

THE HIGH COURT - COURT 29

COMMERCIAL

Case No. 2016/4809P

THE DATA PROTECTION COMMISSIONER

PLAINTIFF

and

FACEBOOK IRELAND LTD.

AND

DEFENDANTS

MAXIMILLIAN SCHREMS

HEARING HEARD BEFORE BY MS. JUSTICE COSTELLO

ON WEDNESDAY, 22nd FEBRUARY 2017 - DAY 9

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1 **THE HEARING RESUMED AS FOLLOWS ON WEDNESDAY, 22ND**
2 **FEBRUARY 2017**

3
4 **REGISTRAR:** At hearing commercial action, Data
5 Protection Commissioner Plaintiff -v- Facebook Ireland 11:02
6 and Maximilian Schrems.

7 **MR. MURRAY:** May it please the court. There has been a
8 slight rearrangement of the furniture. Prof. Richards,
9 please.

10
11 **PROF. RICHARDS WAS RE-EXAMINED BY MR. MURRAY AS**
12 **FOLLOWS:**

13
14 1 Q. Prof. Richards, when we broke up on Monday afternoon we
15 were looking at **ACLU -v- Clapper**, that's the first 11:03
16 **Clapper** case, the decision of the Second Circuit, and
17 that's at Tab 15 if we could --

18 A. Which book?

19 2 Q. Well, it's Tab 15 in Book 1 of the Book of Authorities,
20 but Mr. Young might be able to help you. 11:03

21 Prof. Richards, I think we had finished at the point
22 and in particular we were looking at paragraph 6 on
23 page 801 where you had explained that, in relation to
24 the seizure of the metadata, it was the Fourth
25 Amendment which established standing and observed that 11:04
26 this would not have been available to US citizens?

27 A. That's correct.

28 3 Q. And if you can just, to put this in context and remind
29 us, Prof. Richards, Mr. Gallagher used a phrase on a

1 number of occasions on Monday, and in particular in the
2 course of the afternoon, "*interference with the data*"
3 and he used the phrase "*use*" and he used the phrase
4 "*access*" and he used the phrase "*disclosure*", insofar
5 as - and I think you express some satisfaction with 11:04
6 that phrase - but insofar as you know what it means
7 what was the interference that was in issue in this
8 case?

9 A. The interference in this case, and again, as
10 I suggested on Monday, interference is not typically 11:05
11 the word that US lawyers might use in this context.
12 But in this case, to use I think the word that lawyers
13 would use, the injury or the injury in fact was the
14 seizure of the data by the United States government.

15 4 Q. Mr. Gallagher put it to you repeatedly on Monday 11:05
16 afternoon that this case established that interference
17 with the data constituted harm or accessing the data
18 constituted harm, is that in your opinion a correct
19 construction of the reference to seizure?

20 A. It is not. 11:05

21 5 Q. And what do you understand the case to have decided
22 insofar as it defined or identified a type of
23 permissible harm for the purposes of the Article III
24 test?

25 A. I read Clapper to say that, because the United States 11:05
26 government seized the data and because the plaintiffs
27 in this case both alleged and proved as a result of the
28 illegal Snowden disclosures that the data had in fact
29 been seized, and, furthermore, because there was a

1 colourable claim that their Fourth and First Amendment
2 rights had been violated, that that constituted an
3 injury in fact within the meaning of Article III.

4 6 Q. **MS. JUSTICE COSTELLO:** Can you explain colourable
5 claim? I suspect that's more complicated than I think. 11:06

6 A. Unfortunately, Judge, that's correct, it is more
7 complicated. So there is a problem, a logical problem
8 in standing doctrine; what happens if you don't prove
9 your claim, do you, therefore, lack standing? It
10 creates a bit of a chicken and egg problem of 11:06
11 circularity. So US courts have resolved this problem
12 by requiring that what is necessary is a colourable
13 claim, a claim that is, it's hard to define terms of
14 art outside of their meaning, a claim that one can
15 make, a reasonable claim, not necessarily one that will 11:07
16 be proven, but a legitimate claim within the meaning
17 of --

18 7 Q. **MR. MURRAY:** A phrase that's used in this system is a
19 *stateable* claim, is that a phrase you have heard
20 before, a *stateable* claim? 11:07

21 A. I couldn't say for certain that they are the same
22 thing, but it would certainly, the non-technical
23 definition of *stateable* would be along the same lines
24 as *colourable*, that's correct.

