

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 TUESDAY, 28th FEBRUARY 2017 - DAY 12

12

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1 THE HEARING RESUMED AS FOLLOWS ON TUESDAY, 28TH
2 FEBRUARY 2017

3
4 **REGISTRAR:** Matter at hearing, Data Protection
5 Commissioner -v- Facebook Ireland Ltd. and another. 11:03

6 **MR. O'DWYER:** Perhaps before Prof. Vladeck begins.

7 **MS. JUSTICE COSTELLO:** Yes. I got your --

8 **MR. O'DWYER:** Thank you, Judge. Well that was the
9 first matter I was going to mention. You have the
10 amended, they are actually shorter. 11:03

11 **MS. JUSTICE COSTELLO:** Yes. I have printed them off
12 and I haven't put them in the folder yet but I'll do
13 that, yes.

14 **MR. O'DWYER:** Thank you, Judge, and we may have to
15 organise to have them on the electronic tablet instead 11:03
16 of the ones that were there.

17 **MS. JUSTICE COSTELLO:** Yes.

18 **MR. O'DWYER:** But, Judge, the second thing I was going
19 to mention was just in terms of the amici and I suppose
20 the order in which they be heard and when they might be 11:04
21 heard.

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

23 **MR. O'DWYER:** I think it's agreed, I haven't had a
24 chance to talk to Mr. Maurice Collins, but I think he
25 is agreeable that EPIC would go first. 11:04

26 **MS. JUSTICE COSTELLO:** Oh, right.

27 **MR. O'DWYER:** And, Judge, having talked to
28 Mr. Gallagher earlier, it appears that more than likely
29 Prof. Vladeck is going to take all of today between

1 everything, and I was going to ask the court could we
2 say that possibly, rather than possibly we start for
3 15 minutes or 20 minutes.

4 **MS. JUSTICE COSTELLO:** You can start tomorrow.

5 **MR. O'DWYER:** That we would start tomorrow. 11:04

6 **MS. JUSTICE COSTELLO:** Yes.

7 **MR. O'DWYER:** And we could, I suppose, effectively say
8 not before tomorrow. And then, I know we are, I mean
9 our submissions have been cut down --

10 **MS. JUSTICE COSTELLO:** Hmm. 11:04

11 **MR. O'DWYER:** -- quite considerably. They are shorter
12 than they were originally, I think a thousand and a
13 half words. I think, I anticipate I will certainly be
14 no more than an hour and a half, possibly only an hour.

15 **MS. JUSTICE COSTELLO:** Yes. 11:04

16 **MR. O'DWYER:** I don't know what the estimates for the
17 others are. I think, Mr. Cush told me that he reckoned
18 he would certainly be, he would take a shorter amount
19 of time than that. I'm not sure exactly, but certainly
20 no more than an hour, an hour and a half as well. 11:05

21 **MS. JUSTICE COSTELLO:** Hmm. And is he to follow you or
22 is Mr. Maurice Collins to follow?

23 **MR. O'DWYER:** It will either be himself or Mr. Collins
24 will follow me. It just depends to a certain extent on
25 availability and when they can slot in. 11:05

26 **MS. BARRINGTON:** Yes, I think the running order, having
27 spoken to Mr. Cush this morning, Judge, is that
28 Mr. Cush will follow Mr. O'Dwyer.

29 **MS. JUSTICE COSTELLO:** Hmm.

1 be handed up to you and also Book 3 which is the
2 affidavits of Mr. Serwin and Prof. Richards. And,
3 I suppose, finally - sorry, that's Book 2, I think,
4 I beg your pardon - and I suppose finally I think it
5 may be helpful to have the American materials, the 11:07
6 first two folders that go up as far as Tab 49, just so
7 you have them to hand, Prof. Vladeck.

8 A. Mm hmm. Great.

9 2 Q. Very good. So, yes, I wonder can you tell the court
10 please what is your current occupation? 11:07

11 A. Sure. So I am a professor of law at the University of
12 Texas School of Law in Austin, Texas a trifle warmer
13 than it is here. This is my 12th year as a law
14 professor. I graduated from law school, Yale Law
15 School, in 2004, after which I clerked for two federal 11:07
16 circuit judges: Judge Marsha Berzon on the Ninth
17 Circuit in San Francisco, Judge Rosemary Barkett on the
18 Eleventh Circuit in Miami.

19
20 During my twelve years as a law professor I've been 11:08
21 actively involved, not just in my teaching and writing,
22 but also in litigation challenging US counterterrorism
23 policies both in the surveillance sphere and more
24 generally especially Guantanamo military detention,
25 military commissions. I have testified before Congress 11:08
26 a number of times. I have participated in a number of
27 the major cases in this field. I have been published
28 widely in a number of journals and I think it's safe to
29 say I am one of the leading experts on the intersection

1 between national security law in the United States and
2 the federal courts.

3 3 Q. Can I just take you back a little bit just in relation
4 to your college education, I think you received a BA
5 summa cum laude from Amherst; is that right? 11:08

6 A. That's right.

7 4 Q. That was in history and maths; is that right?

8 A. Yeah. So I graduated in 2001 from Amherst College.
9 I wrote my senior history thesis on the war crimes
10 trials after the First world war, which actually is 11:08
11 what got me into and law and how legal systems handle
12 part of what got me into law and an interest in how
13 legal systems handle national security crises. And so
14 I was actually in law school on September 11th which is
15 part of what got me interested in the post 9/11 field. 11:09

16
17 I was very fortunate to be in the right place at the
18 right time, there really were no experts in American
19 law schools on the law of national security crises, so
20 I was able to get first hand practice experience as a 11:09
21 first year law student, as a second year law student
22 working on the Guantanamo cases, working on the
23 military commissions. I actually was involved in my
24 first brief in the Supreme Court before I was admitted
25 to the Bar because there weren't that many people doing 11:09
26 what I did, so it was a fortuitous time.

27 5 Q. Yes. Just in relation to your JD, you got that I think
28 in Yale Law School, that's right?

29 A. Yes, that's right.

1 6 Q. Can I just remind you, we have a stenographer who is
2 trying to take down your testimony, so you might just
3 speak a little bit slowly for him.
4 A. I have the curse of being from New York, we all talk
5 fast. 11:09
6 7 Q. Yes. Well hopefully some years in Texas will remediate
7 that?
8 A. I think it might just exacerbate it as a reaction.
9 8 Q. Yes. And I think you won a prize for best team
10 performance in moot court on two occasions; is that 11:10
11 right?
12 A. Yes. So I was in law school. The three major
13 activities I was involved in, I was in moot court where
14 I won the prize for best oralist and for best brief.
15 I was the executive editor, basically the No. 2 person 11:10
16 on the law review, and I was the student director of
17 what we eventually called the Balancing Civil Liberties
18 with National Security after September 11th Project, we
19 needed a better name. But those are my three principal
20 activities. 11:10
21 9 Q. Yes. Can I just ask you please to identify for the
22 court your textbook publications please, and I think
23 you deal with this at paragraph 2 of your report. So
24 if you can identify those for the court please?
25 A. Sure. So in addition to my law review and popular 11:10
26 publications, I'm the co-editor of the two leading case
27 books, the National Security Law and Counterterrorism
28 Law case books in US law school. I was brought on as
29 of the end of the last edition in 2011 and so I've been

1 involved in each of the annual supplements. And then
2 just last summer we put out brand new editions, the
3 sixth edition of the national security law book and
4 third edition of the counterterrorism book. I am
5 responsible for roughly one quarter of the chapters in 11:11
6 both of those books.

7 10 Q. Yes. Can I just ask you now to turn, and I know you
8 briefly mentioned it, but if I could ask you in a
9 little bit more detail, your work as counsel please;
10 could you identify for the court please the occasions 11:11
11 where you act as counsel and the type of cases that you
12 do and how it works with your teaching obligations?

13 A. Sure. I mean I actually think one of the best virtues
14 of being an American legal academic is the opportunity
15 to both teach and write from a more academic 11:11
16 perspective and to be involved in the day to day
17 litigation. I counted last night, I have actually
18 filed 60 briefs as counsel or co-counsel either on
19 behalf of the party, him or herself, or on behalf of
20 amici in a wide range of cases in the US courts, some 11:11
21 involving counterterrorism, some more generally raising
22 questions about the power of the federal courts.
23 I counted, I think, three that involved standing in
24 particular.

25
26 And in addition to those 60 briefs I think I have
27 signed as an amicus, as an expert, probably about 75 or
28 80 briefs in my career, including one as relevant here
29 in the wikimedia case. This is the appeal currently

1 before the Fourth Circuit the Federal Appeals Court in
2 Richmond, Virginia.

3 11 Q. And you signed them as an amici; is that right?

4 A. That's right. So it's because of my expertise, the
5 lawyers who write these briefs think that it will help 11:12
6 the court to know that individuals like me with my
7 expertise have the views that are espoused in the
8 brief. Sometimes it makes a difference, sometimes it
9 doesn't, but it seems like a valuable enterprise to
10 ensure that the court isn't just hearing from the 11:12
11 interested parties but also from the disinterested
12 academics.

13 12 Q. And is this state level, federal level, what kind of
14 courts are these?

15 A. Just about all of them have been federal. It's the 11:12
16 nature of my expertise that it's almost always
17 litigated in federal court. I think there is one or
18 two briefs that we filed in state courts, but it's
19 almost always federal because the litigation invariably
20 involves the federal government. 11:13

21 13 Q. And are these, so let's take first the first instance
22 which is acting as counsel for either parties for
23 amici, are you paid for that work or how does that
24 operate?

25 A. Unfortunately, no. All of these cases are pro bono, 11:13
26 that is to say the clients aren't paying for our
27 services. Oftentimes they are detainees or other
28 individuals who lack financial means. My wife wishes
29 I had chosen a more lucrative field of expertise, but

1 I guess she is stuck with me. So, no, these are all
2 just taking them on because I find the issues
3 interesting, the matters important, the questions worth
4 having the best exposition for the courts.

5 14 Q. And what about in the context of you acting as an 11:13
6 amici, how does that work because we are not so
7 familiar with it here?

8 A. We are never paid. I mean I know that there are
9 contexts where firms will pay amici, but I think that
10 actually possibly calls into some question the 11:13
11 independence and impartiality of the amici. More often
12 than not it's just, you know, we do it because we think
13 that it's important to make a proper statement of the
14 law to the courts.

15 15 Q. Then I think you have also testified in Congress, can 11:14
16 you just briefly describe that, please?

17 A. That's not paid either. So testifying before Congress
18 is a bit of a, how do I say, performance art. I have
19 often been called as a minority witness in hearings on
20 national security policies or other related topics. 11:14
21 I want to say about 13 or 14 hearings, I think, in my
22 career. These hearings are, I think, often more
23 spectacle than substance. I think the members are
24 trying to make their points for the cameras and then be
25 done. 11:14
26

27 But every once in a while we have been, I think,
28 fruitful exchanges, even if they are not necessarily
29 meant to be fruitful. And so it's a useful opportunity

1 again I think to help try to clarify the open questions
2 in the law and which propositions are settled.

3 16 Q. Then just in relation to your writings, I know you have
4 already identified some of your academic writings,
5 particularly textbooks, I think you have also written 11:14
6 for various law journals, you say at paragraph 2,
7 including the Harvard Law Review and the Yale Law
8 Journal, what kind of material do you write about?

9 A. So I mentioned previously that my expertise is both in
10 the federal courts and the national security law. Many 11:15
11 of my pieces are at the intersection of those two, but
12 some are one or the other. So I have written pieces
13 about national security policy, for example should
14 Congress provide a more specific statutory
15 authorisation for the armed conflict with the Islamic 11:15
16 State. I have written about purely what I might call
17 nerdy federal court questions, esoteric jurisdictional
18 problems that don't implicate national security policy.
19 It's really a wide range. It is actually one of my
20 favourite things about the job is I get to go where the 11:15
21 ideas take me.

22 17 Q. Yes. And I think you also write for some blogs or
23 online forums, can you identify which ones those are
24 please?

25 A. Sure. So the two principal online fora for which 11:15
26 I write, I'm the co-editor in chief of Just Security,
27 which is an online forum dedicated towards welcoming
28 and introducing readers to viewpoints from all
29 spectrums, all across the spectrum on US national

1 security law on policy.

2 18 Q. So just slow down. So it's US national security law
3 and policy?

4 A. Indeed.

5 19 Q. Yes. 11:16

6 A. And also for Lawfare, which is a very similar idea. If
7 you may, they are sort of the yin and the yang of
8 national security blogs in the United States. Just
9 Security I think is often perceived as being centre
10 left, maybe a little bit more to the left; Lawfare is a 11:16
11 little bit more centre right, but between them I think
12 there's a very rich contribution to the discourse on
13 issues that are often reduced to sound bites in the
14 popular press.

15 20 Q. Yes. Now can I ask you to turn to your involvement in 11:16
16 this particular case.

17 A. Hmm.

18 21 Q. Can you just identify please, can you remember when you
19 were asked and what your initial reaction was, please?

20 A. Sure. So I was contacted by Gibson Dunn in early 11:16
21 September of last year to enquire if I was aware of
22 this case and if I had an interest in participating as
23 an expert witness. And I recall my initial reaction
24 was frankly a bit sceptical.

25 11:16

26 I have been rather critical, as I note in my report, of
27 the oversight and accountability régime in US law for
28 all counterterrorism and national security policy,
29 including surveillance. And so I was not immediately

1 convinced that I had much to say that would be useful
2 beyond what was described to me.

3
4 Then I read the DPC Draft Decision. What struck me
5 about the DPC Draft Decision, as I note in my report, 11:17
6 is that it described a régime of US law that looked
7 deeply unfamiliar to me, not because there isn't aren't
8 obstacles, not because there aren't difficulties, but
9 it just struck me as a very oddly apportioned
10 assessment of what the obstacles were, of what the 11:17
11 remedies were and so on. And so it became clear to me
12 that it would be useful, that I could be useful by
13 writing a report that clarified what I saw as what were
14 the real problems in the remedial régime and where
15 I thought the DPC Draft Decision perhaps overstated 11:18
16 some concerns or misstated some concerns or, in a
17 couple of cases, I think, just missed, I think, key
18 pieces of the puzzle, not because I was convinced in
19 any regard about the underlying answer of adequacy, but
20 just because it seemed to me worthwhile to have a 11:18
21 complete picture and an accurate picture of what the
22 remedial régime looked like before even endeavouring to
23 answer that question.

24 22 Q. Yes. In relation then to what I think has been
25 described in this court as the charge letter, can you 11:18
26 remember what you were asked to give an opinion on
27 please?

28 A. So after a couple of weeks we came to an agreement that
29 I would participate and I received my instruction

1 letter. The three principal topics I was asked to
2 address in my report were, first, the scope of remedies
3 under US law for violations of surveillance authorities
4 with a special focus on government violations; second,
5 standing doctrine and how standing doctrine would or 11:19
6 would not be an obstacle in the context of litigation
7 challenging these surveillance authorities; and then,
8 third, to more specifically react and respond to the
9 DPC Draft Decision and to identify what I saw as
10 inadequacies in the decision or incompleteness or just 11:19
11 odd points of emphasis or omission.

12 23 Q. Yes, thank you. And I think you provided a report, you
13 swore your affidavit on 2nd November; isn't that right,
14 it's to be found at Tab 1 of the book?

15 A. Yes, that's correct. 11:19

16 24 Q. Yes.

17 A. So I believe I completed the report a couple of days
18 prior, but I swore the affidavit on November 2nd.

19 25 Q. Yes. I think it's a 33 page report and can you
20 identify for the court please what assistance, if any, 11:19
21 you had in coming to this report?

22 A. I had none, I like to work alone. I find it sort of
23 less messy than way. I should say my secretarial
24 system helped me with the actual printing of the report
25 and mailing of it, but, insofar as the preparation of 11:20
26 the substance, that was entirely me. I did receive
27 feedback at one point from Gibson Dunn. I believe they
28 identified 12 points in my draft report that they would
29 like me to expand upon or places where I had used

1 language that was imprecise and they encouraged me to
2 be more precise. And so I incorporated, I believe,
3 most of those suggestions in the final report. But
4 that was the only communication I had with anyone about
5 the substance of the report while I was preparing it. 11:20

6 26 Q. I see. And in respect of the briefing materials,
7 I think you received just before you did your report a
8 report from Mr. Serwin that he had done for the DPC; is
9 that right, and can you remember when exactly did you
10 get it? 11:20

11 A. So I believe I received the Serwin report, the May 24th
12 Serwin memo I should say, on October 28th, so I was
13 pretty far along by that point. And indeed I think the
14 report reads as if it was incorporated late because
15 I really had finalised the report by that point. 11:21

16 I think I had received Ms. Gorski's affidavit perhaps
17 ten days prior to that.

18 27 Q. Yes.

19 A. And so as I was drafting the report I tried to
20 incorporate them as much as I could. 11:21

21 28 Q. And what about Prof. Richards' report?

22 A. I didn't receive that until after I had filed my
23 report.

24 29 Q. Yes. Can I just ask you then, there is just a few
25 points in your report I will ask to deal with and then 11:21

26 I may ask you, if I may, to respond to some of the
27 Richards and the Serwin points.

28

29 So I think at paragraph 17 you deal with the FISA Act

1 and you describe it as a complex compromise, can you
2 explain what you mean by that please?

3 A. Sure. So one of the remarkable things to me about FISA
4 since I first started studying it probably about
5 15 years ago is how unusual and unorthodox a compromise 11:21
6 it was that produced it in the first place. I think
7 the court knows there were huge intelligence scandals
8 in the United States in the 1970s and FISA was part of
9 what's often described as a *grand bargain* in US law
10 where all three branches, where the courts, the 11:22
11 Executive Branch, the legislature gave up something to
12 try to put the foreign intelligence surveillance
13 régime, however defined, on to firmer legal footing.

14
15 So, for example, we have the creation of the 11:22
16 intelligence committees. There had previously been no
17 permanent standing oversight body in Congress to
18 oversee foreign intelligence surveillance activities.
19 We had the creation of the FISA court and we had the
20 government agreeing to subject surveillance that had 11:22
21 previously been subject to no judicial review to the
22 judicial review before the FISA court, to review before
23 life tenured independent Article III judges of all of
24 these kinds of surveillance applications.

25
26 It's hard given today's political climate to believe 11:22
27 that we could ever have done something so responsible.
28 There are obviously flaws in the compromise in every
29 direction, but I think it's important to sort of start

1 there in an assessment of the régime.

2 30 Q. Yes. And I think at paragraph 23 then of your report
3 you make reference to an article that you wrote, the
4 FISA court and Article III?

5 A. Mm hmm. 11:23

6 31 Q. And I think that was in relation to the FISC and its
7 relationship with Article III, and I wonder can you
8 just identify why it was concluded that there were no
9 constitutional objections to the FISC court, please?

10 A. Sure. So there were objections raised at the time of 11:23
11 this whole grand bargain debate in the 1970s, that it
12 would actually be unconstitutional to give these
13 federal judges this kind of strange ex parte, in camera
14 role in supervising foreign intelligence surveillance.
15 The justice department responded with I thought what 11:23
16 was a fairly, at the time, persuasive memorandum
17 arguing that in effect a FISA warrant, a classic
18 warrant for a search under FISA, was analogous to an
19 ordinary search warrant in an ordinary criminal case
20 where judges also routinely heard those ex parte and in 11:24
21 camera, right, the difference being the notice on the
22 far side.

23
24 And the reason why those classic ordinary warrants did
25 not raise constitutional concerns was because they were 11:24
26 meaningfully subject to some kind of subsequent review,
27 right, that they were ancillary to subsequent judicial
28 proceedings, be they criminal prosecutions where a
29 criminal defendant would have the right to move to

1 suppress evidence against him, or civil suits for
2 injunctive or declaratory relief or damages. And so,
3 insofar as they were ancillary to this other
4 proceeding, they were not by themselves an Article III
5 problem.

11:24

6 32 Q. Yes, thank you. Now can I just turn then to a little
7 later in your report, paragraph 57, and at this point
8 you summarise the collection powers that the US
9 government enjoys. And I wonder could you just
10 identify, I suppose, each of the, I think you identify
11 four different types of collection powers, I wonder
12 could you just speak to that part of your report
13 please?

11:24

14 A. Sure. I mean there are more than four, but the four
15 principal ones, and I think this is consistent through
16 all of the experts' discussions, are the two provided
17 by the Stored Communications Act, so that's the 2703(d)
18 order and a national security letter, which we have
19 heard discussed; classic FISA warrants, which is where
20 I just described a sort of conventional, go to the
21 court, demonstrate probable cause to believe that the
22 target of the search is a foreign power or an agent of
23 a foreign power; and then Section 702, the 2008
24 revision that we now know was the source of the PRISM
25 and Upstream programmes. Those struck me as the four
26 most likely collection authorities that would impact an
27 EU citizen's data as relevant to these proceedings.

11:25

11:25

11:25

28 33 Q. Yes. And can I ask you then please to go on to the
29 judicial review of collection mechanisms and I think

1 you identify that as at paragraph 74 of your report?

2 A. Mm hmm.

3 34 Q. And I think you identify in particular challenges by
4 the recipients of directives and I wonder could you
5 just speak to that paragraph please and just elaborate 11:26
6 on that?

7 A. Sure. So I think one of the points that Prof. Swire
8 and I are no in deep accord on is that, in assessing
9 the availability of judicial remedies, it's important
10 to see the whole ball field, if you will; that is to 11:26
11 say, right, if the question is of whether courts are in
12 a position to answer the merits questions, that is to
13 say the underlying legality of the collection and the
14 surveillance, are there meaningful opportunities for
15 courts to do so. I have been critical in the past that 11:26
16 there aren't as many as I would like.

17
18 But one of the things that I point out in paragraph 74
19 is that we've made some progress on this front. So,
20 for example, there are now meaningful opportunities for 11:26
21 the recipients of national security letters and 2703(d)
22 orders to challenge those orders in court. Section 702
23 itself, as we have heard, provides a mechanism for the
24 communications service provider, the recipient of the
25 directive, to object in the FISA court. And we know 11:27
26 that, at least in the context of the pre-702 statute,
27 the Protect America Act, that Yahoo indeed did bring
28 such a challenge. And we also see in the criminal
29 context that courts are in a position, in the context

1 of a motion to suppress, to answer many of the same
2 questions.

3
4 So I know last week reference was made to the Ninth
5 Circuit's Mohamud decision, I am sure I am 11:27
6 mispronouncing that.

7 **MS. JUSTICE COSTELLO:** We had a debate on that point.

8 A. Indeed. I will not take a position on who has that
9 right. But I think what's telling about that case like
10 the Yahoo case is not what the bottom line answer was 11:27
11 but that there was a bottom line answer, that in the
12 Mohamud case the Ninth Circuit reached the legality of
13 the Upstream collection; in the Yahoo case the FISA
14 Court of Review, an appellate level court, reached the
15 legality of the Protect America Act surveillance 11:28
16 authority.

17
18 When I think of sort of the academic side of this, of
19 ensuring that these questions are getting a full
20 judicial consideration, those to me are very relevant. 11:28
21 You know they may not be exhaustive, but they certainly
22 are an important part of the story.

23 35 Q. **MS. HYLAND:** And in the context of judicial review by
24 the electronic communications companies, can you
25 comment on the Microsoft -v- NSA decision in relation 11:28
26 to the material that was stored in Ireland?

27 A. Indeed. I mean so we also see more, I think especially
28 since the Snowden disclosures, more public and visible
29 pushback by some of these communications service

1 providers against government requests. Because, if
2 you'll forgive me, I think it has become somewhat in
3 vogue to be publically now opposed to the government.
4

5 So Microsoft, for example, objected successfully to a 11:28
6 Stored Communications Act order that had directed them
7 to turn over e-mails stored on a server here in
8 Ireland. And the Second Circuit Court of Appeals, the
9 Federal Appeals Court in New York, actually held that
10 Microsoft was correct, that the statute did not allow 11:29
11 for the trial court to basically compel Microsoft to
12 pull these e-mails off of a foreign server.
13

14 And we have seen that, I think Prof. Richards referred
15 to the Microsoft Seattle case where Microsoft was 11:29
16 challenging some of these non-disclosure rules. We are
17 seeing much more of this. There was a famous case last
18 year where Apple objected quite publically to an order
19 compelling Apple to help the FBI decrypt a locked
20 iPhone. So, you know, before Snowden I think there was 11:29
21 an abysmal lack of pushback by these companies. We're
22 seeing much more of this now which again I think helps
23 move the ball in ensuring that somehow some way these
24 merits questions are getting at least some day in
25 court. 11:29

26 36 Q. And can I ask you about another matter you referred to
27 in paragraph 74 which is review by the FISC?

28 A. Mm hmm.

29 37 Q. Can you explain what you mean by that, please?

1 A. So again I mean I think one of the innovations of the
2 post 9/11 surveillance reforms was to give the FISA
3 court more adversarial process. I mentioned that the
4 original understanding of the FISA court was that all
5 it was going to do was a classic warrant application, 11:30
6 and so in that context it didn't necessarily make sense
7 to have the warrant's target be represented by counsel
8 at a time the warrant issued.

9
10 Starting just before 9/11, but especially after, as 11:30
11 Congress expanded the role of the FISA court, Congress
12 also put in place more procedures for adversarial
13 participation in the FISA court. So, for example, the
14 phone records programme, section 215, that statute had
15 a procedure for the recipient of what was called a 11:30
16 Production Order, of Verizon, say, to come and contest
17 it in court. Section 702 has a provision for the
18 recipient of a directive to come and contest it in
19 court. And in all of these contexts, if the court
20 rules against the recipient, they have a right to 11:30
21 appeal to the FISA Court of review, this intermediate
22 appellate court, and from there to the Supreme Court.

23
24 These to me are, I think, useful innovations, not just
25 because I think they help my goal which is getting 11:31
26 these questions answered on the merits, but I think
27 they also ameliorate some of the constitutional
28 objections that might otherwise have been raised to
29 wholly one-sided proceedings on questions bigger and

1 broader than just an individual search warrant.

2 38 Q. Yes, thank you. Can I ask you to look then in
3 paragraph 78 where I think you summarise the
4 constraints that apply to the various collection
5 authorities and you might just step the court quite 11:31
6 briefly through those, much of this the court has heard
7 about, but if you can just speak to that paragraph,
8 please?

9 A. Sure. So even though the focus in my report obviously
10 was on the remedies and the standing question, I wanted 11:31
11 to at least situate that discussion in a discussion of
12 the other constraints that were available and relevant.
13 So I talk in paragraph 78 about the sort of built-in
14 constraints on collection. We might call these the
15 *inherent* constraints, that is the limits on the 11:32
16 underlying collection authority. For example, in the
17 Fourth Amendment itself, in Executive Order 12333 and
18 in PPD-28. I talk about the constraints on use and
19 retention, so these are what we often refer to as the
20 minimisation rules that have been in some cases baked 11:32
21 into the underlying authority; in other cases imposed
22 externally, either by Congress or by the FISA court.

23
24 The internal constraints on access, one of the things
25 that I think became more clearer after the Snowden 11:32
26 disclosures was, whether because of the Snowden
27 disclosures or just as a PR reaction to it, the
28 government was much more aggressive in limiting which
29 of its employees could access this data and under what

1 circumstances. So we saw, for example, the rise of
2 requiring multiperson access, right, that one person
3 couldn't access particular data without someone else
4 helping them, I guess on the theory that two bad apples
5 is much less likely than one. 11:33

6
7 We saw also the rise of internal oversight.
8 Prof. Swire referred last week to Inspectors General
9 and also to the creation of new privacy and civil
10 liberties offices, also external oversight by the new 11:33
11 Privacy and Civil Liberties Oversight Board, oversight
12 by the House and the Senate intelligence and, from my
13 perspective, much more important judiciary committees.
14 It is our judiciary committees that really are most
15 often the most sort of rigorous legal constraint on the 11:33
16 government since I think they take their charge of
17 fealty to the law and the constitution most seriously
18 in that context.

