yes, okay. So it is in fact the government itself, the
3 executive, the Department of Justice, acting, I
4 imagine, through the United States Attorney for the
5 district in which the prosecution is brought, is that 12:19
6 right?

7 A. Or it certainly could be, you know, initiated by the
8 Attorney General himself or herself. But it would be,
9 as I understand it it would be the Department of
10 Justice, which the FBI is obviously part of. 12:19

11 176 Q. So insofar as it was suggested to you by Ms. Hyland
12 that criminal prosecutions do *shine a light* on the
13 government's activities when the government is using
14 the information that's been targeted, who is it that
15 gets to decide whether this light is going to be shone 12:20
16 into the government's activities?

17 A. It would be the government choosing to prosecute
18 someone.

19 177 Q. I want to ask you to look at the **Mohamud** case - or
20 maybe I'm mispronouncing that; mo-hack-mud perhaps - 12:20
21 which Ms. Hyland provided to you and which --

22 A. In which boo -- or is that separate?

23 178 Q. This is a case that was handed up to you. It's a case
24 on which Facebook are obviously relying in the
25 proceedings and I want to ask you to look at some 12:20
26 aspects of it.

27 A. I'm not sure I have it, I'm sorry.

28 179 Q. Okay, we'll get another copy of it for you I'm sure.

29 A. I apologise.

1 180 Q. This was, I *think*, furnished to you by Ms. Hyland
2 yesterday.

3 A. It may have been.

4 181 Q. It may have been taken back (Same Handed to witness).
5 A. I have a copy. Thank you. 12:20

6 182 Q. So this is the Portland, Oregon Christmas market
7 bomber, as it were, and this is a decision of the Ninth
8 Circuit Court of Appeals handed down a few weeks ago in
9 early December. Do you recall looking at this case
10 yesterday? 12:21

11 A. I do.

12 183 Q. Yeah. Are you aware from the newspapers of this
13 prosecution or does it...

14 A. I had heard about it and I think I had -- I don't think
15 I had read the decision, I think I had pulled it down. 12:21

16 184 Q. All right.

17 A. But I had not read it before yesterday.

18 185 Q. So what happens here, Mr. Serwin, is that
19 Mr. Mack-mood...

20 A. Well, how about we say "the defendant"? 12:21

21 186 Q. Yeah, because that's the third pronunciation I've used.
22 The defendant is prosecuted for certain terrorist
23 activities and part of the evidence used against him
24 comprises e-mails exchanged with a person outside the
25 jurisdiction of the United States. I don't know, 12:21
26 Judge...

27 **MS. JUSTICE COSTELLO:** I'm trying to remember where we
28 got this. Because I've got so many loose pages.

29 **MS. HYLAND:** Yes. It was actually handed up loose.

1 **MS. JUSTICE COSTELLO:** I know it was loose. But in
2 what context? Because I put it in the folders where we
3 were dealing.

4 **MS. HYLAND:** Yes, in the context of probably 1806, the
5 motion to suppress, I think it arose in that context. 12:22
6 We can certainly hand the court up another copy if
7 that's helpful?

8 **MS. JUSTICE COSTELLO:** I'm not entirely sure that
9 that's a wonderful solution, even if it's a temporary
10 one. 12:22

11 **MS. HYLAND:** No, I know, Judge, I'm sorry.

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

13 187 Q. **MR. MURRAY:** Very good, Judge. Thank you. (To
14 witness) So part of the evidence used against him and
15 admitted into the trial comprises e-mails exchanged 12:22
16 between him and a person outside the jurisdiction,
17 those e-mails having been harvested, as it were,
18 pursuant to section 702, as part of a programme which
19 is not described in great detail in the judgment, but
20 which *is* identified as *not* being Upstream. Okay? 12:23

21 A. Yes.

22 188 Q. Now, one of the arguments which was advanced by the
23 defendant was that these e-mails should be inadmissible
24 because they were e-mails which came to or were
25 received by him within the United States and he relied 12:23
26 upon the Fourth Amendment. And counter argument was
27 that the target of the e-mail was in fact somebody
28 outside the United States. And the issue arose as to
29 the jurisdictional consequences of that under United

1 States constitutional law. So can I ask you to look at
2 page 38, where --

3 A. Yes.

4 189 Q. -- this -- and this appears to be the most recent
5 statement of the legal position on this:

12:23

6

7 *"No warrant... required to intercept the overseas*
8 *foreign national's communications or to intercept a US*
9 *person's communications incidentally."*

10

11 So the legal theory - and you, I'm sure, are familiar
12 with this - as I understand it is that in American law,
13 if the warrant is legitimately received/obtained
14 vis-à-vis A -- or, sorry the information is
15 legitimately obtained vis-à-vis A then the fact that B,
16 a US national or citizen, is mentioned in the
17 information doesn't give B any independent right to
18 assert a Fourth Amendment violation. Is that the
19 theory?

12:24

20 A. I think it's, I think that's...

12:24

21 190 Q. In general terms?

22 A. In general.

23 191 Q. Okay. But nothing turns on it. But what is perhaps
24 more important is what's said there:

25

12:24

26 *"As a threshold matter, 'the Fourth Amendment does not*
27 *Apply to searches and seizures by the United States*
28 *against a non-resident alien in a foreign country'."*

29 A. Yeah.

1 192 Q. Do you see that?
2 A. I do. And that's consistent with my understanding.
3 193 Q. Okay. "At the time of the search" -- sorry, they quote
4 Verdugo-Urquidez. "*Thus the government's monitoring of* 12:25
5 *the overseas foreign national's e-mail fell outside the*
6 *Fourth Amendment.*" Do you see that?
7 A. Yes.
8 194 Q. "[The defendant] *argues that under Verdugo-Urquidez,*
9 *the location of the search matters, and that here, the*
10 *searches took place in the United States.*" 12:25
11
12 Now, you may recall this is an argument -- well, sorry,
13 not an *argument* apparently, an opinion expressed by
14 Prof. Swire in a footnote in his report to the court.
15 As an expert, he says that actually, if the search 12:25
16 occurs within the United States that that's sufficient
17 to engage the Fourth Amendment. But this is what the
18 court says about that:
19
20 "[The Defendant] *argues that under Verdugo-Urquidez,* 12:25
21 *the location of the search matters, and that here, the*
22 *searches took place in the United States. Indeed, the*
23 *government acknowledges that 'collection from service*
24 *providers under section 702 takes place within the*
25 *United States.'* Yet, as one court put it, '*what matters*
26 *here is the location of the target', and not where the*
27 *government literally obtained the electronic data.*"
28 A. That is what it says, yes.
29 195 Q. And is that your understanding, and prior indeed to

1 seeing this decision, of what the legal position was?
2 A. Yes. Again I think that was part of the discussion we
3 were having on crosses. I don't believe the Fourth
4 Amendment generally applies to non-US citizens --
5 non-US nationals, wherever the information is gathered. 12:26

6 196 Q. Very good. Then it says:

7
8 *"Consistent with Verdugo-Urquidez and our precedent, we*
9 *hold that this particular type of non-upstream*
10 *collection – where a search was not directed at a US*
11 *person's communications, though some were incidentally*
12 *swept up in it – does not require a warrant."*

13
14 And that was the point I was, I'm sure badly, making,
15 that even though you're a US person and your 12:26
16 information is swept up incidentally, if you're not the
17 target, you don't get the right to make the Fourth
18 Amendment argument.

19
20 *"Because the search was targeted at a non-US person*
21 *with no Fourth Amendment right.*

22
23 *The FISA Review Court in In re Directives Pursuant to*
24 *Section 105B... similarly applied this principle,*
25 *holding that 'incidental collections occurring as a*
26 *result of constitutionally permissible acquisitions do*
27 *not render those acquisitions unlawful'."*

28
29 And then quoting various cases addressing that. And I

1 also want to ask you just to look at...

2 **MS. HYLAND:** Judge, I wonder could I just identify how
3 this arises from re-examination-in-chief? Mr. Murray
4 seems to be putting almost a submission to the witness
5 and I don't understand how it arises. 12:27

6 **MR. MURRAY:** Yes, thank you. Judge, it arises because
7 Ms. Hyland put this document to the witness and, having
8 put the document to the witness, I am entitled to take
9 the witness through *any* aspect of the document that I
10 do. That's a consequence of her putting *any* document 12:27
11 to the witness.

12 **MS. HYLAND:** well, Judge, only, I say, if it's relevant
13 to a point, if he's seeking to make a point. I don't
14 believe he can simply just traverse the document
15 because I opened the document. This is re-examination 12:27
16 to clarify points that were made in cross-examination.
17 So Mr. Murray hasn't identified what point it is in
18 cross-examination that he wants the witness to deal
19 with.

20 **MR. MURRAY:** well, Judge, with respect, the point which 12:27
21 I am making is obviously one germane to the case in
22 terms of this being a *very* recent decision addressing a
23 legal issue under American law, which is relevant to
24 your consideration --

25 **MS. JUSTICE COSTELLO:** well, it certainly was an area 12:28
26 that I had already highlighted. So you had traversed
27 it, Ms. Hyland. So I'm certainly going to allow him to
28 carry on. Because he's exploring what was under that
29 heading. And that was put to the witness, so I think

1 we're allowed to go further into the document.

2 197 Q. **MR. MURRAY:** And there's only one last point that I
3 want to draw your attention to please, Mr. Serwin, on
4 page 49 and it's just a comment about section 702 and I
5 just wonder if I could perhaps, or if you can comment 12:28
6 on this. On page 49 at the top of the page, do you see
7 there the sentence begins "*However*"? On the top --

8 A. Yes.

9 198 Q. The second sentence:
10
11 "*However, as described above, section 702 differs in*
12 *important ways from traditional FISA, and a mechanism*
13 *that might provide additional protections above and*
14 *beyond those already employed in a traditional FISA*
15 *context provides far less assurance and accountability*
16 *in the section 702 context, which lacks those baseline*
17 *protections.*"

18
19 Do you have any comment to make on that statement?

20 A. I think obviously the different programmes have 12:29
21 different - you know, and it was beyond the scope of
22 my, obviously, opinion here to talk about the oversight
23 mechanisms - but I think each one of them has a
24 different level of assurance and accountability. And
25 obviously this court here is saying that 702 has 12:29
26 relatively less than more traditional requests under
27 FISA, I think that's the point.

28 199 Q. And finally, insofar as the **ACLU/Clapper** and indeed the
29 winter Olympics case, **Valdez**, determined there to be a

1 concrete and particularised injury, *is* it the case that
2 both of those cases involved persons asserting Fourth
3 Amendment - and in fact in the Valdez case *First*
4 Amendment - rights?

5 A. Yes. 12:29

6 MR. MURRAY: Thank you.

7 MS. JUSTICE COSTELLO: Thank you very much, Mr. Serwin.

8 A. Thank you.

9 MR. GALLAGHER: Prof. Swire, Judge.

10 MS. JUSTICE COSTELLO: Thank you. 12:30

11 MR. GALLAGHER: He'll be found in book three, Judge, in
12 the second divided -- sorry, it's down a bit; the
13 affidavit is the fourth divide.

14 MS. JUSTICE COSTELLO: which book did you say again,
15 Mr. Gallagher? 12:30

16 MR. GALLAGHER: It's the fourth divide is the --

17 MS. JUSTICE COSTELLO: No, which book, sorry?

18 MR. GALLAGHER: I'm terribly sorry, it's three, Judge.

19 MR. GALLAGHER: Three. Thank you. Then maybe we need
20 to swear the witness. 12:30

21
22
23
24
25
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28
29

1 under the next heading, your being a lead author on the
2 book of EU Data Protection Directive and its effect on
3 EU and US relations. Over the page, you were involved
4 in the project on the EU-US model contract clauses -
5 those are the SCCs that we've been... 12:32

6 A. They turned into them, yes.

7 205 Q. ... referring -- they turned into the SCCs. And you
8 were leader of the US Government delegation to the EU
9 on privacy issues in 1997 and 1998. And could you just
10 briefly tell the judge what that involved? 12:33

11 A. Yes, Judge. So at that time - this was in the
12 discussions that eventually turned into the Safe
13 Harbour agreement - I was a professor at the time and I
14 was asked to lead a delegation with a State Department
15 and Commerce Department member to come to six countries 12:33
16 in the EU, three on one trip, three on the other,
17 including Sweden in January. And we interviewed data
18 protection experts and others to try to especially
19 focus on the issue of access - what are the rules under
20 Article 12 of the Directive, the European Data 12:33
21 Protection Directive on access?

22
23 The concern was that Article 12 is stated in very broad
24 terms as having an absolute right with no exceptions.
25 And our research turned out that there were numerous 12:33
26 exceptions in practice of various sorts, which we then
27 wrote up in a memorandum to the US Department of State
28 and Commerce. And that became the basis for discussion
29 of that issue in the Safe Harbour report later.

1 206 Q. Then in six you identify that you were the chief
2 counsel for privacy, including the Safe Harbour
3 negotiations. And in paragraph seven -- sorry, 16 over
4 the page but item seven, you continued the work on EU
5 data protection issues prior to the Snowden leaks. And 12:34
6 then you were appointed - at paragraph 18 - to
7 President Obama's Review Group on Intelligence and
8 Communications Technology. Could you briefly explain
9 to the court what that was and what the purpose of that
10 Review Group was? 12:34

11 A. Yes, Judge. So in June of 2013 the Snowden stories hit
12 the press. In August of that year President Obama
13 named five people to this Review Group on Intelligence
14 and Communications Technologies. It was a group that
15 included two experts in intelligence: Michael Morell, 12:34
16 who'd been no. 2 at the CIA; a Richard Clarke, who'd
17 been the chief anti-terrorism advisor to both
18 Presidents Clinton and the second Bush; also Cass
19 Sunstein, a Professor at the University of Chicago and
20 Harvard, who's the most cited law professor; and Dean 12:35
21 Geoffrey Stone of the University of Chicago, a civil
22 liberties expert. I was considered the privacy expert
23 for the group.

24
25 We were tasked with presenting in 90 days a report to 12:35
26 the President - which we did - that was supposed to
27 look at five topics: One is national security; the
28 second is protecting privacy and civil liberties; the
29 third is international effects, including with allies

1 for economic and other purposes; the fourth was to have
2 trust of users on the internet; and the fifth was to
3 try to address unauthorised leaks.
4

5 So we worked on the report, we had public hearings. I 12:35
6 led the discussions with the European people who
7 testified for us, including members of the Commission,
8 Data Protection Authorities, members of the EU
9 Parliament, a surveillance critic of the United States
10 named Caspar Bowden. And so that information about the 12:35
11 EU was brought in as part of the information we had
12 when we wrote our report. We presented it to the
13 President at the beginning of December in 2013 and the
14 book was later published as a Princeton University
15 press book, it about got wide attention when it was 12:36
16 published.

17 207 Q. And I think it is referred to by various people and
18 referred to in footnotes as the Review Group report, is
19 that correct?

20 A. Correct, yes. 12:36

21 208 Q. And the Review Group made recommendations, is that
22 correct?

23 A. Yes, we made 46 recommendations on a wide range of
24 topics involving how to basically change the US rules
25 connected to the internet after these NSA revelations. 12:36
26 In January of 2014, President Obama gave a speech on
27 the topic. At the time he delivered the speech, his
28 senior advisors told us that they had adopted 70% of
29 our 46 recommendations in letter or in spirit.

1 Subsequent to that, in the USA Freedom Act, which was
2 passed in 2015, a number of our other recommendations
3 were included into law and statute in the United
4 States.

5 209 Q. And can you tell the court whether, as part of your 12:36
6 role on this Review Group, you had access to classified
7 materials?

8 A. For this, we were given the top clearance, it's called
9 TSSCI - Top Secret Special Compartmentalised
10 Information. We were allowed to ask for any briefings 12:37
11 we wanted. We met with General Alexander, the Head of
12 the NSA, we went to the CIA, we went to the FBI. Every
13 briefing we asked for, we were given. And again,
14 having a former senior official of the CIA and a senior
15 anti-terrorism official, we had people who had insights 12:37
16 into where the -- what questions to ask and where
17 things would be suitable to ask for. So we had very
18 thorough briefings for this Review Group and it was
19 under this classified rules.

20 210 Q. You go on in the next page, page five, to set out your 12:37
21 expertise in US surveillance law. And I'm not going to
22 take you through those, you detail that expertise over
23 the next four pages, isn't that correct?

24 A. Yes, Sir.

25 211 Q. Now, I think as a result of having access to classified 12:37
26 material, you are regarded under US law as possessing
27 classified status, is that correct?

28 A. That's correct. I signed an agreement to that effect.

29 212 Q. And does that impose obligations on you with regard to

1 the material that you've seen and use that you can make
2 of it?

3 A. Yes, now when I publish on topics that were covered by
4 the Review Group, such as Section 702 for instance, I
5 am required to do what's called pre-publication review; 12:38
6 I have to submit a draft in late stages to the Office
7 of the Director of National Intelligence. They review
8 it to make sure I'm not giving away any classified
9 information. They don't have editorial control over
10 what I say, but they review it to make sure I don't say 12:38
11 anything I'm not supposed to say.

12 213 Q. And did you go through that process with this report?