25 8 Q. Thank you. Now can I ask you to turn in the same book 11:07
26 to the next tab which is the other **Clapper** case which
27 is the decision of the United States Supreme Court in
28 **Clapper -v- Amnesty**. Mr. Gallagher asked you to look
29 at a statement in the dissent of four of the judges,

1 Judge Breyer delivering the decision, but also that of
2 Justice Ginsburg, Sotomayor and Kagan, and the passage
3 was at the bottom of page 1155 on the right-hand side.
4

5 Mr. Gallagher put to you and I think you agreed with 11:08
6 him that the interception of the contents of an e-mail
7 or a telephone conversation, access as it were to the
8 contents of the communication, was likely to be found
9 to be concrete and particularised?

10 A. That's correct. 11:08

11 9 Q. Now while on that, from your general expertise in the
12 area of privacy and data protection, could you perhaps
13 identify for the court the different type of, and we'll
14 use Mr. Gallagher's word, *interferences* with data
15 rights that can present themselves? 11:08

16 A. There are a wide variety of "*interference rights*" that
17 can occur with respect to data. In fact the thinking
18 broadly, the full range of fair information practice
19 principles, which I believe to be embodied in the
20 Directive in the European Union, could in a sense 11:09
21 constitute interference. But in this case the court is
22 referring to a particular subset, perhaps one might
23 even go so far as to say a narrow subset of the
24 universe of interference which is the seizure of the
25 contents of a telephone communication which we know to 11:09
26 be protected under the Fourth Amendment since 1967 in
27 the Katz decision and the seizure of the contents of
28 e-mails which, while their constitutional status is
29 debatable - I think I said on Monday that an appellate

1 court has recognised, I think, I believe the Supreme
2 Court would recognise the contents of e-mails as fully
3 protected by the Fourth Amendment if a case were to get
4 to it. But certainly there is a colourable claim there
5 under the constitution. 11:10

6
7 There is also a claim under statute, the Electronic
8 Communications Privacy Act does prevent the unlawful
9 interception of the contents of an electronic
10 communication, an e-mail. So there is a highly 11:10
11 colourable claim, if not a de facto stated claim there.

12 10 Q. Yes. Now could you, just for the assistance of the
13 court at this stage of the proceedings, identify what
14 other types of interferences there could be?

15 A. There can be unlawful use, unlawful -- sorry, there can 11:10
16 be use, there can be disclosure, there can be general
17 processing or accessing. There can be storage under
18 less than fully secure conditions. There can be
19 storage that is, not just insecure, but which leads to
20 a breach with various degrees of culpability on the 11:11
21 part of the, what I believe one would call a data
22 processor under European law. There are multiple other
23 things that one can do with data.

24
25 There can also be a failure of notice under certain 11:11
26 circumstances and perhaps also a failure to provide a
27 meaningful choice. Now not all of these might
28 necessarily apply to government in this context, but
29 there are a wide, my understanding of interference in

1 European law is that it encompasses a much broader set
2 of data handling and use and processing practices than
3 the seizure of the contents of communications.

4 11 Q. And if one of those types of interference constitutes
5 harm or injury in fact, does that mean that the others 11:11
6 do?

7 A. No, not necessarily. In fact we discussed on Monday
8 the civil context of data breach cases, I believe the
9 Nickelodeon case was one of them. In those cases
10 broadly defined across the universe of these cases 11:12
11 there is a great degree of uncertainty about what, in
12 the *civil* context, what the harm standard is, what the
13 culpability standard is for data breaches. And some
14 courts seem to require a finding of harm and some
15 courts do not, the idea that negligent handling might 11:12
16 be enough.

17

18 I think all that one can, all that *I* can confidently
19 say, and I think all that perhaps others could
20 confidently say, on this point, particularly after the 11:12
21 Spokeo decision which required or at least illuminated
22 or highlighted the importance of concreteness and added
23 some new textual, a new test or some new language to
24 refine the element, is that it is unclear.

25 12 Q. Now -- 11:12

26 A. And I believe that the confusion in the lower courts
27 will continue. Prof. Solove, who we made reference to
28 on Monday, and Prof. Citron have recently circulated a
29 paper that makes essentially these points, that there

1 is great confusion in the lower courts on the question
2 of what constitutes standing or harm particularly after
3 Clapper and particularly after Spokeo.

4 13 Q. Now, Prof. Richards, I want to ask you something
5 slightly different, but just to go to page 1156. The 11:13
6 minority judges provide just a description of what the
7 effect of section 1881a(e) is on the right-hand side of
8 the page, just above B, I just want to read this to
9 you. It says:

10
11 *"Thus, using the authority of section 1881a the 11:13*
12 *government can obtain court approval for its*
13 *surveillance of electronic communications between*
14 *places within the United States and targets in*
15 *Foreign territories by showing 'a significant purpose 11:13*
16 *of the acquisition is to obtain foreign intelligence*
17 *information', and that it will use general targeting*
18 *and privacy-intrusion minimization procedures of a*
19 *kind."*

20
21 Now if any person, be they US citizen or otherwise, 11:14
22 wants to challenge the fact that it is possible to
23 access their information without probable cause showing
24 to an Article III judge, to an independent judge, if
25 that is their complaint, given that that's what the 11:14
26 statute provides, what is the mechanism that they have
27 to agitate that complaint under United States law? How
28 can they present that complaint, what would the theory
29 by which they present that complaint have to be?