19
20 And then obviously, and this is I think the focus of my 11:33
21 report, ex ante and ongoing judicial supervision
22 through what my report calls judicial review. I didn't
23 mean that as the term of art, I meant that to sort of
24 more generally as litigation, right, the opportunities
25 that litigation provided for judicial accountability. 11:33

26 39 Q. Yes. And can I ask you in respect of litigation,
27 I suppose, remedies, can you just describe to the court
28 the APA? Because you'll have heard and some of the
29 other witnesses give evidence about that and you have

1 read Prof. Richards and Mr. Serwin responding to you,
2 but if you could first just please identify what
3 exactly is it and when is it used?

4 A. So the Administrative Procedure Act, it's hard to
5 describe succinctly because it's so many things. It 11:34
6 was enacted in the 1940s in direct response to the rise
7 of the administrative state in really world war II era
8 America. And the idea behind the Administrative
9 Procedure Act was to provide a general framework for
10 judicial oversight of agency action, the idea being 11:34
11 that as more and more power was delegated to the
12 administrative state, to Executive Branch agencies, it
13 would be more and more important to invest the courts
14 with some function of overseeing how that power was
15 delegated and how it was exercised. And so we saw, 11:34
16 right about the same time, Congress providing for
17 robust judicial review of agency action, wholly in
18 response to the concern that otherwise all of this
19 power it was delegating would potentially be
20 unreviewable because of what were then constraints on 11:35
21 causes of action against the government.

22
23 So just, for example, there was no general federal
24 mandamus action until 1961, right. We went 100 and,
25 gosh, 72 years without a general federal mandamus 11:35
26 action. That made it difficult, right, to bring
27 administrative claims against the government. The APA
28 was a step toward relaxing that. And what the APA did
29 was it basically said we are generally going to allow

1 litigation against the federal government unless it's
2 for damages, that damages are a different bucket
3 because they implicate sovereign immunity in ways that
4 prospective or declaratory relief, at least from
5 Congress' perspective, do not.

11:35

6
7 And so the APA to me is the starting point in any
8 discussion of a remedial framework to sue the federal
9 government. It is, as we have seen from the testimony,
10 it is sometimes overcome by statutes that will either
11 expressly or implicitly preclude it. It is sometimes
12 ineffective, but I was struck in reading the DPC Draft
13 Decision that it was not even mentioned because my
14 first reaction to this entire question of suing the
15 government is the APA.

11:36

11:36

16 40 Q. And can I just ask you, just in relation to some of the
17 detail of it, is sovereign immunity relevant in the
18 non-damages context in which it operates?

19 A. So it would have been but for the APA, right. That is
20 to say the federal government could have and sometimes
21 did claim sovereign immunity from declaratory or
22 injunctive actions prior to the APA. The APA in 5 USC
23 section 706 effects a complete waiver of the federal
24 government's sovereign immunity in non-damages actions.

11:36

25 41 Q. Yes.

11:37

26 A. And section 702 says, even expressly, that it will not
27 be a bar to suit, that you can name the United States,
28 right, that that will not be a sovereign immunity
29 problem.

1 42 Q. And in respect of what types of decisions can one bring
2 an action under the APA?
3 A. So the statute requires what's called final agency
4 action, the theory being that we don't want agency
5 deliberations to be subject to review, that we want the 11:37
6 agency to actually have taken some concrete step before
7 it can be sued.
8
9 But final agency action, I think it's worth stressing,
10 has been interpreted rather capaciously as a functional 11:37
11 requirement, not a formal one, right. That is to say
12 we don't look to see if the agency has formally
13 promulgated a rule or a decision making, we look to see
14 if they have acted in a way that has completed the
15 assertion of authority, the action that might give rise 11:37
16 to the underlying claim.
17 43 Q. Now you heard Mr. Serwin express reservations about its
18 use partially on the basis that it required agency
19 action?
20 A. Mm hmm. 11:38
21 44 Q. And can I ask you to address that with particular
22 reference to an action taken under section 702 of FISA?
23 A. Yes, it's a not helpful coincidence that they are both
24 section 702.
25 45 Q. Yes. There is a section 702 in the APA; is that right? 11:38
26 A. So, if it helps the court, I would like to just refer
27 to the APA to mean section 702 of the APA.
28 **MS. JUSTICE COSTELLO:** Okay.
29 A. So in the context of surveillance under 702 of FISA,

1 the final agency action, which has not been well
2 litigated. I believe Mr. Serwin points in his November
3 30th memo to the Sixth Circuit decision in ACLU -v-
4 NSA. This is a 2007 surveillance case where the court
5 held that the plaintiffs did not have a claim because 11:38
6 they could not show final agency action.

7
8 But I read that case I think differently from
9 Mr. Serwin. I see that as the court making the same
10 conclusion that the Supreme Court reached in the 11:39
11 Amnesty -v- Clapper case, that the plaintiffs couldn't
12 demonstrate that their communications had in fact been
13 collected. I don't see anything in that decision or
14 any other decision frankly that suggests that the
15 collection of a private party's communications wouldn't 11:39
16 in all cases be final agency action. And, more to the
17 point, in the context of Section 702 of FISA
18 specifically, the issuance of a directive to a
19 communications service provider to me is a
20 quintessential final agency action. And indeed I think 11:39
21 we see a comparable analysis by the Second Circuit
22 under the context of Section 215 in the ACLU -v-
23 Clapper case.

24 46 Q. And what about the application of the APA to a
25 certification, an annual certification under 1801? 11:39

26 A. Yeah, I mean again this hasn't been tested in court,
27 but I actually do think that a certification would also
28 constitute final agency action because it is a formal
29 step that has functional consequences, right. That is

1 to say it is the trigger that opens the doors to the
2 issuance of directives.

3
4 Now it's possible, if you'll forgive me for going a bit
5 into the weeds, it's possible - we are already there 11:40
6 I know, further into the weeds - it's possible that a
7 challenge to a certification might not yet be *ripe* in
8 the sense that until the government takes some action
9 pursuant to the certification a court might be inclined
10 to say 'yes this happened but it's premature. We 11:40
11 haven't gotten to the point where there has been an
12 invasion of' --

13 47 Q. **MS. JUSTICE COSTELLO:** You have authorisation but not
14 action pursuant to the authorisation?

15 A. Precisely. And so if the challenge were, you have 11:40
16 heard about the difference between as applied and
17 facial challenges in US law, if a challenge were an as
18 applied challenge I could see a court saying 'the
19 certification itself is not really what you are
20 complaining about, it's the directive', right, it's the 11:40
21 actual collection, as opposed to in the Amnesty -v-
22 Clapper case where it was a facial challenge and so it
23 was to the entire structure of the statute.

24 48 Q. **MS. HYLAND:** Yes. Can I just ask you to focus for a
25 moment on the comparison that was identified by 11:41
26 Mr. Serwin, I think it's at paragraph - it's page 5 of
27 his November report at paragraph, sorry there isn't
28 paragraph numbers, but you will find it at page 5. And
29 you will see there at the bottom of page 5 he made

1 reference to the Klayman -v- Obama decision and, as it
2 were, I suppose identified that as a counterweight to
3 the ACLU -v- Clapper case?

4 A. Mm hmm.

5 49 Q. And I wonder can you just comment on the two cases and 11:41
6 what your view is, I suppose, of the state of the law
7 having regard to those cases?

8 A. Of course. So Mr. Serwin is referring to the district
9 court decision in what became the Klayman -v- Obama
10 case. 11:41

11 50 Q. Mm hmm.

12 A. And his argument, as I understand it, is that there the
13 district court held that the APA remedy was indeed
14 precluded by the more specific remedies available to
15 plaintiffs to challenge government surveillance under 11:42
16 FISA and other statutes, and that that's a reason why
17 he was, I gather from his testimony last week he said
18 that's why he didn't include it in his initial memo.
19 I find that a bit hard to believe, but so be it.

20 11:42
21 I disagree with that analysis for a couple of reasons,
22 and I cite in my report a lengthier discussion.
23 I wrote a, if you'll forgive me I wrote a blog post on
24 the subject that is cited in footnote 25 of my report.
25 The short version is that analysis completely misreads 11:42
26 the remedies in FISA to apply to the plaintiff in
27 Klayman, that is to say, right, that the district court
28 in that case said that these remedies that were
29 available to *other* parties but were clearly not

1 available to Klayman himself were sufficient to
2 preclude his challenge.

3
4 Now in the district court in Klayman that was important
5 because the district court then reached the 11:42
6 constitutional question and held that the phone records
7 programme was unconstitutional. So this holding was in
8 the context of ruling for the plaintiff anyway. But in
9 any event that decision, which I have criticised on
10 logical grounds, was also vacated on appeal. So as 11:43
11 between the Second Circuit's I think more, to my mind,
12 convincing analysis, that is still precedent.

13 **MS. JUSTICE COSTELLO:** That's in ACLU -v- Clapper?

14 A. Correct, where they reached, where it was the exact
15 same issue. And the Second Circuit spent, I believe, 11:43
16 several pages walking through why the APA claim was not
17 precluded by these other statutes. That is still very
18 much good law. The district court decision in Klayman
19 was never precedent, right. Our district courts
20 opinions are not precedential and in any event it was 11:43
21 vacated on appeal. So I don't mean to sort of key
22 score in this regard, but my opinion is that the Second
23 Circuit's analysis is more convincing anyway and it's
24 the one that's still on the books.

25 51 Q. **MS. HYLAND:** Yes. I think Mr. Serwin said when I was 11:43
26 cross-examining him as a reason for not identifying the
27 APA was that it was not one of the *primary* remedies,
28 how would you respond to that?

29 A. I mean *primary* is a subjective word. I don't think

1 it's my place to criticise adjectives that other people
2 use. But my experience as a federal courts teacher and
3 litigator is that, when thinking about suing the
4 government specifically, the APA is where you start.
5 This isn't true for private litigation. I mean 11:44
6 obviously the APA could never be used to sue Facebook
7 or Microsoft, and so it makes perfect sense to me why
8 experts who are focussed more specifically on
9 litigation, data privacy litigation in that context
10 might not think of the APA. But the APA is sort of the 11:44
11 catch-all and then the question is how do the more
12 specific remedies available in that context interact
13 with it.

14 52 Q. Yes. I think Prof. Richards said, as a justification
15 for him not identifying the APA, he was going to focus 11:44
16 on relief that seemed to be the most substantive and
17 the APA was not one of them, you don't have to add to
18 or answer if there is nothing further to add, but is
19 there anything further you wish to add to that?

20 A. I mean I would just suggest that the record belies that 11:45
21 conclusion, right. To my mind the Second Circuit ACLU
22 -v- Clapper case is *the* most sort of far-reaching
23 decision we have had on the merits in a post 9/11
24 surveillance case and the APA was the principal basis
25 for the remedy there, right. And, you know, I think in 11:45
26 over half of the major surveillance cases that we have
27 seen in suits against the government, the APA has been
28 part of the claim. It's part of the claim in the
29 wikimedia case, it's part of the claim in the valdez

1 case. And so I guess I just, you know I understand
2 that I and my colleagues might disagree about its
3 import, but the notion that it just ought not to be
4 discussed strikes me as very strange.

5 53 Q. Yes. In relation to the suppression remedy 1806, you 11:45
6 have already mentioned it this morning briefly,
7 I wonder can you identify the relevance of that remedy
8 to EU citizens in particular, how would it play out in
9 practice?

10 A. Well, so I mean I think there are two ways in which it 11:45
11 is relevant, Judge, one direct and one indirect.
12 Obviously the direct way is if an EU citizen were ever
13 prosecuted pursuant to evidence that was derived from
14 Section 702 of FISA or other FISA authorities, 1806
15 would presumably provide him or her with an opportunity 11:46
16 to object to that surveillance in the context of motion
17 to suppress. Those cases tend to be few and far
18 between, so I think the more insignificant, albeit
19 indirect way in which it is relevant, is that it allows
20 in other cases for judicial consideration of the 11:46
21 underlying merits of these programmes back to the
22 **Mohamud** case and the Ninth Circuit actually being the
23 first Court of Appeals to reach the merits in any
24 degree of Upstream and of the legality of that
25 programme. 11:46

26
27 You know, I assume reasonable minds will disagree about
28 the analysis in these opinions and whether they are
29 answering the merits questions correctly. My hope, my

1 brief is that they be answered in the first place.

2 54 Q. Yes, thank you. Now just with regard to paragraphs 84
3 and 85 of your report, there's a reference to 1810 and
4 you note that:

5 11:47

6 *"The DPC Draft Decision is sceptical of the remedy*
7 *provided by 1810 because it does not operate as a*
8 *waiver of sovereign immunity which means the US cannot*
9 *be held liable under this section."*

10 11:47

11 Before we deal with sovereign immunity, can I just ask
12 you to describe for the court precisely what kind of
13 remedy is 1810 and who it is against?

14 A. So 1810 is meant to be a damages remedy. It was part
15 of FISA as initially enacted in 1978. It was actually, 11:47

16 at least in the context of *that* discussion, an
17 important piece of the puzzle, that there would be
18 civil remedies. It is rather specific, though. It
19 only authorises damages, and it directs that damages
20 will be brought for violations, for wilful or 11:47

21 intentional violations of FISA as defined in section
22 1809. Judge, you may recall 1809 is the criminal
23 penalty in FISA. That's very narrow. That's not going
24 to encompass of course negligent violations of FISA.
25 It's going to be difficult to prove, but it's not 11:48
26 nothing.

27
28 And so one of the points that I was struck by in
29 reviewing the DPC draft was the assumption that, if

1 there was no damages against the United States, 1810
2 was effectively pointless.

3
4 I don't think that's quite right. 1810 is still
5 creating a cause of action that could be used for 11:48
6 *non-damages* relief where you would not have the
7 sovereign immunity problem identified by the Ninth
8 Circuit and referenced by the DPC entirely because of
9 the APA, not to be the dead horse, right, but it's the
10 APA waiver that means that 1810 would not run into 11:48
11 sovereign immunity problems if the relief being sought
12 was not damages.

13 55 Q. Can I just take you back, though, to the situation
14 where we are looking at a damages remedy. I take your
15 point about the non-damages remedy under 1810, but in 11:49
16 respect of the damages remedy, I think what you said is
17 at paragraphs 84 and 85?

18 A. Yes.

19 56 Q. You deal with this question of sovereign immunity and
20 I think what you say at paragraph 85 is that: 11:49

21
22 *"It is worth emphasising that in virtually every case*
23 *in which 1810 could apply, the federal government would*
24 *almost certainly indemnify the officer defendant."*

25
26 And can I ask you first just to explain to the court
27 how a suit would work against an officer defendant as
28 opposed to the US government itself, please?

29 A. So imagine a situation where someone at the NSA abuses

1 their authority wilfully, whether to exact revenge
2 against an ex-girlfriend or something similar. In that
3 context 1810 I think could be used if we knew about the
4 underlying misconduct to seek damages, which it
5 authorises expressly, directly against the officer who 11:49
6 at least, when sued in his personal capacity, cannot
7 invoke sovereign immunity. So US law has long drawn
8 this distinction, however unconvincing it may be,
9 between suing an officer in his official capacity in
10 which he is treated as being the State and suing an 11:50
11 officer in his personal capacity in which he is not,
12 even though of course it's only because of his badge of
13 authority that this violation has likely occurred in
14 the first place. And the reason why we have done that
15 is to account for the problems sovereign immunity would 11:50
16 otherwise raise, so that sovereign immunity does not
17 become a complete shield.

18
19 And so in 110 you could very possibly have a damages
20 claim against an officer in his personal capacity on 11:50
21 the claim that he willfully and intentionally violated
22 FISA in collecting this surveillance, and then the
23 question would simply be could you collect damages
24 against the officer. He might have other defences but
25 sovereign immunity would not be one of them. 11:50
26

27 And if at the end of the day you were to obtain damages
28 it's my experience, Judge, that he would almost always
29 be indemnified. Just about all federal officers have

1 agreements in their conducts or in the manuals that
2 govern their conduct that say 'scope of employment
3 harms, they will not be responsible for out of pocket'.

4 57 Q. **MS. JUSTICE COSTELLO:** Even if they are sort of going
5 on, what we call in this jurisdiction, sort of a frolic 11:51
6 of their own?

7 A. So the frolic questions is exactly right. And in this
8 regard I hope you'll bear with me when I say US
9 jurisprudence takes a remarkably generous view of scope
10 of employment. So just to give one example: There was 11:51
11 a torture claim arising out of Guantanamo after 9/11
12 where, under a different statute that's not relevant
13 here, scope of employment mattered. And the government
14 argued quite vehemently that the allegations of torture
15 by government agents were within their scope of 11:51
16 employment, even though it's not legally possible for a
17 country's domestic law to authorise torture.

18
19 So, you know, I think there would be a question at the
20 margin there, Judge, for sure, but our instinct, our 11:52
21 inclination has been to read that very broadly and to
22 generally indemnify officers.

23 58 Q. **MS. HYLAND:** Very good. Can I ask you now to move to
24 the ECPA, as it has been described, the Stored
25 Communications Act, and in particular can I ask you to 11:52
26 look, sorry to consider something I think you dealt
27 with at paragraph 26: what was the purpose of the
28 enactment of ECPA?

29 A. Sure. So ECPA actually is rather old. But it was like

1 FISA a rather, I think, useful series of compromises
2 between the legislature and the Executive Branch over
3 what to do about what was then the very novel idea of
4 stored electronic communications, obviously now not so
5 novel.

11:52

6
7 And the idea behind ECPA was to create a framework of
8 rules that would apply, not equally to the private
9 sector and the government, but that would at least
10 cross the bridge between them. So that there would be
11 rules that would bind private companies in what they
12 could do with electronic communications and there would
13 be rules that would bind the government. And so we see
14 in ECPA two different causes of action to deal with
15 that distinction, right. We see section 2712, which
16 I know has been dealt with in some detail.

11:53

11:53

17 59 Q. Yes.

18 A. Which is focussed on the government, and section 2707
19 which is focussed on just about every other possible
20 defendant, the idea being that both could in theory
21 violate the Stored Communications Act but the rules for
22 how you can sue them are going to differ.

11:53

23 60 Q. Yes. And can I just ask you please to look at the
24 DPC's decision which is - I am sorry, I'm not sure if
25 that was in the book that I asked you to look at, it is
26 in Book 1 and it's at Tab 18. I'm just going to ask
27 you to look at how 2707 is dealt with. And if you have
28 that book in front of you I'm going to ask you to look
29 at Tab 18 which is the DPC decision and then paragraph

11:53

1 49 subsection 2?

2 A. Mm hmm.

3 61 Q. And you'll see there at paragraph 2, there's a
4 reference to ECPA, there's a reference to 2712 and in
5 the last three lines there's a statement:

11:54

6

7 *"There is also uncertainty as to the extent to which*
8 *damages actions are available against governmental*
9 *entities that breach either the wiretap Act or the*
10 *SCA."*

11:54

11

12 I wonder could you comment on that sentence but with
13 particular reference to the damages actions that are
14 available against *non-governmental* bodies, please?

15 A. Sure. I mean so this line, like many of the lines in
16 the DPC draft, I was a bit surprised to see. As
17 I mentioned before I didn't see Mr. Serwin's May 24th
18 memo until shortly before I filed my report at which
19 point I saw similar lines and understood where these
20 discussions came from.

11:54

21

22 I don't think there is uncertainty as to the extent to
23 which damages actions are available against
24 governmental entities. Because 2707, which I don't
25 believe is mentioned in paragraph 49, I think fills out
26 the gap. And indeed there's case law suggesting that a
27 person under section 2707 can include a local
28 government entity, perhaps even a federal government
29 entity. So, you know, it strikes me that there's not

11:55

1 uncertainty there, there's just not a lot of case law,
2 and those aren't always the same thing.

3 62 Q. Yes. And in relation to non-governmental entities,
4 private persons, let's say an electronic communications
5 company, what's the position about suing those 11:55
6 companies under 2707, please?

7 A. Oh I don't think there is any question that they are
8 liable to suit under 2707. The critical difference,
9 Judge, is that 2707 covers a slightly narrower field of
10 substantive rights than 2712. 2707 is targeted just at 11:55
11 the Stored Communications Act. I believe the language
12 in the section refers to is "*this chapter*" or "*this*
13 *subchapter*". 2712 is that along with three provisions
14 of FISA, right. That's the critical difference there.
15 But that where you have a violation of the stored 11:56
16 Communications Act 2707 I think is quite plain that it
17 would authorise a damages suit against a private
18 violinator.

19 63 Q. Yes. And I think it also identifies in subparagraph
20 (b) that it can also include equitable or declaratory 11:56
21 relief as may be appropriate; isn't that right?

22 A. That's right. And indeed, I mean I think it's helpful
23 here because, as you may recall, Judge, 2712 has this
24 exclusivity provision that suggests that it is the only
25 way to obtain relief for violations of the 11:56
26 aforementioned sections in 2712(a). 2707 makes clear
27 that that's a narrow exclusivity provision, that it's
28 saying it's the only way to obtain relief against the
29 United States where the defendant is the federal

1 government or a federal officer in his official
2 capacity. 2707 I think actually clarifies that there
3 are broader remedies against other parties including
4 for damages, damages again not carrying the sovereign
5 immunity implications as applied to non-governmental
6 defendants. 11:57

7 64 Q. Yes, thank you. Can I ask you then to move on to the
8 standing question which, as you know, Prof. Vladeck,
9 has occupied some time in this court.

10 A. My federal court students would be so happy to hear how 11:57
11 much we have talked about standing.

12 65 Q. Yes, probably the only ones.

13 A. Indeed. It would help them for their final exam.

14 **MS. JUSTICE COSTELLO:** Maybe the transcript can be
15 released to your students. 11:57

16 A. I don't think they would appreciate that, but we'll
17 see.

18 66 Q. **MS. HYLAND:** Could you just identify in brief the
19 history of the standing doctrine and how it arose?

20 A. Sure. So standing doctrine, as I teach my students, is 11:57
21 very much a creature of the 20th century. You can't
22 really find the word "*standing*" in nineteenth century
23 US judicial decisions. And the reason for that is
24 because it's the 20th century where we have seen the
25 rise of two different threads of the administrative 11:58
26 state where you have what the Supreme Court has,
27 I think, inartfully referred to as *public* rights. This
28 is to say rights conferred by statute that are widely
29 held, so rights to clean air, rights to clean water,

1 rights to disclosure of donations to political
2 committees. That's put some pressure on the private
3 law model where we assume contract tort property, the
4 person who is harmed is going to be the one who is
5 bringing the suit. 11:58

6
7 But also the articulation of constitutional protections
8 under US law that lack common law analogues, so equal
9 protection or antidiscrimination rule. There is no
10 common law analogue to an antidiscrimination tort. And 11:58
11 so in that context that put pressure on the Supreme
12 Court to identify who the right parties are to enforce
13 these public or at least non-discretely held rights.

14
15 And that's why it's really the 1960s, 70s and 80s when 11:58
16 we see the rise of what we now call standing doctrine.
17 And the idea being, as I think Justice Thomas quite
18 helpfully summarised in Spokeo, to distinguish on the
19 one hand between rights that have at least loose common
20 law analogues which are classically actionable which do 11:59
21 not tend to raise standing problems and rights that
22 aren't where the questions are harder and where much of
23 the debate and dispute arises.

24 67 Q. Yes. Then can I ask you to identify a remedy for
25 breach of privacy in the common law? 11:59

26 A. Well, sure.

27 68 Q. If any. I beg your pardon, if you think there is any.
28 What is the position of a breach of privacy at common
29 law?

1 A. I mean trespass, right. A common law trespass was, the
2 US Supreme Court until 1971 treated trespass by federal
3 officers as a common law tort, even when it was a
4 Fourth Amendment violation. So if an FBI agent broke
5 down your door without cause in the middle of the 11:59
6 night, your remedy against them was a common law tort
7 action for trespass. Because the theory was that you
8 could, not perfectly but at least largely map up the
9 element of trespass with the invasion of privacy that
10 was implicated by such a search. 12:00

11 69 Q. Yes. When it comes to, I suppose, the modern day
12 theories of standing, I'm going to ask you to treat
13 notification separately from concreteness and I'm going
14 to ask you to deal with concreteness first please. And
15 I wonder please can you identify what you perceive to 12:00
16 be the current position in US law in respect of
17 concreteness as of the present day in the national
18 surveillance context?

19 A. Sure. So I mean as I teach my students, and I think as
20 you have unfortunately heard way too much about, 12:00
21 there's a meaningful distinction between the two prongs
22 of the actual injury element, right, that there's the
23 actual or imminent injury and then there is concrete
24 and particularised. And when I teach my students for
25 better or for worse is that concrete and particularised 12:00
26 has to be understood by reference to this distinction
27 between the common law analogue harms, what we might
28 think of as the more private rights model, and the
29 public rights model. We then not to see cases dwelling

1 in detail on concreteness in the context of a private
2 law harm. It's really only in the public law context
3 that we see a lot of focus on concreteness and there
4 the most important case without question, and the case
5 that I spend the better part of an entire class on, is 12:01
6 the Lujan decision from 1992 where the Supreme Court
7 went out of its way to say 'Congress cannot allow
8 litigants to sue if they create injuries that are not
9 concrete', right? And so that was a surprise when it
10 came down I think to a lot of observers, but that has 12:01
11 defined the shape of standing jurisprudence really in
12 the 25 years since.

13 70 Q. And is that spelled L-U-J-A-N; is that right?
14 A. Yes.

15 71 Q. Yes. I think the stenographers just want to change, 12:01
16 thank you. And can I just ask you then in relation to
17 Spokeo - you've heard, again, a lot of discussion
18 about Spokeo. And you have -- you did not identify it
19 in your report. Can you explain why and then can you
20 explain what your perception of the importance of 12:02
21 Spokeo is please?

22 A. Sure. So I remember when Spokeo came down. We were,
23 as I think Prof. Richards mentioned in both his report
24 and his testimony, very nervous that it was going to be
25 much, much worse. And if you'll forgive a tangent, I 12:02
26 think it's important to note the impact of Justice
27 Scalia's passing, that it probably deprived the court
28 of the majority it had had for perhaps a broader
29 ruling.

1
2 **Spokeo**, when it came down, struck me as basically a
3 reaffirmation of **Lujan**. It was a very narrow decision.
4 It was basically saying something I already taught to
5 my students, which is that a procedural right by itself 12:03
6 is not sufficient to satisfy the concreteness
7 requirement of Article III, that you have to have some
8 additional proof of harm. You know, I think it was a
9 *helpful* reaffirmation of that principle and a useful
10 illustration of how that principle applies in practice. 12:03
11 But it didn't strike me as especially significant,
12 given that it's not mentioned in the DPC draft
13 decision, Mr. Serwin's May 24th memo only briefly
14 adverts to it in a paragraph and doesn't say anything
15 substantive about it, he just describes it and in my 12:03
16 canvass of standing decisions, I believe it's one of
17 over a dozen that the Supreme Court has handed down
18 since the **Amnesty -v- Clapper** case.

19 72 Q. When you say "one of a dozen", what's the category, if
20 you like, of that dozen? 12:04

21 A. I'm sorry. So decisions where the justices have, in
22 one form or another, discussed Article III standing in
23 some way that might possibly bear on the issue in this
24 case. And it just didn't strike me as especially
25 helpful to walk through all of them, right. It seemed 12:04
26 to me that the more important point was to explain what
27 was still available after **Clapper** - Supreme Court
28 **Clapper** - and what wasn't. In retrospect, knowing how
29 much more focused it has become, I *should've* probably

1 said something about it. But what I would've said
2 would've been very modest, that as in Lujan, we have
3 this principle as about concreteness.

4 73 Q. And would you agree with what I think both Mr. Serwin
5 and Prof. Richards says, which is that post-Spokeo 12:04
6 there has been a tightening in standing requirements?