13 A. Yes, I did.

14 214 Q. And as a result of going through that process, were any
15 changes made to your report? 12:38

16 A. So there were no changes made where they said I needed
17 to remove classified information. The expert lawyers
18 who reviewed the report did provide, as a service,
19 clarifications or corrections of US law - they wanted
20 it to be accurate, I wanted it to be accurate. And the 12:39
21 process we did for that is they submitted these
22 corrections, if it were clarifications, to counsel -
23 and Gibson Dunn was the law firm that hired me. I did
24 not receive the reports or talk to the US officials.
25 They were provided to Gibson Dunn and Gibson Dunn 12:39
26 orally went through the proposed or possible
27 clarifications and corrections.

28
29 So for instance, at the time I wrote it, I wasn't as

1 clear as I now am on the difference between the annual
2 certification under 702 and the individual directive
3 that goes to a company. So if Facebook gets certain
4 selectors, they get a directive that day. Every year
5 there's a certification. So we cleared up terminology 12:39
6 like that in an attempt to be just as accurate as
7 possible for you to hear US law.

8 215 Q. And were you -- who had the final say in relation to
9 any changes that were made to your report following
10 that? 12:40

11 A. I received the comments orally from counsel. I made
12 the decisions. The US Government didn't see it again
13 after that time, it was my decision.

14 216 Q. With regard to the report itself, I think you were
15 assisted by various research assistants, is that 12:40
16 correct?

17 A. Correct. I'm a senior counsel with a law firm called
18 Alston & Bird and so I was hired through this law firm.
19 The law firm has no current client relationships with
20 Facebook nor any conflicts. And so under my direction 12:40
21 and control, I had associates and more senior lawyers
22 assist me in doing the research and helping me write
23 the report.

24 217 Q. I think Mr. Richards or Mr. O'Dwyer, Prof. Richards or
25 Mr. O'Dwyer, I can't remember, passed some comment in 12:40
26 the materials that an organisation on which you're
27 involved has received some funding from Facebook. And
28 could you state the position to the court in that
29 regard?

1 A. Right. I've never been in an attorney-client
2 relationship with Facebook. I've gone back now through
3 the 20 years or whatever in privacy and data protection
4 and went through my records for any connection where
5 there was any financial relationship to Facebook and I 12:41
6 found three examples of that.

7
8 One of them is I'm a Professor at Georgia Tech now, the
9 Georgia Institute of Technology, and I have a research
10 project on what's called mutual legal assistance, how 12:41
11 you share data between governments for law enforcement
12 purposes - there's a website page that gives this.
13 I've, since late 2014, raised over \$400,000 for this -
14 I have research people who work for me for this, like a
15 centre on the topic. In 2015, before this case came 12:41
16 up, Facebook donated \$25,000 related to that research.
17 It went to the Georgia Tech Foundation, which is an
18 independent research recipient of money. There was no
19 strings attached, they didn't get to have editorial
20 control or rights of review on it, it was research 12:42
21 money to allow the research to go forward. That's one.

22
23 The second one is in 2012 and 2013 I was global
24 co-Chair of something called the Do Not Track Process.
25 That's the world wide web consortium, the organisation 12:42
26 that gave us HTML standard was trying to create a
27 standard for individuals to click something on their
28 browser so they could say 'Don't track me' when they're
29 on the internet. This was a process where we had over

1 a hundred different groups - we had European data
2 protection regulators, we had privacy experts, we had
3 companies, we had the Federal Trade Commission. So
4 there were over a hundred actors in this process.

5
6 I was named the co-Chair to try to mediate. When I was
7 announced that I was going to take this position, there
8 was an article in the New York Times and it said "A
9 mediator is brought in to try to solve Do Not Track."

10 So in the course of doing that, as this leader, I had
11 the privilege of trying to raise enough money to make
12 sure we could do all the things we were trying to do,
13 including hold the meetings. I raised somewhat over
14 \$100,000 from that, and we went to a wide range of
15 companies. Facebook donated \$10,000 - to the W3C, not
16 to me - for the expenses of running the process. But
17 they donated as one of the companies, along with a
18 number of others in that case.

19
20 The third item, as I've searched my -- I've had a lot
21 of experiences over the years and on this one I'm a
22 member of something called The Future of Privacy Forum.
23 Prof. Richards is also on the advisory board of that.
24 I'm on the advisory board, as he is. I'm also a senior
25 fellow there, but -- and Future Privacy Forum has over
26 100 companies that fund it. Facebook is one of those
27 companies. I've never been involved in talking to them
28 about money, I don't know how much they give to the
29 Future Privacy Forum. They've never specifically

1 funded any of my research there, but Facebook does fund
2 this organisation of which I'm a senior fellow.

3
4 So those are the three things. And in each case, where
5 Facebook has had any money, it's been a small, less 12:44
6 than 10% amount of money for a bigger project. And
7 I've never been in an attorney-client relationship with
8 them.

9 218 Q. You did, I think, Professor, prepare a report for
10 Facebook that was submitted to the DPC in connection 12:44
11 with this prior to her preparing her draft decision, is
12 that correct?

13 A. I'm sorry, I'm not sure what you're referring to.

14 219 Q. Oh, sorry, maybe I've got that wrong. You weren't
15 involved in submitting material to the DPC before she 12:44
16 made her draft decision?

17 A. I was not involved, no.

18 220 Q. Sorry.

19 A. I testified last year at the request of the Belgian
20 Privacy Agency, I testified last year. So the first 12:44
21 Schrems opinion came down in October in 2015. In
22 December, the Belgian Privacy Agency had a hearing
23 where they were trying to understand the implications
24 for the transatlantic whatever. I was the only US
25 person not in the government asked to testify. I 12:44
26 presented detailed testimony of more than 40 pages
27 explaining the reforms that had happened in the US
28 since the Snowden leaks had started.

29 221 Q. And I think you prepared a report for that, is that

1 correct?

2 A. It was submitted as testimony essentially to the
3 Belgian Privacy Authority.

4 222 Q. I'm sorry, and I think that report was submitted to the
5 DPC. But you weren't involved in that aspect? 12:45

6 A. I was not involved in that.

7 223 Q. I'm terribly sorry. Now, can I ask you then --

8 A. And just to clarify, I did that as a private citizen,
9 nobody paid me, I was a professor asked to testify for
10 the authority. 12:45

11 224 Q. And that contact was made by the Belgian Privacy
12 Authority?

13 A. Correct, (Inaudible).

14 225 Q. And you were involved in the meeting of the experts and
15 I'm going to take you back to that subsequently, but I 12:45
16 think it might be more efficient just to go through
17 your report first, because it will assist in
18 understanding some of the areas of disagreement. And
19 there's just some aspects of the report I just want to
20 draw your attention to -- 12:45

21 A. Okay.

22 226 Q. -- before I come to that. And I think there's some
23 matters that you want to update the court on with
24 regard to developments that have taken place since
25 everybody filed their reports. So I'm going to leave 12:45
26 that to one side, Professor, first.

27 A. Okay.

28 227 Q. And there are just some aspects of your report now I
29 want to draw your attention to. If you'd be kind

1 enough to go to the first chapter, which is the
2 summary.

3 A. Yes.

4 228 Q. And in page one, in paragraph four you identify the 12:46
5 systemic safeguards that are discussed in part two of
6 your report and then you express a conclusion with
7 regard to the effectiveness of those safeguards in the
8 last paragraph of that report -- of that page, isn't
9 that correct?

10 A. Yes, at the bottom of page 1-1 and paragraph five, the 12:46
11 top sentence says: "*In my view, the US system overall*
12 *provides effective safeguards against abuse of secret*
13 *surveillance powers.*" And I quote findings from an
14 Oxford expert, Prof. Brown, who comes to the same
15 conclusion and says, among other things, that the 12:46
16 United States, now that he's done his comprehensive
17 examination of Europe and other countries, is now the
18 benchmark for protections in this area.

19 229 Q. Prof. Brown, I think, has done a detailed report which 12:47
20 is part of the materials before the court and we'll
21 look at that later when we come to that section of your
22 report. Can I then ask you to just refer to paragraph
23 eight of your report on page three of this?

24 A. Mm hmm.

25 230 Q. You identify there the potentiality of a very broad 12:47
26 impact in finding a lack of adequacy or essential
27 equivalence in this context if that transpires to be
28 the correct test, isn't that correct?

29 A. Yes. And there's more detail later in this chapter.

1 But I put forth five items. The first one is that the
2 term who would be applied, the term under 702 of
3 electronic communications service providers is very
4 broad, the idea there's a narrowing construction
5 doesn't stand.

12:48

6
7 The second one - and this is based in part on my
8 studies related to China, Russia, India and Brazil, the
9 BRIC countries - is that the surveillance safeguards in
10 most or all other countries outside of the EU are less
11 extensive than in the US. And so the effective and
12 inadequacy finding would thus logically appear to be,
13 if we're doing contracts or the same contracts in these
14 cases, that if you block the US then you would block
15 transfers to all these other non-EU countries, except
16 where those countries could show their safeguards are
17 greater than the US.

12:48

12:48

18
19 The third --

20 231 Q. I --

12:48

21 A. Please go ahead.

22 232 Q. Sorry, go ahead, no.

23 A. I was just ticking through them, if you'd like. I
24 could -- so the third one is if there were to be an
25 inadequacy finding for standard contract clauses, that
26 could have implications for other lawful bases for data
27 transfers. And I'm not making a statement here about
28 what the effect of anything in this case would be on
29 Privacy shield or binding corporate rules, but there's

12:48

1 at least a possibility of what I term a categorical
2 finding of inadequacy - we're talking about how well
3 there are protections perhaps against US surveillance.
4 And so if it did apply to those other lawful bases,
5 there would be significant implications for the overall 12:49
6 EU and US relationship affecting foreign relations,
7 national security, economic and other interests of the
8 Member States and of the EU itself. And since it's
9 about surveillance, it's been hard for me to see why
10 they wouldn't apply similarly if there was a broad 12:49
11 finding here.

12
13 The fourth item here in paragraph eight is that the
14 testimony that I present supports the conclusion that
15 an inadequacy finding would have large effects on EU 12:49
16 economic well-being. The EU institutions, such as the
17 Commission, have clearly indicated the economic
18 importance of maintaining data flows with the United
19 States. And in addition, under WTO, World Trade
20 Organisation law, "*the General Agreement of Trade in 12:49*
21 *Services bans 'discrimination between countries where*
22 *like conditions prevail'.*" And there appears to be a
23 strong case that this kind of illegal discrimination
24 under WTO law would exist if transfers to the United
25 States were barred, despite having less extensive 12:50
26 surveillance safeguards than the rest of the world and
27 the Member States themselves; if you go after the
28 United States for not being good enough and the United
29 States is stronger in this respect, there's a WTO

1 problem.

2

3 The fifth one is A finding of inadequacy would also
4 create large risks for EU national security and public
5 safety. NATO and other treaty obligations emphasise
6 information sharing for national security and mutual
7 defence. The European Union has stated that
8 information sharing with the US is "*critical to*
9 *prevent, investigate, detect and prosecute criminal*
10 *offenses, including terrorism*".

12:50

11 233 Q. Professor, I forgot to refer you to the most important
12 part of your report, which is divide seven. And it has
13 a list of acronyms that the court might find useful.

14 A. I'll endeavour to speak in English whenever possible.

15 234 Q. At the very last part of that, Judge. That, I think,
16 covers most of the acronyms that have been foisted on
17 you and I should've drawn your attention to that. Can
18 I take you then to page four of your report? And I
19 don't need you to detail the contents of that, except
20 summary, a biographical summary. But in paragraph 13
21 you indicate that your views on the overall adequacy of
22 protections related to US surveillance practices have
23 changed a great deal over time in light of pro-privacy
24 reforms that the US has adopted. And you might just
25 explain that to the court briefly and how that came
26 about.

12:50

12:51

12:51

27 A. So after the attacks in 2001, the US passed the USA
28 PATRIOT Act. And I was very involved in critiquing the
29 expansion of surveillance authority at that time, wrote

1 numerous things. In 2004, notably, I wrote this
2 article called "The System of Foreign Intelligence
3 Surveillance Law" - a big long article on FISA and the
4 related law - and in that report I had numerous
5 critiques and proposed numerous reforms. Since that 12:51
6 time there's been a regularisation of how this is
7 treated under US law.

8
9 So in the appendix to chapter two, I list ten different
10 proposals in that one law review article that are now 12:52
11 law in the United States. So we've had changes from
12 that, we've had changes from the Review Group where so
13 many of the reform recommendations have been
14 implemented. And so after 9/11 I was very worried we
15 didn't have a very good system of law in place. By the 12:52
16 time we've gone through all these many reforms, I
17 believe the US clearly has the strongest system in the
18 world for judicial oversight and other protections
19 related to this secret surveillance.

20 235 Q. I want you to just refer then to the next section of 12:52
21 your report on page six and just to speak very briefly
22 on a point, I think, of significant departure between
23 you and Mr. Serwin and Prof. Richards as regards, or
24 with regard to the importance of systemic safeguards.
25 And you might explain to the court why you think those 12:52
26 are important.

27 A. Yes, your Honour. So we had the task of protecting
28 fundamental rights, such as the fundamental rights in
29 privacy. My view is that remedies after the fact for a

1 mistake are certainly an important part of it, but what
2 we really want to have is an overall system that works
3 well. I was thinking last night of how to explain this
4 and I thought of auto safety; if we have a car that
5 we're driving around, it's important if there's a crash 12:53
6 we can have remedy after the fact for a default in the
7 car. What we really want though is good engineering in
8 the car, we want the systemic safeguards, the thing to
9 work right day in and day out. Then we also want to
10 have a right if something goes wrong. But a tremendous 12:53
11 fraction of the safety comes from the good building
12 that goes into it. And so when I talk about systemic
13 safeguards, I'm talking about, as we build the
14 information systems and we build the checks and
15 balances and oversight mechanisms, that's the 12:53
16 engineering that we have to get right. Then in the
17 end, also we need to have ways to make sure it's done
18 properly by the courts. But the good engineering is
19 central to how we actually get protection.

20 236 Q. Professor, you then, if you go to page ten, there's 12:53
21 just something that I want to ask you to clarify for
22 the judge. It may be, Judge, that this is very clear
23 to you already, but to avoid any risk of confusion. I
24 think you were here for at least some of Ms. Gorski's
25 cross-examination and -- 12:54

26 A. No, I wasn't. I came after that.

27 237 Q. I see. I'm sorry. The issue arose, she corrected me
28 when I referred to traditional 702. But it's in fact
29 traditional FISA and 702 was introduced in 2008. And I

1 think your report, you identify the difference between
2 traditional FISA and the requirement for individual
3 warrants that exist and then the section 702, which
4 deals with the programmes, isn't that correct?

5 A. That's right. I think one way to think about it is in 12:54
6 1978 when FISA was created, the model to have in mind
7 is an individual Soviet spy maybe contacting people
8 around the United States. And so if that person was an
9 agent of a foreign power, we had the FISA court, the
10 FISC and they would look to see if there's probable 12:55
11 cause whether that person was an agent of the Soviet
12 Union. And then if all the standards were met, they
13 would say 'we're going to do surveillance on this
14 person'.

15
16 After 2001, after the changes then, there arose these 12:55
17 two programmes: 702, which we're mostly talking about
18 today; also, Section 215 of the PATRIOT Act, which has
19 now been shut down basically as bulk collection. And
20 these were programmes that operated more like a 12:55
21 regulatory effort to watch over an entire programme.
22 And so in my report in chapter three, for instance, we
23 talk about the different ways that the judges in the
24 FISA court look at how this is done, how the
25 targeting's done, the minimisation is done. But it's 12:55
26 not an individual Soviet agent now, it's how the
27 overall facilities and collections are operating, so
28 it's a different scale and there's different kinds of
29 oversight mechanisms for that.

1 238 Q. And do you have a view as to why that change was
2 brought about? what made that change necessary?
3 A. I'd say that there's a variety of reasons. But one of
4 the big changes is that the nature of the threat
5 changed. In the Review Group we talk about this. In 12:56
6 the Cold War we would go after - we, the United States
7 - go after Soviet agents or we'd target communications
8 inside the Soviet Union. And that didn't raise much
9 chance that the sort of ordinary peoples'
10 communications would be there. 12:56
11
12 The problem today, or the challenge for people doing
13 this is that the same - I've turned it off - but the
14 same phones and the same software and the same networks
15 that are used by us in our daily communications are 12:56
16 exactly the ones used by the people we're worried
17 about, the terrorist attacks or whatever it is. And so
18 we have a challenge of how do we create effective,
19 looking at that for national security, an effective
20 safeguards so that, as that happens, we somehow come to 12:57
21 a view that we're doing a good job on that? And that's
22 a different scale and it's a different technological
23 problem than the individual Soviet spy or the wire tap
24 over there in the Warsaw Pact that it used to be.
25 239 Q. In the next section of your report, page 11(c), you 12:57
26 deal with oversight of surveillance activities and in
27 the following sections various safeguards -
28 transparency safeguards, I think, on page 12, executive
29 safeguards on page 14, systemic safeguards on law

1 enforcements. And then you have a conclusion on
2 systemic safeguards. These are matters you elaborate
3 on later in your report in the various chapters, isn't
4 that correct?

5 A. Okay. Yes, I do. 12:57

6 240 Q. Then could I ask you to go to page 23 of that section
7 of the report and paragraph 63? And you refer there to
8 non-judicial individual remedies in US law. And could
9 you briefly explain what you're referring to there and
10 what their importance is in your view? 12:58

11 A. Right. So in the United States there's multiple ways
12 that concerns about, for instance, surveillance
13 programmes get handled. One of them is the free press
14 - we've had a very strong tradition of that. And
15 there's no Official Secrets Act in the United States 12:58
16 the way there are in some other countries. So the
17 press has had a long history, including with the
18 Snowden things, of publishing things that the
19 government wouldn't necessarily want to have them
20 publish. But there's basically no prior restraint, 12:58
21 except in the most extraordinary circumstances.