1 A. They would have to allege harm. They would have to
2 show that --

3 14 Q. But the cause of action that they would have to bring,
4 what would it be?

5 A. It would depend upon the theory. One could bring a 11:15
6 fourth -- if the question is, as I understand it, a
7 failure of probable cause, the appropriate theory of
8 relief would be a Fourth Amendment claim that protects
9 against --

10 15 Q. A challenge to the legislation; is that correct? 11:15

11 A. Yes.

12 16 Q. Yes.

13 A. The statute was unconstitutional under the Fourth
14 Amendment, and I believe that claim was brought in this
15 case. 11:15

16 17 Q. Yes. And is there any other mechanism by which you
17 could agitate that complaint, apart from a challenge to
18 the constitutionality of the legislation?

19 A. One could argue that the statute was being applied in a
20 way that exceeded the statutory authority. 11:15

21 18 Q. But aside from the latter, could an *EU* citizen bring a
22 constitutional challenge to complain of the fact that
23 their information could be accessed without proof of
24 probable cause to an independent judge?

25 A. An EU citizen would have a harder time than a US 11:15
26 citizen. There is a subset of EU citizens, a very
27 small subset, who are permanent resident aliens who
28 could plead constitutional rights as if they were
29 United States citizens most likely. However, one's

1 typical EU citizen who has no substantial connection to
2 the United States, is not a permanent resident, would
3 have a particularly hard time asserting a
4 constitutional right.

5
6 I would not say that it would be impossible because, as
7 we discussed on Monday, there are two cases before the
8 Supreme Court this term. However, the plain reading of
9 the Verdugo-Urquidez case, which we discussed on Monday
10 as well, is that an EU citizen or any non-US citizen
11 who lacks substantial connection to the United States,
12 and perhaps also physical presence, which is a
13 complicating interpretive fact with respect to data,
14 would have a very hard time making a claim.

15 19 Q. Now, Prof. Richards, it was then suggested to you that
16 there was something *extraordinary* about this challenge,
17 the challenge brought by the plaintiffs in this case.
18 Mr. Gallagher said: "*You expected the court to*
19 *entertain a challenge to the constitutionality of*
20 *legislation, with no facts, no idea of the programme,*
21 *no idea of how the discretion is going to operate, no*
22 *idea of how the FISC court will operate.*"

23
24 Is it unusual in the United States law to have a facial
25 challenge to legislation of this kind?

26 A. It is not unusual. I believe that the question that
27 I was that I believe I was answering that Mr. Gallagher
28 had asked me was whether courts like to hear facial
29 challenges and I believe I answered that they do not

1 like it, but that does not mean it is not impossible.
2 In fact, particularly in the fundamental rights area,
3 particularly the First Amendment right of free
4 expression, facial challenges to statutes are quite
5 common --

11:17

6 20 Q. Now, Prof. Richards?

7 A. -- and sometimes successful.

8 21 Q. Prof. Richards, I want to ask you to look at something
9 else in the decision of the minority which
10 Mr. Gallagher wished to rely upon and it's to go to
11 page 1159 where the minority summarised their
12 assessment of the probability or likelihood of harm,
13 and it's in the right-hand side of the page where the
14 minority said this:

11:17

15
16 *"The upshot is that that (1) similarity of content, (2)*
17 *strong motives, (3) prior behavior, and (4) capacity*
18 *all point to a very strong likelihood that the*
19 *Government will intercept at least some of the*
20 *plaintiffs' communications, including some that the*
21 *2008 amendment, but not the pre-2008 Act, authorizes*
22 *the Government to intercept."*

11:18

23
24 Could I ask you just to turn over in the same vein to
25 the next, page 1160 on the left-hand side. Just above
26 (iv):

11:18

27
28 *"we need only assume that the government and doing its*
29 *job in order to conclude that there is a high*

1 *probability that the government will intercept at least*
2 *some electronic communication to which at least some of*
3 *the plaintiffs are parties. The majority is wrong when*
4 *it describes the harm threatened to the plaintiffs as*
5 *'speculative'."*

11:19

6
7 Do you have any comment to make on those observations
8 by the four members of the Supreme Court?

9 A. I think there are two disagreements among the majority
10 justices and the dissenting justices in this -- well,
11 there are at least two differences. One is about the
12 correct legal standard. I believe that the dissenters,
13 Justice Breyer and the three justice's joint opinion,
14 would have preferred that the Second Circuit test on
15 objectively reasonable likelihood would satisfy the
16 constitutional minimum. Of course the Supreme Court in
17 the majority rejected that standard overtly.