7 A. I disagree with that. I think there are certainly
8 examples, Judge, of cases post-Spokeo where lower
9 courts have found no standing. So two that come to
10 mind are a pair of cases in the Seventh and Eighth 12:05
11 Circuits, these are the Chicago and St. Louis based
12 Courts of Appeals that have rejected standing under
13 Spokeo under a very specific statute called the Cable
14 Communications Policy Act, where the claim was simply
15 that a private cable provider had wrongfully retained a 12:05
16 customer's data, not that he or she had, you know, been
17 harmed otherwise.

18
19 It strikes me that those cases come out the same way
20 under Lujan. And indeed, in the casebook that I teach 12:05
21 out of - it's called Hart and Wechsler, it's the
22 landmark casebook in the field - in its supplement for
23 this year, I don't remember the exact language, but
24 it's something to the effect of Spokeo reaffirms the
25 principles which are articulated in Lujan. So of 12:05
26 course there are cases after Spokeo that reject
27 standing - I wouldn't have expected otherwise. But to
28 say that it *narrows* the standing is to imply that it
29 somehow changes the test. And it seems quite clear to

1 me that, no, it just applies the test to a more
2 contemporary example.

3 74 Q. Yes. And can I ask you just to look at a case, a very
4 recent case, 20th January of this year, the case of
5 Horizon, that I think you wanted to identify passages 12:06
6 in that that you consider to be of relevance. That's
7 just going to be handed up there to the court and to
8 you (Same Handed). If I could ask you to look at that
9 case and to just identify why you think it's relevant
10 and what parts of it please? 12:06

11 A. Sure. So, Judge, this is another circuit level case.
12 This is another, basically, data breach case --

13 75 Q. When you say "another data breach case", is it the *same*
14 statute --

15 A. No, I'm sorry, so this is under the Spokeo statute, the 12:06
16 Fair Credit Reporting Act, not the Cable Communications
17 Policy Act. There are, as I think Mr. --
18 Prof. Richards excuse me, testified, we have sort of a
19 sectoral approach to privacy law, so there really are
20 different privacy statutes in different fields. This 12:06
21 is FCRA, this the Spokeo statute. And in this case the
22 claim was *not*, as in Spokeo, that somehow incorrect
23 data had simply been posted, rather in this case we had
24 a class action that the inadequate protection of data
25 led to its theft and led to its being purloined from 12:07
26 the health care provider. And the Third Circuit, in
27 rather detailed discussion, walks through why, in its
28 view, that *is* sufficient to create standing, that *is* a
29 concrete injury, even after Spokeo. I believe -- just

1 give me one moment.

2 76 Q. Yes.

3 A. It's right about page, it's star 634, I believe it's
4 page seven of the printout. The heading is
5 "B. Analysis of the Plaintiff's Standing".

12:07

6 **MS. JUSTICE COSTELLO:** Yes, thank you.

7 A. So I think we see here a very, I think, thoughtful
8 discussion - it's several pages long, so if you'll
9 forgive me, Judge, I'm not just going to read it - but
10 it's a sort of thoroughgoing discussion of what Spokeo
11 does and doesn't require in the context of
12 concreteness. And what it suggests is something I had
13 already thought to be true, which is that in this
14 context of concreteness, the question is not whether
15 the harm is tangible or intangible, right, the question
16 is whether there's some reason to believe that the
17 violation of the statute has created some direct even
18 potentially intangible harm to the plaintiffs - in this
19 case a far greater risk of data theft and of breach of
20 privacy. Contra that with Spokeo, where what happened
21 was simply an incorrect piece of information that
22 actually redounded to the plaintiff's benefit. And
23 even there the court didn't throw the case out, it sent
24 it back to the Court of Appeals to determine whether
25 the Plaintiff could still show some tangible or
26 intangible harm.

12:07

12:08

12:08

12:08

27
28 So if I can back up a second. What the Horizon case
29 helps to show is how all of the fighting over Spokeo is

1 over one inch of real estate about concreteness. And I
2 think it's remarkable, Judge, *none* of these cases are
3 against the government, right, that there seems to be
4 far less trouble on the part of American courts
5 believing that when the government is the actor, when 12:09
6 they are wrongfully acquiring, wrongfully retaining,
7 wrongly using or disseminating information, it's not
8 nearly as much of a stretch to view that injury as
9 concrete, in contrast to these cases, right, that the
10 issue there is the one we've been talking about, which 12:09
11 is whether you have notice, whether you can show that
12 the injury *actually* happened to you. Once that's
13 satisfied, there's no concreteness problem in that
14 context.

15 77 Q. **MS. JUSTICE COSTELLO:** So are you not saying that it's 12:09
16 the same test applying to the government, but you're
17 saying it's easier to satisfy?

18 A. Well, so we haven't had cases - I mean, right, there
19 aren't, I'm unaware of a post-**Spokeo** decision where
20 there's specific analysis of the concreteness problem 12:09
21 in a case against the government, because so much of
22 the focus is on the actual or imminent injury problem.
23 But it certainly seems from this decision and from
24 others that the more it looks like, the more the injury
25 looks like something with some kind of common law 12:10
26 analogue - an invasion of privacy, for example - the
27 more the courts are going to find it to be concrete,
28 right, however it's defined by Congress.
29

1 And the reason why that matters, Judge, is because I
2 think there's a fairly good argument if and when this
3 comes up in a case that we have different epitions of
4 privacy in information retained by the government
5 versus our service providers. In the context of the 12:10
6 two circuit cases I mentioned that reject standing
7 after Spokeo, in both of those cases the information at
8 issue had been voluntarily provided by the customers to
9 the cable company and their claim was simply that the
10 companies were holding onto the data too long and that 12:10
11 that increased the risk of theft and of a consequent
12 invasion of privacy. And the courts say that's too
13 speculative. In contrast, if it's the government
14 that's retaining the data, right, I think courts will
15 have much less trouble identifying that as an invasion 12:11
16 of privacy, because of all the power the government has
17 with that data that, say, my cable company doesn't
18 have.

19
20 And if I can be, if you'll forgive me for one more sort 12:11
21 of point here, the other reason why this matters is
22 because in the context of actual or imminent injury - I
23 know you've heard a lot about the sort of where you are
24 in the case, right, the motion to dismiss versus
25 summary judgment - an actual or imminent injury should 12:11
26 be something you can allege in your complaint, but that
27 you have might have to go to discovery to prove,
28 because it's going to depend upon seeing what the
29 defendant has actually done, right? A concrete injury

1 does not depend upon what the defendant has done, it
2 depends upon your allegation of harm to you. And so
3 it's much more likely, in my view, that those cases,
4 the concreteness cases, the Spokeo line, will and do
5 get kicked out at the motion to dismiss stage, because 12:11
6 it's the plaintiff who has the relevant information,
7 contra the government surveillance cases where the
8 whole fight is over whether a plaintiff knows or will
9 be able to demonstrate at discovery that their
10 communications in particular have been collected. 12:12

11 78 Q. **MS. HYLAND:** And in the context of government action in
12 that national surveillance sphere, can you comment on
13 the differences, if any, from a standing point of view
14 as between acquisition of data, retention of data,
15 dissemination of data? 12:12

16 A. So I don't think there's any question that every court
17 that has had this question so far has held that
18 acquisition and dissemination by government is a harm,
19 is a concrete harm whether because of its clear
20 analogue to common law privacy ideas or otherwise. The 12:12
21 retention question is the open one, right, it has not
22 been litigated. But it's my sense, Judge, that courts
23 are going to be much less skeptical of the retention
24 harm in the context of government surveillance than in
25 the context of my cable company keeping my information 12:12
26 longer than it should've. The cable company can't *do*
27 that much with that information. The government can.

28 79 Q. Yes.

29 A. And so I think it's -- you know, we haven't seen a

1 post-Spokeo government surveillance case, but that, to
2 me, is where there would be the real question.

3 80 Q. Thank you. Prof. Richards said when he was being, I
4 think, cross-examined that the problem with data
5 privacy claims was that the rights were likely to be 12:13
6 considered intangible or abstract. And then he went on
7 to say it was more difficult for courts to entertain
8 privacy claims because of their non-corporeal
9 intangible nature. Now, I wonder could you comment on
10 that, but having regard to what you just said? 12:13

11 A. Yeah, I mean, I guess respectfully, I disagree. I
12 think that invasions of privacy are actually relatively
13 accessible to federal judges and that it's much easier
14 for them to understand how wrongful collection or
15 dissemination of data is going to harm a plaintiff. 12:13
16 Retention is the harder case, because the question then
17 becomes: what is the actual harm of wrongful retention?
18 In the context of a cable company, it's speculative,
19 right - it's the possibility that through the wrongful
20 retention some other bad thing will happen. In the 12:13
21 context of government retention, I think the concern is
22 it's already an invasion of privacy, the government is
23 keeping data on its citizens that it was not -- and on
24 other persons that it was not allowed to keep.

25 81 Q. Yes. Can I ask you now just to move to the difference 12:14
26 between, if you like, Fourth Amendment rights and what
27 might be described as statutory rights? And you may
28 remember that Mr. Serwin, when he was being
29 cross-examined, I asked him about the paragraph in ACLU

1 -v- Clapper where the court held that the collection of
2 data per se was a seizure and was, therefore, a harm.
3 I don't know if you want to -- are you familiar with
4 the passage I'm talking about?

5 A. I am. 12:14

6 82 Q. Yeah. And he said that that was only applicable to
7 persons invoking Fourth Amendment rights. And I wonder
8 could you comment on that please?

9 A. So I think that that might blur the line a bit between
10 the injury question, which is the standing inquiry, and 12:14
11 the merits question. I think it's actually fairly well
12 settled in US law that the injury need not be the
13 merits, right? In other words, that is to say to have
14 standing, you need not be injured by the violation
15 itself, right, the violation could have caused 12:15
16 indirectly an injury to you.

17
18 And if I may illustrate that? There's a famous Supreme
19 Court case called Craig -v- Boren - it's actually 12:15
20 pretty stupid - but the short version was Oklahoma had
21 a statute that said near beer - this is sort of
22 slightly alcoholic beer - could be sold to 18 to
23 20-year old women, but not 18 to 20-year old men on
24 the, shall we say, antiquated notion that of course the
25 woman won't be driving. That is very old thinking. 12:15
26 The plaintiff in Craig -v- Boren who challenged the
27 statute as unconstitutional sex discrimination was not
28 an 18 to 20-year old man, it was a store owner, right,
29 where the injury to him wasn't a violation of *his* equal

1 protection rights, it was the economic loss, right, it
2 was losing the business of the 18 to 20-year old men
3 who would buy near beer.

4
5 So we have this tradition where the injury does not 12:15
6 have to be the direct violation, it just has to be
7 somehow caused - that's the causation problem with
8 standing. In the context of the Fourth Amendment, you
9 can have a non-citizen who does not have Fourth
10 Amendment rights, or at least may not have Fourth 12:16
11 Amendment rights, who is still injured and then the
12 question is whether he has a claim on the merits.

13
14 A case in point - as my report notes, I'm co-counsel in
15 a case before the US Supreme Court right now about 12:16
16 whether a Mexican national shot on the wrong side of
17 the border, shot by a US agent in Texas, Mexican
18 nationals in Mexico, can he bring a damages suit under
19 the Fourth Amendment? The government says no, he was
20 shot on foreign soil, he has no Fourth Amendment 12:16
21 rights. That may or may not be true, but no one says
22 he doesn't have standing, right? There's no claim that
23 because he has no Fourth Amendment rights, he has no
24 standing. Everyone agrees that the shooting was the
25 injury, right, and that the question then just goes to 12:16
26 the merits, not to standing. I hope that illustrates
27 the point.

28 83 Q. And I think that is the Hernandez case, isn't that
29 right?

1 A. Yeah.

2 84 Q. I think Prof. Richards referred to that, yes. Can I
3 ask you then to turn to notification please? And I
4 think that's the part of standing, if I may call it,
5 the notification part, the actual imminent part of the 12:17
6 test. And in particular you deal with that, I think,
7 at paragraphs 89 onwards of your report and you note at
8 paragraph 90 that you've been sharply critical of the
9 Clapper - that's Amnesty -v- Clapper - ruling
10 beforehand. And I think there is an article that you 12:17
11 wrote in relation to that.

12 A. Mm hmm.

13 85 Q. I wonder can you just identify for us, I suppose, your
14 previous position when you say you've been sharply
15 critical and your position now please? 12:17

16 A. Well, I mean, my position hasn't changed, I'm still
17 quite critical. But I think there are two important
18 points to make about the Supreme Court Clapper decision
19 that help to put it in context. The first is that,
20 unlike virtually all of the more recent cases that 12:17
21 we've been discussing this morning and that other
22 witnesses have discussed, this was at summary judgment.
23 And that's really a very important difference, because
24 it meant that we no longer made inferences in the
25 plaintiff's favour; it was no longer about what they 12:17
26 could allege, it was about what they could prove. And
27 that ties to the second point, which -- this was before
28 Snowden. And I think it's not an exaggeration to say
29 that we knew very little about Section 702 of FISA

1 before the Snowden disclosures. Obviously part of the
2 point of that litigation was to learn more. But
3 Justice Alito, I think, had no trouble condemning as
4 speculative allegations in that context that I think
5 would be not easily as condemned today.

12:18

6
7 Now, that said, I have used fairly harsh language to
8 describe **Clapper**. I've suggested, I think, that it may
9 have sounded a death knell, I think was the language I
10 used at one point, on standing in this context, that
11 it's made it exceedingly difficult to challenge these
12 programmes. And I think that's true. The key though
13 is can you survive a motion to dismiss? Now, I know
14 Professor -- no it's Mr. Serwin, I believe, who said,
15 quite rightly, that surviving a motion to dismiss is
16 not a remedy. Of course that's true. But what it does
17 two is two things: First, it opens the door to
18 discovery, which gives the plaintiffs an opportunity to
19 actually make the showing that they could not make
20 without notice; second, it puts pressure on the
21 government to settle, right - that once discovery is
22 opened, the government may be in a position where it
23 would rather make the case go away than open its
24 records.

12:18

12:19

12:19

12:19

25
26 And the reason why I say that, Judge, is because I
27 think after Snowden - it's not the Snowden disclosures
28 themselves, but it's all of the materials that have
29 been declassified by the US Government since Snowden -

1 plaintiffs have been able to overcome the rather
2 substantial hurdles that I thought and still think
3 Clapper places in the way of standing. Another way of
4 putting that, Judge, is if there was a brand new secret
5 programme that we knew very little about, I think 12:19
6 Clapper would be a very big problem.

7
8 But in the context of PRISM and Upstream, we now know
9 so much that we see plaintiffs who are able to survive
10 motions to dismiss - in Schuchardt, the Third Circuit 12:20
11 case that we've talked about and in Valdez, which
12 wasn't even about 702.

13
14 So I think Clapper is *wrongly* decided, I don't think it
15 comes out the same way today. But I also think we've 12:20
16 seen more context since then that has made it possible,
17 at least for challenges to PRISM and Upstream, to go
18 forward where they could not have before Snowden.

19 86 Q. **MS. JUSTICE COSTELLO:** When you say you don't see it
20 comes out the same way today, do you think that it's 12:20
21 likely to be revisited and reversed or modified?

22 A. So, you know, our Supreme Court's approach is to never
23 admit that it's reversing itself when possible. I
24 think it's quite possible -- you know, standing is, as
25 I think all the experts have testified, such a 12:20
26 fact-intensive doctrine. I think it would be very easy
27 in a subsequent case, perhaps even the wikimedia case,
28 for the court to "clarify" what it meant in Clapper in
29 a way that is not nearly as hostile to standing. And

1 indeed, I mean, I think one of the points on which the
2 experts all have common cause is that the wikimedia
3 case is an important test of this proposition and that
4 the District Court decision granting a motion to
5 dismiss for lack of standing is simply wrong and ought 12:21
6 to be and hopefully *will* be reversed on appeal.

7 87 Q. **MS. HYLAND:** I'm going to ask you a little bit about
8 wikimedia. But before we do that, can I just ask you,
9 in respect of the knowledge of the programmes that you
10 just referred to, are the PCLOB reports relevant in 12:21
11 that respect?

12 A. Oh, enormously. I mean, I think, you know, I share the
13 concerns that have been raised about the PCLOB
14 currently lacking a quorum. That's a big problem. But
15 the PCLOB reports - I believe Prof. Swire mentioned the 12:21
16 report on Section 702 in particular - along with all of
17 the declassified documents - we've had decisions by the
18 FISA court declassified, we've had minimisation
19 procedures declassified, we've had, you know, a number
20 of other, I think, very helpful entries into 12:21
21 understanding what these programmes do - have really
22 changed the playing field both with regard to what
23 kinds of allegations are plausible in this context and,
24 if we get to that point in discovery, how the state
25 secrets privilege may or may not be a factor in what 12:22
26 the government must turn over.

27 88 Q. Yes. Now, you mentioned wikimedia. I think you're
28 involved in that as a -- in what capacity are you
29 involved in that?

1 A. I signed an amicus brief. Not the same one as
2 Prof. Richards, but they're very much paddling in the
3 same direction. You know, the District Court in the
4 Wikimedia case, I don't mean to be critical - well, or
5 at least overly critical - really, I think, missed the 12:22
6 point of the distinction between a motion to dismiss
7 and summary judgment, in basically arguing that the
8 plaintiff's allegations were too speculative, relying
9 on the language from Clapper. At a motion to dismiss,
10 we assume those allegations are true so long as they 12:22
11 are plausible. And it strikes me, and we argue in our
12 brief, Judge, that in light of what we know about
13 upstream, the plaintiff's allegations in the Wikimedia
14 case are certainly plausible and that the question
15 really is just whether they can show actual or imminent 12:22
16 injury, not concreteness, they should at least have the
17 chance in discovery to do that.

18 89 Q. Yes. Can I just finalise -- sorry, can I finish,
19 therefore, in relation to standing just in respect, I
20 suppose, of the different statutory provisions. And 12:23
21 can you just describe, I suppose, particularly from a
22 concreteness point of view how relevant, if you like,
23 is the statute that a plaintiff is acting under?

24 A. So it can be very relevant and it can be not relevant.
25 And that's one of the -- you know, the experts all 12:23
26 agree that standing is indeterminate. I don't think
27 that means it's incoherent, right, that sometimes
28 Congress will specially empower someone to sue. So in
29 the Lujan case, there was a statute that specifically

1 said any citizen could bring suit, regardless of what
2 happened to them. The statute has some role in
3 defining the injury and necessarily in defining the
4 injury and identifying the class of plaintiffs who are
5 allowed to sue to enforce it.

12:23

6
7 The problem that both Lujan and Spokeo make clear is
8 that Congress can define the injury, Congress cannot
9 allow litigation of a nonexistent injury simply by
10 calling it an injury, right? And so the question when
11 you have a statutory claim is simply whether the injury
12 the statute recognises satisfies the usual Article III
13 requirements. So in the context of the Fair Credit
14 Reporting Act, we see the contrast between the Spokeo
15 case where the court says 'Doesn't look like it, but
16 we'll send it back' and the Horizon case that we were
17 discussing where the court says 'Yes, this is
18 concrete'. The facts are going to matter in the
19 context of the specific statute.

12:24

12:24

20 90 Q. Can I bring you back to the statutes that we're
21 interested in in this context, which is obviously
22 national surveillance? I suppose how do you perceive
23 the position in respect of concreteness, having regard
24 to the statutes we're concerned with in this context?

12:24

25 A. Right. So I mean, again I think if the claim is that
26 an EU citizen believes that their data has wrongly been
27 collected by the US Government from a firm like
28 Facebook, that's concrete. The question is not proving
29 that that harm was concrete, the question is proving

12:24

1 that that harm actually occurred. And so all of the
2 pressure in that context is going to be on the actual
3 or imminent prong of standing doctrine, not the
4 concrete particularised prong.

5 91 Q. Very good. 12:25

6 A. Because I think there's just no dispute in US law that
7 government data collection is a concrete harm whether
8 it's lawful or not.

9 92 Q. Thank you. Now, can I ask you to move to Rule 11? And
10 you know that Mr. Serwin dealt with this in his 12:25
11 memorandums. And I wonder can you identify for the
12 court what is your view about Rule 11 being an
13 impediment, which is what both Mr. Serwin and the DPC
14 concluded?

15 A. So I must confess, I mean, I think I've mentioned my 12:25
16 reactions to the DPC draft decision. I think the two
17 points that I found most surprising about it were the
18 complete non discussion of the APA and the discussion
19 of Rule 11. Rule 11 is something we teach every first
20 year civil procedure student in US courts -- sorry, in 12:25
21 US law school. We're trying to scare them, right?
22 'Don't bring frivolous lawsuits'. In the real world,
23 in litigation against the government, it is just *never*
24 an issue. And when I say it's never an issue, I mean
25 I've never heard it discussed, right, even in the 12:26
26 context of preparatory meetings for bringing cases like
27 the wikimedia case, where I actually did provide some
28 background discussion with ACLU before they filed.
29

1 And the reason for that's fairly simple; Rule 11 is
2 meant to deter frivolous and vexatious litigation. The
3 government would look rather silly, I think, if it
4 argued that claims challenging secret surveillance
5 programmes were frivolous and vexatious, when we know 12:26
6 for a fact that there *have* been secret surveillance
7 programmes, that they've been contested and contestable
8 and so on. And so I just, I did not understand the
9 impulse to spend any time on Rule 11. As I think
10 Mr. Serwin noted, it's never been invoked in a national 12:26
11 surveillance case. I've never even heard it discussed
12 in this context. And frankly, Judge, it wouldn't
13 apply, right? I mean, the key is whether there's some
14 plausible basis for making the claim. You know, if
15 someone like Mr. Schuchardt can make his claim that, 12:27
16 you know, the government - basically a sort of a
17 tinfoil hat kind of claim - without running into Rule
18 11, I think that's a probably pretty good exemplar of
19 how much of a non-issue it is.

20 93 Q. Have you ever seen Rule 11 as an impediment to bringing 12:27
21 claims in this context discussed in law review
22 articles?

23 A. None with which I'm familiar.

24 94 Q. Okay.

25 A. I'm sure there's -- I mean, you know, there's a law 12:27
26 review article for everything. So it wouldn't surprise
27 me if it's somewhere. But, Judge, it's not usually
28 discussed in litigation against the government in
29 general, on the theory that, you know, the government

1 is a fairly responsible actor that's not trying to --
2 there's no reason to, right? It's hard to win costs and
3 attorneys' fees in these cases and so the assumption is
4 that lawyers are going to act responsibly, even on
5 claims that they're not sure are true. 12:27

6 95 Q. Yes. Can I just ask you to finish then, Prof. Vladeck,
7 in relation to the DPC decision. You've heard it
8 described as being fragmented, that the US system has
9 fragmented remedies and I wonder could you respond to
10 that please? 12:28

11 A. I mean, I think "fragmented" is a little pejorative.
12 If I may, we certainly have no overarching, right,
13 dominant one meta remedy. But that's true, Judge, not
14 just in the surveillance context - I mean, it is true
15 in general in our system, that there really is no one 12:28
16 supervening statute that authorises remedies against
17 the federal government.

18
19 That's an interesting contrast to violations of federal
20 law by state officers. So if someone in my state of 12:28
21 Texas breaks federal law, there actually *is* an
22 overarching federal statute that allows for suits
23 against the state officers, it's called section 1983,
24 and it dates back to right after the civil war.

25 There's no federal analogue. And part of that is, I 12:28
26 think, tied to the sovereign immunity tradition that
27 Congress wants to think carefully, right, one case at a
28 time about when it's going to subject the federal
29 government to liability.

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That's why the APA is so important. Because that was Congress' concession, frankly, that they were too - I don't know what the adjective is - that it was just, that they didn't need to do that case by case approach any more for non-damages claims, right? And so the APA is sort of now a gap filler, where previously it was not fragmented, but I think in Prof. Richards' words, sectoral.

12:29

MS. HYLAND: Very good. Prof. Vladeck, thank you for that. I wonder could you answer any questions?

12:29

A. Thank you.

PROF. VLADECK WAS CROSS-EXAMINED BY MR. MURRAY AS FOLLOWS:

12:29

MR. MURRAY: Good afternoon, Professor.

A. Hello.

96 Q. Professor, you told Ms. Hyland at the beginning of your evidence that when you were invited to give evidence on behalf of Facebook you thought that you could be useful by writing a report that "clarified what I saw were the real problems in the remedial regime".

12:29

A. Mm hmm.

97 Q. So could you perhaps, first of all, tell us what you see as the real problems in the remedial regime?

12:29

A. Sure. I think my report alludes to this, but let me be more explicit if I may. I've been very critical, for example, of the USA Freedom Act, the 2015 reform, that

1 in my mind did not go nearly far enough to increase the
2 adversarial litigation in the FISA court. Judge, I
3 think you've heard reference to this amicus who is now
4 in a position to participate. I have been part of the
5 drafting of the initial proposal which was for that 12:30
6 amicus to be a party where he or she would have far
7 more rights to information, to appeal, to participate.
8 And I think it's an unfortunate result that that got
9 watered down.

10
11 I've been critical of some of the litigation in the 12:30
12 context of motions to suppress. So for example,
13 Section 1806, there's some fight, Judge, about which
14 information the lawyer is allowed to access in moving
15 to suppress evidence derived from FISA in a criminal 12:31
16 case. There's a Seventh Circuit case from, I want to
17 say 2014, called Daoud - that's D-A-O-U-D - where I've
18 been critical of the Seventh Circuit for limiting the
19 lawyers' access to information in the context of moving
20 to suppress and leaving it up really to the trial judge 12:31
21 to make that decision.

22
23 And I've been critical more generally of the Oversight
24 Committees. I had a rather unfortunate experience
25 before the House Intelligence Committee in 2013 where I 12:31
26 had the Chair of the committee ask me why no one had
27 complained about the phone records programme and I
28 responded, slightly tongue in cheek, 'No one knew about
29 it'. And his response was 'Obviously your right to

1 privacy is not violated if you don't know about it'. I
2 disagree.

3
4 So I've been unimpressed by those mechanisms. And as I
5 mentioned in response to Ms. Hyland -- and I think, you 12:32
6 know, the Supreme Court in the Clapper case was badly
7 wrong on standing. So in all these respects, I really
8 do think that there ought to be more in the context of
9 remedies for surveillance abuses, Judge. And, you
10 know, if I had my pie in the sky regime, it wouldn't 12:32
11 just be for surveillance, there are actually even more
12 substantial gaps in remedies for all US federal
13 government action. Surveillance, as I think I say in
14 my report, is actually an area where there is unusually
15 robust, or at least relatively robust review. 12:32

16
17 So those are I think, Mr. Murray, some of the places
18 where I would like to see more.

19 98 Q. Well, just to be clear, Professor, what I asked you -
20 and I'm only using *your* language - was the *real* 12:32
21 problems in the remedial regime. So just so we're
22 absolutely clear, you've identified four: USA Freedom
23 Act not going far enough in terms of adversarial
24 litigation in FISA court; issues you have around the
25 conduct of motions to suppress; the Oversight 12:32
26 Committees and your experience with Mike Rogers - who I
27 think is no longer on the --

28 A. Indeed.

29 99 Q. -- committee; and finally, your concerns about the

1 Clapper case. That's four. Are those the real
2 problems?

3 A. To my knowledge - I mean, as compared to obstacles in
4 other fields - yes, those are the four that strike me
5 as the most significant. 12:33

6 100 Q. Those are the real problems, Professor?

7 A. Well, I mean, in my perspective, that's what I would
8 call them. I suspect that others might disagree.

9 101 Q. Okay. And your report then, the report you prepared
10 for the court, is a report which clarifies these real 12:33
11 problems, is that correct?

12 A. Well, I certainly attempted to at least fill out the
13 record. So for example, there's one place in the
14 report - let me just find it, if you'll forgive me?