22
23 We also, as we have in the ACLU in this case or EPIC or
24 others, a very wide range of organisations who serve as
25 a mediator. If you're an individual and you think 12:59
26 there's a problem, you can find these groups like the
27 ACLU and they have staff and very talented people and
28 they work and push hard in order to try to bring out
29 change, either through litigation or through the

1 Congress.

2

3 There's also the ability to petition all the different
4 agencies, the States' Attorney Generals and others that
5 are talked about here. So there's many things besides 12:59
6 traditional lawsuits that provide great pressure on
7 improper behaviour, in my experience.

8 241 Q. And in that context, I think in paragraph 63 you
9 mention the PCLOB that the court has heard about. I
10 think that has a statutory basis, is that correct? 12:59

11 A. Yes, the unlovely term "PCLOB", the PCLOB, Privacy and
12 Civil Liberties Oversight Board, was created by
13 statute, I believe in 2007 - there was an earlier
14 version in an earlier statute - and it's an independent
15 agency, they have top secret clearances, they have the 12:59
16 reports that are talked about in the materials here.
17 And they have the ability to request briefings on
18 anti-terrorism activities in great detail and have done
19 these long reports on 215 and 702.

20 242 Q. And we've already had reference in the evidence to the 13:00
21 report on Section 702 done by PCLOB, isn't that
22 correct?

23 A. Yes. It's quite a detailed and lengthy report. I take
24 that as the most official, most elaborate description
25 of how 702 works. They went through a careful 13:00
26 declassification review and everything they published
27 was published in an unclassified form so the world can
28 read it. So we've had an independent body that made
29 sure it was correct and made sure they weren't leaking

1 classified secrets, but give tremendous detail compared
2 to our previous knowledge about the programme.

3 243 Q. And did it have access to classified material in the
4 production of that report?

5 A. Absolutely. They had the -- to my knowledge, they had 13:00
6 access to top secret information to the briefings that
7 they requested on that.

8 **MR. GALLAGHER:** That might be an appropriate place,
9 Judge, thanks.

10 **MS. JUSTICE COSTELLO:** Yes. Two o'clock. 13:01

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(LUNCHEON ADJOURNMENT)

1 THE HEARING RESUMED AFTER THE LUNCHEON ADJOURNMENT AS
2 FOLLOWS

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

5 **REGISTRAR:** At hearing Commercial Court action, Data 14:04
6 Protection Commissioner as Plaintiff -v- Facebook
7 Ireland Ltd. and Maximilian Schrems as Defendants.

8 244 Q. **MR. GALLAGHER:** Prof. Swire, you were speaking about
9 the PCLOB report on Section 702 in 2015, did that
10 report make various recommendations? 14:04

11 A. Yes. I call it *PCLOB*. The PCLOB report made quite a
12 long list of recommendations, more than ten. I don't
13 have them memorised, they are in the report in various
14 places.

15 245 Q. And are you in a position to update the court generally 14:04
16 on the implementation of those recommendations?

17 A. Right. So there's been, since the report came out the
18 PCLOB has had two annual reviews of how the
19 recommendations have been taken. And overwhelmingly in
20 a very large majority they have been accepted. Some of 14:05
21 them are in the process of being implemented, others
22 have been fully implemented. But all of them were
23 taken seriously as a tick list of what to try to do
24 next.

25 246 Q. If I can direct you to page 27 of Chapter 1 and you 14:05
26 refer there in paragraph 76 to 79 to what you call
27 "*conclusions on individual remedies with a caveat*" and
28 could you explain to the court what you are referring
29 to there and the significance of that?

1 A. To both the remedies and the caveat? Is that what you
2 want?

3 247 Q. Well it's really the caveat on the remedies I think.
4 We'll look at the remedies.

5 A. This part of the summary in chapter 7 in my report 14:05
6 talks about individual remedies, goes through the
7 various sorts of them. When it comes to individuals
8 finding out what the intelligence service has about
9 them, the caveat is that there's a real risk that
10 hostile actors, other intelligence services or somebody 14:06
11 like that could use this technique to get in and find
12 out what the agency is doing. So in the United States
13 and other countries there's been great reluctance to
14 allow probing of the intelligence service.

15 14:06

16 That was recognised, for instance, in the US Supreme
17 Court in Clapper when they used this as a reason not to
18 allow the suit to go forward. Because if you allow
19 multiple people to probe and find out whether there's
20 records held by them in the anti-terrorism database, 14:06
21 let's say in five cases the answer is yes and then they
22 have standing and they go forward and in five cases the
23 answer is no, they don't have standing; now you have
24 revealed who you are surveilling and who you aren't.
25 There is more detail in the report, I don't know how 14:06
26 much you want right now.

27 248 Q. Yes, we'll come back to that?

28 A. Okay.

29 249 Q. In paragraph 77 you give an analogy by reference to the

1 field of cyber security?

2 A. Yes. I teach cyber security along with privacy. In
3 cyber security you don't want to have a whole new class
4 of attack. We know about phishing attacks to try to
5 get your information or a firewall, you want to have
6 defences around your system. 14:07

7
8 The point I have here is that attackers in cyber
9 security want to probe the system. If I am a cyber
10 attacker or hacker I'd like to be able to go into your 14:07
11 system and find out where everything is and how it
12 responds to different kinds of prompts by myself. In
13 that way I'll know what your system is like.

14
15 The point here is, if we allow probes, anything on me 14:07
16 when I do e-mail, anything on me when I do chat, if we
17 allow probes like this into the intelligence service
18 then an organiser attacker, and intelligence services
19 are always under attack, an organised attacker has the
20 ability to map what the NSA or the German BND is doing. 14:07
21 That's a tremendous risk to national security to allow
22 a systematic probing of the sources and methods and
23 operational activities of the security service.

24 250 Q. You have intrigued everybody, I think, in paragraph 79
25 with your reference to a privacy bug at the very end of 14:08
26 it, and you might just tell us what you are referring
27 to in that sentence?

28 A. Right. I was told there was a question about a feature
29 versus a bug. A feature is something, a desirable

1 property of your software, your system; a bug is
2 something that's not desirable. So an example that
3 I have come up with is, in your phone you might have a
4 map app. Now a feature is it lets you get around
5 Dublin and shows you where you are, and that's exactly 14:08
6 what you want from your map application.

7
8 The bug is that a privacy matter, the company running
9 it will often know where you are. It will see that you
10 started here and went there and went somewhere else. 14:08
11 And so there's a privacy risky to using your map
12 location, but it's an absolute feature that actually
13 gets you from where you are to where you are going.

14
15 The point in terms of an Article 47 right to be able to 14:08
16 see what the intelligence service has is there's a
17 privacy feature to that which is that it's an
18 application of the Article 47 approach to being able to
19 find out what the government agency is doing. That's
20 part of the full scheme of remedies. But the security 14:09
21 bug is it's allowing this kind of attack. So the
22 individual says 'hmm let's see if I use this e-mail or
23 use this keyword are they going to be able to return a
24 record and say they are looking at me or they return a
25 record and they're not looking at me'. So that's the 14:09
26 security bug, that's the problem and the risk on the
27 security side. The exact same thing that's desirable
28 from one point of view is not desirable from the other.
29 That's true for the map application, it's true for the

1 security defence that I'm talking about.

2 251 Q. Can I ask you then to move to chapter 3, Professor, and
3 if you would be find enough to go to page 12 where you
4 deal in some detail in paragraph 38 and following with
5 the FISA court or FISC as it's been referred to? 14:09

6 A. Right.

7 252 Q. Could I ask you to give a general explanation, a
8 general summary first as to how the FISA court operates
9 and then I'm going to ask you to deal in more detail
10 with just some aspects of it? 14:10

11 A. Right.

12 253 Q. But in the context in which we are concerned
13 section 702 and the operation of programmes, could you
14 give that explanation to the court?

15 A. So first just what the court is. So these are federal 14:10
16 judges, federal trial judges, they are selected by the
17 Chief Justice. They are picked for a rotation for some
18 number of years, seven years or something like that.
19 So if you were a trial judge and then you got picked,
20 along with your regular docket you would go into the 14:10
21 classified room and do your FISA work, and you would
22 have assistance by staff lawyers who would help you.
23 The Department of Justice would come with applications.
24 There might be an application for that Soviet agent, an
25 individual order. It might be the annual certification 14:10
26 under section 702 where the Director of National
27 Intelligence, the Attorney General will come to you and
28 say 'we are certifying this programme for the year,
29 here are our procedures for targeting and minimisation,

1 here are the safeguards we put in place, here's how we
2 are going to run this thing'.
3

4 In both these cases you're acting as a judge. You're
5 looking at the individual order or you're looking at 14:11
6 the annual certification. You can ask questions and
7 they do. We have documentation of very detailed
8 questions about 702. You can decide that you don't
9 like the certification and you go back for further
10 questions and they can come back with round two. 14:11
11

12 In fact there's a lot of evidence now from the
13 declassified things that the court has often modified
14 orders. The first request comes from the Department of
15 Justice, the judge says 'I'm comfortable with this part 14:11
16 but not this part, can you come back and give me a new
17 version with the modification'. So it's judges acting
18 as judges. They are full federal judges named by the
19 President and confirmed by the Senate. So that's the
20 basic operation of the court. 14:11
21

22 Then if there's a disagreement, the Department of
23 Justice can go up on appeal, there's a FISA Court of
24 Appeal. If there's a case at that point it could go to
25 the Supreme Court, though we haven't had that happen 14:11
26 yet.

27 254 Q. I think, in terms of the appeal, the government can
28 appeal; is that correct?

29 A. The government can appeal. One of the changes in 2015

1 is for these important cases that we now have a group
2 of six experts in privacy and civil liberties called
3 amici curiae.

4 255 Q. **MS. JUSTICE COSTELLO:** Sorry when you say important
5 cases, is that all of them because they are all
6 important? 14:12

7 A. Sorry, that's fine. There's a language in the 2015
8 law, the USA FREEDOM Act. I think the word in the
9 statute is "*significant*", I'm not sure that's exactly
10 right, but it's something along those lines. So 14:12
11 between -- and the exact procedures in the materials,
12 it's between the judge and the Department of Justice,
13 there is some back and forth. The judge can say that
14 he or she would like there to be an amicus named, we
15 have had this for multiple cases since it started. And 14:12
16 at that point, the amici have been selected in advance,
17 there's a panel of them. One of them is named to this
18 case and they are then tasked to brief and argue in
19 front of the FISA judge. They get access to the
20 classified materials, they get to do oral argument. 14:13

21
22 Let's say the case comes out and the amicus is not
23 happy with the outcome. They do not have a right to
24 appeal, within the US structure it's tricky to have an
25 amicus having a right to appeal, it's almost like 14:13
26 giving evidence, it's really tricky. Sorry. But the
27 amicus can request an appeal and the judge, trial
28 judge, will know about that and then the decision could
29 be made that there will be an appeal. So it's not an

1 appeal as of right, it's a permissive appeal.

2 256 Q. That's an appeal to what's called the?

3 A. The FISCR.

4 257 Q. FISCR, if I can articulate the R bit of it.

5 A. Yes. Foreign Intelligence Surveillance Court of 14:13
6 Review, right.

7 258 Q. And is there a further appeal then from there?

8 A. So if there's a decision by the Foreign Intelligence
9 Surveillance Court of Review, which would be three
10 Court of Appeals judges, the appeal then would go to 14:13
11 the Supreme Court.

12 259 Q. The Court of Appeal judges, this is from the Court of
13 Appeal system, federal system; is that correct?

14 A. There is judges on a panel sort of standing by for
15 this. There are judges that might be from the District 14:14
16 of Columbia circuit. I know to my knowledge one judge
17 from the Second Circuit where I used to clerk has
18 served on it.

19 260 Q. Just to maybe address the issue raised by the court
20 there in terms of whether it's significant or whatever 14:14
21 the designation is?

22 A. Right.

23 261 Q. Who decides whether an amicus should be involved in a
24 particular decision or a particular determination that
25 is being made by the FISC court? 14:14

26 A. So to be certain I should probably look at the statute
27 or maybe, and I don't know exactly what footnote it is
28 here. I believe the answer is a judge. I don't know
29 what the procedure, whether you want me to search for

1 the footnote right now or not?

2 262 Q. No, we can get it again.

3 A. Okay.

4 263 Q. It's the judge who decides whether the assistance of an
5 amicus is likely to helpful or appropriate? 14:14

6 A. Appropriate for that case. That's my recollection, but
7 I don't have that statute --

8 264 Q. Okay.

9 A. -- specifically noted in my head right now.

10 265 Q. If you go to paragraph 39 of your report on page 12? 14:15

11 A. Mm hmm.

12 266 Q. You speak about the central role played by the FISC
13 since 1978 in regulating the collection of foreign
14 intelligence information. Now I think over the period
15 the FISC court has been criticised, indeed it was 14:15
16 criticised by Ms. Gorski here, and could you express an
17 opinion to the court as to whether various criticisms
18 have been addressed or what are the significant changes
19 that you believe have taken place to the FISC court
20 structure? 14:15

21 A. Well, there's different periods. So when I wrote my
22 article in 2004 after I had been in government trying
23 to explain this FISA court, it's the most widely cited
24 law review article on this. And in trying to explain
25 it I talked in there about is the FISA court a 14:15
26 rubber-stamp, do they just automatically say what the
27 Department of Justice wants. At that point we didn't
28 have, we had almost no declassified opinions. So
29 I interviewed people who had worked in the FISC and

1 people who played different roles. what I wrote at
2 that time, and which I believe to be true, is that the
3 FISA court with these federal judges has always played
4 a role of scrutinising the material that came before
5 them.

14:16

6
7 The way it would work for the traditional FISA, the one
8 Soviet agent kind of FISA, is that you had to, the
9 Department of Justice would have to go and get a series
10 of approvals that they had met agent of a foreign
11 power, that the person was inside the United States and
12 it would have to go up to a very senior official in the
13 Department of Justice. And so by the time you gotten
14 all the signatures for a FISA request you had this
15 stack of paper. People have gone like this, I am
16 marking with my hands, a pretty big stack (indicating).
17 So then it would go to the court and if the court
18 didn't like it they would send it back and the justice
19 department would have to get the signatures again and
20 then they would come back for the order.

14:16

14:16

14:16

21
22 In fact at one period in 2000 the court was not pleased
23 with how the FBI had been doing some of these things
24 and they cut off requests for a period of time because
25 they were frustrated and they wanted to show they were
26 being serious.

14:17

27
28 so in 2004 already my view was judges were acting like
29 judges, that they were looking at it and trying to make

1 their determination. After 2013 there has been a
2 tremendous increase in the amount of declassified
3 opinions. And so chapter 5 of my report is the first
4 place that I'm aware of that sort of puts in place
5 where the FISA court was, where it is now, what the 14:17
6 declassified opinions say. It's sort of a story of
7 what we have learned since 2013.

8 267 Q. And I think one of those declassified opinions is the
9 opinion referred to by Ms. Gorski, the Bates opinion of
10 2011 that was declassified sometime, I think, in 2013 14:17
11 or thereafter; is that correct?

12 A. Is that the internet metadata report?

13 268 Q. It is, the MCT decision.

14 A. Oh, MCT the Upstream 702. Sorry, I don't mean to talk
15 in gobbledegook. Do you want me to describe that? 14:18

16 269 Q. No, but that's an example of something that has been
17 declassified since?

18 A. Right. It's now a routine matter declassification. We
19 give the website, you can go look at a whole docket of
20 declassified FISA opinions. 14:18

21 270 Q. And who makes the decision with regard to
22 declassification?

23 A. It's been a combination of things. Initially it was
24 done by the FISA judges on their own motion. They had
25 to go through a declassification review, as I did for 14:18
26 my statement, but they showed themselves determined to
27 declassify certain opinions.

28
29 After 2013 President Obama ordered quite a large

1 programme of declassification, there were a lot of
2 people reading it and redacting the part that needed to
3 be redacted. And so the -- I'm trying to remember if
4 the USA Freedom has changes on this. As a matter of
5 practice since 2013 there has been very big changes. 14:18
6 The FISA court of review, sorry the FISA procedures
7 state how the court will go about deciding to
8 declassify. Those were classified until a few years
9 now ago and now they are declassified. So we know from
10 the court's procedures that they have a procedure for 14:19
11 declassification.

12 271 Q. And the procedures are amongst the materials, but there
13 are rules as to how it operates, rules of procedures
14 that are available; isn't that correct?

15 A. The FISA court, the FISC rules of procedures are 14:19
16 available and they are cited in my materials.

17 272 Q. And if you would be kind enough to go to paragraph 48
18 of that section?

19 A. Yes.

20 273 Q. You identify there the various sections of chapter 5 14:19
21 and I just want to touch on them at the moment. But in
22 paragraph 1 you say:

23
24 *"The newly declassified materials support the*
25 *conclusion that the FISC today provides independent and 14:19*
26 *effective oversight over US government surveillance."*

27
28 Then in 2: *"The FISC monitors compliance with its*
29 *orders and is enforced with significant sanctions in*

1 *case of non-compliance.*"

2
3 what sort of sanctions are those?