11:19

11:19

18
19 I believe also, though, there is, even under the
20 majority standard, the dissenters have a second point
21 of disagreement with the court which is that, even
22 under that standard, the harm is not speculative.

11:19

23 22 Q. Now Prof. Richards, I want to ask you to turn now to
24 the Spokeo case. You'll find that at Tab 35 which is
25 in Book No. 3. Prof. Richards, like a number of the
26 cases that Mr. Gallagher put to you on Monday
27 afternoon, Spokeo was a case arising from a statute
28 called the Fair Credit Reporting Act, is that a statute
29 with which you are familiar?

11:20

1 A. That is correct, yes.

2 23 Q. And the complaint in Spokeo arose from the fact that,
3 in breach of a provision of that statute, information
4 of the -- well what had occurred to information of the
5 plaintiff in breach of the statute? 11:21

6 A. I am sorry, there was a noise in the background,
7 I didn't hear.

8 24 Q. In breach of the statute what was the plaintiff's
9 complaint, what did he say had occurred in breach of
10 the statute? 11:21

11 A. The Fair Credit Reporting Act is a federal law that
12 I believe is about, over 40 years old that protects the
13 accuracy of the credit reporting system and regulates
14 what are colloquially referred to as the credit bureaus
15 or credit reporting agencies. 11:21

16

17 One of the requirements of the Fair Credit Reporting
18 Act which applies the fair information practice
19 principles or some of them to the credit reporting
20 industry in the United States is that, and this is 11:21
21 listed on page 1 in the syllabus, it is also of course
22 in the substantive text of the opinion, that the Fair
23 Credit Reporting Act require consumers and reporting
24 agencies to "*follow reasonable procedures to assure*
25 *maximum possible accuracy of consumer reports*" and 11:21
26 imposes liability upon regulated commercial entities
27 that fail to comply with any requirement of the Act.
28

29 So it imposes a series of regulatory obligations.

1 There are also requirements that credit reports be
2 furnished to a consumer upon request, without charge
3 under certain circumstances. There are requirements of
4 other kinds of notice and access and a procedure for
5 rectification of false materials, false data. 11:22

6 25 Q. what happened to the plaintiff here?

7 A. In this case the data broker Spokeo had data on --

8 26 Q. Sorry, it's a phrase that perhaps isn't used often
9 here, but a data broker being someone who collects
10 information and then sells it on to advertisers or 11:22
11 commercial companies?

12 A. That's correct. Spokeo, the defendant in this case,
13 advertises itself as a people search engine in which it
14 aggregates data about individuals, compiles them and
15 then sells them, a subscription to look up information 11:22
16 about. And I believe they have records on most of the
17 individuals in the United States.

18 27 Q. So what happened to the plaintiff, what did they do to
19 the plaintiff?

20 A. He was applying for a job and his file was used, he 11:23
21 alleged, and he found that there were errors in his
22 file. But the errors, unlike other kinds of errors --

23 28 Q. when you say his file was used, what do you mean?

24 A. His file was accessed by potential employers, certainly 11:23
25 by Spokeo and Spokeo's data on Mr. Robins, who was the
26 plaintiff in this case, contained errors but they were
27 errors that were positive. The aggregate of the
28 information was that he was perhaps more employable
29 than otherwise. There were demonstrable errors in his

1 report and he brought suit saying that Spokeo had
2 failed to follow procedures designed to assure maximum
3 possible accuracy. And so his allegation was 'Spokeo,
4 you violated the Act because you did not follow
5 procedures to make sure that the errors in my report, 11:24
6 that my report was accurate', and Spokeo countered
7 'well it doesn't matter because there was no harm
8 here'. And so because it has positive statements about
9 you and therefore you lacked standing because you
10 failed to demonstrate an injury in fact. 11:24

11 29 Q. Congress had conferred a cause of action on Mr. Robins?
12 A. Congress had. Congress had conferred a cause of action
13 upon any person who can allege a wilful failure to
14 comply with any requirement of the Act. So it was a
15 broad right of action. 11:24

16 30 Q. And the Supreme Court held, notwithstanding Congress'
17 provision of that cause of action, he had no standing?
18 A. That's correct.

19 31 Q. Now, I want -- Mr. Gallagher put to you a note which
20 you had prepared with a man I think you have just 11:25
21 referred to a few moments ago, Mr. Solove?
22 A. Yes.

23 32 Q. You recall he put that document to you?
24 A. Yes.

25 33 Q. And you said to the judge well that this note which he 11:25
26 put to you predated the decision in Spokeo, but that
27 Mr. Solove had prepared a subsequent one after the
28 decision, you recall saying that?
29 A. Yes.