15 102 Q. Professor, I don't want to stop you at all and won't, 12:33
16 but we know that you refer to these matters in your
17 report, or at least some of them, and we will look at
18 that, but I'm just asking you to confirm that your
19 report does what you told the court you hoped it would
20 do, which is clarify what you saw as the real problems? 12:34

21 A. I believe so. I mean, I think my report alludes to
22 each of those four problems. And indeed, if I may, in
23 footnote 22 I think my report identifies one problem
24 that the DPC draft decision did *not* identify, which was
25 the - Ms. Gorski refers to this as well - the failure 12:34
26 of the government to always provide notice to criminal
27 defendants.

28 103 Q. Yes. Now, of course, as you have alluded to, you have
29 written widely and frequently on difficulties with the

1 remedial regime. And do you think the four real
2 problems you've just identified capture all of the
3 complaints you've made about the remedial regime with
4 which we're concerned in your writings?

5 A. I very much doubt it. 12:34

6 104 Q. No. They don't, as it happens.

7 A. I mean, there are certainly more. But you asked,
8 Mr. Murray, what I thought the real problems were. I
9 took "real" to mean most significant.

10 105 Q. Okay. 12:34

11 A. Those were the four that jumped out to me.

12 106 Q. All right. State secrets privilege, which you have
13 advocated should be abrogated...

14 A. Mm hmm.

15 107 Q. ... that didn't feature in your list of real problems. 12:35

16 A. Well, I mean, I do think it's an issue. It's addressed
17 in my report, Judge. I actually can claim at least
18 some credit for the argument that the ACLU has
19 successfully used in the Jewel case that FISA, the
20 litigation FISA authorises would make little sense if 12:35
21 it were subject to the state secrets privilege, right,
22 that FISA actually may, in some circumstances, *abrogate*
23 the state secrets privilege. It's certainly an issue,
24 Mr. Murray, I just think that it's possible in this
25 context that it's not nearly as big of an issue as 12:35
26 Ms. Gorski, for example, makes it out to be. And I
27 would note, I mean, the DPC draft didn't even refer to
28 the state secrets privilege.

29 108 Q. And when you say it's addressed in your report, is

1 there criticism in your report of the state secrets
2 privilege or a record that you believe that should be
3 abolished and, as you said in your writings, replaced
4 with something more tailored? Is that in the report?

5 A. I don't believe I said that literally in those words. 12:35

6 109 Q. Mm hmm.

7 A. I do believe that I refer in paragraph 101 and 102 and
8 footnote 31 to the argument that I've helped to advance
9 about the abrogation of the privilege in FISA cases.

10 110 Q. And heightened pleading standards, Ashcroft -v- Iqbal, 12:36
11 is that a real problem or an unreal problem?

12 A. It's certainly a real problem in general litigation,
13 Judge. I don't think it's a problem in the
14 surveillance context especially. Because again I think
15 this is where the Snowden disclosures -- I don't mean 12:36
16 to use shorthand; this is where the declassifications
17 *after* the disclosures have been such a game changer.
18 The Iqbal case is a 2009 Supreme Court case about
19 requiring allegations and a complaint to be plausible
20 in order to survive a motion to dismiss - I can't just 12:36
21 throw anything I want onto a paper and have the court
22 assume them to be true, they have to be plausible.

23

24 Mr. Murray, my view is that challenges to programmes
25 like PRISM and Upstream are inherently plausible based 12:37
26 on these declassifications. And I think it's telling
27 that we *haven't* seen, in, for example, the wikimedia
28 case -- well, wikimedia sort of blurs this distinction.
29 But we haven't seen in, for example, the Schuchardt and

1 Valdez cases the government arguing and the courts
2 agreeing with implausibility.

3 111 Q. So Ashcroft -v- Iqbal is not a real problem?
4 A. In the specific context of challenges to PRISM and
5 Upstream, I don't believe it is. 12:37

6 112 Q. Sovereign immunity, official immunity, are they real
7 problems?
8 A. Well, I mean, we've discussed this. I think that
9 sovereign immunity is a nuisance that can be litigated
10 around because of the points that Ms. Hyland and I 12:37
11 averted to on direct, that is to say sovereign immunity
12 is, Judge, shaping much of this jurisprudence, it is
13 producing effects in which causes of action are pursued
14 and why. But I mean, I think as the ACLU -v- Clapper
15 case quite powerfully shows, when you plead the right 12:37
16 claim in the right way, it is not an obstacle.

17 113 Q. So sovereign immunity and official immunity, something
18 else which we see in your literature, those are not
19 real problems either, is that right?
20 A. We haven't seen, Mr. Murray, so far as I *know*, we have 12:38
21 not seen a post-9/11 surveillance case with meaningful
22 litigation of official immunity. So I think it would
23 be difficult to say something that hasn't been fully
24 litigated in this context is a problem.

25 114 Q. Take this statement: "*One of the most troubling* 12:38
26 *features of contemporary US counterterrorism policies*
27 *has been the near total absence of meaningful judicial*
28 *review*".
29 A. Sounds familiar.

1 115 Q. well, does that sound familiar because *you* said it?
2 A. Indeed. And I've written this, Judge. I mean, I've
3 been very critical of how difficult it has been for
4 plaintiffs in all contexts to obtain meaningful
5 judicial review of the merits of these programmes. And 12:38
6 I don't retract that statement, I don't disagree with
7 that statement. The point, I think, is just that the
8 surveillance context may be unique, in that we have
9 both statutes where Congress has authorised suits,
10 where in other contexts it has not. There is no, for 12:39
11 example, 2712 or 1810 for targeted killing, right? And
12 we have more declassification in the context of PRISM
13 and Upstream than we had in other contexts. So,
14 Mr. Murray, I stand by that statement, I just think
15 that surveillance may not be quite as loose -- 12:39
16 116 Q. I see. It doesn't apply to surveillance, is that
17 right?
18 A. I didn't say it doesn't apply. I just think that there
19 are ways around those obstacles in this context that
20 the DPC draft decision, frankly, Judge, I think just 12:39
21 undervalued.
22 117 Q. well, let's just stay with the question please,
23 Professor. "*One of the most troubling features of*
24 *contemporary US counterterrorism policies has been the*
25 *near total absence of meaningful judicial review*"; does 12:39
26 that or does that not, in your opinion, apply to the
27 question of national security surveillance?
28 A. So I mean, Judge, if you'll forgive me for trying to
29 add nuance to my answer, I think it has been a

1 troubling feature. But as I said in direct, on the
2 Mohamud case, in the directives case in the FISA court
3 of review in 2008, we've had merits decisions on these
4 programmes in ways that we've not seen similar
5 decisions in other counterterrorism policies. And so, 12:40
6 Mr. Murray, I do believe that some of the obstacles are
7 also present and a serious problem in the surveillance
8 context. I just remain of the view that the DPC draft
9 decision overstates the categoricalness of these
10 remedies in this -- of these obstacles in this context. 12:40

11 118 Q. I understand that, Professor. You've said it a number
12 of times. Would you please answer my question; is the
13 statement which I've just read to you - and I will read
14 it to you *again* if you would like - is it or is it not
15 applicable to national security motivated surveillance? 12:40

16 A. I mean, think it's -- I can't answer that yes or no,
17 Judge. Because I think it's applicable to a degree.
18 But to say yes would give the wrong impression, the
19 exact wrong impression that I think the DPC draft
20 decision gave. 12:40

21 119 Q. Well, it is a statement which *you* made, confident, I'm
22 sure, that you could make it in the general way you did
23 about contemporary US counterterrorism policies. So
24 why can't you tell us whether it does or does not apply
25 to national security, or to surveillance for purposes 12:41
26 of national security? I mean, if you're saying you have
27 to be more nuanced than you're saying it *doesn't* apply.

28 A. I'm saying that I think it doesn't apply to the same
29 general degree.

1 120 Q. Okay. It applies to lesser degree?
2 A. Yes, that's --
3 121 Q. Well, what degrees are there around the phrase "near
4 total absence of meaningful judicial review"?
5 A. I think we have counter examples that prove that it 12:41
6 *hasn't* been near total in the context of surveillance.
7 122 Q. I see. So it's *not* true in the context of surveillance
8 for the purpose of national security?
9 A. I mean, I just, I think it would deprive my answer of
10 nuance to give a yes or no answer here. I mean, I 12:41
11 think the answer is, simply put, that there have been
12 less complete obstacles in this context. And, Judge, I
13 mean, this is not an opinion question, frankly, I think
14 we have examples in these decisions that have reached,
15 on the merits, the legality of these programmes that 12:42
16 have no analogue for most of the other controversial US
17 post-9/11 counterterrorism programmes.
18 123 Q. You referred, again in response to a question from
19 Ms. Hyland, to you sending your draft report to Gibson
20 Dunn and their coming back to you with comments. 12:42
21 A. I did.
22 124 Q. Yeah. We received correspondence from Mason Hayes and
23 Curran late last night, Professor, which strongly
24 suggests - and I'm sure I'll be contradicted if I'm
25 wrong - that your report was secretly sent in draft 12:42
26 form to the US Government for comment. Were you aware
27 of that?
28 A. I was not.
29 125 Q. You were not aware of that?

1 A. No.

2 126 Q. Until I just told you that there now?

3 A. I'm sorry, let me clarify, Judge. I was not aware at
4 the time I filed my report. I became aware, I believe,
5 last Friday, in response to the exchange arising out of 12:42
6 Mr. Swire's statement that my statement had been
7 submitted. But I did not know until that moment.

8 127 Q. Yes, sorry, you knew it when you answered Ms. Hyland's
9 question approximately an hour and a half ago?

10 A. I did. 12:43

11 128 Q. Yes. How did you find out?

12 A. I think it just came up in conversation, Judge, with
13 counsel after court last week.

14 129 Q. It came up in conversation? 'God, it's very cold out.
15 By the way, your report was secretly sent to the US 12:43
16 Government in draft form for their comments and they
17 sent them to Gibson Dunn, who passed them on to you but
18 didn't tell you where they came from', is that the --

19 A. That's not quite how it was put, Judge. I was not --
20 as best as I can recall, the conversation went 12:43
21 something like this: Someone on the team mentioned that
22 the report, that *my* report had also been sent to the
23 government for comments. I was surprised to learn
24 that; it had never been made -- brought to my
25 knowledge. Frankly though, that didn't change anything 12:43
26 from my perspective, because I still had control of my
27 report. I looked at the, I believe it was 12
28 suggestions that I received back from what I believed
29 to be Gibson Dunn. Almost all of them, Judge, were

1 simply to amplify points or correct imprecisions in
2 language, none of them went to any of the conclusions.
3 And frankly, Mr. Murray, if I had known that I'd
4 received comments from the United States Government, I
5 would've mentioned it in my report. But I'm not sure 12:44
6 it changes anything.

7 130 Q. I'm just wondering why you didn't mention it when you
8 answered Ms. Hyland's question?

9 A. Her question was whether I had assistance with my
10 report. I did not. 12:44

11 131 Q. I see. And you didn't think that was something you
12 needed to disclose?

13 A. I mean, I'm happy to disclose it now.

14 132 Q. Well...

15 **MS. HYLAND:** Judge, I wonder could I just object to 12:44
16 this line of questioning. I didn't identify that as a
17 question because I didn't believe it was relevant. And
18 I don't believe that -- there's a letter, there's a
19 detailed response letter to Philip Lee which perhaps
20 the court should see if this is a line that Mr. Murray 12:44
21 wishes to embark on.

22 133 Q. **MR. MURRAY:** we'll come back to that issue, Professor.

23 A. Sure.

24 134 Q. Now, in your report you say that there are gaps and
25 defects in contemporary US doctrine when it comes to 12:44
26 judicial review of US counterterrorism policies. Do
27 you want to add any gaps or defects to the four that
28 you identified when I asked you a few moments ago about
29 the real problems?

1 A. Well, I believe my report identifies more than four,
2 right? I mean, I think there are other gaps and defects
3 that arise from the nature of the oversight function.
4 We've, Mr. Murray, we've discussed obviously the
5 Privacy and Civil Liberties Oversight Board currently 12:45
6 lacking a quorum. Judge, that, to me, is a problem. I
7 wouldn't identify it as on a par with the four
8 principal obstacles I identified, but it certainly is
9 imperfect from my perspective. You know, I'm sure if I
10 spent all day thinking about it, I could come up with 12:45
11 an exhaustive list, but I don't mean to say that those
12 four are exclusive, Mr. Murray, only that those are the
13 principal and to my mind, Judge, most significant
14 obstacles.

15 135 Q. All right. And in relation to some of the reservations 12:45
16 that you very fairly put into your report, Professor, I
17 just want to remind you of those. You refer to
18 standing as an obstacle. Paragraph 13 of your report.
19 Is that how you describe it?

20 A. I believe I may have said *substantial* obstacle. 12:46

21 136 Q. Mm hmm.

22 A. Let me just pull it up if you don't mind? Mm hmm, I'm
23 there, paragraph 13.

24 137 Q. And what do you describe it as there?

25 A. "*Although standing doctrine has been an obstacle to 12:46*
26 some efforts to obtain judicial redress... it is not
27 nearly as comprehensive a constraint as the DPC Draft
28 Decision suggests".

29 138 Q. But you would describe it, because you volunteered it a

1 moment ago, as a substantial obstacle, wouldn't you.

2 A. I would. And I have.

3 139 Q. Yes. In fact you've described it as setting an
4 extremely high bar, isn't that a phrase you used, not
5 in your report, but elsewhere? 12:46

6 A. I believe I've used the phrase "extremely high bar".
7 And indeed, Judge, before the Snowden disclosures, I
8 believe I even used phrase that the coffin was slamming
9 shut. Because it struck me, at least at the time of
10 the **Clapper** decision, that the Supreme Court was making 12:47
11 it very difficult for plaintiffs to bring these claims.
12 Given what we now know, I think that those very well
13 were exaggerations, although still obviously a
14 substantial obstacle.

15 140 Q. What you said was: 12:47

16
17 *"The coffin is slamming shut on the ability of private
18 citizens and civil liberties groups to challenge
19 government counterterrorism policies, with a possible
20 exception of Guantanamo Bay".* 12:47

21 A. Mm hmm, that sounds familiar. And, Judge, I believe
22 that quote was given the day or the day after the
23 Supreme Court's decision in the **Clapper** case in 2013.

24 141 Q. You say in your report, page 31, footnote 29 the courts
25 have made it too difficult for plaintiffs to challenge 12:47
26 post-September 11th counterterrorism and national
27 security policies. That's your view.

28 A. It is. And if I may, one of the examples I use in my
29 report, Judge, is in the targeted killing context; even

1 where the plaintiff is a US citizen, courts have been
2 very reluctant to allow claims that targeted killing,
3 for example, was illegal or unconstitutional to go
4 forward. The same has been true of torture claims or
5 other forms of prisoner abuse. And I think that the 12:48
6 contrast between those contexts, where there really has
7 been virtually no litigation of the merits whatsoever
8 and this context, where there has been, I think we can
9 all agree, *more* litigation of the merits is useful.

10 142 Q. You've a concern about the dearth of legal remedies for 12:48
11 the abuses of Executive Orders?

12 A. Mm hmm.

13 143 Q. 12333.

14 A. I do. So I think you've heard both Prof. Richards and
15 Prof. Swire talk about the difficulty of suing to 12:48
16 enforce Executive Orders. Part of that, Judge, is
17 because the nature of an Executive Order is that it's
18 not a binding external document. It binds the
19 executive branch, but then the question is: How do
20 executive branch actors exercise that authority? I 12:48
21 think it would be very hard, Mr. Murray, to challenge
22 surveillance simply on the ground that it violates
23 Executive Order 12333.

24 144 Q. You say at paragraph 98 that there are shortcomings in
25 the existing US legal regime with regard to redress of 12:49
26 unlawful government data collection.

27 A. I do.

28 145 Q. Collection.

29 A. Mm hmm.

1 146 Q. And what are those shortcomings?
2 A. The same that I have adverted to; the problems with the
3 internal review in the FISA court, the, to me, real
4 problems with the Oversight Committees and how little
5 oversight I think they actually perform, the standing 12:49
6 obstacles that we've discussed and the suppression
7 issue that I rose in the -- sorry, raised in the
8 context of Section 1806.

9 147 Q. There are -- you say in your writings:
10
11 *"victims of governmental overreaching in the conduct of*
12 *national security policy will primarily have to turn to*
13 *the political branches for redress, since retrospective*
14 *judicial remedies will likely be unavailing".*

15 A. Um mum. 12:50

16 148 Q. That's your view?
17 A. It *is* my view. And, Judge, part of the reason for that
18 - if I can be allowed just a brief moment? We have
19 something in American law called the **Bivens** doctrine -
20 B-I-V-E-N-S - this is a 1971 Supreme Court case that 12:50
21 allows for suits directly under the Constitution for
22 damages when a federal officer is alleged to have
23 violated the Constitution. Judge, the Supreme Court
24 has been very hostile to the recognition of new **Bivens**
25 claims in the last, frankly, 30 years. The **Hernandez** 12:50
26 case in which I'm co-counsel and which I alluded to
27 before, one the questions raised there, Judge, is
28 actually whether there should be a **Bivens** claim in that
29 context. So when I talk about the difficulty of

1 obtaining retrospective relief, that stems largely, not
2 entirely, but largely from the retrenchment that we've
3 seen of the Bivens remedy, which of course is also a
4 problem in the context of surveillance if a US citizen
5 is suing directly under the Fourth Amendment for
6 damages. 12:50

7 149 Q. But does it not, Professor, go a little bit further?
8 Because I had understood you to write that Bivens had
9 built into it an exception which arose when there was
10 something in the nature of special circumstances or 12:51
11 exceptional circumstances and that --

12 A. Mm hmm. "Special factors" I believe is the court's
13 term.

14 150 Q. Thank you. And that your concern was that a number of
15 the circuits had identified national security as such a 12:51
16 special factor, isn't that...

17 A. It is. And indeed, I mean, Judge, there's another case
18 before the Supreme Court this term where the government
19 has also invoked national security as a special factor.
20 This is the Abbasi case - A-B-B-A - oh, gosh, I don't 12:51
21 remember if it's one S or two, it might be two Ss - I.
22 Bivens, as I think I mentioned in my report, is a
23 problem insofar as it's caused difficulties for
24 retrospective relief for damages.

25 12:51
26 The reason why I think it's not as large a problem in
27 the context of surveillance, Judge, is twofold. First,
28 unlike, in all of these other national security
29 contexts, there are statutes in the surveillance

1 context that do specifically authorise damages. So
2 we've talked about 2712, we've talked about 1810.
3 Those don't have analogues in the context of detainee
4 treatment, in the context of military detention, in the
5 context of targeted killing. Second, the problems with **Bivens** 12:52
6 are, if I can say this, hardly unique to EU
7 citizens, right? That is to say, even those with
8 unquestionable well established Fourth Amendment rights
9 have difficulty with **Bivens**. And so if the question is
10 simply whether the remedies are uniquely inaccessible 12:52
11 to EU citizens, the irony of my view is that no,
12 they're inaccessible to everyone in this context,
13 right, and that the real question is whether there are
14 better statutory remedies in the surveillance space.
15 My view is that there are. 12:52

16 151 Q. Yeah. And your concern in making the observations we
17 have just discussed, Professor, is with obstacles to,
18 inhibitions upon, restrictions with judicial remedies,
19 isn't that right?

20 A. Principally, yes. I mean, I have also commented, 12:53
21 Judge, as I've mentioned, on my own perception of the
22 inadequacies of the legislative oversight process. But
23 my real expertise, Judge, is the federal courts. And
24 so that's why the principal focus of my report and of
25 my work has been in that context. 12:53

26 152 Q. Can you look at your report in that regard? Because I
27 think it's at paragraph 73 that you talk about some of
28 this oversight.

29 A. Mm hmm.

1 153 Q. I want to read this:

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You see that?

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A. I do.

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154 Q. And you agree with her.

29

A. So I've written -- I've been critical of that exact

1 statement, Mr. Murray, that I think that that statement
2 was divorced from context. I agree that I believe the
3 US oversight regime is, to quote Carrie Cordero, the
4 most oversight laden foreign intelligence activity in
5 the history of the planet. Judge, where I disagree is 12:54
6 I don't think it's enough. Like, that is to say, I
7 think it's more than most other intelligence services
8 have been subjected to. I just don't think that it's
9 what I would like if I were in charge.

10 155 Q. Well now, you have been critical about that very 12:54
11 statement. In fact you quote it in one of your pieces
12 and you say:
13

14 *"The oversight these defenders trumpet includes the*
15 *intelligence agency's own internal checks, the 12:55*
16 *one-sided non-adversarial and largely procedural review*
17 *of such programmes before the secretive foreign*
18 *intelligence service court".*

19 A. Idea.

20 156 Q. Yeah. 12:55

21 A. So again --

22 157 Q. In fact we'll just hand up your discussion of this
23 (Same Handed).

24 A. There's my Friend Mike Rogers.

25 158 Q. It is. *"The best evidence yet that government 12:55*
26 *surveillance oversight is nowhere near adequate."* You
27 see that?

28 A. I do.

29 159 Q. And you quote the quote that you have in your report

1 and you proceed with some flourish, Professor, to
2 describe -- well, to present it in, would you accept,
3 pejorative terms: "*The behind closed doors*" --
4 A. Yeah.
5 160 Q. -- "*demands of the Congressional intelligence* 12:56
6 *committees. And as those who support the government's*
7 *surveillance activities are keen to point out, the*
8 *intelligence agencies check each and every one of those*
9 *boxes in order to, amongst other things, collect all of*
10 *our telephony meta-data, spy on foreign governments,* 12:56
11 *tack into the backbone of electronic communications*
12 *service providers like Google/Facebook. Not only are*
13 *these checks and balances portrayed as rigorous, but*
14 *the current proposals for additional checks and*
15 *balances involving outside, or at least disinterested* 12:56
16 *actors are dismissed a simply unnecessary."*
17
18 And you proceed to recount your experience with
19 Mr. Rogers, who couldn't understand how somebody's
20 privacy was violated if they didn't know about it, 12:56
21 isn't that right?
22 A. Indeed.
23 161 Q. Yeah. Now --
24 A. And -- I'm sorry.
25 162 Q. No, no, please... You see, Professor, as we read 12:56
26 paragraph 73 of your report where you quote Ms. Cordero
27 with apparent approval, we see none of these
28 qualifications which you are liberal with in your
29 publication. why is that?

1 A. Well, I mean, so two points if I may, Judge. The first
2 is I believe that elsewhere in the report I express the
3 very concerns that I make, frankly, to use Mr. Murray's
4 term, with more flourish in the piece he's passed up.
5 And so I don't think that the report is in some way not 12:57
6 identifying these concerns. But the second is again,
7 Mr. Murray, my charge, my instructions were to react to
8 the DPC draft decision. And whether one believes, as
9 apparently Ms. Cordero does, that these oversight
10 mechanisms are adequate, or as I did that they are not, 12:57
11 they at least deserve to be described correctly. And
12 so, you know, my own sense is that it comes through in
13 the rest of my report why I think that these oversight
14 mechanisms are inadequate.

15
16 Judge, I've been frank about why I don't have a lot of
17 faith in the Intelligence Committees, I've been frank
18 about why I was disappointed about the USA Freedom Act
19 and why it didn't go far enough. You know, I think my
20 popular writing perhaps uses a little more flourish 12:57
21 than my formal report to this court did.

22 163 Q. And where do you tell the court that actually you
23 disagree with what Ms. Cordero says there?

24 A. I would think, Mr. Murray, it's implied in all of the
25 places in which I point out my objections to these 12:58
26 regimes.

27 164 Q. Sorry, you're talking here about the specific situation
28 of House and Senate Intelligence and Judiciary
29 Committees, which we've heard Prof. Swire present to

1 the court as a part of his remedial framework. You're
2 quoting Ms. Cordero, who was a former government
3 official, with this apparently positive description of
4 the oversight structures, but actually you don't agree
5 with it at all and have published disagreement with it, 12:58
6 but you don't advise us that in your report, isn't that
7 right?

8 A. Well, I don't think that's a fair characterisation. I
9 agree with the quantitative assessment that there are
10 more mechanisms in place than what we know to be true 12:58
11 for just about all other foreign intelligence
12 surveillance operations in the world. I disagree with
13 the implicit qualitative assessment that she offers. I
14 don't take a position on that in the paragraph you
15 mentioned, Mr. Murray, and I think elsewhere in the 12:58
16 report I explain exactly what my concerns are about the
17 inadequacies, as Mr. Murray, I think, has quite
18 artfully demonstrated in the existing regime.

19 165 Q. Well, Professor, someone at some stage told you what
20 your obligations to the court were as an expert 12:59
21 witness, didn't they?

22 A. Indeed.

23 166 Q. Yeah. who told you that?

24 A. It was in my instruction letter from Gibson Dunn.

25 167 Q. Okay. And you understood that you're not here as an 12:59
26 advocate of any kind?

27 A. I do.

28 168 Q. You understood that you've to present the court with an
29 independent and objective assessment of all of the

1 facts upon which you rely?

2 A. I do.

3 169 Q. Yeah. And do you think you comply with that, Sir, by
4 quoting somebody and telling us now that really you
5 disagree with what you describe as the implicit 12:59
6 qualitative assessment but not recording that
7 disagreement in your report?

8 A. I mean, so, Mr. Murray, I think that the disagreement
9 with that qualitative assessment is apparent on the
10 face of my report. That I did not include it as a 12:59
11 sentence at the end of paragraph 75 or whatever it is
12 may be a flaw in drafting. But I don't think my report
13 hides the ball on this point, Judge.

14 170 Q. Very good.

15 **MS. JUSTICE COSTELLO:** we'll take it up at two o'clock. 13:00

16 **MR. MURRAY:** Thank you, Judge.

17 A. Thank you.

18

19

20 (LUNCHEON ADJOURNMENT) 13:00

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1 THE HEARING RESUMED AFTER THE LUNCHEON ADJOURNMENT AS
2 FOLLOWS

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

5 **REGISTRAR:** In the matter of Data Protection 14:03
6 Commissioner -v- Facebook Ireland Ltd. and another.

7 **MS. HYLAND:** Yes, Prof. Vladeck, please.
8

9 CONTINUATION OF CROSS-EXAMINATION OF PROF. VLADECK BY
10 MR. MURRAY 14:03

11
12 171 Q. **MR. MURRAY:** So, Professor, good afternoon. You were
13 discussing your lack of faith in the intelligence
14 committee and can I ask you just to turn to your report
15 at paragraph 78, please? 14:04

16 A. Yeah, I'm there.

17 172 Q. So: "*The collection authorities described above, you*
18 *say, are subject to a series of significant*
19 *constraints*", you see that?

20 A. I do. 14:04

21 173 Q. Yes. And over the page then you list them: "*Legal*
22 *constraints on collection; legal constraints on use and*
23 *retention; robust internal constraints on access to the*
24 *data; internal oversight through the Inspector General*
25 *and the PCLO, external oversight by the PCLOB; external* 14:04
26 *oversight by the House and Senate intelligence and*
27 *Judiciary Committees; and ex ante and ongoing judicial*
28 *supervision through judicial review.*"
29

1 And you say in the next paragraph: "*In addition to the*
2 *substantial oversight and accountability mechanisms*
3 *described above, US law provides an array of remedies.*"
4

5 And you said, Professor, after - sorry, just before 14:05
6 lunch - that you thought elsewhere in the report we
7 could see what your concerns were about the
8 intelligence committees, can you help us where we find
9 that in your report?

10 A. So I went back and looked, I actually don't 14:05
11 specifically address that in the report.

12 174 Q. No.