4 A. Hmm, well one is to purge any information that was
5 improperly collected which is in an important penalty 14:20
6 in the intelligence world. If you get intelligence and
7 then you can't use it, it makes the agency sad.

8 274 Q. Do you know whether that has happened or not?

9 A. It happens routinely, it's an absolutely standard part
10 of any mistake made. For instance in the 702 14:20
11 programme, it's a standard remedy. But beyond that
12 they have stopped surveillance programmes on multiple
13 occasions. And the list in No. 2 in paragraph 48,
14 which is the internet metadata programme, was stopped
15 because the court was not pleased with the compliance. 14:20
16 The upstream programme was found unconstitutional and
17 then later modified and allowed to go forward, but it
18 was stopped until the modifications happened.

19
20 As part of that there was a deletion of all data 14:20
21 collected via the Upstream programme for the whole
22 period before October 2011. In the 2009 case involving
23 the 2015 telephone records, there was a temporary
24 prohibition on the agency accessing the entire
25 database. 14:21

26 275 Q. Yes. Then in 3: "*In recent years both the FISC on its*
27 *own initiative and new legislation have greatly*
28 *increased transparency.*"

1 And again you expand on that further in chapter 5?

2 A. Correct.

3 276 Q. And then you deal in 4 with the matter that you have
4 mentioned, the question of receiving briefings. But
5 I think you identify there the range of sources from 14:21
6 which briefings can be obtained; is that correct?

7 A. Right. So one clear and notable place is that
8 companies like Yahoo and Facebook can themselves raise
9 objections to directives or to other parts of FISA
10 orders and they have done that. There was a very large 14:21
11 case involving Yahoo where there was a long debate
12 about whether the court was going to uphold the
13 programme or not under constitutional attack.

14

15 So there have been times when the ACLU and other civil 14:21
16 liberties groups have been asked for briefing. But as
17 of right the service providers can do it and the amici
18 now are there when there's a case the court believes
19 would be assisted by having a briefing.

20 277 Q. Can I ask you to move to paragraph 72 of that section 14:22
21 on page 24. I just want to draw your attention to the
22 testimony before the Belgian privacy authority that you
23 gave and that you have referred to earlier and you
24 describe that there; is that correct?

25 A. Yes. 14:22

26 278 Q. Would you go to the next section of this, which is
27 paragraph 77. You describe various oversights,
28 oversight mechanisms and the concept or the role of
29 agency Inspector General?

1 A. Right.

2 279 Q. Could you just briefly explain to the court the role of
3 the Inspector General?

4 A. Okay. The Inspectors General are quite a significant,
5 not very well known part of the way we try to keep the 14:23
6 US government agencies doing what they are supposed to
7 do. The original part was to make sure that fraud,
8 waste and abuse was being routed out. So if an agency
9 was not acting properly with government funds, that was
10 the original source. 14:23
11

12 Over time it's clearly become a job of the IGs, the
13 inspectors general, to look for violations of law. So
14 if there's an -- and each agency, the NSA, the National
15 Security Agency, the Department of Justice, each of 14:23
16 these agencies has their own Inspector General. They
17 are appointed by the President with Senate confirmation
18 and then they cannot be fired except for cause, so the
19 President cannot fired them. The agency head cannot
20 fire them, unless they go through a whole procedure 14:23
21 that's quite unusual. And so the Inspectors General
22 then are there to watch for violations of law. There
23 is whistle-blower provisions that whistle-blowers can
24 go to them to tell them about problems. The Inspectors
25 General have their own budget so they don't squeeze on 14:24
26 the budget side and they have access to classified
27 information. So it's a substantial check on lawless
28 behaviour inside each agency.

29 280 Q. Does the NSA and the other intelligence agencies to

1 which reference has been made here, do each of them
2 have their own independent Inspector General?

3 A. Yeah. Each agency in the intelligence community has
4 its own Inspector General.

5 281 Q. And if the Inspector General discovers something, what 14:24
6 can the Inspector General do about it?

7 A. The Inspector General has the ability to make reports.
8 Often they make reports to Congress, often they make
9 reports publically. At paragraph 79 there is two
10 examples of the Inspectors General recently acting in 14:24
11 the privacy domain. In 2015, in paragraph 79, the
12 Homeland Security Inspector General issued a report
13 finding misconduct by agents of the US Secret Service
14 improperly accessing information and they found the
15 violations to be valid, put sanctions against the 14:25
16 employees and identified potential violations of law
17 for further investigation.

18
19 Criminal investigations would go to the Department of
20 Justice for prosecution but the IG can recommend 14:25
21 prosecution. In the next year the Inspector General
22 within the customs and border protection found a
23 different violation involving the Privacy Act and, as
24 part of that, made recommendations for enforcement and
25 changes. 14:25

26 282 Q. And what importance do you attach to the role of the
27 Inspectors General in the context of protections for
28 data subjects?

29 A. They are one source of independent oversight who have

1 access to classified information and whose job and
2 responsibility and oath is to uphold the law.

3 283 Q. Can I ask you to move to page 28 and you detail there
4 the role of legislative oversight in the context of the
5 US Senate Select Committee in particular; is that 14:26
6 correct?

7 A. Yes, Senate and House.

8 284 Q. Senate and House.

9 A. I didn't mean to show any disrespect to the co-equal
10 branch of the legislature. 14:26

11 285 Q. And do those committees have access to classified
12 material as well?

13 A. Yes. The members and the selected staff have access to
14 classified information. There is secured classified
15 facilities in Congress. I have testified in front of 14:26
16 the Senate Intelligence Committee. We go inside a
17 classified room and it's held in closed session. They
18 also do things in open session. They have very many
19 hearings, every week is the norm. In some cases they
20 are highly critical. I footnote to a very large and 14:26
21 critical study of the Central Intelligence Agency's
22 activities related to torture. So they are there to
23 look at the intelligence activities. They were built
24 after the Watergate problems as a way to make sure
25 Congress had the ability to investigate the 14:27
26 intelligence agencies.

27 286 Q. In page 33 paragraph 93 and following you deal with the
28 Federal Privacy Council and the Privacy and Civil
29 Liberties Offices in the Agencies and could you briefly

1 tell the court what their role is?

2 A. So last year -- there's federal privacy officers in
3 every agency, there's lots of different jobs that they
4 have, some of which we can talk about more. But now,
5 in order to coordinate across the different agencies, 14:27
6 so the Health and Human Services and the Homeland
7 Security or whatever, there's a privacy council, they
8 have subcommittees on different tasks, how do we do
9 Privacy Act, how do we do privacy impact assessments.
10 So the council is chaired from the white House Office 14:27
11 of Management and Budget.

12
13 Inside each agency and increasingly over time there has
14 been CLPOs, civil liberties and privacy offices. So
15 there is now one in the NSA. That was created newly in 14:27
16 the President's speech in 2014. So Becky Richards is
17 the first privacy officer and civil liberties officer.
18 She is there, she has full classified access. She has
19 the ability to speak with the director, she has the
20 ability to do investigations. She has an office whose 14:28
21 job is to be there every day to work on privacy and
22 civil liberty things. We have had that in other
23 agencies such as Homeland Security since the Homeland
24 Security Act of 2002, so it's an increasing feature of
25 how this is done. 14:28

26 287 Q. Now can I just ask you firstly, with regard to the FISC
27 court, can you tell the judge as to whether you are
28 aware of any similar court system in any of the
29 European countries that are members of the EU?

1 A. Right. So I have studied this. There is the from a
2 report, the Fundamental Rights Agency report, and
3 I have read other things over time. There's no system
4 with anything like the routine day in, day out
5 oversight access to classified information by judges 14:28
6 that I have found in any European country. The UK has
7 something that's a little bit similar where there's
8 access to classified information, but their scope of
9 responsibility is much narrower and they don't have
10 full judicial power. 14:29

11 288 Q. In terms of the Inspectors General, do you know whether
12 there's an analogue to those in any of the European
13 countries, are you in a position to say that?

14 A. I haven't studied that, I don't know.

15 289 Q. Okay. Now you deal then in 34 with the transparency 14:29
16 mechanisms and in paragraph 96 the declassification of
17 the numerous FISC decisions that you have referred to,
18 a new website devoted to public access to intelligence
19 community information, the first principles of
20 intelligence transparency for the intelligence 14:29
21 community; and, at four, the first two intelligence
22 communities statistical transparency reports;
23 unclassified reports on NSA's implementation of
24 Section 702 and numerous speeches and appearances by
25 the intelligence community. I just want to ask you 14:30
26 about one or two of those?

27 A. Mm hmm.

28 290 Q. But, before doing so, you refer in the next section to
29 the USA FREEDOM Act provisions mandating public law

1 about major FISC decisions and that's what you were
2 referring to earlier, I think; is that correct?

3 A. I believe -- yes, there's a provision that says that
4 when there is important decisions of law the public
5 must learn of that. It's a way to try to deal with the 14:30
6 problem of secret law, that was a criticism earlier.

7 291 Q. Yes. And then in paragraph 100 over the page you deal
8 with transparency reports by the US government, what
9 sort of reports are you talking about there?

10 A. So since the original FISA there were statistics 14:30
11 released, but a very, very small number of things: How
12 many orders and how many orders were approved. Now -
13 and there is detail in 100 - there is mandated annual
14 reports that provide quite a lot more detail about
15 quite a lot more. So report on the total number of 14:31
16 applications filed and orders issued under section 702,
17 as well as the estimated number of targets affected by
18 such orders. So we get a sense of the scale. There's
19 this fear that maybe everybody is under section 702 and
20 instead we have statistical reports on how many people 14:31
21 are under section 702.

22

23 So that provides a year by year comparison and it
24 provides an official statement by the US government of
25 the scope of these activities that is subject to 14:31
26 oversight by all the people who watch these things
27 being created to make sure they are accurate.

28 292 Q. Are you aware of any Member State that publishes
29 similar information?

1 A. Well, there's different kinds of transparency in
2 different Member States. I was reading some of the
3 German reports about a public notice and how many
4 people are, how many people receive notice that they
5 have been under surveillance by the BND by the German 14:32
6 equivalent of the NSA. There was a report in the last
7 year or so that the number was five people received
8 notice from them that they had been under surveillance.
9 So there is some limited kinds of transparency. There
10 is nothing statistical in the same way or anything 14:32
11 close to magnitude that I'm aware of.

12 293 Q. If you go to paragraph 102 you identify in the third
13 sentence that for 2015 there were 94,368 targets under
14 the Section 702 programmes?

15 A. Yes. 14:32

16 294 Q. Then in the next section you deal with transparency
17 reports by companies and could you briefly explain,
18 maybe by reference to paragraph 105, what's involved
19 there?

20 A. So companies for many reasons have wanted to reassure 14:32
21 their customers and also I think as part of their, they
22 feel their role in accurately telling customers how
23 things are done, to give their own transparency
24 reports. These are now available every six months or a
25 year for most of the major telecommunications 14:33
26 companies. It didn't exist a few years ago. There was
27 this litigation that happened with all the major
28 internet companies that was, there was an agreement
29 with the government reached in 2014 that allows much

1 more detail in these transparency reports than before.
2 And so there's a table here in paragraph 105 that gives
3 some numbers. I tried to make the numbers
4 understandable.

5
6 So at the bottom of 105 and 106 it says, if we look at
7 the most searched for company based on the public
8 reports that was substantial, if we assume that Google
9 was, that everyone in Dublin was a Google user, then we
10 would get a number of about 15 users on average would
11 have content requests. So I looked up Dublin and its
12 suburbs have about 1.1 million people and, based on the
13 statistic, the top of the range, the biggest number you
14 would have according to these public reports would be,
15 for all of Dublin, 15 people would have their content
16 targeted by section 702. And then there is non-content
17 on average would be --

18 295 Q. **MS. JUSTICE COSTELLO:** when you say 702, that's as we
19 know PRISM and Upstream?

20 A. PRISM and Upstream combined. So on average, if you
21 sort of think about the world of Google's customers,
22 you'd have something on that order. 15 is, there's
23 language in previous cases about mass and unrestrained
24 surveillance and 15 out of 1.1 million seems like a
25 quite different field than some of what was reported in
26 the press previously.

27 296 Q. **MR. GALLAGHER:** Over the page you deal with Executive
28 Branch safeguards, but you offer an opinion I think to
29 the court in paragraph 110 and following as to your

1 experience of the level of compliance with executive
2 safeguards?

3 A. Right.

4 297 Q. And could you explain that?

5 A. So I spent, I worked in the white House in 99/2000, was 14:34
6 back there under President Obama, have worked in and
7 around Washington and numerous places. One tries to
8 come up with a view of what's really going on. So what
9 I say here, based on my experience, is that there is
10 far greater adherence to lawfulness than the TV version 14:35
11 of government.

12
13 So I have in 110 probably a badly written sentence
14 about how Jack Bauer in the television show "24" or
15 similar characters are always breaking the rules. That 14:35
16 might make for exciting drama but is bad social
17 science, it's not what I have observed.

18
19 In our review group, which is discussed at page 112,
20 where we were tasked, among other things, to see 14:35
21 whether the NSA was basically running a lawless kind of
22 operation, we made a series of findings and some of
23 them are quoted here. So at paragraph 112 the report
24 stated:

25 14:35
26 *"NSA employs large numbers of highly trained, qualified*
27 *and professional staff. The hard work and dedication*
28 *to mission of NSA's work force is apparent. NSA has*
29 *increased its staff in its compliance office - we know*

1 *that it was over 300 people by the time we did that*
2 *report - and addressed many concerns expressed*
3 *previously by the FISC and others."*
4

5 And so the rigour of the compliance efforts is what the 14:36
6 study and the access and the classified basis impressed
7 upon me. That's my view having spent a lot of years in
8 this area, that these are public servants, working
9 hard, they are trying to protect their fellow citizens,
10 they are trying to do job, they're not there break the 14:36
11 law. That's my view of what's going on overwhelmingly.

12 298 Q. Did you have an opportunity to read John DeLong's
13 report --

14 A. I did.

15 299 Q. -- in connection with this? 14:36

16 A. Yeah.

17 300 Q. And you see his description with regard to compliance
18 within the NSA and the procedures that are employed?

19 A. Well, John DeLong was the head of the compliance
20 division of the NSA at the time we did the review group 14:36
21 report. So he was leading this group of 300 people who
22 were overseeing compliance with 702, overseeing
23 compliance with all the rest of the stuff. So he
24 describes in his report software systems, auditing
25 procedures, ways that people are detected if they are 14:37
26 doing an improper search, ways that there is job
27 sanctions if you don't get the training. If you don't
28 get the training every year then you lose the ability
29 to access the database. So there's quite a lot of

1 detail in his report about sort of an auditing
2 accounting oversight system around access to these
3 databases.

4
5 The history of the FISA judges looking at it has been, 14:37
6 when the judges have thought things were not being done
7 well, they wanted assurances that the NSA was following
8 the rules. Early on after 2001, and early on even in
9 2008 and '09, there was some quite large violations of
10 practice. The judges thought that a certain thing was 14:37
11 prohibited, in fact it was being done. The judges
12 cancelled programmes or said we can't allow this to go
13 forward unless we do sort of field by field oversight
14 of it.

15 14:37
16 Then the NSA came back and said 'well here is what we
17 have built, here is our software, here is the
18 compliance system, judge, we think now you should
19 authorise the system again'. And in some cases the
20 judges said 'you have given us enough assurances, the 14:38
21 system can go back into place', in other instances, as
22 with internet metadata, they never got to that point
23 and the programme ended.

24
25 So this is, we can read the declassified opinions, they 14:38
26 are footnoted in my report. It is judges applying a
27 lot of scrutiny and judges being clear that when the
28 next certification comes to them, it's not just what
29 the Attorney General is saying now, is that they are

1 going to do oversight as judges to make sure it's
2 actually being followed. They have affidavits from
3 senior officials, and increasingly over time they have
4 had NSA technicians come in as fact witnesses sworn in.

14:38

5
6 One of the problems earlier on is that there was a
7 problem where you would have the judge talking to the
8 Department of Justice lawyers, Department of Justice
9 lawyers would talk to the NSA lawyers, the NSA lawyers
10 would talk to the NSA technical people and it was less
11 than perfect by the time it all happened. And so now
12 they are much more likely, compared to previous
13 practice, to bring the NSA technical people in and to
14 try to make sure that it's being done the way the judge
15 understands it to be done because that wasn't being
16 done properly before.

14:38

14:39

17 301 Q. Ms. Gorski was invited to make some criticism of the
18 disclosure made by the US government to the FISC court
19 in the context of the Bates 2011 opinion on the MCTs?

20 A. Yes.

14:39

21 302 Q. And can you tell the court whether any changes have
22 taken place and what is the position now in that
23 regard?

24 A. That's detailed in chapter 5, the changes are listed in
25 chapter 5.

14:39

26 303 Q. Okay. We'll perhaps come to them then.

27 A. We can do it now or later as you prefer, right.

28 304 Q. I do apologise for jumping ahead. There is just one
29 other matter: with your experience of the procedures

1 and the compliance procedures in particular and level
2 of compliance, from your examination of these matters,
3 is what John DeLong says about that consistent with
4 your experience?

5 A. I read his report, everything was consistent with my 14:40
6 own experience. He knows things I don't know, but
7 there was nothing I saw in it that I disagree with.