1 **MR. MURRAY:** And I want you now to take a look at that
2 note to which you referred. (SAME HANDED TO THE COURT)
3 (SAME HANDED TO THE WITNESS)

4 **MS. JUSTICE COSTELLO:** This is the subsequent note, is
5 it? 11:25

6 **MR. MURRAY:** It is, Judge, yes.

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

8 34 Q. **MR. MURRAY:** It wasn't put by Mr. Gallagher. He put
9 the *pre Spokeo* note. And I just want to open some of
10 the comments that Mr. Solove makes, can you just tell 11:25
11 the court who Mr. Solove is and what his expertise is?

12 A. Yes. Professor Solove is a leading scholar in our
13 field. He is in many or most people's opinion the
14 highest regarded scholar of information privacy law in
15 the United States, if not indeed the world. He is the 11:25
16 author of the leading case book and a highly prolific
17 author who has written extensively, multiple books and
18 many, many -- including the article I referred to a
19 moment ago.

20 35 Q. If you can just go to the second page of that, he says: 11:26

21
22 *"The Supreme Court steps in and creates confusion. The*
23 *US Supreme Court sided with Spokeo sort of in a rather*
24 *murky and inconsistent decision. Justice Alito writing*
25 *for the court delivered what reads like a lecture to 11:26*
26 *the Ninth Circuit attempting to school them on how the*
27 *standard works. The only problem is the decision begs*
28 *nearly all the important questions, states inconsistent*
29 *rules and fails to provide any test or clear guidance."*

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And if you then turn --

MS. JUSTICE COSTELLO: Sorry, where is?

MR. MURRAY: Judge, I am terribly sorry.

MS. JUSTICE COSTELLO: I think I may have skipped a page. 11:26

MR. MURRAY: If you go to the second page.

MS. JUSTICE COSTELLO: Yes, I know, but when I go from that page to the next page I have, it says *"so let's see what the court teaches us"*. 11:26

MR. MURRAY: Unfortunately your copy isn't paginated the same -- it should be actually on the same page. *"so let's see what the court decided"*?

MS. JUSTICE COSTELLO: Oh, yes. No, I better hand it down and get another one. Because I have *"let's see what the court teaches us"*. 11:27

MR. MURRAY: Okay. Sorry about that, Judge. (SAME HANDED TO THE COURT)

MS. JUSTICE COSTELLO: Thank you.

36 Q. **MR. MURRAY:** So there is, hopefully on the next page, Prof. Richards, I don't want to spend too much time on this, but Prof. Solove says: 11:27

"well, you know, the Supreme Court seemed to be saying at one point Congress has created a cause of action, therefore it has defined what harm is and it can do so." 11:27

And then he says: *"But, no, not so fast."* *"The court*

1 states", do you have that passage? Yes:

2
3 *"The court states that Congress' role in identifying*
4 *and elevating intangible harms does not mean that a*
5 *plaintiff automatically satisfies the injury in fact* 11:27
6 *requirement whenever a statute grants a person a*
7 *statutory right and purports to authorize that person*
8 *to sue to vindicate the right. Article III standing*
9 *requires a concrete injury, even in the context of a*
10 *statutory violation. For that reason Robbins could* 11:28
11 *not, for example, allege a bare procedural violation*
12 *divorced from any concrete harm and satisfy the injury*
13 *in fact requirement of Article III."*

14
15 And then he continues: "So Congress has the power to 11:28
16 *deem intangible harms to be concrete injuries except*
17 *when it can't. A bare procedural violation of a*
18 *statute doesn't seem to be enough. There must be*
19 *concrete injury. But in FCRA, that's the statute,*
20 *Congress plainly created a provision to allow people to* 11:28
21 *sue for violations in FCRA. So by the plain language*
22 *of the statute, something many of the Supreme Court*
23 *justices strongly defer to, Congress seemingly declared*
24 *there was a concrete injury whenever any requirement of*
25 *the statute was violated. That's why Congress wrote in* 11:28
26 *the statute Plaintiffs could sue when there is a*
27 *failure to comply with any requirement of FCRA. If*
28 *Congress had thought the violation of only some FCRA*
29 *requirement were concrete injuries then it would*

1 *probably have written the law to say that, but the*
2 *court held either that Congress didn't mean what it*
3 *said or that Congress' power to define concrete*
4 *injuries is limited in some way."*

11:28

5
6 And then he proceeds to consider the judgment and says,
7 after No. 2: *"Okay, I'm getting a bit confused here.*
8 *So a mere violation of a procedural right can be*
9 *sufficient for concrete injury without any additional*
10 *harm, but the court said just a few paragraphs earlier* 11:29
11 *that a bare procedural violation divorced from any*
12 *concrete harm cannot constitute concrete harm, thus we*
13 *need to distinguish when a violation of a procedural*
14 *right is a concrete injury and when it isn't. One way*
15 *to distinguish it is to defer what Congress has written* 11:29
16 *in statute. The court stated earlier that Congress has*
17 *the power to elevate harm that are ordinarily*
18 *insufficient to be concrete injuries and deem them as*
19 *such, but no.*