13 A. But I should clarify, Mr. Murray. So my instructions,
14 Judge, as I think I mentioned earlier, were not
15 necessarily, indeed were not at all to address the 14:05
16 broader adequacy question of Article 47. That wouldn't
17 be within my purview, I wouldn't feel remotely
18 competent as an expert to assess that. My report
19 I think is quite clearly focussed on eight critiques of
20 the DPC Draft Decision. My understanding of the DPC 14:05
21 Draft Decision is that it does not discuss these
22 intelligence committees as an oversight mechanism at
23 all. And so I was simply trying to describe their
24 existence. I suspect we can disagree about the
25 adjectives used to describe the robustness of the 14:05
26 oversight, but the critiques I offer of the DPC draft
27 really had nothing to do with the oversight provided by
28 the Congressional committees. I was much more focussed
29 on the regime of legal remedies.

1 175 Q. And what disagreements is between us about the
2 adjectives that you use?

3 A. I mean I think, Mr. Murray, I mean we actually probably
4 don't disagree.

5 176 Q. No, that's the point. 14:06

6 A. Indeed.

7 177 Q. That you use a - excuse me - you use words and
8 descriptors in your report which don't reflect your
9 view and, contrary to the *unequivocal* statement that
10 you made to the court before lunch that it was clear 14:06
11 from the rest of your report that you had these
12 reservations, it's not in your report *at all*; isn't
13 that correct?

14 A. At least on the point of the intelligence committees,
15 it clearly was something I should have said more 14:06
16 clearly and did not. But, Judge, I would just say it
17 was a difficult balance to strike in writing this
18 report between being exhaustive and being accessible.
19 I didn't think it was appropriate to comprehensively
20 set out every single line of argument about every 14:06
21 single one of the authorities discussed.

22

23 Frankly I viewed the paragraphs leading up through
24 paragraph 78 as more *descriptive* than analytical and
25 conclusory, and so I perhaps was a bit too quick in my 14:07
26 description.

27 178 Q. Well, sorry, what you said, and whether you think you
28 were too quick or not, you said to the court about your
29 own report: "*It comes through in the rest of my report*

1 *why I think these oversight mechanisms are inadequate."*
2 That does not come through in the rest of your report
3 *at all?*
4 A. I would dispute the characterisation "*at all*", Judge.
5 I think that there are seven or eight different places 14:07
6 in the report where I refer to my own reservations
7 about the existing scheme. I think Mr. Murray is
8 correct that I do not in the report expressly flag my
9 concerns about the intelligence committees.
10 179 Q. And where do you impliedly flag your concerns about the 14:07
11 intelligence committees?
12 A. Well I think I refer in numerous places, Mr. Murray, to
13 being critical of the overall holistic régime.
14 180 Q. Yes. You see the problem, Prof. Vladeck. You're here 14:08
15 as an independent expert witness, we're all, the court
16 in particular, are relying upon you and relying upon
17 you to make *full* disclosure of your position and of the
18 evidence that you are relying on; isn't that right, you
19 know that?
20 A. Yes. 14:08
21 181 Q. You understand that?
22 A. I do.
23 182 Q. And you include a gushing account in your report of the 14:08
24 oversight achieved through, inter alia, the
25 intelligence committees; you have a quotation without
26 *apparent* approval about the most oversight laden
27 foreign intelligence activity in the history of the
28 *planet*, no less; this is what we're told when we see
29 your report, you the independent expert, but it turns

1 out that's not what you think at all. In fact you, or
2 at least Steve in his article in Slate, proceeds to
3 criticise this very statement which you rely upon in
4 your report. We understand you saying that you didn't
5 want to burden us with undue detail, it doesn't require 14:08
6 much in a sentence to say "*but I don't agree with*
7 *this*"?

8 A. Well I guess I did not take it, Judge, frankly, as my
9 assignment, it was not part of my instructions to react
10 in detail to every single feature of US surveillance 14:09
11 law. And so, you know, if I had to do it again
12 I certainly probably would have made more clear to
13 Mr. Murray and to the court that I had concerns about
14 the oversight process. I believe I alluded to them on
15 direct testimony as well. And so I just think that the 14:09
16 focus of my report was, correctly, on what I was
17 instructed to cover which was the perceived
18 deficiencies on my part in the DPC Draft Decision.

19 183 Q. Well then why were these in your report at all?

20 A. I was, I thought it would be helpful, Judge, to at 14:09
21 least describe what I saw as the state of the law, that
22 if I jumped right to paragraph 79 the report would not
23 make a lot of sense.

24 184 Q. But excuse me, Professor, that is not the way these are
25 introduced, look at paragraph 78 of your report please: 14:09
26 "*The collection authorities described above are subject*
27 *to a series of significant constraints*"?

28 A. Mm hmm.

29 185 Q. "*Including the intelligence committee*", which

1 I understand you to say you don't think is a
2 significant constraint at all?

3 A. Well, so I think, if I had to do it again I would have
4 flagged that there is disagreement about how
5 significant the intelligence committees as such are, 14:10
6 Judge. But I do think that that paragraph lists
7 I think it's seven different examples of places where
8 there are at least some mechanisms. And, frankly,
9 Judge, I think where you stand on the utility of the
10 intelligence committees is a function of where you sit. 14:10
11 Prof. Swire and I ourselves have very different views
12 on just how efficacious they are. My views I think
13 have been made clear. I'm not especially optimistic
14 that they are an adequate check on their own, but
15 I think the question is whether more holistically, 14:10
16 right, it's right to at least include them in a
17 description of the régime and the DPC Draft Decision
18 does not even do that.

19

20 So I think it's, Mr. Murray is exactly right, that 14:10
21 I should have more forthright, that I've been critical
22 of that one thread. I saw the purpose of my report
23 differently.

24 186 Q. No, no, I am sorry, Professor: Are you or are you not
25 in your report describing the intelligence committee as 14:11
26 a significant *constraint*?

27 A. I believe I am referring to a list of seven
28 constraints.

29 187 Q. Yes.

1 A. And saying that together, Judge, they are significant.

2 188 Q. Oh, I don't think that's what it says at all: "*The*
3 *collection authorities described above are subject to a*
4 *series of significant constraints*", not a series of
5 constraints which together are significant, a series of 14:11
6 significant constraints?

7 A. That's true. But if you look at, Judge, paragraphs,
8 subparagraph (f), right, I refer to both the
9 intelligence and the judiciary committees. It is my
10 experience, Judge, that, contra the intelligence 14:11
11 committees, the judiciary committees have been far more
12 robust in pushing back against some of these
13 programmes, that the judiciary committees actually
14 spearheaded what became the USA Freedom Act, which
15 elsewhere in my report I suggest didn't go as far as 14:11
16 I would have liked to see it.

17

18 So I don't think it is incorrect to say that that has
19 been a significant constraint. I think the
20 intelligence committee has not been as significant as 14:12
21 it is often portrayed as being.

22 189 Q. Is there any other part of your report on reflection
23 that you have decided could have addressed its subject
24 matter more fulsomely?

25 A. I mean I think it's a difficult balance, Judge, but 14:12
26 nothing that comes to mind immediately.

27 190 Q. I see. Well what about the PCLOB? You sent a tweet on
28 21st December last talking about the impending demise
29 of the PCLOB, do you recall that tweet?

1 A. I do.

2 191 Q. Okay. So when you spoke about the impending demise of
3 the PCLOB last December, 21st December to be precise,
4 what were you referring to?

5 A. So I think, Judge, in my direct testimony this morning 14:12
6 I referred to the fact that at the moment the PCLOB
7 doesn't have a quorum. And whereas I had been
8 optimistic at the time I submitted my report, which, if
9 I recall, was about a week before the presidential
10 election in the United States, that the election would 14:12
11 go a particular way and that President Clinton would
12 see fit to re-appoint members of the PCLOB. One of the
13 many, I think, consequences of the result of the
14 election is that I don't imagine President Trump is
15 going to be in any great hurry to fill the vacancies on 14:13
16 that board, which is, I believe, what led me to send
17 that tweet.

18 192 Q. I see. So your position now in terms of the PCLOB to
19 the court is what?

20 A. Well, as I think I said this morning, Judge, I think 14:13
21 the PCLOB can be and has been an important part of this
22 process, but I think I was quite candid that the
23 current lack of a quorum is a problem and is one that
24 I don't harbour any great illusion is going to be
25 resolved overnight. 14:13

26 193 Q. **MS. JUSTICE COSTELLO:** Are you saying its effectiveness
27 can be altered depending on whose in the white House?

28 A. Well, or at the very least depending upon the
29 confirmation process in which the President obviously

1 plays a significant role. I believe that there are
2 currently four of the five seats on that board that are
3 open, and obviously it takes a nomination by the
4 President and confirmation by the Senate to fill those
5 seats. I wish that it were more of a priority for this 14:14
6 White House to fill those seats, but I also recognise
7 that it has not been thus far.

8 194 Q. Yes. Prof. Swire, and I'll be corrected if I'm wrong,
9 referred to six to eight months to fill, do you from
10 your experience believe that the PCLOB's vacancies will 14:14
11 be filled in six to eight months?

12 A. I wouldn't want to guess, Judge. It's hard. The only
13 data point we have is how quickly this new President
14 has been filling vacancies which is to say not quickly.
15 I believe that only about 5%, if I remember the news 14:14
16 stories correctly, of open federal vacancies have been
17 even had someone nominated for them so far. So I don't
18 know the basis for six to eight months, I would be
19 surprised if it was sooner than that for sure.

20 195 Q. Yes. Well do you think it will be done within six to 14:14
21 eight months as the man who sent the tweet referring to
22 its impending demise?

23 A. I mean again I think it depends on how much President
24 Trump shows an interest in restaffing the PCLOB and
25 that's the concern that led me to send that tweet. 14:15

26 196 Q. Well you have been watching and writing about the Trump
27 Administration, Professor, so from your vantage point
28 as someone expert in this field, observing what is
29 happening in matters allied to it, could you share with

1 the court your best prediction as to what's going to
2 happen to the PCLOB, please?

3 A. It certainly seems to me, Judge, that it's not likely
4 to be a priority for the Trump Administration. I think
5 the real question, and this is where I just could only 14:15
6 speculate, is how staffing the PCLOB dovetails with the
7 reform conversation that now must begin in Congress
8 about Section 702. Section 702, as I believe you know,
9 is set to expire on December 31st of this year. That
10 means that one way or the other there has to be a 14:15
11 legislative conversation about the reauthorisation of
12 that programme.

13
14 I would imagine, Judge, that a discussion of the role
15 of the PCLOB will be part of that discussion. You 14:15
16 know, it's hard to predict how that's going to play
17 out, and I don't feel confident enough in my assessment
18 of the politics on Capitol Hill right now. I am
19 cautiously optimistic that concerns about this
20 President might lead Congress to be a little more 14:16
21 proactive, but so far we haven't seen any evidence to
22 support that.

23 197 Q. Am I correct in thinking that the PCLOB was vacant and
24 all positions on it vacant from 2007 to 2012?

25 A. I would have to go back and check the dates, 14:16
26 Mr. Murray, but that sounds right to me.

27 198 Q. Okay. And then three and a half years into his term
28 President Obama nominated four members to the board, in
29 August 2012?

1 A. That sounds right to me.

2 199 Q. He appointed Mr. Medine as chairperson in May 2013,
3 Mr. Medine resigned in July 2015 and as of this point
4 in time there's only one member, Elizabeth Collins?

5 A. That sounds correct. 14:16

6 200 Q. Yes. Clause 14 of the President's executive order
7 from, I think, January 17th, what does that tell you
8 about the likely attitude of the administration to the
9 privacy rights of Europeans?

10 A. It's hard - so certainly Clause 14, I think, was taken 14:17
11 by many, Judge, as a negative harbinger. And I don't
12 have a good response to that. I think it does - it is
13 an ill portents. But I will say, I mean I think that
14 this matter is complicated politically by the role of
15 corporate America in this conversation, as I think this 14:17
16 case illustrates. I don't think it's as obvious to the
17 current white House as it might have been when they
18 were campaigning that the data privacy rights of
19 Europeans are not a relevant issue and are not
20 something they should care about. But, Mr. Murray, I'm 14:17
21 not a political scientist and I wouldn't want to go too
22 much further in speculating about how this is going to
23 play out.

24 201 Q. You referred at one point this morning about, and I'm
25 sure this wasn't your exact phrase, about being on the 14:17
26 same page as Prof. Swire in relation to one of the
27 matters that you were asked about, what are the
28 disagreements you have with Prof. Swire?

29 A. So frankly I think Prof. Swire and I differ somewhat

1 substantially on how much faith we place in the
2 internal checks that have been discussed. And, Judge,
3 I think, I know enough to know that that doesn't mean
4 I am right. Prof. Swire has internal experience that
5 I do not. But as an external *watcher*, I guess is the 14:18
6 best way to put it, as an external viewer, I have
7 concerns about the sufficiency, for example, of
8 Inspectors General and about the PCLOB as we have
9 discussed, Mr. Murray, and I put much more faith,
10 Judge, I think in the courts. To me the judicial 14:18
11 remedies are the ones that are the least susceptible to
12 manipulation by the Executive.

13 202 Q. Yes. And I think this is something, if I can say,
14 Professor, that comes across in your writing. I think
15 you have an article about, and again please forgive me 14:18
16 if I am misdescribing it, what you describe as
17 merits-based adjudication --

18 A. Indeed.

19 203 Q. -- by Article III judges of these issues in which you
20 advocate the extension of judicial remedies to address 14:19
21 some of the concerns you have about counterterrorism in
22 general or surveillance in particular, is that a fair
23 summary of your position?

24 A. Certainly.

25 204 Q. Yes. And you believe, and again please correct me if 14:19
26 I misdescribe your position, you believe judicial
27 remedies to be *significantly* superior to remedies which
28 lie in the discretion of the Executive?

29 A. I do. I think that there are obviously examples to the

1 contrary in both directions, Judge. But I think this
2 comes from my training as a federal courts scholar,
3 that I have perhaps too much faith, that when push
4 comes to shove it's going to be the courts and not the
5 political institutions that protect our liberties. 14:19

6 205 Q. Yes. I think you have a paper about where you describe
7 yourself, I'm sure not accurately, Professor, as a
8 federal court *nerd* and this is the basis from which you
9 extol the significance of an independent judiciary as a
10 bulwark against the Executive and in which you 14:20
11 certainly imply if not state your concerns about the
12 rights of citizens, and I am sure that applies to
13 everybody else --

14 A. Quite.

15 206 Q. -- being entrusted to the discretion of the Executive? 14:20

16 A. Certainly. I think that's a perfectly fair
17 characterisation of my writing.

18 207 Q. We have seen again in fairness, and we have discussed
19 them this morning, that within, and this is the focus
20 of a significant part of your writing, it is that 14:20
21 belief as to the importance of judicial remedy which
22 prompts you to highlight what you perceive as being
23 inadequacies in the judicial remedial structure? And
24 some of the inadequacies we have discussed this morning
25 in the context of issues such as standing, your 14:20
26 concerns, again articulated in your writing, about the
27 absence of an adversarial procedure in the FISA court,
28 your concerns about sovereign immunity, all of those
29 feed into your anxiety over inadequacies in the

1 judicial remedial system?

2 A. That's right. I mean I think my overarching concern,
3 Judge, is that it seems to me that our system is only
4 advanced one way or the other by having these merits
5 questioned answered. If the government prevails, so be 14:21
6 it. At least we have some settling of the law, at
7 least we would understand what the reasons are for why
8 the government has the legal authority to take
9 particular actions as opposed to if these cases are all
10 sent out on procedural grounds where the merits are 14:21
11 obscured and no precedent is set.

12 208 Q. Now can I ask you, Professor, and thank you for that,
13 can I ask you please to look to your report, page 3
14 footnote 2.

15 A. Mm hmm. 14:21

16 209 Q. And there you express the view, you are talking about
17 the **Bivens** claim, I think you are referring to the
18 national security exception that we discussed this
19 morning, and you say in the second sentence:
20
21 *"Because EU citizens lacking substantial voluntary
22 connections to the United States are not protected by
23 the Fourth Amendment - see Verdugo-Urquidez - they,
24 unlike US citizens, are non-citizens lawfully present
25 in the US could not pursue such claims."* 14:22
26

27 Do you see that?

28 A. I do.

29 210 Q. And page 4 footnote 3 you explain that: "A US person

1 *is a term of art used in US surveillance law to refer*
2 *to a US citizen or a non-citizen, law permanent*
3 *resident of the US. A non-US person is an individual*
4 *who does not meet either of these criteria and thus an*
5 *individual usually lacking many, albeit not all, of the* 14:22
6 *relevant constitutional protections," correct?*

7 A. Mm hmm.

8 211 Q. So that would be a reference to the fact, I presume,
9 that if you are a non-US person within the definition
10 there, you would have, for example, Sixth Amendment
11 rights to a fair trial and a jury trial and so forth? 14:22

12 A. I mean certainly that is my view, yes.

13 212 Q. Yes. And then if you go to paragraph 40, please?

14 A. Mm hmm.

15 213 Q. There again you state, at this time in the context of 14:23
16 the PCLOB: "*Drafting applications that demonstrated*
17 *satisfaction of [FISA's] probable cause standard, the*
18 *government has asserted, slowed and in some cases*
19 *prevented the acquisition of foreign intelligence*
20 *information even though the targets of the surveillance*
21 *were invariably non-US persons and, thus, outside the*
22 *ambit of the Fourth Amendment."*

23
24 Do you see that?

25 A. I do. 14:23

26 214 Q. Yes. And then if you go forward to paragraph 55, you
27 again go back to the Verdugo-Urquidez case and you say
28 in the last sentence, it is the third sentence:
29

1 *"Although the Supreme Court has never addressed whether*
2 *the Fourth Amendment might apply to searches of those*
3 *individuals' data if the data is located within the*
4 *United States, the prevailing assumption is the answer*
5 *is 'no'."*

14:24

6 A. Mm hmm.

7 215 Q. And that remains your position?

8 A. So I believe, Judge, that expert report I think
9 clarified that, I still believe that the answer is --

10 **MS. JUSTICE COSTELLO:** I am sorry, which report?

14:24

11 A. I am sorry, the expert document, the joint expert
12 document.

13 **MS. JUSTICE COSTELLO:** Oh, Yes.

14 A. Pardon me for shorthand. I believe that it clarified
15 that there was some daylight between me and Prof. Swire
16 on this matter. I do believe, Mr. Murray, that the
17 answer is likely to be 'no', but I also agree with the
18 statement in the expert document that the Supreme Court
19 has not decided the question.

14:24

20 216 Q. **MR. MURRAY:** which it clearly has not done?

14:24

21 A. Quite.

22 217 Q. And you refer in your articles or in your paper in one
23 of the footnotes to an argument that is floated in some
24 of the academic journals to the contrary based on
25 Justice Kennedy's separate opinion in **Verdugo-Urquidez**?

14:24

26 A. Indeed. And if I may just briefly, I mean there is,
27 the **Hernandez** case, which I mentioned this morning, one
28 of the questions before the court right now is whether
29 to eschew the formal inside or outside approach to the

1 Fourth Amendment.

2 218 Q. **MS. JUSTICE COSTELLO:** Is the Hernandez one shooting
3 across the border?

4 A. That's right, I'm sorry, Judge. And one of the issues
5 before the Supreme Court is whether the court should 14:25
6 eschew the very formalistic inside versus outside
7 distinction drawn by Chief Justice Rehnquist's opinion
8 in Verdugo-Urquidez in favour of a more functional
9 approach articulated by Justice Kennedy. Obviously
10 I think, Mr. Murray, that could have consequences, but 14:25
11 at least where we are right now Verdugo does appear to
12 be quite...

13 219 Q. Exactly. And indeed I think you have gone on the
14 record to record the fact that that issue may not even
15 be reached in that case? 14:25

16 A. Indeed. There are two, Judge, procedural questions
17 also presented in the Hernandez case that might allow
18 the court to decide the case without reaching the
19 merits question. I will say I do think that it is
20 inevitable that at some point in the near future the US 14:25
21 Supreme Court will have to answer some of these
22 complicated data privacy Fourth Amendment questions,
23 whether in the context of the cases we have been
24 discussing in these proceedings or otherwise.
25 14:25

26 For example, there have been a series of cases in the
27 lower federal courts about what's called cell site
28 location information, basically a phone company's
29 knowledge of where you are when you are making your

1 phone calls based on which tower you are pinging.
2 Those raise messy questions about expectations of
3 privacy, very much of a piece with these that I think
4 will eventually get to the Supreme Court, whether in
5 the Hernandez case or otherwise.

14:26

6 220 Q. Yes, because, and it is interesting you raise that,
7 because in fact there is an argument being strongly
8 presented and accepted in some of the lower courts that
9 you have no expectation of privacy in information of
10 that kind, that even though the government, without
11 warrant, can access from telecommunications companies
12 information that will tell law enforcement where you
13 have been at particular points in time, that you have
14 no constitutional or statutory vested right in that
15 because of the fact that you have shared it with the
16 telephone company in the first instance?

14:26

14:26

17 A. And this, Judge, is the fight over what we call the
18 third party doctrine. I believe Mr. Murray referred to
19 the Jones case last week. This was the case where
20 there was a GPS tracker installed on the suspect's car
21 and there was the separate plurality opinion by Justice
22 Alito that suggested that it is not the trespass, it's
23 the totality of the circumstances. There is clearly
24 going to have to be a reckoning by the Supreme Court
25 with the substantive Fourth Amendment questions that
26 these kinds of cases raise. I don't have a good feel
27 yet for which way that's going to come out.

14:27

14:27

28 221 Q. But as matters presently stand those *bare*
29 constitutional issues, if I can so describe them -

1 well, maybe perhaps if I put the question to you this
2 way: EU citizens cannot agitate such claims on the
3 basis of bare constitutional violation; isn't that
4 correct?

5 A. Can I just ask for clarification, Mr. Murray. 14:27

6 222 Q. Yes.

7 A. What do you mean by bare constitutional violation?

8 223 Q. Well to bring for example a **Bivens** type of case seeking
9 damages on the basis that a vested constitutional right
10 has been violated? 14:27

11 A. So if we had, Judge, an EU citizen, let's say an Irish
12 citizen, with no connection to the United States who
13 believes that his data has wrongfully been collected
14 and all he brings is a **Bivens** claim for damages,
15 I think the defect would be a merits defect, not a 14:28
16 standing defect.

17 224 Q. Yes.

18 A. Where the lower court would say, a lower court would
19 say 'see **Verdugo-Urquidez**, you have no claim on the
20 merits, good-bye'. 14:28

21 225 Q. Yes. So an EU person, therefore, in order to bring a
22 claim seeking the type of relief which you passionately
23 advocate for US citizens in your writing, an EU person
24 seeking to bring such a claim before a court as opposed
25 to some body set up by the Executive, they have no 14:28
26 basis for a freestanding constitutional claim and the
27 only circumstance in which they can sue is if there is
28 a statute, by which I include the APA, which will be
29 construed by the courts as being intended to confer a

1 cause of action on a non-US citizen?

2 A. So I would just disagree, Mr. Murray, with the very
3 last part of your statement. I don't believe, Judge,
4 the courts have drawn a distinction. When Congress
5 chooses to create a private cause of action, courts 14:29
6 doesn't usually say 'but only for citizens', unless
7 there is some textual clue in the statute to that
8 effect. So, for example, there is no clear text in the
9 APA that allows non-citizens to sue, but every court,
10 to reach the question, has said obviously non-citizens 14:29
11 who meet the criteria of the statute are allowed to
12 sue.

13 226 Q. Yes. The non-citizen has to have what's described as a
14 zone of interest?

15 A. Well any plaintiff does. 14:29

16 227 Q. In the underlying statute to use the vehicle of the
17 APA?

18 A. Any plaintiff does, Judge. I mean I think my point is
19 just that that test is not citizenship specific.

20 228 Q. Yes. And is Section 702 intended to confer rights of 14:29
21 that kind on EU citizens?

22 A. I think there is no question that Section 702 *can* be
23 invoked by non-citizens. I am unaware, Judge, of any
24 decision specifically saying EU citizens as such.

25 229 Q. Yes. 14:29

26 A. But I am also unaware of cases saying that the APA is
27 not available to non-citizens as a categorical matter.

28 230 Q. Okay. Now I want you to look at the Mohamud case, not
29 because you disagree with what the law presently stands

1 on this, but just to confirm, this is the Ninth Circuit
2 confirming last December this very point?

3 A. Mm hmm.

4 **MS. JUSTICE COSTELLO:** Is this the one we have already
5 had? 14:30

6 231 Q. **MR. MURRAY:** It is, Judge, sorry. The person outside
7 the United States whose e-mails are intercepted has no
8 basis for a Fourth Amendment claim even though the
9 interception occurs within the United States
10 jurisdiction. But I want to ask you just to comment on 14:30
11 one other aspect of this please, Professor, which is
12 page 48.

13
14 You will be familiar with this paragraph that begins
15 "*where Executive Branch certification*"? 14:30

16 A. Mm hmm.

17 232 Q. "*While Executive Branch certification contributes some*
18 *degree of further protection, it does not weight*
19 *heavily. Typically in the Fourth Amendment context,*
20 *review from a neutral magistrate to considered the* 14:30
21 *appropriate check on the Executive, which otherwise may*
22 *be motivated by its interest in carrying out its*
23 *duties.*"

24
25 **Leon**, that's a search warrant case. And then after 14:30
26 summarising what it says: "*Under these circumstances,*
27 *where the only judicial review comes in the form of the*
28 *FISC reviewing the adequacy of procedures, this type of*
29 *internal oversight does not provide a robust safeguard.*"

1 The government notes that In Re Sealed case from 2002
2 the FISA review court observed that Congress recognised
3 certification by the Attorney General in the
4 traditional FISA context 'would assure written
5 accountability within the Executive Branch' and 14:31
6 'provide an internal check on Executive Branch
7 arbitrariness'. However, as described above,
8 Section 702 differs in important ways from a
9 traditional FISA, and a mechanism that might provide
10 additional protections above and beyond those already 14:31
11 employed in a traditional FISA context provides far
12 Less assurance and accountability in the section 702
13 context, which lacks those baseline protections."
14

15 Do you agree with that? 14:31

16 A. I do. I would have preferred if they added a little
17 more context, which is just to say that I think the
18 basic point the court is trying to make there, Judge,
19 is that you don't have the opportunities in the 702
20 context that the traditional FISA process allows for, 14:32
21 the kind of individualised case specific review.
22 I think that's the key point they are trying to make,
23 that the review under 702 is largely at the structural
24 procedural level.

25 233 Q. Okay. 14:32

26 A. And, yes, Mr. Murray, I completely agree with that.

27 234 Q. You agree with that?

28 A. Yes.

29 235 Q. Thank you. I want to ask you to look very quickly,

1 Professor, at two Articles you have written, both of
2 them addressing the decision in Clapper, just so the
3 court can be clear as to what your position is in
4 relation to this. The first is at Tab 1 -- sorry, the
5 first is the person - do you have a booklet there in 14:32
6 front of you? No, I'm sorry.

7 A. No.

8 236 Q. The first is a 2012 article and the second a 2016
9 article.

10 A. Thank you. 14:32

11 237 Q. So if I can just ask you to confirm a number of the
12 observations that you make (SAME HANDED TO THE COURT)
13 (SAME HANDED TO THE WITNESS) in the first article,
14 Professor. Here I think you raise a variety of
15 concerns in relation to a number of different aspects 14:33
16 of judicial review of national security, and, if you
17 turn to page 1296?

18 A. Mm hmm.

19 238 Q. I think you observe there:
20
21 *"As of May 2012 not a single damages judgment is*
22 *awarded in any of the dozens of lawsuits arising out of*
23 *post September '11 US counterterrorism policies."*
24

25 I think there may have been, you may have written 14:33
26 elsewhere there has been one since; is that right?

27 A. So there has been one that has gone all the way to
28 damages and that was I believe the al-Kidd material
29 witness case.

1 239 Q. And I think if you turn to page 1313?
2 A. Mm hmm.