8 305 Q. Sorry, we will now move to chapter 5 and you can
9 perhaps, I think it may be in paragraph 30 but I just
10 might be wrong, the section on "*the FISC is not a* 14:40
11 *rubber-stamp*" begins on paragraph 23 at page 9. Then
12 you identify in paragraph, beginning on 28 but in
13 paragraph 30, this process of clarification of various
14 matters?

15 A. Right. So in paragraph 30, and I'm not inclined to -- 14:40
16 let's see, eleven rounds of briefing and action before
17 the court on that particular matter. So it's a sign of
18 a judge thoroughly probing the situation before coming
19 to final decisions about what to do.

20 306 Q. Yes. If you go back just for a moment to paragraph 15 14:41
21 of that section. You set out in general the standard
22 FISC procedures and the multiple rounds of review of
23 surveillance applications?

24 A. Yes, I think I have described in summary form what's
25 happened here. But there is paperwork that's done by 14:41
26 the Department of Justice, it goes to the judges, if
27 they are not satisfied they ask for more details, they
28 can decide to either approve or not approve or modify
29 after they have done that.

1 307 Q. I think that applies to what we will call the more
2 traditional applications; isn't that correct?

3 A. Correct. There is even more levels of scrutiny for
4 section 702 because it's a whole programme, not the one
5 Soviet agent traditional thing. I think the step by 14:41
6 step is in a different part later in the chapter.

7 308 Q. It is. Can I bring you then to paragraph 25 on page 9
8 and you say that: "*The FISC has made use of its*
9 *Article 3 powers*"?

10 A. Right. 14:42

11 309 Q. "*To engage in and to require the government to respond*
12 *to successive rounds of review investigating the*
13 *government's proposed surveillance*"?

14 A. Right.

15 310 Q. And you give an example of how those powers are 14:42
16 exercised. And if you go over the page at 510 in the
17 same paragraph you describe the process in terms of
18 reviewing a certification's legality; is that correct?

19 A. So this was for the original time that the court
20 authorised Section 702 surveillance. The 2008 FISA 14:42
21 Amendments Act, Section 702 of that 2008 Act, and
22 before allowing the surveillance to go forward there's
23 a list of steps that it went through that included
24 targeting and minimisation procedures, a hearing about
25 how it was going to be done, supplemental submissions, 14:42
26 internal guidelines to ensure compliance with the
27 certification. So before the first surveillance was
28 done under 702 this list of steps was gone through.

29 311 Q. And we now know that certifications, new certifications

1 have to be approved every twelve months or within a
2 twelve month period; is that correct?

3 A. That's correct.

4 312 Q. And could you go to paragraph 32 on page 12?

5 A. Mm hmm. 14:43

6 313 Q. You identify in paragraph 32 that when an application
7 is made to the FISC, it may review the government's
8 past compliance with orders and that that is
9 particularly true for long running programmes such as
10 PRISM where compliance incident reporting provides 14:43
11 feedback for the FISC to judge how its orders are being
12 implemented?

13 A. Yes, I think paragraph 34 gives the view, not of the
14 Department of Justice, but of the independent Privacy 14:43
15 and Civil Liberties Oversight Board. It summarised the
16 role of compliance reports and said that compliance
17 notices must state the type of non-compliance that's
18 occurred. In essence the court has created a series of
19 precedents regarding how the government interprets
20 various provisions which informs the court's 14:44
21 conclusions regarding whether those procedures comply.
22 So what we see here is, it is described really as a
23 common law process where the judges get to know
24 Section 702. There is directives under the
25 certifications every year, there is the PRISM and there 14:44
26 is the Upstream and what we have is independent
27 oversight board after being briefed on a classified
28 level describing this kind of judicial oversight.
29

1 I think the one point that might be helpful is that the
2 judges are using their full judicial power under
3 Article 3 of the US constitution. So they can have
4 inherent powers of the judiciary, they can do contempt
5 of court, they can require witnesses to appear, they 14:44
6 can refuse to approve a programme until the agency has
7 done what they tell them to do. So these are judges
8 acting in the full majesty, if you will, of what a
9 federal judge can do.

10 314 Q. And in paragraph 35 you refer to a recently 14:45
11 declassified FISC opinion that you consider
12 significant?

13 A. I'm just reviewing it (witness reading the document).
14 Okay, so in paragraph 35 it talks about how the FISC,
15 and this was after the earlier problems with Upstream 14:45
16 had been fixed, that the FISC was doing active
17 monitoring with its staff attorneys to raise compliance
18 related questions. There was hearings regarding
19 changes to the targeting and other procedures and it
20 was only after all of that compliance oversight 14:45
21 happened that they approved the certification for the
22 year.

23 315 Q. And in paragraph 37 you say that: "*One year later in*
24 *2015 the Department of Justice presented the next*
25 *certification to reauthorise Section 702 programmes.*" 14:45
26

27 And you identify how the FISC directed its staff
28 attorneys to convey a number of compliance related
29 questions to the government and they reviewed that?

1 A. And also, as part of that, though I think it's in a
2 different paragraph, the Department of Justice --
3 sorry, PCLOB made various recommendations for studies
4 about how targeting was done and various things and
5 whether MCTs were being handled properly. And so the 14:46
6 certification --

7 316 Q. **MS. JUSTICE COSTELLO:** MCTs?

8 A. I am sorry. In the Upstream -- I apologise, I'll try
9 to avoid that.

10 **MS. JUSTICE COSTELLO:** NCTs I get, I thought you said 14:46
11 MCTs, I didn't think it was cars.

12 A. No, MCTs, multi-communication transmissions.

13 **MR. GALLAGHER:** Those are for our cars, Professor.

14 **MS. JUSTICE COSTELLO:** No, no, that was me, I misheard
15 you. It was MCTs, I have learned that one. 14:46

16 A. Okay.

17 317 Q. **MR. GALLAGHER:** In the next section, Professor, you
18 identify, as you have already mentioned, that the FISC
19 has modified a significant percentage of surveillance
20 applications? 14:46

21 A. Yes.

22 318 Q. And you identify over the top of page 15 specific
23 orders of magnitude in that regard by reference to the
24 period June 8, 2015 to December 31, 2015, the third
25 line on page 15? 14:47

26 A. The USA Freedom Act, which was passed in June of 2015,
27 changed the public statistics reporting. It used to be
28 that if the Department of Justice tried for an order,
29 didn't get it, they tried again, modified it three or

1 four times, that would count as an approved order. Now
2 if they do their first try and it's not approved and
3 later it's approved, it counts as a modified order. So
4 we have a new sample which is that paragraph 41, for
5 the first six months 17% of the orders were either 14:47
6 turned down or modified, mostly modified. So we have
7 some sense of how often modification is approved. We
8 didn't have those numbers before.

9 319 Q. In paragraph 43 you refer to a recently declassified
10 FISC opinion which illustrates the proactive oversight 14:47
11 that can result from FISC's internal discussions, and
12 that's with reference to justifying the capturing of
13 information known as post cut-through digits?

14 A. Right. After you get through the phone call they say
15 'if you want to do this, hit one; if you want to do 14:48
16 this, hit two'. That's post cut-through digits, just
17 to make it seem like it's something we all understand.

18
19 But the point I think in paragraph 44 is the judges met
20 for their semi-annual conference and the consensus of 14:48
21 the judges is that they needed further briefing, that
22 this is basically a programmatic oversight. We're not
23 sure how this new thing or this particular thing works
24 and the judges got together and said we need more
25 hearings on it, more briefing on it. 14:48

26 320 Q. And in paragraph 48 you give an example of the judges
27 exercising their constitutional authority?

28 A. Yes.

29 321 Q. In 49 the consequences of that and you might just

1 briefly refer to that?

2 A. Right. So a programme that is now often called stellar
3 wind, which is a version of what was briefly called the
4 warrantless wiretapping programme and had other names,
5 came to the FISC eventually. Eventually, I think it 14:48
6 was 2006. But when the court looked at it they
7 understood that there were these procedures that were
8 helpful in the war against terrorism in their view, and
9 they talked about the possible important risks to
10 national security. But they said under the statute 14:49
11 they didn't see any lawful way to have this programme
12 go forward. So they stopped the programme. They said
13 'basically, Congress, if you want to go do this, that's
14 up to Congress' and Congress in 2007 did a temporary
15 version. Congress in 2008 did what we now call 14:49
16 Section 702 and set forth a series of protections and
17 procedures.

18

19 So until 702 is passed there was this period where
20 there was no programme doing that and the intelligence 14:49
21 agencies were quite upset about that and pushed hard to
22 try to get something that now looks like Section 702.

23 322 Q. And I think paragraph 49 refers to the fact that this
24 order was made notwithstanding the consequences that
25 were going to occur; isn't that correct? 14:49

26 A. There was clear recognition by the court that there
27 were going to be national security risks for not having
28 the programme. But they are judges and they didn't
29 have a lawful basis to authorise it so they didn't

1 authorise it.

2 323 Q. And in the next section you explain how the FISC
3 monitors compliance with its orders and has enforced
4 with significant sanctions in the case of
5 non-compliance?

14:50

6 A. Do you want me to speak?

7 324 Q. Yes.

8 A. Well, I think one part is part (a) here, paragraphs 54
9 and afterwards, shows that it's not just the judges on
10 their own saying compliance is important. There's an
11 oversight part of the national security division in the
12 Department of Justice. So you have the national
13 security lawyers. One part of it is oversight. They
14 have a job periodically, every two months for some,
15 every quarter or every half a year for others, to go
16 give compliance reports. Some of it goes to Congress,
17 some of it goes to the FISA judges. So you have
18 full-time oversight lawyers whose job is to watch out
19 for how this compliance is doing, to give reports. The
20 reports are sworn under affidavits saying we believe
21 them to be correct.

14:50

14:50

14:50

22
23 So there's a system of the lawyers in the justice
24 department being required to do that. Then it goes to
25 a separate set of audits that include the Director of
26 the National Intelligence office. There is periodic
27 reports and along with that there is reporting within
28 the agencies.

14:51

29

1 So I think from the outside sometimes people think the
2 NSA is this lawless place, from the inside my
3 experience is they feel like they have plenty of
4 bureaucracy watching everything they do. If you count
5 up the number of reports and stuff you might see why 14:51
6 they feel that way.

7 325 Q. Can I ask you just to identify an example of an
8 assessment of compliance with procedures dated November
9 2016 --

10 A. Ah. 14:51

11 326 Q. -- and it is conducted by the Attorney General and the
12 Director of National Intelligence, if I could hand that
13 in to you?

14 A. You're going to hand that up. This was one of the
15 documents that was posted in January and that the 14:51
16 expert report lists.

17 327 Q. It postdated the expert report?

18 A. The sort of five experts consensus report, whatever it
19 is called. (SAME HANDED TO THE COURT) (SAME HANDED TO
20 THE WITNESS) 14:51

21 328 Q. Yes.

22 A. Where do I look at that for myself? Thank you. Is
23 there a page I should look at?

24 329 Q. Yes, if you just look at the executive summary.

25 A. Yes. 14:52

26 330 Q. It refers to the FISA Act in the first paragraph
27 requiring the Attorney General and Director of National
28 Intelligence to assess compliance with certain
29 procedures and guidelines pursuant to section 702. And

1 that's an example of that sort of assessment that you
2 have been referring to?

3 A. Right. So I think, if you go back to before 2013, it
4 would have been very surprising to have anything like
5 this report in the public domain. You can see at the 14:52
6 top it says: "*Top secret. No foreigners means no*
7 *foreigners, no non-US persons.*"

8
9 But now the decision has been made to have much greater
10 transparency so we get to read this. I think the third 14:52
11 paragraph which starts with the letter U for
12 unclassified says:

13
14 "*This joint assessment finds the agencies have*
15 *continued to implement the procedures and follow the* 14:52
16 *guidelines in a manner that reflects a focussed and*
17 *concerted effort by agency personnel to comply with the*
18 *requirements of Section 702. "*

19
20 It gives some statistics, there is about a half of 1% 14:53
21 which is one in 200 compliance incidents. It talks
22 about --

23 **MS. JUSTICE COSTELLO:** I presume that means
24 non-compliance really?

25 A. Yes, that's a non-compliance problem, right. I didn't 14:53
26 mean to --

27 **MS. JUSTICE COSTELLO:** No, no, I understand.

28 A. I'm saying the words here.

29 **MS. JUSTICE COSTELLO:** Yes.

1 A. There is discussion either here or in other documents
2 that we cite to about what kinds of mistakes happen.
3 It can be, for instance, a typo in a phone number
4 selector, that would count as a compliance incident. A
5 very common compliance incident is, if there is 14:53
6 somebody who is under surveillance, let's say somebody
7 from, pick your country, I don't know, I'll pick
8 France. Somebody from France flies to the United
9 States, when they get to the United States the 702
10 order has 'supposed to stop' when they get to JFK 14:53
11 Airport because now they are inside the United States.
12 And so if there was any continued monitoring of their
13 communications once they got to the United States,
14 that's a compliance incident. So the agency has to
15 have procedures in place to try to figure out if 14:53
16 somebody has come into the US.

17
18 So we have a significant number of compliance problems,
19 one in 200 is a long way from zero. But mistakes in
20 writing out the selectors, mistakes in this kind of 14:54
21 coming to the US are two of the substantial categories
22 of mistakes. And then any data collected under those
23 is purged, that's the standard thing. As of Monday you
24 weren't allowed to have it, any date thing after Monday
25 has to be purged. 14:54
26

27 There is also in this report a statement that there has
28 been no findings of intentional. So the last sentence
29 on page 3 is: "*Based upon a review, the joint*

1 A. Thanks very much. So targeting is the mechanism for
2 deciding which non-US persons outside the United States
3 are going, which *selectors* are going to be used, what
4 e-mail addresses or what phone numbers are going to be
5 used. So that's an important moment. If it's not, if 14:56
6 it doesn't fit targeting guidelines then it's not
7 allowed to be collected under 702, it would be a
8 compliance incident.

9
10 So how does the targeting happen? And so the statute 14:56
11 could seem a little vague here. The statute says the
12 target is somebody who is not in the US and not a US
13 person and there's some foreign intelligence purpose.
14 And that's roughly what the statute says. So at that
15 level of generality can seem 'well, what the heck, 14:56
16 I can certify almost anything'. But what I felt this
17 was, this was released in January, it's on the website
18 now. I thought it was helpful -- let me see.

19 333 Q. Go to page 5, I think.

20 A. Yes, I was looking for the paragraphs. I'm getting 14:56
21 there. Okay, so the bottom of page 5 there's a
22 paragraph that begins "*as also described in the 702*
23 *report by the Privacy and Civil Liberties Board. IC*
24 *analysts - intelligence community analysts - must*
25 *comply with certain documentation and other 14:57*
26 *requirements prior to tasking a selector*". So before
27 they can go for a phone number or an e-mail address.

28 334 Q. **MS. JUSTICE COSTELLO:** what does tasking a selector
29 mean?

1 A. Tasking a selector means the NSA employee is saying
2 this phone number is going to be a selector that we can
3 look at under 702.

4 335 Q. **MR. GALLAGHER:** I think PCLOB, if my recollection
5 serves me, and correct me, just says tasking 14:57
6 identifying. They identify the selector, but I think
7 they use the term tasking, would that be correct?

8 A. Tasking is used inside the agency and the intelligence
9 communities. This is a phone number that counts now,
10 this is an e-mail address that counts now, that's what 14:57
11 it means. We have met 702 and we can do this.

12 336 Q. Yes. Just in that context, Professor, the PCLOB report
13 says an individual cannot be the selector?

14 A. Correct.

15 337 Q. It's some e-mail address or phone number or some other 14:58
16 such selector?

17 A. Right. You can't have a person's name, you can't have
18 a topic such as nuclear bomb or something. It has to
19 be a phone number or an e-mail address or some other
20 selector of that sort. 14:58
21

22 I think, on page 6 it's useful in the first paragraph,
23 in the second half of the paragraph it says what each
24 NSA analyst has to do to select one phone number or one
25 e-mail address and it sets five things. It has to 14:58
26 document the selector being tasked, the analyst has to
27 document citations to the specific documents or
28 communications that led the agency to determine that
29 the person is outside the US.

1 oversight people look at these targeting rationales to
2 make sure they are detailed enough. So the analyst has
3 to describe why the tasking of a particular facility,
4 phone number, e-mail is requested.

5
6 And then in 10 it is: *"To memorialise the linkage*
7 *between the user of the facility and the specific*
8 *foreign intelligence purpose covered by the*
9 *specification, to document the analyst assessment based*
10 *on their specialised training, that this will return* 15:00
11 *foreign intelligence information, and a written*
12 *explanation of the basis for their assessment that this*
13 *person is going to have foreign intelligence*
14 *information in the correct foreign power or foreign*
15 *territory."* 15:00

16
17 In other words, all of the tasking is directed against
18 specific individual targets, no bulk or mass
19 surveillance occurs under this statute. But the last
20 part has been mentioned in various places. I think the 15:00
21 details in those two paragraphs shows a sort of
22 documentation for each phone number. That's what true
23 for every phone number or e-mail under 702. It's not
24 permitted to do 702 surveillance unless *that* e-mail or
25 that phone number has met what's required in these two 15:00
26 paragraphs.

27
28 And then the rest of the report says there's not been,
29 we have seen this, there's been no intentional

1 violation of that in the compliance report.

2

3

But that level of care and targeting is the thing that I thought was interesting and more detailed than I had seen publically before.

15:01

6

7

would you be kind enough, Professor, to go to page eight?