11:29

20
21 *In FCRA Congress created a cause of action when any*
22 *requirement of FCRA was violated so Congress has*
23 *expressly allowed people to sue for violation of the*
24 *FCRA requirements but when they get to court they might*
25 *be turned away because only some violations of FCRA* 11:29
26 *requirements are viable, despite what Congress said.*
27 *Essentially Congress gave the right to sue but*
28 *sometimes there might be no place to hear the suit."*
29 And then he comments about that.

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And then finally he says, he goes, he refers to the preamble, and he explains what the problem was in the case, and this is midway down the following page, do you have that, Prof. Richards?

11:30

"In FCRA's preamble, Congress issued its findings under a heading called 'Accuracy and fairness of Credit Reporting'. What happened to fairness? Congress also decided that the purpose of FCRA is to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance and other information in a manner which is fair and equitable to the consumer with regard to confidentiality, accuracy, relevancy and proper utilisation of such information in accordance with the requirements of the subchapter. What happened to fair and equitable to confidentiality, to relevance?"

11:30

11:30

Spokeo's complaints were actually about accuracy ironically but the court then supplies an example where inaccuracies might not cause harm. In addition."

11:30

They quote then, this is the zip code, I think: *"All the inaccuracies cause harm or present a material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code without... (as read)... concrete harm. So do we get a test for when*

11:30

1 Congress is allowed to deem a violation of a statute a
2 concrete injury and when it has gone too far? No. We
3 just get these two examples."
4

5 And then over the page, just the last thing I want to 11:31
6 draw your attention to, at the end of the page he said
7 this:

8
9 "When Congress deems something to be a concrete injury,
10 the court should respect the will of Congress. The 11:31
11 entire reason for the concrete injury requirement is a
12 separation of powers, of protection of Congress against
13 encroachment by the courts. But the Spokeo decision
14 usurps Congress' power curtailing its ability to define
15 concrete injury. So now for concrete injuries maybe 11:31
16 we'll know them when we see them or, to be more
17 precise, we'll know them when the courts can imagine
18 them. I need to stop thinking about Spokeo. It is
19 straining my imagination and now I have a concrete
20 injury headache." 11:31

21
22 So would you like to just comment on what Prof. Solove
23 says there about the uncertainty arising from the
24 decision and its implications to what you were
25 addressing in response to Mr. Gallagher's questions? 11:32

26 A. Yes. I should add that I was aware of this source when
27 I was preparing my report, but I decided not to cite it
28 because it is, though substantive, it is humorous. But
29 I think it makes a very important substantive point

1 which is that the Spokeo decision, by purporting to
2 clear up the requirements for Article III standing by
3 giving some additional detail to the concreteness
4 requirement, actually created as a logical matter
5 further confusion that will necessarily result in 11:32
6 confusion in the lower courts until ultimately the
7 Supreme Court is required to step in and resolve the
8 confusion.

9
10 And this is particularly problematic because standing 11:32
11 doctrine has never, at least in my experience as a
12 lawyer and an academic, been a clear doctrine, as
13 I explained in my report. I explain criticisms of it
14 in my report and as I explained in my testimony on
15 Monday. 11:33

16 37 Q. Now can I ask you, just before we leave Spokeo, to go,
17 Prof. Richards, to Justice Ginsburg's partial dissent
18 where she just explains her interpretation of the facts
19 in the light of the holding by the court. It's towards
20 the end of Tab 35 and if you could look at page 3 of 11:33
21 her opinion. There is a paragraph which begins "*I part*
22 *ways with the court*":

23
24 "*I part ways with the court, however, on the necessity*
25 *for a man to determine whether Robbins' particularised* 11:34
26 *injury was 'concrete'. Judged by what we have said*
27 *about 'concreteness', Robbins' allegations carry him*
28 *across the threshold. The Court's opinion observes*
29 *that time and again, our decisions have coupled the*

1 *words 'concrete and particularized'.*"

2
3 And she refers to cases that Mr. Gallagher put to you
4 and she then says: "*True, but true too, in the four*
5 *cases cited by the Court, and many others, opinions do* 11:34
6 *not discuss the separate offices of the terms 'concrete*
7 *and particularised'.*"

8
9 And he then -- sorry, she then just talks about the
10 court's decision in the next paragraph and in the last 11:34
11 sentence of it she says of Mr. Robins:

12
13 "*He seeks redress not for harm to the citizenry, but*
14 *for Spokeo's spread of misinformation specifically*
15 *about him.*" 11:34

16
17 And can I ask you to turn over to the next page in the
18 second paragraph, she says:

19
20 "*Robins would not qualify, as the Court observes, if he* 11:34
21 *alleged a 'bare' procedural violation, one that results*
22 *in no harm, for example, 'an incorrect zip code'. Far*
23 *from an incorrect zip code, Robins complains of*
24 *misinformation about his education, family situation,*
25 *and economic status, inaccurate representations that* 11:35
26 *that could affect his fortune in the job market.*"

27
28 She then quotes from an amicus brief: "'Spokeo's
29 inaccuracies bore on Robins' ability to find employment

1 *by creating the erroneous impression that he was*
2 *overqualified for the work he was seeking, that he*
3 *might be unwilling to relocate for a job due to family*
4 *commitments, or that his salary demands would exceed*
5 *what prospective respective employers were prepared to* 11:35
6 *offer him'."*

7
8 Now I just want you to bear that in mind,
9 Prof. Richards, and to go back to the Nickelodeon case
10 which Mr. Gallagher spent a little time on Monday. 11:35

11
12 This was a decision of the Second Circuit handed down
13 in June last year. Sorry, incidentally, you said
14 fairly to the judge that you had not read this
15 decision, have you seen a reference to this decision in 11:36
16 Prof. Vladeck's report?

17 A. I have not.

18 38 Q. Yes. Or in anywhere in the undergrowth of
19 Prof. Swire's report?

20 A. Not that I recall. 11:36

21 39 Q. In fact Spokeo -v- Robins was a decision of the United
22 States Supreme Court dealing with standing in data
23 breach cases, did either Prof. Vladeck or Prof. Swire,
24 insofar as you can recall, reference Spokeo in their
25 reports to the court? 11:36

26 A. Not that I can recall.

27 40 Q. I see. Now have you had an opportunity now to look at
28 this case since it was furnished to you on Monday?

29 A. I have.

1 41 Q. Yes. And this was a class action brought on behalf of
2 children under 13 who had used a website associated
3 with the Nickelodeon television channel. I think the
4 complaint was that Nickelodeon had harvested
5 information about the users' internet use, the 11:37
6 children's internet use, which was then being provided
7 to third parties, is that a fair summary of your
8 understanding of the case?
9 A. That's correct.

10 42 Q. Yes. And it was in that context that the issue arose 11:37
11 as to whether there had been Article III standing
12 established, is that so?
13 A. That's correct.

14 43 Q. Yes. And this was in breach of statute; is that
15 correct? 11:37
16 A. Yes.

17 44 Q. Yes. So if I can ask you to turn just to the
18 consideration of page 10 of the ruling. On the
19 right-hand side of the page under footnote 50, it say:
20 11:37
21 *"The defendants assert that Article III standing is*
22 *lacking in this case because the disclosure of*
23 *information about the plaintiffs' online activities*
24 *does not qualify as an injury in fact. Google rejected*
25 *a similar argument stating that, when it comes to laws 11:38*
26 *to protect privacy, a focus on economic loss is*
27 *misplaced."*
28
29 That's the Ninth Circuit --

1 A. I am sorry, this is page 10, you said?
2 MS. JUSTICE COSTELLO: Yes, sorry, I am in trouble too.
3 MR. MURRAY: Okay, sorry. We're looking at different
4 versions of the judgment. I wonder --
5 MS. JUSTICE COSTELLO: If we hand them back and you can 11:38
6 find them.
7 MR. MURRAY: Well if Mr. Gallagher's solicitors had
8 copies of the -- this is the one that was given to the
9 court and to the witness.
10 MR. GALLAGHER: Judge, if I can help, do you see 11:38
11 Article III standing (a)?
12 MR. MURRAY: Sorry, that's very helpful, Mr. Gallagher.
13 I'll be able to cross reference it, Judge, thank you.
14 MR. GALLAGHER: There is a heading and it's a few
15 paragraphs down from that. 11:38
16 MR. MURRAY: If you turn to page 7 of the document.
17 MS. JUSTICE COSTELLO: Sorry, 7, I was on 10.
18 MR. MURRAY: No, because I referred you to 10, I was
19 looking at a different version, Judge, if you look at
20 page 7. 11:38
21 MS. JUSTICE COSTELLO: Yes, Article III standing.
22 MR. MURRAY: Then under footnote 50.
23 MS. JUSTICE COSTELLO: Yes, thank you.
24 45 Q. MR. MURRAY: No, no, thank you: "*The defendants assert*
25 *that Article III standing is lacking in this case* 11:38
26 *because the disclosure of information about the*
27 *plaintiffs' online activities does not qualify as an*
28 *injury in fact. Google rejected a similar argument"?*
29

1 And that was a decision of the same circuit in an
2 earlier case, I think perhaps a pre Spokeo case?

3 A. I believe so.

4 46 Q. The Google case.