3 240 Q. You explain there the fact that a number of different
4 circuit courts have recognise a new obstacle to **Bivens**
5 claims in national security cases, that is the special 14:34
6 exemption, and that effectively operates to cut out any
7 freestanding claim for constitutional damages in a
8 national security context?

9 A. Or at least it has so far. I am optimistic,
10 Mr. Murray, that at some point the Supreme Court will 14:34
11 right the ship on this front. But I mean, Judge, the
12 notion of a freestanding constitutional damages remedy
13 has been quite elusive so far in the national security
14 space, indeed I should say in general. I mean the
15 Supreme Court has been hostile to **Bivens** claims, as 14:34
16 I think I mentioned this morning, in ways that are
17 frankly unfortunate.

18 241 Q. And then if you go to page 1329, just to confirm this,
19 I quoted this to you earlier, in the last sentence on
20 that page: "*In the short-term this jurisprudential 14:35*
21 *pattern.*"
22

23 And that's your reference to a number of issues that
24 you have identified with national security law:
25 "*Suggests that victims of governmental overreaching in 14:35*
26 *the conduct of national security policy will primarily*
27 *have to turn to the political branches for redress*
28 *since retrospective judicial remedy will likely be*
29 *unavailing.*"

1 A. Mm hmm.

2 242 Q. That's the position which you adopted then?

3 A. Indeed.

4 243 Q. And I think, as you indicated this morning, you adhere
5 to that view? 14:35

6 A. I do.

7 244 Q. So if I can ask you then please to turn to an article
8 which is going to be handed up to you just about the
9 specific issue of standing which is what I want to talk
10 to you about (SAME HANDED TO THE COURT) (SAME HANDED TO 14:35
11 THE WITNESS) briefly?

12 A. Mm hmm.

13 245 Q. If you turn to page 552, this is an article largely
14 about the decision in Clapper?

15 A. Mm hmm. 14:35

16 246 Q. And I think midway down the first full paragraph on
17 that page?

18 A. If you'll forgive me, Mr. Murray, I am sorry, you had
19 said this was from 2016, I just want to clarify I think
20 it's from 2014. 14:36

21 247 Q. No, that's from 2014?

22 A. Oh, there's another one. Okay, apologies.

23 248 Q. But there's a further article that I'm going to come
24 back to.

25 A. Mm hmm. 14:36

26 249 Q. "At the time", midway through that paragraph:
27
28 "The upshot of Justice Alito's analysis seemed obvious.
29 Given that the actual implementation of such

1 surveillance authority is highly classified, it would
2 be virtually impossible for any individual to ever
3 satisfy the certainly impending standard that his
4 majority opinion articulates. Clapper thereby appeared
5 to insulate the government's secret surveillance 14:36
6 programmes under Section 702 or otherwise from all
7 external judicial challenge".

8 A. And I think that at the time Clapper was decided, this
9 is how I, I believe that was a correct description.

10 250 Q. Yes. If you turn over the page, 553, you say: 14:36

11
12 "One can certainly question whether Clapper would have
13 come out the same way if these stories had broken prior
14 to the court's decision - that's Snowden - and yet
15 although these disclosures seem to have given even 14:36
16 greater credence to the plaintiff's allegations in
17 Clapper, they don't necessarily cure the standing
18 defect identified by Justice Alito. After all
19 plaintiffs still cannot identify specific
20 communications of theirs that have been obtained by the 14:37
21 government under PRISM. Moreover, even in the
22 analogous context of telephony metadata programme under
23 Section 215 where the FISA court orders disclosed by
24 Edward Snowden included one identifying a specific
25 phone company Verizon that has been turning over all of 14:37
26 its business customers' metadata, the government has
27 continued to argue the parties don't have standing to
28 challenge."
29

1 And this of course predated the second Clapper, the
2 ACLU -v- Clapper.

3
4 And then if you go over the page, 554, you say:
5 *"whatever the ultimate merits of the government's view, 14:37*
6 *it remains unlikely as a general matter that Snowden*
7 *disclosures by themselves will have more than what you*
8 *describe as a frictional effect upon the ability of*
9 *most whose communications are intercepted under secret*
10 *government surveillance programmes to challenge such 14:37*
11 *surveillance in court."*

12
13 And if you then go to page 567, please.

14 A. Can I just interject there?

15 251 Q. No, no, I am sorry, and if you wish to interject please 14:37
16 do.

17 A. Just briefly. I mean I stand by that statement, Judge.
18 I think the key there is, I was referring to the
19 Snowden disclosures specifically. I think it's worth
20 stressing that, at the time I wrote this article, we 14:38
21 were at the very beginning of a very sustained period
22 of voluntary disclosures and declassification by the US
23 government that amplified the record in ways that
24 I think are fairly significant. You know, just to put
25 that in the context. 14:38

26 252 Q. Yes. But as you acknowledge in your report to the
27 court and as is clearly the case, people who are
28 subject to surveillance under section 702 will never
29 know of that fact?

1 A. That's right. And so to me, Judge, the significance of
2 the declassifications and the disclosures is in
3 creating plausibility in allegations of surveillance
4 that might not previously have been there, which in my
5 view should at least allow plaintiffs to get over the 14:38
6 motion to dismiss bar at which point we get to
7 discovery. So the real difference between what was
8 true when I wrote this article and what I think is true
9 today is not that the law has changed, it is that there
10 is more facts now in evidence that would give at least 14:39
11 a little more cushion to plaintiffs. As evidenced, for
12 example, in, Mr. Murray referred to the ACLU -v-
13 Clapper case, I would add the Schuchardt case, the
14 Valdez case. And frankly the second amendment, the
15 first amended complaint in the wikimedia case, which 14:39
16 I think showed just how much more we now can
17 meaningfully allege about the surveillance than we
18 could, even as late, Mr. Murray, as 2014.

19 253 Q. Well just so we can agree the following: In
20 Schuchardt, Professor, I think the court itself almost 14:39
21 expressed scepticism about whether the plaintiff was
22 even going to get to the bar; isn't that right?

23 A. That's right, as I think it rightly should have. My
24 point is simply, Mr. Murray, that there is a difference
25 that I think is quite significant in this context 14:39
26 between naked - I forget the word - bare allegations
27 based on the Snowden disclosures and allegations that
28 build in the detail we now have about the PRISM and
29 Upstream programmes that may not be conclusive at the

1 end of the day, Judge, but at least I think are
2 sufficient now to get over that motion to dismiss
3 threshold. In cases where we have someone who actually
4 was likely surveilled, Mr. Murray, I would agree
5 Schuchardt is not one of them. 14:40

6 254 Q. But in order to bring yourself within any such new
7 circumstance you still have to bring yourself within
8 some programme that has been disclosed, without that
9 you face exactly the same problem as the plaintiffs did
10 in Clapper 1; isn't that right? 14:40

11 A. I agree with that and that's why I think it's rather
12 significant, Judge, to go back to the exchange last
13 week with Prof. Swire about whether there are two
14 programmes under Section 702 or whether there are at
15 least two programmes. 14:40

16 255 Q. Yes.

17 A. My understanding was that there are two. Of course I'm
18 not privy to further information on that point, but
19 I agree, Mr. Murray.

20 256 Q. Yes. And indeed this is why you have advocated the 14:40
21 introduction by Congress of legislation which would
22 expand standing because, significantly, Professor, if
23 I can say so, it's your thesis that, because of the
24 decision in Lujan, it is possible for Congress through
25 legislation to create new categories of, well to allow 14:40
26 plaintiffs who would be precluded under a Clapper
27 formulation to bring suit, that's your thesis?

28 A. I might just add a slight bit of nuance, Mr. Murray.
29 Judge, the point I tried to make in the articular that

1 you have before you is that I do think Congress has
2 some wiggle room to adjust the burden of proof in the
3 standing context. So it would not be as in Spokeo
4 creating a new injury that did not previously exist.
5 It would simply be instructing that to survive, to 14:41
6 establish a constitutionally cognisable injury it would
7 lower the probability threshold.

8 257 Q. Yes. So if we look at page 567, please.

9 A. Yes.

10 258 Q. *"whatever you think - and you are talking about 14:41*
11 Clapper - of such a distinction as a logical matter,
12 the larger legal point that it underscores is the
13 exceptionally bar Clapper imposes before plaintiffs
14 will be able to choose - sorry, to challenge secret
15 government surveillance programmes going forward." 14:41

16 MS. JUSTICE COSTELLO: I beg your pardon, which page
17 are you on, Mr. Murray?

18 MR. GALLAGHER: Judge, I am terribly sorry, page 567.

19 MS. JUSTICE COSTELLO: 6-7?

20 MR. MURRAY: Yes, and it's the middle paragraph on that 14:42
21 page?

22 MS. JUSTICE COSTELLO: I have it, thank you.

23 259 Q. *"The exceptionally high bar Clapper imposes. Indeed 14:42*
24 *even if court subsequently conclude...(as read)...to*
25 *the government that the injury occurs at the point of*
26 *collection, that still assumes that future plaintiffs*
27 *will be able to prove that such collection is*
28 *occurring, a difficult proposition at best in the*
29 *absence of additional Snowden like disclosures or far*

1 *great volitional transparency on the part of the*
2 *government."*

3
4 And then if you go forward please, Professor, to page
5 578, and the first full paragraph on that page, the new 14:42
6 section:

7
8 *"In one sense the most important takeaway from the*
9 *above analysis is the extent to which the Supreme*
10 *Court's Article III standing jurisprudence interposes 14:42*
11 *substantial obstacles to judicial review of secret*
12 *surveillance programmes, if not all secret government*
13 *conduct on the merits."*

14
15 And then you proceed to explain why Justice Kennedy's 14:42
16 Lujan concurrence may herald an opportunity for
17 Congress to legislate?

18 A. Quite.

19 260 Q. If I can ask you then to look to your 2016 article?

20 **MS. HYLAND:** I think professor Prof. Vladeck might have 14:43
21 had something to say there.

22 A. Just very briefly, Judge.

23 **MR. MURRAY:** Oh, I am sorry.

24 A. I just would like to point out the significance of the
25 word 'secret' in that statement. My concern very much 14:43
26 is about the next section 702, right. That is to say
27 if there is some future programme that Congress creates
28 pursuant to one of these authorities. So, for example,
29 we did not know that the telephone, that the bulk

1 telephone metadata programme was being carried out
2 pursuant to section 215. So I stand happily by all
3 these statements. My point is just to suggest that
4 it's not clear to me that 702 in that context is quite
5 as secret as it used to be. 14:43

6 261 Q. Then if you go to your 2016 article, and this is
7 written with the benefit of the various developments
8 which you have discussed in your evidence at page 1037,
9 Professor?

10 A. Mm hmm. 14:43

11 262 Q. *"One of the most troubling structural features of
12 contemporary US counterterrorism policies has been the
13 near total absence of meaningful judicial review with
14 remarkably few rulings on the lawfulness of either the
15 government's key programmes or many alleged abuses 14:44
16 arising out of their implementation. With a handful of
17 narrowly circumscribed exceptions, courts faced with
18 civil suits seeking remedies against allegedly unlawful
19 government surveillance detention, interrogation,
20 rendition and watch listing amongst myriad other 14:44
21 initiatives have refused to provide relief and usually
22 not because of a determination that the underlying
23 government conduct was lawful, rather because of
24 obstacles that in the court's views bar them from even
25 reaching the merits of the plaintiffs' claims"?* 14:44

26 A. Mm hmm.

27 263 Q. This is an up to date view, yes?

28 A. It is. I mean I would say, Judge, consistent with
29 I think everything I said this morning, I continue to

1 believe, as my report expressly suggests, that
2 surveillance is perhaps the weakest of the exemplars in
3 this context because of the remedies that exist in that
4 context and because of the examples we have of merits
5 decisions, right. We have the Second Circuit ACLU -v- 14:44
6 Clapper. We have the FISA Court of Review in the In Re
7 Directives case. We have the FISA court of review in
8 the In Re Sealed case. We have the Ninth Circuit in
9 Mohamud. So I completely agree and still endorse this
10 view, Mr. Murray. I just think that it's worth 14:45
11 clarifying, especially in the light of the DPC Draft
12 Decision, why surveillance may be an actually slightly
13 more nuanced story than frankly what is true for just
14 about every other area of US counterterrorism policy.

15 264 Q. But these complaints that you have, if I can so 14:45
16 describe them, or concerns that you express perhaps
17 more accurately, apply to the surveillance arena as
18 well?

19 A. They certainly do.

20 265 Q. And if you look at page 1045 you express this view: 14:45

21
22 *"As significantly, Clapper may foreclose the prospect*
23 *of resolving the constitutional challenges to*
24 *Section 702 in any forum other than a motion to*
25 *suppress in a criminal case, a context that turns 14:45*
26 *entirely on voluntary decisions by the government to*
27 *introduce evidence derived from Section 702."*

28
29 which of course is, since your article was written,

1 **Mohamud**:

2
3 *"And, two, in which judges to date have been especially*
4 *skittish at the prospect of resolving such grave*
5 *constitutional questions in such case specific facts.* 14:46
6 *Decisions like Clapper thereby not only make it*
7 *difficult for future plaintiffs to challenge other*
8 *secret government programmes, but they make it harder*
9 *for any court to resolve the underlying merits of the*
10 *constitutional questions raised by the FISA amendments* 14:46
11 *in any context."*

12 A. I agree, they make it harder. I believe, Mr. Murray,
13 this article went to print before the district court
14 decision in the wikimedia case, I hope I'm not
15 misstating, misremembering the timing here. 14:46

16
17 But, Judge, I think the point I was trying to make, and
18 I hope this comes through, is that I don't think that
19 surveillance remedies are easy, right. I don't think
20 that these obstacles are irrelevant. I just think that 14:46
21 it's a helpful comparison of the merits decisions that
22 we have seen in the surveillance context, which perhaps
23 I undersell in this particular paragraph, from the
24 complete paucity of similar merits decisions in other
25 counterterrorism contexts simply in the context of 14:47
26 assessing the DPC Draft Decision and its discussion of
27 the completeness of and the adequacy of the US remedial
28 régime.

29 266 Q. So if you go forward to page 1085 because you haven't

1 just, as you have just told us I think for the first
2 time, undersold the matters to which you refer, you
3 proceed at page 1085 onwards to suggest what reforms
4 are required of the law to put in place an adequate
5 system of judicial remedies, one broadening statute - 14:47
6 sorry, standing?

7 A. Can I just clarify? Judge, by 'adequate' I was not
8 making any reference in this article to Article 47.

9 267 Q. No, that's not suggested.

10 **MS. JUSTICE COSTELLO:** That's fair. 14:47

11 **MR. MURRAY:** Adequate is the word --

12 A. Indeed.

13 268 Q. -- that you use?

14 A. Quite.

15 269 Q. In or Steve uses in his blog about the... 14:47

16 A. We are the same person.

17 270 Q. I see. Well that resolves that mystery so. That is
18 the words used in the article about the intelligence
19 committee; isn't that right, it's not adequate
20 oversight, that's what you said? 14:48

21 A. Indeed.

22 271 Q. Okay. So you have a meaning for the word 'adequate' in
23 your own mind?

24 A. I do.

25 272 Q. Yes. And I'm not trying to pin you nor Facebook to 14:48
26 your definition of adequacy for the purposes of
27 Article 47, nor could I, but in *your* opinion the
28 judicial remedies that are available for surveillance
29 undertaken in the interests of national security are

1 not adequate; isn't that correct, in your view?

2 A. In my opinion as a matter of US law, yes, they are not
3 adequate. But, Judge, let me just stress. I mean
4 I think if you asked anyone else on either side of this
5 issue in the United States to describe my views on this 14:48
6 question, they would put me pretty far to one extreme
7 on the role I would like courts to play, right. That
8 is to say that I would probably not be perceived as a
9 centrist on what I think of appropriate judicial review
10 in this space. And so I just want to suggest that, 14:48
11 yes, it is my assessment of adequacy, but I suspect
12 that mine is an outlier and I am comfortable in my
13 outlier opinions.

14 273 Q. Well, outlying or not, Professor, yours is the one that
15 Facebook have chosen to put up to the court? 14:49

16 A. Mm hmm.

17 274 Q. So 1085. You identify what *you* believe should be done
18 to remedy the deficiencies in the judicial remedy
19 system to which you referred, "*broadening standing by*
20 *statute*", do you see that? 14:49

21 A. Mm hmm.

22 275 Q. And indeed you have gone and articulated what you
23 believe should be the test. After **Clapper** you say on
24 page 1086 Congress should authorise suit by any prison
25 who can demonstrate? 14:49

26 A. I believe I said "*could*", Mr. Murray, I'm sorry.

27 276 Q. Excuse me?

28 A. I think you said "*should*", I said "*could*".

29 277 Q. I am terribly sorry, excuse me, you are absolutely

1 right.

2 A. I don't mean to be pedantic.

3 278 Q. No, no. I am afraid I misread it, not just missaid it:

4

5 *"Congress could authorise suit by any person who can 14:49*

6 *demonstrate a reasonable basis to believe that their*

7 *communications would be acquired under FISA and that*

8 *they have taken objectively reasonable steps to avoid*

9 *such surveillance. Congress could do the same for*

10 *other challenges to secret government programmes."* 14:49

11

12 So that can be done without doing violence to

13 Article III of the constitution in *your* view, and,

14 although you corrected me, I had understood from the

15 tenor of your writing and your evidence that you 14:50

16 believe it should be done?

17 A. Yes, although if we listed, Mr. Murray, all the things

18 I wished the United States Congress would and should do

19 we would be here very long.

20 279 Q. Okay. Well, we don't have to be here for very long 14:50

21 because that's the one we are concerned with and you

22 agree?

23 A. And let me say, so the point, Judge, is my concern is

24 the next, as I said previously, my concern is the next

25 programme. We now know I think the basics about PRISM 14:50

26 and Upstream, we now know about the telephone metadata

27 programme which the Second Circuit invalidated and

28 Congress then largely scrapped. And so my concern is

29 ensuring that there are meaningful remedies the next

1 time the government embarks on a programme that is
2 somehow materially different from the ones about which
3 we already know. In contrast I think we actually know
4 quite a bit about Upstream and PRISM in 702 largely
5 thanks to some of the litigation that has, that we have 14:50
6 been discussing.

7 280 Q. And you also had concerns in this article, did you not,
8 about the impact of sovereign and official immunity?

9 A. Mm hmm. Although that's usually in the next context in
10 which I - I do refer to the Al-Haramain decision and 14:51
11 sovereign immunity in the context of FISA. The
12 official immunity context, Judge, is much more of an
13 issue in the context of Bivens claims, which Mr. Murray
14 and I have already been discussing, where there
15 actually is a viable claim and where the courts have 14:51
16 been unwilling to impose liability if the officer did
17 not violate what's called a clearly established right
18 and not just somehow transgressed the law. And that's
19 been an obstacle in some of these other cases,
20 especially the prisoner treatment cases. 14:51

21 281 Q. And indeed, if you just turn back to page 1080 in that
22 article, you express, in the context of a consideration
23 of damages claims?

24 A. Mm hmm.

25 282 Q. And this article is about remedies; isn't that right? 14:51

26 A. Quite.

27 283 Q. It's about the types of remedies that are available.
28 "*As frustrating as those decisions*", just after
29 footnote 193?

1 A. Mm hmm.

2 284 Q. *"As frustrating as those decisions are in the context*
3 *of doctrines that make suits against the government*
4 *nearly impossibly to pursue as a normative matter, our*
5 *rebuttable presumption that the claim should run* 14:52
6 *against the government and not the individual officer*
7 *would not only overcome many of the doctrinal hurdles*
8 *but also would put the burden on the government and not*
9 *the plaintiff to demonstrate a particular abuse was*
10 *committed without official sanction."* 14:52

11
12 So you believed, certainly when you were writing that,
13 that sovereign immunity was a barrier, however
14 significant, to obtaining relief?

15 A. Again, Judge, I just want to be clear, especially in 14:52
16 context where there is no statutory cause of action.
17 The key point here is that it's the statutory causes of
18 action such as the APA that are read as waivers of
19 sovereign immunity. The context outside of
20 surveillance, as I think I have mentioned, don't have 14:52
21 the same kind of, don't have the same volume of
22 statutory waivers, and so in that context sovereign
23 immunity is much more of an issue. Proceeding against
24 the officer directly is often the only possibility and
25 then we run in the **Bivens** and official immunity 14:53
26 problems.

27 285 Q. Then, if you go back to page 1077, you address the
28 types of relief that should be made available to those
29 who are the victims of such abuses?

1 A. Mm hmm.

2 286 Q. "For starters", you say at page 1077:

3

4 "Should an optimal remedial regime favour prospective
5 or retrospective relief, injunction or damages. To be 14:53

6 sure there are compelling reasons why in appropriate
7 circumstances both forms of relief might be necessary.

8 Damages lack the coercive power of injunctions and will
9 do little to stop ongoing unlawful government conduct

10 and injunctive relief, as Part 2 demonstrated, can 14:53

11 often be side-stepped through government actions to

12 moot the dispute, whether by deceasing the complained

13 of context, releasing the petitioning detainee,

14 removing for the plaintiff those or otherwise."

15

14:53

16 Because there had been instances and in fact
17 surveillance afforded one of them where proceedings
18 became moot because a programme had been discontinued;
19 isn't that right?

20 A. Yes. Surveillance, the only mootness example in a 14:53
21 surveillance context, Judge, was during the very
22 strange interim period under the USA FREEDOM Act.

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

24 A. So the USA FREEDOM Act, Section 215 was due to expire
25 I believe on June 1, 2015 and so Congress, when it 14:54

26 passed the USA FREEDOM Act, created this temporary
27 transitional period during which it actually authorised

28 the very programme it was scrapping, right, to allow

29 the government this move. And there is litigation in

1 the ACLU -v- Clapper case which we have discussed.
2 There was a follow-on decision where the Second Circuit
3 concluded, not that the plaintiffs' challenge to that
4 ongoing piece of the programme was *formally* moot, but
5 that they weren't going to decide it because it was 14:54
6 about to expire, right. Because the transitional
7 period was, I think, set to expire a couple of weeks
8 after the decision.

9
10 And so, even if the Second Circuit had decided that 14:54
11 case, by the time the appeal went to the Supreme Court
12 it would have to be vacated. Because we have a
13 doctrine where if a challenged action is mooted on
14 appeal, right, the benefit in part, you cannot take
15 advantage of the mootness and so we vacate the decision 14:55
16 below.

17 287 Q. And ACLU -v- Clapper was a programme under Section 215?

18 A. That's right.

19 288 Q. Not Section 702?

20 A. That's right. 14:55

21 289 Q. And what's the status of Section 215 today?

22 A. So Section 215 itself has been repealed. It was
23 replaced in the USA FREEDOM Act by a sort of similar
24 looking but more narrowly circumscribed programme
25 where, instead of being able to collect all of the 14:55
26 phone records, the government is supposed to query
27 particular selector terms to the phone companies. So
28 Section 215, as we have colloquially described it, no
29 longer exists.

1 290 Q. Now so you talk there about two types of remedies,
2 injunctions and damages. Injunctions, prospective, can
3 be rendered of limited utility through mootness,
4 damages, retrospective, but don't stop future
5 connection? 14:55

6 A. Mm hmm.

7 291 Q. Can you get damages under the APA?

8 A. No.

9 292 Q. You can get an injunction under the APA?

10 A. Quite. 14:55

11 293 Q. And you can get a declaration. You don't appear to
12 value a declaration as a remedy in your discussion of
13 the remedies here?

14 A. Forgive me. I think I was just using shorthand. I did
15 not mean to demean declaratory relief. I think it 14:56
16 actually has a very important function.

17 294 Q. No, no, but you don't mention it here, do you?

18 A. I don't believe so. But the point, Judge, was to draw
19 the distinction more precisely between prospective and
20 retrospective relief of which injunctions and damages 14:56
21 are the most obvious examples.

22 295 Q. Well, I mean your article was, in fairness to you,
23 easier to read than Prof. Swire's report and therefore
24 more difficult to miss something in, but I don't know
25 that I saw any reference to the APA in your article, 14:56
26 I could be wrong about that?

27 A. No, I mean the purpose of the article, Judge, was to
28 review all of the procedural obstacles and procedural
29 doctrines that have arisen in this context to make it

1 difficult for plaintiffs to sue. It wasn't my quest in
2 the article to identify all of the affirmative avenues
3 that remained since that was not - unlike my
4 instructions for this proceeding, I was simply trying
5 to make a much more specific point. 14:56

6 296 Q. If you are writing this article, comprehensive
7 consideration of remedies and all of the difficulties
8 with them, how come you wouldn't refer to this
9 incredibly important source of remedies as you now tell
10 us it is which you criticise others for not referring 14:57
11 to it?

12 A. Well I don't believe, Judge, I refer to any remedies in
13 this article other than Bivens. Because the point was,
14 this article was simply about identifying all of the
15 road blocks that courts have faced to reach on the 14:57
16 merits.

17 297 Q. You talk about injunctions?

18 A. What's that?

19 298 Q. You talk about injunctions?

20 A. But I don't talk about specific statutory sources of 14:57
21 injunctive relief, right. In other words, what I am
22 trying to say, Judge, is I didn't see my mission in
23 this article, which was not prepared with this case in
24 mind, as identifying every potential avenue for relief.
25 It was more about identifying what had been the major 14:57
26 road blocks and obstacles, and I didn't see a
27 discussion of the APA as particularly central to that.

28 299 Q. Sorry, over the page then, if you go forward to page 7,
29 excuse me, Professor, 1086?

1 A. Mm hmm.

2 300 Q. So in terms of the key recommendations you're making,
3 create on page 1086, after you consider amending the
4 law relating related to standing:

5 14:58
6 *"Creating express causes of action. Congress should*
7 *create express causes of action for violations of*
8 *federal law by federal officers. That's to say it*
9 *should codify the ability of individuals whose federal*
10 *rights have been violated to pursue private civil* 14:58
11 *litigation for prospective relief or retrospective*
12 *relief. Much has been done for the violation of*
13 *federal rights."*

14
15 Do you see that? 14:58

16 A. Mm hmm, I do.

17 301 Q. *"Waiving immunity defences. We should waive the*
18 *federal government's sovereign immunity by enacting a*
19 *Westfall Act-like statute to cover all suits arising*
20 *within a government officer's scope of employment."* 14:58

21
22 Do you see that? And then over the page: *"Abrogating*
23 *the state secrets privilege"*, because it's too broad in
24 your opinion?

25 A. Mm hmm. 14:58

26 302 Q. Is that right?

27 A. Yeah.

28 303 Q. It is too broad?

29 A. I think it has been asserted in a context in which it

1 ought not to have been.

2 304 Q. well why does it need to be repealed?

3 A. well so I think the State Secrets Protection Act, which

4 was the proposal that I have endorsed, I think it was a

5 bill drafted by then Senator Kennedy, would have 14:59

6 abrogated the privilege in particular context and would

7 have left it intact in others but would have created

8 more robust procedural checks to ensure that it was

9 invoked in a case that actually justified its

10 invocation. 14:59

11 305 Q. And does your report which addresses - your report to

12 the court - which addresses state secrets, does it

13 record your advocacy of its repeal?

14 A. I don't believe I did it as such. If you just give me

15 one moment please. 14:59

16 306 Q. Paragraph 100 I think is where you start.

17 A. Mm hmm. No, but I do in paragraph 102 and in footnote

18 32, Judge, refer to the argument we discussed this

19 morning about how FISA itself might be ripe to abrogate

20 the state secrets privilege, which in this context 14:59

21 I think would mean we would not need a new statute from

22 Congress in the specific context of FISA. Now FISA is

23 unique in that regard. I am hard pressed to think of

24 other examples of statutory causes of action that one

25 could argue meaningfully were enacted against in 15:00

26 understanding that state secrets wouldn't be available.

27 307 Q. I am sorry, in your article you advocate the abrogation

28 of state secrets because you have some problem with it,

29 right?