8

9

A. Of the same document?

10 338

Q. Of the same document?

15:01

11

A. Okay.

12 339

Q. And at the top of the page it says that when NSA proposes to direct surveillance at a non-US person targeted, it does so because NSA already has learned something about the target or the facility or facilities the target uses to communicate.

15:01

17

A. Mm hmm. Part of this here in the second paragraph - I'm not sure - the second paragraph talks about this problem of a challenge when somebody was outside the US and comes into the US and so once they're in the US, the Fourth Amendment clearly applies and there's a separate set of rules that would apply. And so, you know, how quickly do we know about a potential change in the foreignness status of a target, either because it turns out they're a US person or it turns out they've come to the US?

15:02

27 340

Q. And at the last paragraph of that page: "*The feasibility of creating standard criteria for determining the expected foreign intelligence value of*

15:02

1 a target..." And it explains how that is done and what
2 the NSA has developed by way of, in the way of guidance
3 for analysts in that regard.

4 A. Right. So this is something that PCLOB did push at.
5 And also in my previous writings I thought that it was 15:02
6 important to have better sort of documentation and
7 rigour in it being a foreign intelligence purpose. And
8 it talks about there being examples in supporting
9 rationale for the foreign intelligence finding. So
10 it's not just that we feel like seeing somebody who's 15:03
11 outside the US, there has to be a sort of defined
12 foreign intelligence purpose before we task the
13 selector.

14 341 Q. And how frequently are these procedures published, do
15 you know? 15:03

16 A. Published? This was the most detailed assessment of
17 targeting that I'm aware of. The certifications are
18 done every year by the FISA judges, look at it every
19 year. I don't know how often this document will be
20 updated. The compliance documents are every six 15:03
21 months.

22 342 Q. And when was that made available, that document, can
23 you remember?

24 A. It was made available in January of this year.

25 343 Q. Just to clarify one thing - I think the court is 15:03
26 already fully familiar with this - but in terms of the
27 FISC court, it doesn't pre-approve the directives, but
28 it has the ability to subsequently *examine* the
29 directives --

1 A. Right.

2 344 Q. -- for compliance with the certification, is that
3 correct?

4 A. Right. So this is, getting these words straight takes
5 a while, but "certification" is the annual decision, 15:04
6 "directive" is this company is given these selectors.
7 The certification is done after all the procedures
8 we've talked about. Then when there's been the proper
9 tasking - maybe there's ten new selectors that go to a
10 company in a directive - that is done administratively 15:04
11 by the NSA. They have to say that it's done under the
12 certifications and in compliance with it. But they get
13 to, based on the analysts doing it and the analysts'
14 boss signing off on it, they get to send it
15 administratively from the NSA to the company. 15:04
16

17 So there's not a judicial look at each selector.
18 There's a judicial look at the system and then as the
19 year goes on and they get the compliance reports, we
20 can see if the directives are being done properly. But 15:04
21 there's not a pre-approval of each selector by a judge.

22 345 Q. If I can take you back to your report then, chapter
23 five, page 21. You identify regular joint DOJ/ODNI
24 audits and similar periodic joint reports at paragraphs
25 57 and following. 15:05

26 A. Mm hmm.

27 346 Q. And at paragraph 60 you identify that US agencies
28 conducting surveillance maintain internal compliance
29 policies. I think you've spoken --

1 A. Yes.

2 347 Q. -- to that already.

3 A. Yes.

4 348 Q. You deal then with compliance incidents at paragraph 62
5 and following. 15:05

6 A. Yes. And these compliance reports that have been
7 recently published give us a good summary overview of
8 the sorts of things that are done.

9 349 Q. And you deal, in page 31, with the Upstream, the 2011
10 Upstream programme opinions. 15:05

11 A. Yes.

12 350 Q. And that refers to the MCTs and, I think, the decision
13 to which we've already referred, is that correct?

14 A. That's correct. I think it would be helpful perhaps to
15 look at paragraph 102, which is what the changes were. 15:05
16 The judge made a finding of unconstitutionality. And I
17 don't know if it would help the court to describe
18 briefly why MCTs were a problem?

19 **MS. JUSTICE COSTELLO:** Mm hmm.

20 A. So in e-mails we're familiar with forwarding; somebody 15:06
21 sends an e-mail, who forwards it on, forwards it on.
22 And when you forward it, there's all the to/from
23 information in the middle of the e-mail text that you
24 can read, who sent it to whom. Some of those earlier
25 e-mails might've been impermissible, they might've been 15:06
26 domestic to domestic or there might be some other
27 reason you couldn't look at them. And so the judge was
28 concerned that impermissible communications were being
29 looked at under 702 and that there were enough of them

1 as to make it an unreasonable programme under the
2 Fourth Amendment - the judge did Fourth Amendment
3 analysis, reasonable search or seizure, said the
4 programme was not reasonable and they stopped the
5 programme.

15:06

6
7 Then in paragraph 102, they started the programme after
8 the judge put in these changes to the Upstream
9 programme. So that's the bottom of page 33/top of 34.

10 First is they reduced how long Upstream could be kept.

15:07

11 So under 702, it's a five-year retention. The new rule
12 for Upstream - not PRISM - is two years. So that means

13 fishing expeditions by Upstream are going to be worth a
14 limited amount of time if they were to occur. Number

15 two is the Upstream collected MCTs, these kinds of

15:07

16 forwarded messaging things, were put into a separate
17 database to avoid mixing them with other assets.

18 Number three, the only people who could get into that
19 database were analysts who had received special

20 training so they'd know the serious concerns about

15:07

21 constitutionality. Number four, they would immediately
22 destroy any MCTs that violated the law that contained

23 wholly domestic communications. And number five, they
24 would flag all other MCTs if they got used in some

25 process as having come from the MCT database. That's

15:07

26 requiring the NSA analyst to make a series of
27 determinations before any of the analysts for any

28 purpose could use the material that had MCT in it. And

29 also, the NSA agreed that there'd be no dissemination

1 to other agencies.

2

3 And it was after these new rounds of safeguards were
4 put in that the judge decided under the Fourth
5 Amendment that it was a reasonable protection. But 15:08
6 until that determination happened, the programme had
7 been stopped.

8 351 Q. **MR. GALLAGHER:** And I think in the PCLOB report they
9 explain the MCT process and indicate that if the MCTs
10 were abandoned entirely, it would limit the efficacy of 15:08
11 the to and from selectors, isn't that correct? It
12 wouldn't capture all those communications?

13 A. So you have a problem of over inclusion and under
14 inclusion. Some of those forwarded e-mails needed to
15 be suppressed because they weren't legal. Some of the 15:08
16 materials in the forwarding chain were the key stuff
17 that you needed. And so the question was how could you
18 sort of minimise the amount of the improper things
19 while still getting the information that was needed?
20 And so the Fourth Amendment in this setting has an 15:09
21 overall reasonableness requirement - it's not a law
22 enforcement probable cause place, it's not a crime
23 you're going after - and so the judge, as judges do,
24 had to decide what reasonable was. And this set of
25 constraints was what the judge decided constituted 15:09
26 reasonableness.

27 352 Q. If you go over the page to 104, in the last sentence
28 you identify that the upshot was the NSA voluntarily
29 deleted all data upstream it had collected prior to

1 findings by the judges that they're now satisfied.
2 They *were* not satisfied, the judges had quite strict
3 consequences on activities and now the judges are
4 satisfied -- have been reportedly satisfied on
5 unclassified things. 15:11

6 354 Q. I think you clarified this already, but to avoid any
7 confusion, the MCT decision that you refer to here was
8 the October 2011 **Bates** decision that we already
9 referred to, isn't that correct?

10 A. Yes. 15:11

11 355 Q. And if you go to paragraph 108, you'll see that you
12 deal with the increased transparency of the FISC court.
13 And I think you said that originally it was regarded
14 very much as a secret court. And is that how it's
15 regarded now by you? 15:11

16 A. Not by me. In 2004 when I was researching for my FISA
17 article, there was almost nothing in public about the
18 court except its existence and the name of the judges.
19 I think there was one opinion that had been
20 declassified when I did that article. And now, as 15:12
21 shown by the 50 pages or whatever of this chapter,
22 there's quite a lot known about the court.

23 356 Q. In paragraph 117 you deal with standing rights to 15:12
24 non-governmental parties. And in 118 you deal with
25 applications, or issues in the ACLU litigation, each of
26 which the FISC resolved in favour of transparency. And
27 those related to various opinions, is that correct, and
28 publications of those opinions?

29 A. The court has found standing and has, in some cases,

1 allowed the ACLU to seek publication or to get
2 publication.

3 357 Q. Yeah. I think there's a more general challenge by the
4 ACLU that failed that's referred to in the expert
5 reports, we'll come to that when we -- the joint expert 15:13
6 report. And we'll come to that shortly. And in page
7 47, 139, the USA Freedom codifies the transparency
8 reporting rights, as you've explained.

9 A. Well, that's the companies are allowed to report in
10 much more detail than before about their interactions 15:13
11 with the court and which authorities they're providing
12 information to the government under.

13 358 Q. And at 149 you refer to, I think, the Yahoo case, which
14 I think you may have already mentioned, that the FISC
15 afforded Yahoo litigation the degree of attention that 15:13
16 significant constitutional questions generally receive
17 in US federal courts. And at 150, they held as a
18 matter of constitutional law that communications
19 providers like Yahoo have standing to challenge the
20 constitutionality of US surveillance statutes on behalf 15:13
21 of their subscribers.

22 A. That's correct.

23 359 Q. Now, I want you to -- I'm going to skip the next
24 chapter - there's just, I think, a brief reference to
25 the FRA report, we can perhaps deal with the substance 15:14
26 of that - and then just move to chapter seven, where
27 you deal with individual remedies in privacy law and
28 you set out the various statutes that the court is now
29 well familiar with. And I do want to perhaps move to

1 just a separate section that's got less exposure during
2 the hearing, and that's on page 12, where you deal with
3 the non-judicial individual remedies in the US against
4 the US Government. And you have already summarised, I
5 think, the main aspects of that when we were dealing
6 with the summary of your evidence, isn't that correct?

15:14

7 A. Yes, this is the PCLOB and Congressional Committees and
8 the ability to go to groups like the ACLU and the free
9 press, all of which create a lot of impetus for change,
10 in my experience.

15:15

11 360 Q. Yeah. But I would just ask you to look for a moment at
12 paragraphs 17 and 18. And they -- sorry, that's going
13 *back* to paragraphs 17 and 18. They deal with the
14 Ombudsperson. And we'll come to that in a bit more
15 detail later. But that's, you deal with that issue in
16 that context. And can I ask you to move on to
17 paragraph 42, where you identify additional US privacy
18 remedies under federal law? And could you identify
19 there what you're referring to? I think you explain in
20 paragraph 43, is that correct?

15:15

15:15

21 A. So on this part, I think having listened to the trial
22 this week and read the various submissions, this is one
23 of the areas where maybe I have the strongest
24 difference in emphasis from what we've heard so far.
25 The point here is that the companies can get sued and
26 individuals can sue them. So there's --

15:16

27 361 Q. These are the Googles, Facebooks and all of this?

28 A. The Googles and Facebooks of the world. And lots of
29 other companies have also gotten some --

1 362 Q. **MS. JUSTICE COSTELLO:** You're talking under American
2 law, you're not talking under these Standard
3 Contractual Clauses?
4 A. Under American law. And that affects behaviour.
5 Because what we have is a company, such as Facebook, 15:16
6 which is under a whole series of legal obligations and
7 when the government says to Facebook 'Please give us
8 this stuff', if Facebook breaks the law, there's all
9 sorts of ways they can be sued. So those are remedies
10 that help to ensure compliance with lawful standards. 15:16
11
12 So one example, the first examples here are if they
13 violate the Stored Communications Act or the Wire Tap
14 Act. So if Facebook were to hand over to the
15 government a thousand stored -- a thousand users' 15:17
16 stored communications, that would be a million dollars
17 in statutory penalties.
18 363 Q. **MR. GALLAGHER:** And how would that arise?
19 A. Because under the Stored Communications Act, if
20 Facebook were to hand over my stored communications to 15:17
21 the government without a proper order, there's a
22 statutory right of action for a minimum of a thousand
23 dollars a person damages. And that became famous - and
24 I wrote about it at the time - when the call detail
25 programme, what we call 215 now, was public. There's a 15:17
26 newspaper story in 2006 that said tens of millions of
27 Verizon and AT&T users were having their stored records
28 handed over. And so if we assume Verizon had 40
29 million customers, the damages they were facing was

1 \$40 billion. And so this is enough money to get the
2 attention of senior management. So what's come out of
3 that is that that law is still in place.

4
5 If the company follows a directive and does it 15:18
6 properly, they are immune from suit. But if Facebook,
7 for instance, were to get ten selectors but to hand out
8 data for a hundred or a thousand or ten thousand
9 people, they'd only have protection for following the
10 directive for the ten authorised selectors, all the 15:18
11 rest would be a thousand dollars a person suit under
12 the Stored Communications Act.

13 364 Q. And those damages, I think you said, are a minimum; is
14 there the possibility of an exposure to aggravated or
15 punitive damages as well? 15:18

16 A. I'm not remembering. It may well be that it's in
17 there.

18 365 Q. Okay.

19 366 Q. **MS. JUSTICE COSTELLO:** And would each individual have
20 to sue? 15:18

21 A. You can have a class action, because it's the United
22 States.

23 367 Q. **MS. JUSTICE COSTELLO:** Okay. But let's say, take your
24 hypothetical there, you've got ten task selectors,
25 you've a hundred people handed over, but let's say - 15:18
26 we'll overcome the notice issue - let's say only five
27 of them bother to sue?

28 A. Then it would be five times the thousand dollars a
29 person. But we've seen leaks happen. Leaks could

1 happen again. And also, I'm not sure the company would
2 be able to defend itself in a private suit by saying
3 that they wouldn't identify who they had turned over,
4 they weren't supposed to turn over.

5 368 Q. **MS. JUSTICE COSTELLO:** well, I understand that point, 15:19
6 but I mean, let's say you've got the five who choose to
7 sue Microsoft, Yahoo, whoever it might be --

8 A. And attorneys' fees also. Yeah.

9 369 Q. **MS. JUSTICE COSTELLO:** -- they get away scot-clear for
10 the 85 others who could've sued? 15:19

11 A. Well, once they're in the door and they do discovery
12 and they get attorneys' fees and then they maybe do a
13 new round, there's a real potential for -- so these are
14 real suits that discipline the company, make the
15 company's lawyers nervous to make sure they're only 15:19
16 doing what they're supposed to be doing. That's --

17 370 Q. **MR. GALLAGHER:** I think the judge's question is more
18 specifically referable, if I understand it, to the
19 question that maybe only five will sue. But you said
20 'well, there could be class actions'. And I think you 15:19
21 deal with class actions in your report, but you could
22 just perhaps explain the significance of the
23 availability of the class action procedure under US law
24 in that sort of situation.

25 A. Right. So I think the basic idea of American class 15:20
26 actions is familiar to people, that they're far easier
27 than they have been in most jurisdictions, that the
28 loser doesn't pay attorneys' fees of the winner in the
29 US law. So a class action can go forward on

1 contingency for the lawyer, so there's no money
2 upfront, without worrying about paying defendants'
3 costs. You have a chance for a jury trial, so that --
4 though I think under -- I don't remember if there's a
5 jury trial in this case, there may not be.

15:20

6
7 But the class action are people similarly situated in
8 fact and law. So if there was a mistake on a directive
9 for a whole set of people, that would seem like a
10 similar fact in law situation, there'd be a plausible
11 story to get a class action for all the people who were
12 affected and the lawyers would be looking at a
13 substantial recovery. So at the end of this chapter
14 there's a list of a million dollar and bigger class
15 action judgments for privacy and it goes on for 12
16 pages --

15:20

15:20

17 371 Q. And do lawyers in the US advertise their services for
18 these class actions?

19 A. There's no shyness involved in the plaintiffs' bar for
20 that, yes.

15:21

21 372 Q. I think you deal with class actions in paragraph 84 and
22 following of that section, but just to identify where
23 it is. Can I take you back then to 50, where you
24 identify what you consider to be the importance of the
25 powers of the Federal Trade Commission --

15:21

26 A. Right.

27 373 Q. -- and the sanctions it can impose, with specific
28 reference, I think, to paragraph 51, which explains --

29 A. Right.

1 374 Q. -- its authority?
2 A. So this is a different right of action. A minute ago
3 we were talking about the individuals are mad at
4 Facebook, they sue Facebook. This is the Federal Trade
5 Commission has jurisdiction over Facebook, federal 15:21
6 agency, and they can sue for any unfair or deceptive
7 trade practice. And in my experience - and this is, I
8 think, agreed by other experts - deceptive practice
9 means that Facebook makes a promise about privacy and
10 then they break it. So for instance, Facebook may well 15:22
11 say, many companies say that 'we will only turn over
12 records as required by law'. If they make that
13 statement and then they turn over extra records, the
14 Federal Trade Commission can come and say 'You broke
15 your promise, that's a deceptive trade practice' and 15:22
16 then they can get a consent degree against the company,
17 which they've done with many of the major companies for
18 different violations, they can get penalties, they can
19 get compensation required from the company to the
20 consumers who were harmed. And the Federal Trade 15:22
21 Commission has a very visible widely known sort of
22 enforcement programme.
23
24 The thing I'd note is that it's not limited to the
25 Federal Trade Commission. So every one of the states 15:22
26 has a State Attorney General. Each of them has the
27 same deceptive and unfair power. So the California
28 Attorney General, if the FTC is shy for some reason,
29 can himself/herself go after Facebook for the deceptive

1 practices with respect to all the California consumers.
2 And so can the Minnesota Attorney General and the
3 Connecticut Attorney General and all that.

4
5 So when you look at Facebook's, if you look at it from 15:23
6 Facebook's point of view, they're worried about
7 individual and class action suits *and* the Federal Trade
8 Commission and every one of these State Attorneys
9 General. So they have, under US law - and these
10 remedies, in many instances, can be brought, or the 15:23
11 complaints can be brought by a US or non-US person -
12 there's just many overlapping kinds of enforcement that
13 can come if a company were to break its rules for
14 handing over data it's not supposed to hand over. And
15 that creates, along with the public relations disaster 15:23
16 of breaking their promise, it creates a series of
17 litigation remedy concerns for General Counsel of a
18 company that has not really been discussed so far as
19 I'm aware in the case, but is a very major reason why
20 the companies toe the line and follow the law, in my 15:23
21 experience.

22 375 Q. Just two things arising out of that. Does the fact
23 that the FTC has sued, the federal FTC has sued, does
24 that prevent one separate class action being brought by
25 consumers to recover damages? 15:24

26 A. No, the wonder of American law is they all go forward.

27 376 Q. And does it prevent state, the state equivalent of FTCs
28 suing, do you know?

29 A. There are in some instances - and I haven't reviewed

1 them for this case - times when the FTCs Act stops the
2 states.

3 377 Q. Yeah.

4 A. I'd have to review that.

5 378 Q. Okay. And you make the point, I think, here that 15:24
6 consumers can make reports, in paragraph 52, to the
7 FTC, they can make complaints.

8 A. Absolutely.

9 379 Q. And --

10 A. And privacy groups routinely do this. EPIC, for 15:24
11 instance, is known for the habit of bringing a formal
12 complaint to the FTC when they think there's a privacy
13 violation. And they could do that by noticing a
14 violation of whatever individual's privacy was
15 allegedly violated. 15:24

16 380 Q. And at the top of page 20 you say companies found to
17 engage in unfair deceptive practices can be fined up to
18 US\$16,000 per violation.

19 A. Yes.

20 381 Q. In paragraph 53 you refer to Prof. Solove, who I think 15:24
21 was referred to by Prof. Richards yesterday --

22 A. Mm hmm, yes.

23 382 Q. -- with regard to the *significance* of this remedy, is
24 that correct?

25 A. Yes. There are other authorities who would agree, and 15:25
26 I agree with the same point; they say at paragraph 53,
27 and I quote them: "*That today FTC privacy jurisprudence*
28 *is the broadest and most influential regulating force*
29 *on information privacy in the United States*".

1 383 Q. And I think the FTC is specifically mentioned in the
2 Privacy Shield, as we saw, in terms of remedies
3 available, isn't that correct?
4 A. That's correct. They had a role in Safe Harbour and
5 they have a role in Privacy Shield. 15:25
6 384 Q. And then you identify some of the more notable
7 enforcement actions over the last number of years by
8 the FTC.
9 A. That's correct. I think I put in Google, a settlement
10 for over \$22 million and a couple of others that are a 15:25
11 million dollars each and 800,000. And then, when you
12 have these kind of settlements under consent decrees,
13 if you violate the consent decree, you're subject to
14 civil penalties that can escalate more sharply.
15 385 Q. In page 22 you deal with the FCC. And I think just to 15:26
16 clarify for the court, certain entities are under the
17 jurisdiction of the FTC, other entities that are
18 involved in a different type of business are under the
19 jurisdiction of the FCC?
20 A. The Federal Communications Commission. 15:26
21 386 Q. Yes, exactly.
22 A. So the phone companies are communications companies of
23 a certain traditional sort. The Federal Communications
24 Commission has its own enforcement bureau. The first
25 case here shows that AT&T had unauthorised disclosure 15:26
26 of a set of customer names and paid a civil penalty of
27 \$25 million. These are substantial enforcement
28 actions.
29 387 Q. And what you have said in relation to the FTC applies

1 generally, I take it, to the FCC? It's a similar
2 process, a similar regulatory role?

3 A. There's details that are different --

4 388 Q. Of course.

5 A. -- but what happens is if a company is called a common 15:26
6 carrier, which is a legal term of art, I don't know if
7 it's an Irish term that's used a lot --

8 389 Q. Yes. Not much, but it --

9 A. You know, railroads were common carriers, they had to
10 take everybody, phone companies were common -- if 15:27
11 you're a common carrier, the FCC has it, not the FTC.
12 But once you're the common carrier' you're under --
13 you're under one or the other for any company that's
14 rel --

15 390 Q. **MS. JUSTICE COSTELLO:** But not both? 15:27

16 A. Not both, under US law.

17 391 Q. **MR. GALLAGHER:** Then in 24 and 25 you identify other
18 agencies.

19 A. Yes.

20 392 Q. 26, in the health sphere. You go on then on page 30 to 15:27
21 deal with enforcement under US law and private right of
22 action.

23 A. The state law, yes.

24 393 Q. The state law. And with regard to State Attorney
25 Generals, and I think we know from Prof. Richards' own 15:27
26 writings, important changes in Californian law in terms
27 of privacy - I think California is one of the leading
28 states in that regard, is that correct?

29 A. It is. The data breach law started in California in

1 2002 and they now exist in most states in the United
2 States. And the GDPR, the General Data Protection
3 Regulation, has a similar data breach rule coming in
4 for Europe next spring.

5 394 Q. At 75 you identify that enforcement by AGs in 15:28
6 California and other states provides individuals an
7 accessible opportunity for redress privacy-related
8 violations within the consumer's own state. How does
9 that occur? Why do you say that's a relevant --

10 A. Well, I think the point here is that there's -- so one 15:28
11 concern in enforcement could be what if the FTC becomes
12 not interested in enforcement - let's say there was a
13 new regime that came in that didn't protect consumers
14 as vigorously? Well, if there is any state Attorney
15 General that's being vigorous then the state Attorney 15:28
16 General can step into the breach that the federal
17 agency's quiet would cause. And so there's a sort of
18 series of overlapping ways that enforcement can happen
19 and you're not reliant on the discretion of just one
20 official. 15:29

21 395 Q. Then you come on and you deal with the class actions in
22 paragraph 84, as I've already identified, and give some
23 examples of that.

24 A. Yes.

25 396 Q. And at 87, standing to sue after Clapper. I'm going to 15:29
26 deal with Clapper in the context of the experts' report
27 and various disagreements that arise in that context.

28 A. Yes, Sir.

29 397 Q. Could I ask you then to go to chapter eight, which is

1 individual remedies and hostile actors?

2 A. Yes.

3 398 Q. And you identify the hostile actors issue in paragraph
4 nine. And you've already dealt with that in the
5 summary. And paragraph 15 then deals with the risks of 15:29
6 revealing national security information. And you
7 explain the state secrets doctrine as well, isn't that
8 correct?

9 A. Yes. So courts in the United States, for
10 understandable reasons, wish to avoid releasing 15:30
11 national security information in open court, and so we
12 have a doctrinal structure to prevent that from
13 happening. Later in the same chapter I talk about I've
14 researched other European countries and they, everyone
15 we looked at had a similar kind of provision that says 15:30
16 'Let's find ways in open court not to release the
17 national security secret'.

18 399 Q. Yes. Then if you go to paragraph 19, you explain its
19 purpose and give some detail in relation to that.

20 A. Mm hmm. 15:30

21 400 Q. And at paragraph 22, that there is independent judicial
22 evaluation of executive state secrets claims.

23 A. Right. So the quote here is from a federal court,
24 where the court must "*assess the validity of the claim*
25 *of privilege*" - state secrets privilege - "*satisfying* 15:31
26 *itself*" - that means the court - "*that there is a*
27 *reasonable danger that the disclosure of the particular*
28 *facts will jeopardise national security.*" That's the
29 sort of plenary backup power of the US federal court.

1 401 Q. Now, I want to come back then, I think we can put that
2 away, Professor, and I'd like to refer you to the FRA
3 report which you refer to in your evidence.
4 A. Is it something I'll need to consult page by page?
5 402 Q. It is. I think you'll need to see it. And I think -- 15:31
6 sorry, the Ian Brown report is what I want to refer to
7 first.
8 A. Ah, okay.
9 403 Q. And that is in divide 66 of that book of US, agreed
10 core and US materials, Judge. Sorry, I meant to refer 15:32
11 to that and not the FRA report.
12 A. Okay.
13 **MS. JUSTICE COSTELLO:** 66?
14 **MR. GALLAGHER:** 66, Judge.
15 A. "Towards Multilateral Standards For Surveillance 15:32
16 Reform"?
17 404 Q. **MR. GALLAGHER:** Exactly. And that is a report that
18 speaks for itself. And if you go to page five, they
19 explain existing foreign intelligence gathering
20 standards, isn't that correct? 15:32
21 A. Yes, I'm reviewing it as you speak. Is there something
22 I should speak to?
23 405 Q. No, just to identify that, that they say that the
24 structures and powers of national security agencies
25 vary widely, but in the US and EU Member States, 15:32
26 surveillance of foreign nationals and the collections
27 of communications that originate outside their
28 territory predominantly take place under the rubric of
29 signals intelligence, which it refers to as SIGINT.

1 And I think at pages nine and ten there is material on
2 which you placed reliance in your report. And can I
3 ask you first is that correct, that that section 2.2,
4 which is dealing with the rules on foreign intelligence
5 gathering in EU Member States, is something that was 15:33
6 relevant to your report and that you refer to --

7 A. Yes, I referred to this study led by Prof. Ian Brown of
8 Oxford, in part because it sets forth categories of
9 what, under a series of different approaches, are the
10 most important things that they thought were there to 15:33
11 reign in lawlessness in the national security area and
12 the surveillance area. And so this studied, under
13 these 10 or 11 criteria, how different countries were
14 doing. And so the report reached conclusions after
15 they went through this step by step analysis of the 15:34
16 different parts of the oversight regime.

17 406 Q. Could you just inform the court, Professor, as to the
18 date of this report, if you can?

19 A. So it was in progress as we were working on this. I
20 don't... 15:34

21 407 Q. It's a very recent report in any event and it postdates
22 --

23 A. Right. So I don't know if it even *has* been finally
24 published yet. It was going through revisions as we
25 were working on this. 15:34

26 408 Q. Okay. Then in 2.2 it says:

27
28 *"whereas US law sets out the scope and criteria for*
29 *which foreign intelligence operations are permitted,*

1 *increasingly requires rudimentary judicial*
2 *authorisation for intelligence operations and has*
3 *different layers of oversight and accountability, many*
4 *of the comparative legal frameworks in European states*
5 *appear to give foreign and military intelligence* 15:34
6 *agencies carte blanche to engage in similar conduct.*
7 *Direct comparisons with the US are difficult because*
8 *much less is known about practice and because the*
9 *regulations that do exist often do not contain*
10 *sufficient detail about the extent to which* 15:35
11 *intelligence can be gathered on foreign citizens'*
12 *communications that originate outside the country. For*
13 *example, in France - a country that has vast SIGINT*
14 *capabilities - there is no publicly available law that*
15 *spells out the precise modalities and safeguards that* 15:35
16 *apply to the collection, analysis and retention of*
17 *foreign intelligence by the French DGSE."*

18
19 And is that statement something that was relied upon by
20 you when you were commenting in the summary of your 15:35
21 report - I think paragraph four - on the comparison
22 between the US and EU states?

23 A. This is one source for that, along with the FRA report,
24 along with my experience in the field over the years.
25 But this is an example of what one finds when one looks 15:35
26 state by state as these areas of law.

27 409 Q. Then if you go to the last paragraph on this page:

28
29 *"Despite these variations in structure and their*

1 *different technical capacities, laws authorising*
2 *foreign intelligence gathered by European Member States*
3 *are broadly similar. A comprehensive review of every*
4 *European legal act that regulates foreign intelligence*
5 *collection analysis is beyond the scope of the paper,* 15:36
6 *but it can still be demonstrated these acts share*
7 *similar structures."*

8
9 Then it goes on:

10
11 *"The collection of communications data outside the*
12 *territory or of the state is authorised for a wide*
13 *variety of purposes."*

14
15 And it identifies what those are and that "relevant"
16 can include countries' foreign policy or economic
17 interests. And is that your understanding, Professor?

18 A. Yes, this was one of the sources I relied on in working
19 on my report.

20 410 Q. And at the bottom of that page it says:

21
22 *"Some countries have safeguards aimed at minimising the*
23 *amount of data held on their citizens. The Netherlands*
24 *has a broad statutory provision requiring the deletion*
25 *of any data that has been wrongly processed. No* 15:37
26 *country explicitly provides for minimisation procedures*
27 *or remedies for non-citizens and there is a lack of*
28 *detail regarding the nature, scale and purpose of*
29 *oversight mechanisms of foreign intelligence gathering*

1 *by European intelligence agencies."*

2
3 And again that's relevant to your report.

4 A. Yes, it is, it's one of the sources I relied on.

5 411 Q. Thank you. And we can put that away for the moment. 15:37

6 Then if I can take up with you the meeting of the
7 experts. But before I actually go into the detail of
8 that, I think there is a clarification and a correction
9 that you want to make with regard to your report. And
10 you might just address those. 15:37

11 A. Yes, thank you. Judge, I have two areas where -- I
12 tried to be accurate in my report, but I have two areas
13 where I'd like to draw your attention to changes or
14 modifications in statements I made in the report. So
15 there's this experts' chart... 15:38

16 **MS. JUSTICE COSTELLO:** Oh, in those, yes.

17 A. Right? And the first one is on page 12 and it's no. 12.

18 **MS. JUSTICE COSTELLO:** Yes?

19 A. So this concerns Executive Order 12333. And that's the
20 main authority when the US Government does signals 15:38
21 intelligence that's conducted outside the United
22 States. Now, the focus of my report is on model
23 contract clauses, standard contract clauses. And so
24 the typical story there would be there's information in
25 Ireland that goes into the United States. The question 15:38
26 is: when it goes into the United States, how's it being
27 treated? Section 702 affects that, the Fourth
28 Amendment, other things affect that. But there's a
29 question about, well, what are the rules for the US if

1 it's collecting things, you know, in Europe, Africa,
2 Asia, wherever it is?

3
4 So in my report, in the middle column where it says
5 "Swire states", my statement in the report said: "*For* 15:39
6 *collection in the United States, any other authority*
7 *such as Executive Order 12333 does not apply.*" And
8 when we had our meeting of the experts, it turns out
9 there are two small modifications of that that I agreed
10 to from Ms. Gorski. It turns out not to affect my view 15:39
11 of 702 and all the rest, but let me just go through
12 those.

13
14 So if you go to the left column here, it says, she
15 said: "*In response to Swire and Vladeck, Ms. Gorski* 15:39
16 *observes that the government continues to rely on what*
17 *she describes*" - it's not the official term - "*as*
18 *transit authority.*" And also the government uses
19 Executive Order 12333 to obtain certain radio
20 communications. 15:40

21
22 So I'll try to explain those. If there's a
23 communication going from Ireland to Mexico and it just
24 happens to route through Florida on the way there but
25 it doesn't stop in any important way there, it's just 15:40
26 on its way, that's transit authority. And so if it
27 *were* to be collected in Ireland or it *were* to be
28 collected in Mexico or anywhere in between on that
29 direct transit, Executive Order 12333 applies even if

1 it turns out that the access is done in Florida, in my
2 example. That's transit authority. That's not Section
3 702, that's not a Facebook server sitting there in
4 California. To get into the Facebook server, that's
5 not transit, it's got to a destination in the United 15:40
6 States. So my statement did not recognise under the
7 definition of electronic communications, it didn't
8 mention that.

9
10 The second one is if there's - and these are fairly 15:40
11 obscure, I just hadn't thought of them when I wrote my
12 blanket statement - the second one is if there's radio
13 communications intercepted in the US that come from
14 outside the US, like in the old microwave towers, then
15 that's considered international, even though the 15:41
16 collection happens in the radio tower in the US. But
17 again, that's the old microwave telephone thing and
18 that's not what we have here under model contracts.

19
20 So I made a blanket statement: If it's collected *inside* 15:41
21 the United States, the Executive Order doesn't apply;
22 if it's collected *inside* the United States, the
23 Executive Order doesn't apply, except for this
24 in-transit thing and the radio communication thing. So
25 she correctly pointed out, subtly, that I hadn't 15:41
26 correctly done it in the report, so I wanted to draw
27 your attention to that.

28
29 I have a second -- sorry.

1 412 Q. **MR. GALLAGHER:** Sorry, go ahead Professor.

2 A. Shall I go to the second one?

3 413 Q. Yes, please do.

4 A. Okay, the second one is on page 19 and it's no. 25 in
5 the experts' discussion.

15:41

6 **MS. JUSTICE COSTELLO:** Yes?