1 A. I mean the article refers to abrogation. What I was
2 specifically endorsing was the adoption of the State
3 Secrets Protection Act.

4 308 Q. Changing it?

5 A. Yes. 15:00

6 309 Q. Yes.

7 A. Quite.

8 310 Q. Because you believe it's overbroad?

9 A. I do.

10 311 Q. And it operates as an inhibition on the judicial 15:00
11 remedies which you believe should be available?

12 A. And the exemplar case that I use in the article, Judge,
13 is a Ninth Circuit case from 2010, it's titled Mohamed
14 -v- Jeppesen Dataplan. This was an extraordinary
15 rendition case, that's the unfortunate euphemism that 15:00
16 we use in the US for sending people to be tortured by
17 third party countries.

18

19 That was the case that, I think, provoked much of the
20 outcry about the state secrets privilege. Because it 15:00
21 wasn't even a suit against the government, it was a
22 suit against a private Boeing subsidiary trying to
23 uncover its role in simply facilitating the movement of
24 the detainees.

25 15:01

26 In that context, Judge, there was no statutory cause of
27 action like FISA, and so the state secrets privilege
28 was a much more categorical obstacle than in context
29 where Congress has quite clearly contemplated that

1 preventing US federal courts from entertaining
2 challenges to secret surveillance programmes. You
3 don't disclose the fact that you argued yourself that
4 it should be abolished. Maybe you have and I've missed
5 it in your report?

15:03

6 A. No, I don't believe I say so in the report.

7 318 Q. No. Why not?

8 A. Again, because as I say in paragraph 101:

9
10 *"The state secrets privilege would pose its own*
11 *obstacle to civil remedies in this context if and only*
12 *if it requires the exclusion of a sufficient quantum of*
13 *evidence such that it 'become[s] apparent ... that the*
14 *case cannot proceed without privileged evidence, or*
15 *that litigating the case to a judgment on the merits*
16 *would present an unacceptable risk of disclosing state*
17 *secrets'."*

18
19 The question in this context for me, Judge, was whether
20 I thought that was going to be an obstacle in the
21 context of a claim by an EU citizen that his or her
22 data was being wrongfully collected in violation of
23 FISA. It's my own view - frankly, it is my *hope* - that
24 in that context the state secrets privilege would be
25 held not to apply because FISA would not make sense in
26 its provision of all these remedies if a state secrets
27 defence remained available.

15:03

15:03

28 319 Q. Did I understand you to say a few moments ago that the
29 only programmes that had existed were bulk meta-data

1 collection and PRISM?

2 A. I don't believe that's what I said. And if it is, I
3 certainly didn't mean it that way.

4 320 Q. No. Because --

5 **MS. JUSTICE COSTELLO:** I think he said Upstream as 15:04
6 well.

7 321 Q. **MR. MURRAY:** Yes. Because your evidence to the House
8 Permanent Select Committee on Intelligence in October
9 2013 was: "*It seems only fair to assume there are a*
10 *number of additional programmes to which the American* 15:04
11 *public is not privy.*" And --

12 A. So we soon thereafter, Judge, learned about the
13 internet meta-data programme, right, which I believe
14 thereafter was shut down, or at least it *had* been shut
15 down by the FISA court, we learned later that it had 15:04
16 been shut down. So what I was saying at that point -
17 this was, again, shortly after the Snowden disclosures
18 - is that we still didn't really know what we didn't
19 know, right? And now, thanks to the PCLOB report and
20 others, I at least have *some* confidence that we have a 15:04
21 better understanding of the list. You know, I'm not on
22 the inside, so I can only speak from what I know from
23 public records.

24 322 Q. You refer in your report to a number of cases in
25 relation to standing, starting at paragraph 91. 15:05

26 A. Mm hmm.

27 323 Q. Are you suggesting that these demonstrate that **Clapper**
28 doesn't mean what it seems to say, or what point are
29 you making with these cases, Professor?

1 A. No, I mean, I think the report is fairly clear on this,
2 Judge. I think I was dealing with those cases just to
3 illustrate that Clapper was not a categorical door
4 closing on these kinds of lawsuits. I was trying to
5 find examples of cases after Clapper that themselves 15:05
6 discussed the kinds of claims Clapper left open and
7 that these were the most obvious ones that came to
8 mind. Just to show that even after Clapper, there was
9 still some opportunity in this context for plaintiffs,
10 if you'll forgive the idiom, to plead themselves into 15:05
11 court, right, to basically create allegations that
12 would be enough to survive a motion to dismiss.

13 324 Q. So at paragraph 91 you have Schuchardt, and we've
14 discussed that already. You then move to the Natural
15 Resource Defense Council -v- Illinois Power Resources 15:06
16 case; is that not a case which is application of a well
17 established principle in federal law to the effect that
18 in environmental claims, groups such as the plaintiff
19 there can establish standing if they can prove that
20 they use an affected area and that their actual use of 15:06
21 that area has been impacted by the pollution of which
22 they contend? There, for example, their contention or
23 their complaint was about smoke, I think, coming from a
24 plant and there was particulate in the air which
25 affected their use of an area. Is that not an 15:07
26 established principle in --

27 A. So I cited the case, Judge, because I was reacting --
28 the DPC draft, in my view, could be read as suggesting
29 that Clapper actually made it very difficult to bring

1 any claim based on future harm, right, because there
2 might be the difficulty of proving that the harm was
3 certainly impending. As I say in my report, I think
4 this District Court case reaffirms, as Mr. Murray quite
5 rightly puts it, the previously established principle 15:07
6 in cases like Friends of the Earth, which I cite in
7 paragraph 92. Judge, the point was just that it was an
8 important reaffirmation, right, that that line of cases
9 was still viable after and notwithstanding Clapper.

10 325 Q. Well, sorry, do you dispute that Clapper establishes a 15:07
11 requirement of "certainly impending"? I thought that we
12 had agreed that that's what it establishes.

13 A. No, it's not about Clapper, Judge, it's about the DPC
14 draft. I had perhaps misread - but I don't think so -
15 the DPC draft decision to suggest in paragraphs 53 and 15:07
16 54 that a plaintiff had to establish some kind of prior
17 harm and what I was reacting to was simply that I did
18 not think that was a technically correct description,
19 even after Clapper, of the actual or imminent prong of
20 standing doctrine. 15:08

21 326 Q. In point of fact, that case that we're just discussing
22 was one when there was *present* harm, because there was
23 particulate in the air at the time they brought their
24 case.

25 A. Indeed. But again, the standing analysis was about 15:08
26 future harm, right? And so all I was trying to do,
27 Judge, was just to show that I think the DPC draft was
28 incomplete in its assessment of Clapper's impact on
29 Plaintiff's ability to plead themselves into court

1 through a showing of actual -- of, pardon me, imminent
2 or future injury.

3 327 Q. But we have no dispute between us that the test is
4 "certainly impending", isn't that right?

5 A. Quite. No dispute.

15:08

6 328 Q. Can I just, on that, ask you to look at your report
7 where you formulate... paragraph 95. Based on -- you
8 formulate, as it were, what you're taking from the
9 various cases:

10

11 *"where EU citizens can marshal plausible grounds from*
12 *which it is reasonable to believe that the US*
13 *government has collected, will collect, and/or is*
14 *maintaining, records relating to them in a government*
15 *database, they will likely have standing to sue even*
16 *[following] Clapper."*

17

18 And when you say "will collect" there, you mean will
19 *certainly* collect, isn't that right?

20 A. I mean -- so if I can insert, Judge, it's "will
21 *certainly* collect or" - and this is the point about the
22 **Susan B. Anthony List** case which I believe I mention in
23 paragraph 93 - or that there is a substantial risk,
24 right? So "certainly impending" -- the problem is that
25 the Supreme Court uses these words like "actual" and
26 "certainly" to mean things that are not necessarily the
27 everyday understanding of those words. "Certainly
28 impending" in the context of the Supreme Court standing
29 jurisprudence means *will* collect, or as **Susan B.**

15:09

15:09

1 Anthony List clarifies, there is a substantial risk,
2 right? I mean, that's the key to me. So in paragraph
3 93 I say this:

4
5 *"As the Supreme Court itself clarified one year after* 15:10
6 *Clapper, '[a]n allegation of future injury may suffice*
7 *if the threatened injury is 'certainly impending, or'"*
8 *- and that's my emphasis, Judge - "'there is a*
9 *'substantial risk' that the harm will occur."*

10
11 So the problem is the court uses terms that in their
12 actual application are a little more squirrely than
13 the everyday person might expect them to be.

14 329 Q. Remind us what the Driehaus case was about.

15 A. So this was about a video about Hilary Clinton and this 15:10
16 was an effort by, I believe it was the State of Ohio,
17 to apply a statute about campaign materials to preclude
18 publication/distribution of this video. And this was a
19 pre-enforcement challenge, right - the state had not
20 yet banned this private group from circulating this 15:10
21 video. They sued in advance of being told they could
22 not circulate the video to challenge it on First
23 Amendment grounds.

24 330 Q. **MS. JUSTICE COSTELLO:** Sorry, who sued?

25 A. I'm sorry, Susan B. Anthony List was this political 15:11
26 action group, political activity committee --

27 331 Q. **MS. JUSTICE COSTELLO:** So it wasn't the state, it was
28 an action group?

29 A. That's right.

1 332 Q. **MR. MURRAY:** But hold on. What happened in the case
2 was that the plaintiffs, who were activists, believed
3 that they were precluded by state -- by federal law
4 from publishing certain advertisements because there
5 was legislation which limited the ability of citizens 15:11
6 to express certain views during an election campaign.
7 A. I think the constraint was from state law. But I don't
8 think that's material.

9 333 Q. Yeah, okay. And they had tried to do this before and
10 been stopped. And there was going to be another 15:11
11 election, because there are elections all the time, and
12 they indicated that they were going to try to continue
13 their campaign and that they would be stopped. So how
14 does that change the law in the context of a test based
15 on "certainly impending"? 15:12

16 A. I don't think, Judge, that I suggested that Susan B.
17 Anthony List changed the law, right? I think the point
18 was that it just clarified that Clapper did not
19 eliminate the substantial risk possibility, right, that
20 a plaintiff could establish an actual or imminent 15:12
21 injury simply by alleging that there was a substantial
22 risk. Of course the question then becomes: what is a
23 substantial risk? And in the context of Clapper,
24 clearly it was not enough to the court that the
25 plaintiffs at that time, I think the term from the 15:12
26 Second Circuit was "had an objectively reasonable
27 likelihood that their communications would be
28 collected".

29 334 Q. Yes, even though they were lawyers and human rights

1 advocates and even though they were in touch with
2 people who it was never disputed would be of interest
3 to the government in foreign jurisdictions, that that
4 was not enough to prove "certainly impending". And
5 that's the test in US surveillance law, isn't that
6 right? 15:12

7 A. It is. I just think that, Judge, if the question is
8 substantial risk, I have to think - and I think we have
9 evidence to support the conclusion - that what is a
10 substantial risk after the Snowden disclosures and the 15:13
11 mountains of declassification that followed them looks
12 differently today than it looked at the time of Clapper
13 itself.

14 335 Q. All right. But what we can all agree on and what is
15 absolutely clear is that if you go to a federal court, 15:13
16 saying 'I am a European person whose information I know
17 as a fact is transported into the United States of
18 America' and I am a lawyer or a person with a high
19 profile - in fact, unless I'm mistaken, FISA,
20 remarkably, applies to anybody who is involved in a 15:13
21 political organisation which is not substantially
22 composed of Americans, is that right?

23 A. Yes, that is the statutory definition.

24 336 Q. So I'm a member of Fianna Fail and I'm therefore caught
25 by FISA, I'm one of the people, because I'm a member of 15:13
26 the a political organisation which is not substantially
27 composed of Americans, that my information may be
28 seized, I'm on the TV all the time giving out about
29 America and a federal court will say 'sorry' -- maybe

1 they will be interested in your information, you can
2 ratchet that up to varying degrees of likelihood of
3 being of interest, but that's not sufficient? The fact
4 that I'm concerned that this may occur, the fact that I
5 believe my privacy is impaired by reason of the 15:14
6 prospect that this could occur, none of that gives me a
7 right to bring proceedings?

8 A. So I would just say again, at the risk of beating a
9 dead horse, there's a difference based on the stage of
10 the proceeding. If Mr. Murray, on those exact facts, 15:14
11 were to bring a claim alleging that the United States
12 is in fact collecting his communications under, let's
13 just say section 702, I actually think, based on what
14 we know now, that that would probably be enough to
15 survive a motion to dismiss, indeed that it *should* be 15:14
16 enough to survive a motion to dismiss. And then the
17 question simply becomes Mr. Murray and his counsel's
18 ability to marshal evidence in support of that claim at
19 discovery, right?

20 15:15
21 That, to me, is the point that I think was missing from
22 the DPC draft report, that the stage of litigation,
23 although it's horribly technical, is very significant
24 to understanding what's available and how a court's
25 likely to react and that we should not assess these 15:15
26 decisions in a vacuum, divorced from the posture in
27 which that particular claim arose.

28 337 Q. well, just to work backwards from that.

29 A. Please.

1 338 Q. If I don't get jurisdictional discovery, or the state
2 secrets doctrine is presented in response to my request
3 for discovery, or I get discovery and I do not discover
4 from that that I am in fact under surveillance, I will
5 not survive a motion for summary judgment, isn't that 15:15
6 right?

7 A. That's right. Although --

8 339 Q. On the Clapper test?

9 A. I completely agree with that. I would just say I'd be
10 curious what the grounds were for being denied 15:16
11 jurisdictional discovery. But the other two pieces I
12 wholeheartedly agree with.

13 340 Q. Well, is that right? Do some of the cases not suggest
14 that there are certain levels of proof that you must
15 have to obtain jurisdictional discovery? 15:16

16 A. There are. And so a good example in this regard, Judge
17 - I'm sorry, it's not cited in my report - there's a
18 2004 case - this is back to extraordinary rendition,
19 I'm afraid - where there was a US citizen who was being
20 detained by, allegedly, Saudi authorities at the behest 15:16
21 of the US Government and he brought a habeas petition
22 in the US court claiming that even though he was in
23 Saudi custody, it was the US that was behind it and,
24 therefore, he was entitled relief against the US. That
25 sounds like a pretty fantastical claim, but Judge Bates 15:16
26 - the same Judge Bates who we see so much of in this
27 context - ordered limited jurisdictional discovery
28 because he found that the gravity of the claim was
29 sufficiently significant that it justify at least some

1 inquiry into whether there was any merit there. The
2 ironic disposition of that case was, instead of
3 proceeding to that discovery, the petitioner magically
4 appeared in a federal courtroom one week later, where
5 he was indicted on criminal charges giving proof to the 15:17
6 claim.

7
8 So Mr. Murray's right, jurisdictional discovery is a
9 matter that is fought over. It's been my experience
10 that courts tend to defer in favour of the plaintiffs 15:17
11 whenever there is some shred of plausibility,
12 especially where the cases raise grave claims of
13 unlawful surveillance, unlawful detention and so on.

14 341 Q. But let's say I'm simply trying to survive a motion to
15 dismiss with our *agreed* formula of what **Clapper** 15:17
16 decides; is it your evidence to the court that simply
17 because I am a European citizen liable to be surveilled
18 under FISA and simply because the US government has
19 programmes that have been approved by the FISC, that on
20 those facts alone my apprehension that I may have been 15:17
21 surveilled would be sufficient to confer standing?

22 A. No, I believe there's one more critical fact, Judge,
23 which I believe in that context Mr. Murray would need
24 to allege that his communications were of the type that
25 we have reason to believe the government has already 15:18
26 been collecting. Right, so for example, if Mr. Murray
27 does not communicate frequently -- I don't mean to
28 refer to Mr. Murray specifically; if the hypothetical
29 plaintiff in this case was not generally communicating

1 overseas, if he didn't use a lot of technology, right,
2 if he simply confined himself to in-person
3 communication with his friends and family, I think that
4 would not meet even a motion to dismiss threshold,
5 because I don't see where the plausible claim would be 15:18
6 that, based on what we know about 702 or about Upstream
7 and PRISM, that those communications were being
8 collected.

9
10 If, in contrast, the hypothetical plaintiff alleged 15:18
11 that, yes, he routinely communicates with people in
12 other parts of the world through e-mail and other
13 electronic media, that some of those people are in
14 Russia or North Korea or involved in activities that
15 might very well be on the radar of US foreign 15:18
16 intelligence surveillance activities, yes, Mr. Murray,
17 I think that would be sufficient.

18 342 Q. But how can that be -- well, sorry, first of all just
19 let us not forget, and to flag it; obviously I can't
20 challenge the constitutional validity of Section 702. 15:19

21 A. I wouldn't say "obviously". It would be an uphill
22 road, given Verdugo-Urquidez --

23 343 Q. But hold on. We've agreed now this morning, or we
24 agreed earlier on that I can't rely upon the Fourth
25 Amendment, in your opinion? 15:19

26 A. Under current law. But I think I also was clear,
27 Judge, that there is an open question before the
28 Supreme Court in the Hernandez case about whether that
29 current law might be in the process of shifting. And

1 just to tie this back to Rule 11 for a moment, Rule 11
2 saying nothing at all -- actually, forgive me, Rule 11
3 is quite express that a claim based on a novel
4 interpretation of the law, right, arguing for a change
5 in precedent is not prohibited, right, it's actually 15:19
6 encouraged. So --

7 344 Q. Okay. But we've agreed --

8 A. So there's no merit --

9 345 Q. We have reached a point earlier this afternoon where we
10 have agreed what the law is; I don't have Fourth 15:19
11 Amendment rights, I can't challenge the
12 constitutionality of it. So how exactly, Professor, do
13 I get the right, having regard to the fact that the
14 plaintiffs in Clapper didn't get it, how exactly do I
15 get the right now to challenge under -- to challenge 15:20
16 having regard to the standing test articulated there,
17 "certainly impending"? I can't prove that it's
18 certainly impending.

19 A. So again at the motion to dismiss stage, the question
20 would simply be whether Mr. Murray had plausibly 15:20
21 alleged, right, *not* proved, that the surveillance was
22 certainly impending. And as I just suggested, I think
23 that would depend to some degree on the nature of his
24 communications.

25 346 Q. **MS. JUSTICE COSTELLO:** Just in relation to that. I 15:20
26 mean, unfortunately we live in a world where we know
27 that you could be sending texts or e-mailing somebody
28 in Brussels, Paris, Madrid, London - these are not
29 exactly unusual places for Europeans to be e-mailing or

1 texting. So how would that play into your scenario?
2 A. Judge, I think if anything, right, that would be part
3 of the factual allegations in the complaint that might
4 very well give rise to, at least if -- remember, at the
5 motion to dismiss stage, we assume all the facts as 15:21
6 alleged and all the plausible well pled effects as
7 alleged in the complaint are true. And so if the
8 allegation in my complaint is in my completely
9 innocuous conversation with my Friends in Paris and
10 Brussels and Munich and Frankfurt the US Government has 15:21
11 nevertheless been collecting at least some of my
12 communications under Section 702 and if I could point
13 to reasons why that was plausible, which, frankly, the
14 PCLOB report would be a good starting point, right,
15 that would survive motion to dismiss. 15:21

16
17 Now, I don't mean to make light of this. The question
18 would then shift, as Mr. Murray quite rightly points
19 out, to the ability of the hypothetical plaintiff in
20 that context to then actually establish the collection 15:21
21 of his communications. And that's where the matter is
22 not, Judge, one of standing, right, it's one of
23 discovery, where the question is simply: Is he entitled
24 jurisdictional discovery? I think the answer would be
25 yes. To what extent does the government invoke the 15:22
26 state secrets privilege as an obstacle to discovery? We
27 don't have a good feel for that yet, but as I've
28 suggested in my report and in my testimony, I think in
29 the context of FISA, courts might be somewhat skeptical

1 of that claim. And even if the government invokes the
2 state secrets privilege as to individual pieces of
3 evidence, is it still possible to answer the basic
4 question necessary to the standing analysis, which is
5 'Dear US Government, do you have any of the 15:22
6 hypothetical plaintiff's communications in your
7 possession?' It might not require the divulgence of --
8 that's not a word; the divulging the state secrets for
9 the government to answer that simple question, given
10 what we already know about PRISM and Upstream. 15:22

11 347 Q. **MR. MURRAY:** Yeah, but sorry, Professor, let's go back
12 to the plausible grounds. So let's try to see what we
13 agree on. I could not bring a suit based on the fact
14 that I have electronic communications with people in
15 the United States and I am anxious about whether the 15:23
16 government can surveil, are surveying my
17 communications?

18 A. Your anxiety by itself would not be sufficient.

19 348 Q. Okay. Why is that?

20 A. Because of Clapper. 15:23

21 349 Q. Yeah. Just Clapper?

22 A. Well, no. I mean, we have -- so there's a long line of
23 standing cases, Judge, where courts have been skeptical
24 of mental or stigmatic harm, right, as a basis for
25 standing, out of a concern that it's too easy to allege 15:23
26 and too hard to prove. That goes to the concreteness.

27 350 Q. So if I say my communications and my ability to
28 communicate is being chilled, whether into the United
29 States or indeed elsewhere, because I believe my

1 communications are going through or I don't want to use
2 X internet service provider or Y because I don't want
3 to be surveilled and that's not fair, that wouldn't
4 suffice to grant standing --

5 A. By itself, no. 15:24

6 351 Q. No. Okay.

7 A. You can't bootstrap your way into standing simply by
8 alleging -- simply by taking steps to create the harm.

9 352 Q. All right. So next I have to allege that I believe I
10 *am* being surveilled, or would it suffice for me to say 15:24
11 I believe it's *possible* that I'm being surveilled?

12 A. So I think the allegation would have to be that the
13 government has or will shortly, right - this goes back
14 to the "certainly impending" - collect records. I
15 don't think it's enough to allege the possibility. 15:24

16 353 Q. Has? Give us that formulation again please, Professor.

17 A. I'm sorry, Judge. Has collected or will shortly
18 collect.

19 354 Q. Okay. well, in the United States do plaintiffs swear
20 to their complaints? Do they aver to their complaints, 15:24
21 or do they just write them and send them in?

22 A. They swear to them on information and belief, Judge --

23 355 Q. Okay. well --

24 A. -- meaning to the best of their knowledge.

25 **MS. HYLAND:** I don't think the witness is quite 15:24
26 finished. I think he's being interrupted

27 A. No, it's fine.

28 **MR. MURRAY:** Sorry, I wasn't interrupting the witness,
29 Judge.

1 A. It's fine. Judge, it's actually the lawyer who signs
2 the complaint, Judge, if it's not a pro se case, it's
3 not the Plaintiff him or herself. And this may be the
4 source of where Rule 11 came from, although the lawyers
5 say 'On information and belief, these are true to the 15:25
6 best of my knowledge', right? So in the complaint you
7 might say 'On information and belief', right, just
8 because that is the -- you're not asserting as fact
9 something that you do not actually know to be fact.

10 356 Q. **MR. MURRAY:** Okay. Well, I'm a conscientious person 15:25
11 and I'm not going to send my lawyer out to aver that I
12 have been or will shortly be surveilled unless I have
13 some information that would justify that, I'm just not
14 prepared to do that. So I can't bring a claim.

15 A. If there's no allegation that the US Government has 15:25
16 collected or will shortly collect your communications,
17 I think you would not meet the actual or imminent prong
18 of the injury-in-fact requirement.

19 357 Q. And I've no reason for believing that they *have*,
20 Professor, and I have no particular reason for 15:26
21 believing that they will shortly, although I've a
22 suspicion they might at some time. That doesn't
23 suffice?

24 A. No. Although once again, Judge, I mean, I think it's
25 critical to say that we apply a relatively lenient 15:26
26 standard in this context. Because the idea is not to
27 chill these claims out of court. And so I think the
28 **Schuchardt** and **Valdez** cases are very instructive in
29 this regard, and the **Wikimedia** case as well, right,

1 where the complaints are rife with allegations that, at
2 least in Schuchardt, I think Mr. Murray and I agree,
3 strain credulity, right, but that are not improper in
4 the context of the complaint that is considered in the
5 context of a motion to dismiss. 15:26

6 358 Q. And it is for all of those reasons, Professor, that you
7 believe the test should be changed?

8 A. It is for all those reasons that I would like to see
9 even greater access to court.

10 359 Q. Yeah. Because at present, standing is a substantial, 15:27
11 as you've said, obstacle to plaintiffs who wish to
12 litigate these issues?

13 A. I think I've been very clear about that. I think,
14 Judge, that the nuance I was trying to add was just
15 that the reason is a little more specific and not 15:27
16 nearly as muddled as I think might come through simply
17 from reading the DPC draft decision and, frankly, some
18 of the other expert reports.

19 360 Q. So can we go back then to paragraph 95 of your report?
20 So when you say "*based on the cases surveyed above*" -- 15:27
21 and the cases that are surveyed above, just to be
22 clear, are the people in, I think it was Ohio - I'm not
23 certain - in paragraph 93 --

24 A. Mm hmm.

25 361 Q. -- who were definitely going to be putting up their ads 15:27
26 in the next election and were definitely going to be
27 breaking the law if they did so. And you refer,
28 obviously, to Jewel and wikimedia as well. And you say
29 on that basis that the test is that can I say on

1 plausible grounds - and you've seen Ms. Gorski's
2 testimony on plausible grounds - where it is reasonable
3 to believe the US Government has collected, will
4 collect and/or is maintaining records. And were you
5 here for Ms. Gorski's evidence? 15:28

6 A. I was not.

7 362 Q. Did you read it?

8 A. I reviewed the transcript.

9 363 Q. Yeah. And did you disagree with what she said about
10 plausible grounds? 15:28

11 A. I think "plausible" is to some degree, Judge, in the
12 eye of the beholder. But I don't think, I mean
13 "plausible", I think, in this case is dramatically
14 enhanced by the volume of public information we now
15 have about how PRISM and Upstream operate. 15:28

16 364 Q. Okay.

17 A. So, Mr. Murray, just to answer your question, I don't
18 think I disagree with her characterisation. I think we
19 might apply it slightly differently.

20 365 Q. Now, you refer in your report to the Remijas -v- Neiman 15:28
21 Marcus case.

22 A. Mm hmm.

23 366 Q. why do you refer to that?

24 A. I found it interesting only because that case -- this
25 is in, I believe it's footnote 26, page 28, Judge. 15:29

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

27 A. I just thought it was interesting that the Seventh
28 Circuit engaged in some discussion of what Clapper did
29 and didn't do. And so I was putting it there - mind

1 you, in a footnote - just to sort of reinforce the
2 point that I believe I made earlier that part of what I
3 was trying do in my report was show the avenues that
4 were found to be open even after Clapper.

5 367 Q. **MR. MURRAY:** The Neiman Marcus case was one where there 15:29
6 had been a significant data breach at a department
7 store --

8 A. That sounds familiar.

9 368 Q. -- which resulted in customers' credit card details 15:29
10 being hacked, isn't that right?

11 A. That sounds familiar.

12 369 Q. Well --

13 A. Yes. I'm sorry, I didn't mean to be coy. Yes.

14 370 Q. Well, sorry, do you remember the facts of the case or 15:29
15 not?

16 A. I do. I do, yes. There was a breach, the details were
17 hacked and the plaintiffs sued, claiming that Neiman
18 Marcus was liable because they did not take adequate
19 procedures to protect their data. Forgive me for being
20 coy. 15:30

21 371 Q. But you just omitted perhaps one detail, which is that
22 the plaintiffs had had transactions, fraudulent
23 transactions on their credit card accounts following
24 the hacking. Not an insignificant detail perhaps?

25 A. I didn't mean to omit it. I apologise. 15:30

26 372 Q. Yeah, okay. So it would've been surprising if your
27 credit card bill increased as a result of a data breach
28 if you didn't have standing to complain about it,
29 wouldn't it?

1 A. Yes. I mean, Judge, I wasn't -- again, I don't mean to
2 overstate why this case is here. The case is there not
3 because I thought that the holding was somehow an
4 important development of the standing doctrine, but
5 just because I at least found the discussion in the 15:30
6 quoted passage in footnote 26 helpful to me in
7 understanding what was left, frankly, of the
8 substantial risk standard. And so I wasn't,
9 Mr. Murray, I wasn't trying to make any broader claim
10 about the import of that case other than just that I 15:30
11 found that particular passage illuminating.

12 373 Q. It doesn't introduce any change in the law, isn't that
13 right?

14 A. Oh, no. To the contrary, I think it was just simply
15 summarising what was true after Clapper. 15:31

16 374 Q. Now, you referred to another case, the Horizon case.
17 And I mean, Professor, various views have been
18 expressed about the effect or non-effect of the
19 decision in Spokeo.

20 A. Mm hmm. 15:31

21 375 Q. And I want to see can we perhaps just narrow our range
22 of disagreement about that.

23 A. Sure.

24 376 Q. So Spokeo was decided in May of last year and some
25 people seem to think it is of relevance to cases 15:31
26 involving breach of what we would describe in Europe as
27 data protection or data privacy rights, isn't that
28 right?

29 A. Yes. And just to be clear, Mr. Murray, I agree that

1 especially in the context of statutes like the Fair
2 Credit Reporting Act and private defendants, like the
3 defendants in Spokeo and in the Horizon case, I
4 wouldn't dispute for a moment that Spokeo is *relevant*.
5 The reaction I had to Spokeo, Judge, was to the 15:32
6 suggestion by Mr. Serwin in his supplemental memorandum
7 and Prof. Richards in his report that Spokeo had
8 somehow narrowed, I believe, or tightened --
9 377 Q. All right.
10 A. -- the doctrine. 15:32
11 378 Q. So let's then, as I said try, to see what we can agree.
12 It's relevant?
13 A. Quite.
14 379 Q. It's relevant to standing?
15 A. It's relevant to the concrete or particular -- sorry 15:32
16 concrete *and* particularised injury prong of the
17 injury-in-fact requirement, which is, as I mentioned
18 this morning, Judge, I think especially relevant in the
19 context of statutory claims against private defendants.
20 380 Q. Yeah. Well, let's, as I said, let's see what we can 15:32
21 agree on first, Professor. It's especially -- it's a
22 case that's relevant to standing, it's a case that's
23 relevant to standing in the context of what we call
24 data breach or data privacy...
25 A. Mm hmm. 15:32
26 381 Q. ... rights. Yes?
27 A. Yes.
28 382 Q. Okay. And it is a case which is of relevance to such
29 data privacy rights arising from particular statutes

1 providing particular protections?

2 A. I agree.

3 383 Q. Okay. And whether it's as a consequence of Spokeo or
4 as a consequence of the pre-existing law articulated in
5 Spokeo, it certainly casts a shadow over the issue or 15:33
6 raises a doubt as to whether you can get damages just
7 for unlawful retention of your information. Now, I
8 know you say private persons versus the state and we'll
9 have a conversation about that in a moment, but would
10 you agree with the manner in which I've just formulated 15:33
11 that proposition; it creates a doubt or an issue about
12 whether you have standing to challenge the simple
13 retention, unlawful retention of your information?

14 A. The only word in that statement I disagree with,
15 Mr. Murray, is "creates". I would have argued, Judge, 15:33
16 that that issue existed --

17 384 Q. No, I thought I had made it clear --

18 A. I'm sorry.

19 385 Q. -- that I'm going to park that dispute. It either
20 created it or it confirmed a pre-existing issue? 15:34
21 A. Yes, fair enough. Then I wholeheartedly agree.

22 386 Q. All right. So there's this issue there about whether
23 data retention generates or presents a concrete injury.
24 Right?

25 A. Mm hmm. 15:34

26 387 Q. Okay. And the reason that's an issue is because either
27 the pre-existing law or Spokeo emphasises the need for
28 concreteness and there is this perhaps slightly
29 confusing statement in the judgment that something can

1 be intangible but concrete, but it's equally clear from
2 the judgment that the mere fact that there is a breach
3 of a statute does not in and of itself create Article
4 III standing in the sense of creating a concrete injury
5 for the purpose of injury-in-fact? 15:34

6 A. Not in all cases, I agree.

7 388 Q. Yeah, not in all cases. All right. So would you also
8 agree that there is a *view* - and I understand you
9 disagree with the *view* - but that there is a view that
10 **Spokeo** *did* introduce a change? 15:35

11 A. I was not aware of that view before I read Mr. Serwin's
12 November memo and Prof. Richards' report. But I can't
13 dispute that that view clearly exists.

14 389 Q. Okay. You mentioned a case, the **Horizon** case.

15 A. Mm hmm. 15:35

16 390 Q. Do you still have your copy of it?

17 A. I do.

18 391 Q. And I've lost my own copy, so forgive me while I try to
19 find where I was, but I think it's maybe footnote 17.
20 In fact, if you go, Professor, to the bottom of page 15:35
21 nine.

22 A. Yeah.

23 392 Q. *"Although it is possible to read the Supreme Court
24 decision in Spokeo as creating a requirement that a
25 plaintiff show a statutory violation has caused a 15:36
26 material risk of harm before he can bring suit, we do
27 not believe the court so intended to change the
28 traditional standard for the establishment of
29 standing."*

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And then there's a discussion about the Nickelodeon case, which we had the pleasure of debating at some point in the distant past in this case. And footnote 17 then says: "*Some other courts have interpreted Spokeo in such a manner*".

15:36

A. So I referred to both of those cases this morning, Judge. These are the Seventh and Eighth Circuit cases --

393 Q. Well, I wonder could we just stay with the quotation for one moment?

15:36

A. Sure.

394 Q. "*Some other courts have interpreted Spokeo in such a manner, most notably the Eighth Circuit in Breitberg, concluding that in the light of Spokeo the improper retention of information under the Cable Communications Policy Act did not provide an injury-in-fact absent proof of material risk of harm from the retention.*"

15:36

And then Gubala, which I think is one of the Cable Communications Act cases, "*finding that as a result of Spokeo, the unlawful retention of the individuals*" -- sorry, "*under the Cable Communications Policy Act did not constitute recognisable injury.*"

15:36

So there seems to be a view somewhere in the courts that - in some circuits - that it did introduce a change?

15:37

A. So if I just may? I mean, Judge, first of all, those

1 are both recent decisions, Breitberg and the Gubala
2 Seventh Circuit case. Second, as I said this morning,
3 Judge, I actually think that those are faithful
4 applications of the Lujan principle, which is to say
5 that concreteness in this context requires more than 15:37
6 the bare assertion of a procedural injury and that in
7 the unique context of Section 551 of the Cable
8 Communications Policy Act - the same claim in both
9 cases, it was the same lawyer - that it made sense
10 under Lujan and not just Spokeo that there would not be 15:37
11 standing simply by a violation of the text of the
12 statute, you had to show something more.

13
14 So, you know, I don't take those cases as suggesting
15 that Spokeo changed or narrowed the law in this regard 15:37
16 as opposed to maybe perhaps clarified what Lujan meant,
17 but we end up in the same place I think.

18 395 Q. Well, I just want to -- I mean, you seem to be
19 disputing -- like, I understand your view is that it
20 didn't change the law. Fine. But I'm just trying to 15:38
21 clarify whether you accept that there is a view --

22 A. I think I said that. I do.

23 396 Q. -- in the courts that it did change the law?

24 A. I mean, I don't know that it makes -- surely there's
25 some judge somewhere who has suggested that Spokeo 15:38
26 changed the -- every time the Supreme Court interprets
27 one of its prior cases, right, it is, at least
28 marginally, changing the law.

29 397 Q. Okay.

1 A. The dispute, if anything, Judge, is just over the vol
2 -- the degree of the change.

3 398 Q. All right. So the application of the requirement for
4 concrete injury - and we agree bare statutory violation
5 is not enough, procedural violation is not enough and I 15:38
6 think we also agree that to establish "harm" you have
7 to bring yourself within an established category of a
8 common law type remedy or a statutory harm, is that a
9 fair...

10 A. I think that's right. 15:39

11 399 Q. Yeah, okay. But it's not just retention cases to which
12 the concreteness requirement applied in Spokeo has been
13 applied, it's also been applied to disclosure cases,
14 isn't that right?

15 A. As in Spokeo itself. I mean, right, in Spokeo itself 15:39
16 we had the disclosure of information that turned out to
17 be to the benefit of the plaintiff, right --

18 400 Q. Well, that wasn't necessarily without dispute. And
19 you've seen the dissent which, or the separate opinion
20 of Justice Ginsburg, which disputes that. 15:39

21 A. Fair enough.

22 401 Q. But take a look -- I'm just going to hand up a
23 collection of the cases (Same Handed). Prof. Richards
24 was berated by Mr. Gallagher for not being familiar
25 with all of these cases. You, I presume, read them all 15:39
26 as they come out, do you?

27 A. So by my research, Judge, there have been somewhere
28 over 500 cases in the federal courts in the eight/nine
29 months since Spokeo citing Spokeo. I hope you'll

1 forgive me in saying I have not read all of them.

2 402 Q. Okay. Well, that's entirely understandable, Professor.
3 But it does sound like it is - and you will have heard
4 the debate last week with Prof. Swire about Facebook's
5 *own* case in the Northern District of California - that 15:40
6 it *is* being used to strike out cases on the grounds of
7 Article III standing in a wide range of circumstances?
8 A. Or at least being invoked. I mean, I think, you know,
9 again that decision hasn't been handed down yet, to my
10 understanding. 15:40

11 403 Q. Okay. But you will be familiar with the fact that
12 there *are* very similar cases in which claims *have* been
13 struck out, in fact under the Illinois biometric
14 statute, isn't that right?
15 A. Indeed. I would just point out, so far as I 15:40
16 understand, that all of the cases invoked by
17 Prof. Richards involve claims against -- well, or I
18 should say claims not against the federal government.

19 404 Q. You are correct about that, yeah. And we'll come back
20 to that in a moment. 15:41
21 A. Fair enough.

22 405 Q. But just to try and understand the principles first.
23 A. Please.

24 406 Q. Because the federal government, I presume, is bound by
25 the same principles of law as apply to everybody else 15:41
26 and it doesn't seem to be shy about bringing
27 applications to strike out proceedings.
28 A. No. The only thing would I suggest, Mr. Murray, is
29 that I do believe, as I said this morning, that there

1 would be a little more sympathy on the part of courts
2 to a retention based injury to a violation of privacy
3 where it was the government wrongfully holding the data
4 as opposed to a private company. Again I'm speculating
5 into a vacuum, because we haven't seen cases to that 15:41
6 effect.

7 407 Q. And there is no legal authority that you can cite to
8 support that proposition?

9 A. I wouldn't say there's no legal authority. I mean,
10 again, right, the third party doctrine, Judge, 15:41
11 presupposes that we surrender our expectation of
12 privacy in data that we voluntarily share with a
13 private company, with our phone provider, with our
14 cable company. As Judge Leon, I think, quite rightly
15 points out in the Klayman case, it's not obvious that 15:42
16 that maps on to the government's ability to take all of
17 those disparate data streams and abrogate them. And so
18 I do think that there is support in those cases at the
19 very least, Judge - and it's only analogous support -
20 for the notion that the privacy concern may very well 15:42
21 differ when it's the government abrogating private data
22 versus data held by private companies. That's the only
23 point I was trying to make.

24 408 Q. And Clapper itself, as we know, was a seizure -- sorry,
25 ACLU -v- Clapper itself was a seizure in breach of the 15:42
26 Fourth Amendment?

27 A. Although that's not the claim, Judge, that obviously
28 won the day in the Second Circuit. The Second Circuit
29 didn't reach the Fourth Amendment question, it simply

1 held that the phone records programme was not
2 authorised by the USA PATRIOT Act, by Section 215.

3 409 Q. But the harm suffered by the plaintiffs was the harm,
4 if they were right in their case - and this is
5 obviously the assumption in standing - that there was a 15:43
6 seizure in breach of the Fourth Amendment?

7 A. Indeed. which I think goes back to my point from the
8 this morning about how the harm doesn't have to be the
9 same as the claim.

10 410 Q. Yeah. And does the Fourth Amendment operate vis-a-vis 15:43
11 private actors?

12 A. No.

13 411 Q. No. So that vis-a-vis state actors, there is a basis
14 for asserting a harm which is not available vis-a-vis
15 private actors? 15:43

16 A. I agree. And I think, Judge, that's further to the
17 point about why retention by the government might
18 differ from retention by a private firm.

19 412 Q. And not available to EU citizens?

20 A. Well, again, I mean, not to muddy the water, but -- 15:43

21 413 Q. If our point of agreement of this afternoon - and I
22 fully understand that you think the law might change
23 and so forth, we had a similar debate with Prof. Swire
24 - but in terms of your best ability of predicting the
25 legal position at this point in time, the EU citizen 15:43
26 doesn't have that?

27 A. And just -- Judge, I agree with Mr. Murray. I just
28 want to put the sort of cherry on top, which is to say
29 because of the absence of a claim on the merits, not

1 because of a lack of standing.

2 414 Q. Yes. But they can't invoke the Fourth Amendment *at all*
3 for the purposes of identifying an injury?

4 A. I think they could. That is to say I think they could
5 allege that their privacy was violated, even if they 15:44
6 don't have an ultimate Fourth Amendment claim on the
7 merits. And that's why I introduced the Hernandez case
8 this morning where you have a Mexican national who very
9 well may not be protected by the Fourth Amendment, but
10 who still has an interest in not being wrongly seized 15:44
11 by having, you know, by having himself be killed. So,
12 right, I think an EU citizen could allege privacy harm
13 for the purposes of the actual -- or, I'm sorry, for
14 purposes of the concreteness and particularised prong
15 of standing, even if the court is ultimately 15:44
16 unsympathetic to that claim on the merits.

17 415 Q. Yeah. But the seizure in that situation would have to
18 be a seizure that was unlawful because of noncompliance
19 with the legislation rather than because of
20 noncompliance with the Fourth Amendment? 15:45

21 A. Based on current Fourth Amendment law, I agree.

22 416 Q. Yeah. So, for example, Beck -v- McDonald is a Fourth
23 Circuit decision from --

24 A. I'm sorry, which tab?

25 417 Q. Sorry, excuse me, tab seven. 15:45

26 A. Thank you.

27 418 Q. So this is a case in which there were data breaches
28 involving the loss of personal information of a large
29 number of patients at, I think, a veterans' hospital.

1 A. Mm hmm.

2 419 Q. And they sought to establish Article III standing based
3 on harm from an increased risk of future identity
4 theft. But there had been unlawful disclosure and the
5 action was brought under the Privacy Act, isn't that 15:45
6 right, the 1974 Act?

7 A. Yes.

8 420 Q. Yeah. So this isn't a case brought under some obscure
9 credit reporting act or a statute about cable TV, this
10 is the Privacy Act itself, yeah? 15:46

11 A. That's right.

12 421 Q. And you've looked at this case, have you?

13 A. I actually, this case is about two weeks old, so this
14 is the first time I'm seeing it, forgive me.

15 422 Q. All right. Well, I fully understand that. So if you 15:46
16 go to page seven. And there does appear, Professor, to
17 be circumstances in which the Clapper, you know,
18 immanence test, a test of time, or timing and the
19 Spokeo or non-Spokeo test of concreteness converge in
20 these types of cases. Because here, if you look at 15:46
21 page seven, it says in the paragraphs on the right-hand
22 side, the top paragraph:

23

24 *"Clapper's discussion of where a threatened injury*
25 *constitutes Article III injury-in-fact is* 15:46
26 *controlling... Clapper's iteration of the well*
27 *established tenet that a threatened injury must be*
28 *'certainly impending' to constitute injury-in-fact is*
29 *hardly novel."*

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Referring to authority in that regard. And then they say:

"We also reject the plaintiffs' claim that emotional upset and fear of identity theft and financial fraud resulting from the data breaches are adverse effects sufficient to confer Article III standing." 15:47

So just to be clear, this is a situation in which there's been an unauthorised disclosure of these people's private information and they have no cause of action so far, their apprehension of identity theft's a bit remote and the emotional upset they have is not cognisable in law as a concrete injury, is that right... 15:47

A. Right. And so, I mean, my, just reacting to this case for the first time, my reaction to this, Judge, is that this is very similar to the Seventh and Eighth Circuit cases in Breitberg and Gubala where the concern the plaintiffs alleged was that the data would be used against them, it would be used in some way to their detriment through data theft, right through someone's abuse of their credit cards etc. and that they could not show that that had happened. So we're back to the actual or imminent problem of Clapper, not the concreteness problem with Spokeo. 15:48

423 Q. Exactly. But what they *can* show is that their private information has, they say, as a result of a breach of

1 the law, been disclosed to somebody who shouldn't have
2 seen it, is that right?

3 A. I mean, so under -- yes. The problem in this case, as
4 I understand it, Mr. Murray, is that the court read the
5 Privacy Act read to not allow that kind of claim. 15:48

6 424 Q. Exactly. The fact that your privacy has been violated,
7 not just now through unlawful retention, but through
8 disclosure, is not sufficient in itself to create a
9 concrete injury under the legislation?

10 A. Because the Privacy Act, as opposed to, say, FISA is 15:48
11 not worried necessarily in the same degree about the
12 government's retention and -- they're different
13 statutes, but yes, I agree.

14 425 Q. And how does that then relate to the JRA?

15 A. Well, I mean, obviously, I think as we've discussed 15:48
16 previously, I mean, the JRA, I imagine - we don't have
17 case law yet - will be interpreted consistently with
18 the Privacy Act.

19 426 Q. Yes, exactly.

20 A. And just briefly, I mean, Judge, this is part of why in 15:49
21 my report I focus more on the other remedies, because I
22 share what I take to be the DPC's concerns about some
23 of the inadequacies of the Privacy Act regime.

24 427 Q. And let's just specify for the judge what those
25 inadequacies are. 15:49

26 A. Well, I think my report is quite clear on this,
27 Mr. Murray.

28 428 Q. Yeah.

29 A. I refer, Judge, to the ability of particular agencies

1 to effectively exempt themselves from the Privacy Act
2 regime, which the NSA, to my knowledge, has done,
3 right, that that's why my focus when thinking about the
4 most effective opportunities to hold the government to
5 account for the kinds of claims we're talking about, 15:49
6 Mr. Murray, are not usually going to be focused on the
7 Privacy Act so much as the APA, FISA etc.

8 429 Q. And if you look at just tab one of that booklet, simply
9 because it brings into focus the discussion that we had
10 with Prof. Swire last week, Vigil -v- Take-Two 15:50
11 Interactive Software is a case brought under the same
12 statute as the legislation that Facebook is being sued
13 for in the Northern District of California and here a
14 claim was struck out on Article III grounds under that
15 statute where, similarly, it was contended that the 15:50
16 defendants had taken and retained unlawfully biometric,
17 private biometric information of the plaintiffs or
18 information captured by the legislation.

19
20 But just in terms of the legal analysis, if you go to 15:50
21 page seven of 19, the legal test articulated there on
22 the left-hand side, the first paragraph, referring to
23 the Driehaus case:

24
25 "*The Supreme Court in Spokeo recently clarified that* 15:51
26 *for an injury to be particularised it had must affect*
27 *the plaintiff in a personal individual way"* - quoting
28 Lujan - "*'for an injury to be concrete it must be real*
29 *and not abstract'.*"

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If you go over then to page 18, at the very bottom of that page they refer to a case which is actually quoted in the transcript we looked at last week, McCullough -v- Smarte Carte, and that's cited in the top right-hand page:

15:51

"Plaintiff is denied standing for alleged violations of the BIPA. In that case the defendant provided for rent a fingerprint coded locker" --

15:51

A. I'm sorry it's at page 18?

430 Q. Sorry, page eight, excuse me. I'm sorry, that's my mistake excuse me.

MS. JUSTICE COSTELLO: On which column?

431 Q. **MR. MURRAY:** And we're at the top right-hand column, Judge, referring to this Smarte Carte case:

15:52

"Denied standing to a plaintiff for alleged violations of the BIPA. In that case the defendant provided for rent a fingerprint coded locker that used the plaintiff's fingerprint as the key to lock and unlock the locker. The plaintiff claimed the defendant had violated multiple provisions of the BIPA. Specifically the plaintiff alleged that the defendant had collected and indefinitely retained fingerprint data without publishing any destruction guidelines. The plaintiff also alleged that the defendant had failed to give any notice or receive any written consent acknowledging that the defendant was collecting or using biometric

15:52

15:52

1 *identifiers.*

2
3 *The court dismissed the plaintiff's claim of bare*
4 *procedural and technical violations of BIPA for want of*
5 *Article III standing, reasoning the plaintiff* 15:52
6 *undoubtedly understood that when she first used the*
7 *system her fingerprint data would have to be retained*
8 *until she retrieved her belongings from the locker. As*
9 *the court held, even without prior written consent, if*
10 *the defendant did indeed retain the fingerprint data* 15:52
11 *beyond the rental period, the court finds it difficult*
12 *to imagine without more how this retention could work a*
13 *concrete harm."*

14
15 (To witness) And that, I think, is a feature of these 15:53
16 cases across a whole range of statutes. And I think
17 you would agree, Professor, that there would be a
18 reasonable basis for contending that the same
19 principles applied vis-a-vis the federal government
20 retaining information under statutes such as FISA? 15:53

21 A. I certainly agree, Mr. Murray, that the government will
22 likely make that argument.

23 432 Q. Yes.

24 A. I remain of the view that because of the different
25 expectation of privacy we have vis-a-vis private actors 15:53
26 and vis-a-vis the government that a court will be less
27 skeptical of the concreteness of the harm from wrongful
28 retention in the context of surveillance data than they
29 have been in these claims. But again, I happily

1 concede, as I have many times, that we don't yet have a
2 case on that point.

3 433 Q. Yeah. well, it's not just that we don't have a case,
4 it's a credible argument being advanced based upon what
5 Spokeo has decided? 15:53

6 A. So I mean, credible insofar -- credible if the
7 government is willing to argue that we have - that
8 *anyone* has; this wouldn't be about EU citizens versus
9 Americans, this would be that *anyone* would have no
10 expectation of privacy even in the government's 15:54
11 retention in a database of information about them.
12 Nothing would surprise me from the perspective of
13 arguments the government might make. Judge, I *would* be
14 surprised if the court accepted that argument.

15 434 Q. But what's the provision of the legislation that you 15:54
16 would point to that would allow you to say that
17 retention of information which has *never* been
18 acknowledged as the basis for a claim at common law,
19 American law, English law, what's the basis on which
20 you could say that retention of the information is a 15:54
21 concrete harm?

22 A. So the best basis I have, Judge, is the one I referred
23 to earlier, which is Judge Leon's decision in the
24 Klayman case, which talks about the different privacy
25 harms that can accrue when the government is holding 15:54
26 onto data from different data streams, as opposed to
27 those data streams simply residing in the servers of
28 private firms. That's the best argument I'm aware of.

29 435 Q. And what relief do you get in that situation if -- you

1 don't get damages?
2 A. No. I mean, so the claims had been structured so far,
3 Judge, to seek some kind of prospective relief where
4 the government is required to purge the data or destroy
5 the data, basically to end the harm, which is the 15:55
6 wrongful retention thereof.
7 436 Q. You can't get damages for what's happened in the past
8 in that situation.
9 A. Not unless - just to tie things back together, Judge -
10 not unless we were talking about, for example, a 15:55
11 violation of 1810, right, where you had some reason to
12 believe that the data was collected or retained in a
13 manner that was willful and intentionally in violation
14 of FISA.
15 437 Q. And FAA -v- Cooper would prevent you from claiming 15:55
16 damages under the Privacy Act, isn't that right, unless
17 you could prove --
18 A. Unless you could show actual harm.
19 438 Q. Yeah. So your range of remedial options is fairly
20 limited, isn't that right? 15:55
21 A. It is limited. I don't think I've ever suggested
22 otherwise.
23 439 Q. No. And it's hard to see even that you could get
24 declaratory relief, isn't it?
25 A. I don't know that that's true. I mean, declaratory 15:56
26 relief requires, depending upon the context, Judge,
27 some kind of showing that this harm is still occurring,
28 right, or that it's likely to occur again in the
29 future. In the context of a claim, right, that the

1 government is holding onto not just my data
2 incorrectly, but many individuals' data, I'm not sure
3 it would be such an uphill battle to get a declaration.
4 440 Q. But in the situation where the breach has occurred and
5 it's stopped, you can't get damages for the reasons we 15:56
6 have discussed --
7 A. Unless you sue under 1810.
8 441 Q. Yeah. You can't get an injunction, because it's not
9 happening any more. And you can't get a declaration
10 for the same reason? 15:56
11 A. Unless you can show some basis for believing that it
12 might recur.
13 442 Q. Well --
14 A. And so this is why, Judge, 18 -- I mean, in a sense
15 this is actually how the pieces fit together. 1810 is 15:56
16 meant to provide a recourse for the malevolent
17 government actor, who's much more likely, in
18 Mr. Murray's example, to be the one who did one or a
19 handful of bad things in the past and is no longer
20 acting. I think the assumption that pervades the 15:57
21 scheme is that where the challenge is programmatic,
22 where the challenge is that the government as a whole
23 is continuing to engage in this programme, that's where
24 the prospective remedies - injunctive relief,
25 declarations - are going to be more important and 15:57
26 available.
27 443 Q. And what have you to establish to get relief under
28 Section 1810?
29 A. To get a refund?

1 444 Q. Relief under Section 1810.

2 A. Oh, sorry. So you have to establish that the

3 defendant, who presumably, if you're seeking damages,

4 would have to be a government officer in his personal

5 capacity, knowingly or intentionally violated FISA as 15:57

6 defined in 50 USC Section 1809.

7 445 Q. So the person who finds, rather like the plaintiffs in

8 the cases that we're looking at here, that their data

9 has been disclosed as a result of a negligent or

10 reckless act - and that in fact is what is occurring in 15:57

11 almost all of these cases; none of them, as far as I

12 can see, involve willfulness - they can't get damages

13 under 1810?

14 A. They certainly cannot if they can't meet that bar, I

15 agree. 15:58

16 446 Q. No. They can't get damages under 1810, they can't get

17 an injunction --

18 A. But, Judge, can I just clarify? They can't get an

19 injunction to stop the collection, since, as Mr. Murray

20 suggested, it happened in the past. I do think they 15:58

21 might be able to pursue an injunction if the government

22 is still holding onto the records, right, on the theory

23 that the retention causes a concrete harm. There would

24 still be a forward looking harm that would be

25 remediable through an injunction. The relief, as I 15:58

26 said, Mr. Murray, would be limited, it would be --

27 447 Q. Yeah. But the retention, you can only stop retention

28 if it's unlawful.

29 A. That's right.

1 448 Q. Yeah. But imagine it's an entirely lawful retention -
2 I think is it six years under FISA?
3 A. One other question is whether there's a violation of
4 the minimisation requirements. So I don't mean to
5 prejudge the merits, Judge, my point is just that an 15:58
6 injunction would be available in that context not to
7 remedy the prior collection violation, but perhaps if
8 you had a claim that the retention was itself unlawful,
9 perhaps to go after that.

10 449 Q. Okay. But where you have a negligent disclosure - no 15:59
11 declaration, no injunction, no damages?
12 A. Negligent disclosure and the claim was simply about the
13 disclosure and not the retention? Yes.
14 **MR. MURRAY:** Judge, I will be a little while more.
15 **MS. JUSTICE COSTELLO:** Yes. well, we'll take it up in 15:59
16 the morning then.
17 **MR. MURRAY:** May it please the court.
18
19 **THE HEARING WAS THEN ADJOURNED UNTIL WEDNESDAY, 1ST**
20 **MARCH AT 11:00** 16:00
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