7 A. This has to do with the scope of the application of the
8 Fourth Amendment. And again I said something that was
9 slightly too broad and it needs to be modified. So in
10 the middle column:

15:42

11

12 *"Swire states: 'Briefly, the Fourth Amendment applies*
13 *to searches and seizures that take place within the*
14 *US'" - searches being done in the United States -*
15 *''(such as on data transferred to the US), and to*
16 *searches against US persons'" - even if we're over in*
17 *Ireland or whatever - ''(US citizens as well as*
18 *permanent residents) that take place outside of the*
19 *US'."*

20

21 And the difficulty is that we don't have clear Supreme
22 Court guidance on the parentheses *"such as on data*
23 *transferred to the US"*. So if we go over to the right
24 hand box:

25

15:42

26 *"Swire concurs with the previous conclusion that the*
27 *Fourth Amendment applies to searches within the US,*
28 *specifically where the non-citizen" - an Irish person -*
29 *"has substantial voluntary connection to the US" - such*

1 as *being* in the US, physical presence in the country."

2
3 So if anybody in this room goes into the United States,
4 you get Fourth Amendment protection, you're inside the
5 US, you've done a substantial connection to the US. 15:42

6
7 "*By contrast, Swire agrees with Vladeck*" - I'm reading
8 from the right-hand box - "*that the Supreme Court has*
9 *not addressed whether the Fourth Amendment would apply*
10 *to searches of non-citizens' data*" -such as Irish 15:43
11 persons' data - "*where the data is located within the*
12 *US but there has not been that kind of substantial*
13 *voluntary connection.*"

14
15 And: "*To the extent Vladeck's earlier testimony said* 15:43
16 *the Fourth Amendment applies, Vladeck*" - and he'll have
17 his chance to say what he says, but it reads here -
18 "*amends his testimony to say the Supreme Court has not*
19 *addressed the issue.*"

20 15:43
21 And "*The experts agree*" - and this includes Gorski -
22 "*that the Supreme Court has not directly addressed this*
23 *issue.*"

24
25 So if the person's in the US then you get Fourth 15:43
26 Amendment protection. If the data about that person
27 goes to the US, we don't have clear Supreme Court
28 guidance - there's cases being litigated. And so I
29 made a statement that was broader than I'm now

1 comfortable with, so I wanted to draw your attention to
2 that. And so in my report, which is lengthy, those are
3 the two instances I'm aware of right now where I said a
4 sentence that I'm not comfortable with and so I wanted
5 to draw your attention to.

15:44

6 414 Q. **MR. GALLAGHER:** Thank you, Professor. And can I take
7 you back then to perhaps the commencement of that
8 document?

9 A. The experts' document?

10 415 Q. Yes.

15:44

11 A. Okay.

12 416 Q. And the changes that have taken place since are
13 identified. And if you go to item two, Executive Order
14 on immigration --

15 A. Yes.

15:44

16 417 Q. -- with Section 14 of the Privacy Act.

17 A. Yes.

18 418 Q. And in the third paragraph, your best estimate at the
19 time was that:

20
21 *"The Executive Order does not have legal effect on*
22 *protections under the Judicial Redress Act – the Order*
23 *did not, for instance, explicitly instruct the Attorney*
24 *General to change the designation of the European Union*
25 *and any of its Member States under the JRA. Mr. Swire*
26 *is not aware of any legal effect of the Executive Order*
27 *on the Privacy Shield."*

28
29 And then:

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"The experts agree that this provision is a change in policy from... Obama."

Have there been any further developments or more recent developments than that? 15:45

A. I'm not aware of any change in connection with the things stated here about that Executive Order.

419 Q. And were there any pronouncements by any relevant body with regard to that? 15:45

A. So I stated this in part based on a private conversation with a State Department official when I was in Brussels for a conference. And the statements he had made about there being no direct effect on the Privacy Act have now been made as public talking points by the State Department. So there's the change -- 15:45

420 Q. There is a public statement?

A. What I had believed to be the case and been told privately was the case has now been said publicly to be the case. 15:45

421 Q. Then the next item is the PCLOB, and appointments are required. So I think there's one person on that at the moment, one or two members. And what is the normal time lag in terms of appointment or what are the things that might hold up an appointment to the PCLOB? 15:45

A. So there's an understandable concern that the PCLOB is not fully staffed and so it doesn't have a quorum to issue reports right now. I don't like that - that's the way it is. So for these boards and for the Federal

1 Trade Commission and for all these other boards, the
2 new President comes in, has to get his new team in
3 place and then work through making nominations. And
4 then those nominations go to the Senate. Then the
5 Senate has to, one by one, look at them after they've
6 done all their disclosures and everything. 15:46

7
8 So very roughly speaking, from my experience, having
9 been in the Obama transition and been around
10 Washington, January is the time when the Cabinet 15:46
11 Secretaries go, February into March is the Deputy
12 Secretaries and Under Secretaries, then gradually you
13 fill in the other people. So in the normal course,
14 for, let's call it a not top tier position, it takes a
15 while - maybe there's names in June or July in the 15:46
16 normal course and then it has to take a while before
17 they're confirmed. So under any administration, many
18 of these positions are not filled for the first six
19 months, maybe eight months or more of the
20 administration. 15:47

21
22 We don't know, there's been no public indication by
23 President Trump of whether he's going to name or not
24 name. There's been speculation in the press that maybe
25 he won't name, but there's no basis for that that I'm 15:47
26 aware of. What I'd say is though that I see no
27 indication that the current administration wants to
28 wreck American businesses. That's not their main job
29 that they've announced that they're trying to do. And

1 so trying to find ways to reach agreement with trading
2 partners on things where we can do things is something
3 you'd think they'd want to do. So if Europe continues
4 to believe PCLOB is important - and the Privacy Shield
5 review is going to look to see whether these safeguards 15:47
6 are in place - the administration would have an
7 incentive to show that it's acting in good faith in
8 moving forward. If it doesn't, then the Privacy Shield
9 review, which is supposed to start this summer, would
10 see that and the Commission would say whatever it says 15:47
11 at that point. But --

12 422 Q. **MS. JUSTICE COSTELLO:** So what you're saying is the
13 Privacy shield review is due up this summer?

14 A. Yes.

15 423 Q. **MS. JUSTICE COSTELLO:** And in theory there really won't 15:48
16 be a quorate PCLOB until this summer?

17 A. I don't know when there will be, but it quite easily
18 would be this summer --

19 424 Q. **MS. JUSTICE COSTELLO:** well, unlikely to be before it,
20 if I can put it that way? 15:48

21 A. Right, it would be unlikely to be before it, based on
22 anything I'm aware of, yeah. And the Commission will
23 then do what it does, you know, at that point.

24 425 Q. **MR. GALLAGHER:** Then if you go to the third page, you
25 see the reports on the Section 702 compliance and 15:48
26 targeting.

27 A. Yes.

28 426 Q. And I think you've updated that in your earlier
29 evidence, isn't that correct?

1 A. Yes, we've talked about both of those sets of
2 documents.

3 427 Q. Yeah. Valdez is something in the context of standing
4 I'll leave for a moment. And then the sharing of raw
5 unevaluated data under E012333, item seven; do you know 15:48
6 what the other agencies have signed up for in terms of
7 requirements that must be met by them before they're
8 entitled to share in that data?

9 A. So this is, raw data is the feed from 12333 intercepts
10 that would go before an analyst has cleaned it up and 15:49
11 done minimisation and such things. And historically,
12 that was only accessible to the NSA is the basic rule.
13 So in January the Obama administration released new
14 rules that let it go to other agencies. Now, along
15 with that, if the other agencies access it, they are 15:49
16 required to have in place the training and access
17 controls and safeguards that the NSA has for it. So
18 there's greater information sharing in this case
19 concerning this 12333 data. Along with the additional
20 sharing there's required under the rules to be the 15:49
21 safeguards that the NSA applies.

22 428 Q. Then if you go to the last item, "*Access to Opinions of*
23 *the Foreign Intelligence Surveillance Court*" - and that
24 was a recent decision - can you explain the difference
25 between *that* application and what the procedure is at 15:50
26 the moment with regard to declassified opinions?

27 A. So I have not read this opinion in detail, but my
28 understanding is that there was a motion by the ACLU,
29 Ms. Gorski's organisation, to have at least a quite

1 general First Amendment right of access, free speech
2 right of access to FISC opinions. And the court did
3 not agree with that view. The history was that the
4 opinions were classified. The recent practice we've
5 talked about is that many of them are *declassified*. 15:50
6 The procedures give the FISC a way to declassify. But
7 the FISC did not agree to this generalised right of the
8 ACLU to get declassified access.

9 429 Q. Now, Professor, I just want to move to a separate
10 matter. As you were giving evidence, we received a 15:51
11 letter from the DPC's solicitors, who express
12 astonishment that they learned that the contents of
13 your report were subject to review by one or more third
14 parties "*and that on foot of such review, changes were*
15 *made to Prof. Swire's expert's opinions as set out in* 15:51
16 *the report and the facts set out therein.*" would you
17 care to address that in evidence?

18 A. Well, I'm under a legal obligation to do
19 declassification review. So I had to submit it. And I
20 described earlier the procedures that happened, which 15:51
21 is I never spoke with the government lawyers. They
22 submitted what I see as technical corrections to
23 improve accuracy. I retained complete editorial
24 control - I decided what to do or what not to do. I
25 saw the edits, suggestions or sort of possible problems 15:51
26 in the text and then myself or people working with me
27 checked the legal sources. And for instance, I
28 mentioned certification versus directives, I had
29 imprecision in language for that.

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Another example is at one point I said that surveillance inside the United States is done either under law enforcement or intelligence authorities, FISA or law enforcement. It turns out there's a specialised statute I wasn't aware of that says when there's surveillance of embassies, which are sort of mixed foreign and domestic, that there's a special provision about embassies that I wasn't aware of. The Department of Justice notes mention this statute. We looked it up, the statute was there. I put that in a footnote in the report.

So there were changes as to accuracy. None of my conclus -- this was done very late in the day, in the last 48 hours before the opinion went final. So far as I recollect, there was no change in any statement by me about 'My opinion is this' or 'My opinion is that', it was in the nature of trying to get accuracy for the report so the court would know accurately, with the best evidence I had available to me of what the law was, what the state of US law was.

430 Q. Those changes that you've identified, when they were identified as matters that were incorrect in the report, you explained that you and/or the assistants checked these matters and satisfied yourselves as to the correct position, is that so?

A. That's correct.

431 Q. And the report that went to the US Government for

1 review, can you tell the court as to what stage of
2 finality that report was at?

3 A. So, because I knew there was declassification review
4 and because the government needs a certain amount of
5 time to look at it, I prioritised in the drafting any 15:53
6 of the parts of the report that involved potentially
7 classified material. So things about 702 I wrote
8 relatively early. Other pieces, such as State Attorney
9 Generals' law, I wrote later, because that didn't have
10 to go to the federal government. 15:54

11
12 I could check my notes, but it was on the order of
13 three or four weeks before the submission was due. I
14 had quite a good version of all the parts where I
15 thought there was any question of classification 15:54
16 issues. That went to the Director of National
17 Intelligence Office. And the first day I got answers
18 back on the sort of response, except they hadn't found
19 any problem with it, the first time I got any response
20 back was in the last 48 hours before the report was 15:54
21 filed. So they had three or four weeks to look at it,
22 then these comments came back. None of the comments
23 said it must be changed because of classification, the
24 only comments, as mediated by this lawyer - the
25 Department of Justice sent it to an a Gibson Dunn 15:54
26 lawyer, who read things to me - those comments I
27 received in the last 48 hours. But the government had
28 three to four weeks to look at the quite final versions
29 - it hadn't been fully site checked and some of that

1 sort of thing, but it was quite final.

2 432 Q. And can you tell the court as to whether there was any
3 alteration to any of the opinions you expressed in the
4 report?

5 A. So far as I recall, no sentence that says 'My opinion 15:55
6 is' or anything like that was changed based on the
7 information from the government.

8 433 Q. And in terms of the report as sworn to as an exhibit to
9 the affidavit, can you tell the court whether the 15:55
10 opinions expressed therein and the views that you've
11 expressed with regard to all of the matters that we've
12 gone through together, or gone through today in
13 evidence, whether those represent the views of anybody
14 other than you?

15 A. Those are my views. I was given -- you know, I'm under 15:55
16 all the independence requirements because I've been
17 instructed, I'm here to assist the judge - the court -
18 and these are my opinions that I stated. There was no
19 constraint, compulsion or whatever from any other
20 party. 15:56

21 434 Q. You did identify that you had - I think, Prof. Richards
22 identified the same and certainly Mr. Serwin - that you
23 had assistants helping you in terms of research, is
24 that correct?

25 A. That's correct. 15:56

26 435 Q. And in terms of the responsibility for the opinions
27 that are expressed in the report and the expert
28 evidence as put before the court, whose responsibility
29 is that?

1 A. I'm responsible for every sentence in the report. I
2 check things over carefully, I work really hard to be
3 accurate and I'm responsible for the report.

4 436 Q. Thank you, Professor. I've some more questions for
5 you. Can I take you to some individual items of the 15:56
6 report of the experts? And if you would be good enough
7 to go to, I think the first paragraph I want to refer
8 to is paragraph 13, which is on page 13.

9 A. Yes.

10 437 Q. And you refer there to I think what you've already 15:57
11 explained, that the legal standards under Section 702
12 are less than strict than requiring the individual --
13 or, sorry, that's the agreed position; an
14 individualised FISA or law enforcement authorisation,
15 but they're in some respects stricter than were applied 15:57
16 by the government between 2001 and the termination of
17 the Stellar Wind Programme in 2007. And what do you
18 intend to convey, or what do the experts intend to
19 convey, to your understanding, in relation to the
20 respects in which they're stricter? 15:57

21 A. Well, so there's sort of legal and factual changes that
22 happen in the world. One of the factual changes that
23 was important to 702, besides the attacks on 9/11, is
24 that in the old days if somebody in Ireland was
25 conversing with somebody in France, whatever, Pakistan, 15:58
26 pick your favourite country, the communication, for
27 instance in a phone network, very likely would've gone
28 from Ireland to France or Ireland to Pakistan or
29 whatever. But with the internet or with social

1 networks or with e-mail providers, it's become quite
2 common for a communication from somebody in Ireland to
3 go through a server that's in the United States.
4

5 Now, in the old days, if it was Ireland to France, that 15:58
6 was 12333, that was extremely -- whatever the rules
7 under 12333, but they're not nearly as strict. These
8 days, if it goes Ireland, server in the US, to France,
9 the 702 rules are the rules we've been talking about;
10 each individual e-mail has to be targeted, there's a 15:58
11 series of judicial oversights, there's compliance
12 mechanisms. So at a factual level, the Ireland to
13 France communications about the rugby match or whatever
14 are quite possibly subject to Section 702 today, which
15 is stricter in multiple dimensions than 12333 is. So 15:59
16 that's a --

17 438 Q. **MS. JUSTICE COSTELLO:** But if it's not going through a
18 processor in the United States, if it's being processed
19 somewhere else, it could be under 12333?

20 A. Yeah. So if it goes from Ireland to the Netherlands to 15:59
21 France then 12333 would apply to the whole route. But
22 the commercial facts of the world, of the way the
23 internet grew and the companies that have turned out to
24 have big servers is that many of those companies are in
25 the United States. And so there was a change in the 15:59
26 sort of, how often this happened; it went from being
27 not that common throughout the United States to being
28 much *more* common. And so when that happened, the Irish
29 person and the French person's communications,

1 increasingly through the 2000s, were or could've been
2 or there was some risk without it being proved,
3 would've been in the United States, subject to those
4 stricter rules.

5
6 Prior to the 2008 amendment, the courts came to the
7 view was that it took an individual FISA order to
8 approve that. So you had an ongoing programme and now
9 by the accident of internet routing it's held in the
10 United States and suddenly you needed a full FISA
11 order, where before you didn't need anything like that.
12

13 So if you think of 702 as something in between - full
14 FISA is stricter, 702 is in the middle and 12333 is
15 less protective - in practice the world went from many
16 communications from 12333 to 702. If you want to look
17 at the legal rules, which is what Ms. Gorski
18 emphasises, it went from a full FISA to 702. So it's
19 stricter and less strict. As a matter of practice, for
20 many communications it's stricter. But in the instance
21 where it clearly was access in the US, it got less
22 strict.

23 **MR. GALLAGHER:** That might be an appropriate place,
24 Judge.

25 **MS. JUSTICE COSTELLO:** Thank you, yes.

26 **MR. GALLAGHER:** Thanks.

27 **MR. MURRAY:** Judge, Mr. Gallagher referred to a letter
28 from my solicitors and I think you should see a copy of
29 the letter. Our concern was the fact that this was not

1 disclosed in the report to the court that the report
2 which had been furnished by Prof. Swire had been vetted
3 by a third party. And we've a number of things to say
4 about that. I'll hand up a copy of the letter and
5 we'll - excuse me, Mr. Gallagher - we'll re-visit it 16:01
6 tomorrow.

7 **MR. GALLAGHER:** Excuse me, Mr. Murray, there is a
8 footnote in the report saying that it has been vetted
9 by the US Government. So I think we can deal with that
10 tomorrow. 16:01

11 **MR. MURRAY:** There are many footnotes in the report,
12 Judge.

13 **MS. JUSTICE COSTELLO:** well, whatever about the rights
14 and wrongs of it, have you any objection to me reading
15 the letter, Mr. Gallagher? 16:01

16 **MR. GALLAGHER:** Oh, I've none whatsoever, Judge.

17 **MS. JUSTICE COSTELLO:** Then I'll take the letter away
18 then.

19 **MR. MURRAY:** Thank you, Judge.

20 16:01

21 **THE HEARING WAS THEN ADJOURNED UNTIL FRIDAY, 24TH**
22 **FEBRUARY AT 11:00**

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