5 A. I believe almost by definition, because this case was 11:39
6 decided in June of 2016, and Spokeo had just come down.

7 47 Q. Yes: "*Google had rejected a similar argument*",
8 effectively the court was now looking to see if Google
9 was going to stand, the Supreme Court having in the
10 intervening time decided Spokeo: 11:39
11

12 "*Instead, in some cases - the court continued - an*
13 *injury-in-fact 'may exist - may exist - solely by*
14 *virtue of statutes creating legal rights, the invasion*
15 *of which creates standing'.*" 11:39
16

17 Now I think it's correct to say, Prof. Richards, that
18 Spokeo was a case involving a statute that created a
19 legal right which was invaded?

20 A. That's correct. 11:39

21 48 Q. Yes: "*Applying this principle other courts have found*
22 *standing in cases arising from allegedly unlawful*
23 *disclosures similar to those in issue here*", he says.
24

25 If you then ask can move to paragraph -- yes, if you 11:40
26 can go under footnote 56, which is on page 8, and what
27 was said here was this, under footnote 56:
28
29 "*In doing so - and this is discussing the Supreme*

1 Court's judgment in Spokeo - the Supreme Court
2 explained that the Ninth Circuit erred in its standing
3 analysis by focussing only on whether the plaintiff's
4 purported injury was 'particularized' without also
5 assessing whether it was sufficiently 'concrete'. In 11:40
6 reaching this conclusion, the court noted that even
7 certain kinds of 'intangible' harms can be 'concrete'
8 for the purposes of Article III. When evaluating
9 whether such a harm qualifies as an injury-in-fact,
10 judges should consider whether the purported injury 11:40
11 'has a close relationship to a harm that has
12 traditionally been regarded as providing a basis for a
13 lawsuit in English or American courts'. Congress's
14 judgment on such matters is 'also instructive and
15 important', meaning that Congress may 'elevat[e] to the 11:40
16 status of legally cognizable injuries concrete, de
17 facto injuries that were factio previously inadequate in
18 law'."

19
20 Now this concept of close relationship to a harm which 11:41
21 has been traditionally regarded as providing the basis
22 for English or American, or claims in English or
23 American law, and Mr. Gallagher asked you about this at
24 the beginning of your cross-examination; what in your
25 opinion, and this is a matter I think you have studied, 11:41
26 what in your opinion is the relationship between
27 interferences with data privacy, again to use the
28 phrase that was put to you on Monday, and common law
29 protections against harm?

1 A. So I would say two things. First, I think it's
2 important when reading this in a non-United States
3 court to give some meaning to the court's use of the
4 phrase "English" here. They are referring to the
5 common law prior to the American revolution. And one 11:42
6 of the first things that American courts did, American
7 legislatures did upon receiving or at least asserting
8 independence was to incorporate the common law of
9 England or chunks of the common law of England into the
10 new law of the new United States. So that is a 11:42
11 reference to the pre-revolutionary English common law.
12

13 In practice it usually means a reference to Blackstone
14 which is usually considered by the American courts,
15 including the Supreme Court, to be a long or at least a 11:42
16 four volume guide to the English common law
17 contemporaneous with the revolution.

18 49 Q. And one of the pre-existing common law claims would
19 have been I suppose analogous to Fourth Amendment
20 breaches Entick -v- Carrington and unlawful searches; 11:42
21 is that correct?

22 A. That's correct.

23 50 Q. Yes.

24 A. In fact the drafters of the Fourth Amendment looked to
25 English law and to their own experience with general 11:43
26 warrants and unreasonable searches by the Crown as
27 requiring the necessity of a protection, a fundamental
28 right protection against unreasonable searches and
29 seizures by the state without warrants.

1 51 Q. Once you move outside that traditional common law
2 protection and move to the jurisprudence after the
3 Brandeis 1890 article, the right to be let alone and
4 the common law privacy as it evolved in the United
5 States, intrusion into seclusion, once you move outside 11:43
6 those zones in your opinion is it easy to construct an
7 analogy between interferences with data privacy and
8 pre-existing common law or indeed --

9 **MR. GALLAGHER:** I think that's a leading question,
10 Judge. 11:44

11 **MR. MURRAY:** well how would you analogise the two,
12 perhaps if I ask you that way?

13 A. I would say two things. First I would say that even
14 though, and Prof. Solove and I actually have written
15 several, at least two articles on this topic. The US 11:44
16 courts did not immediately recognise even tortious
17 invasions of privacy under that mantle until, certainly
18 in the middle of the nineteenth century and it wasn't
19 until the work of Prof. Prosser in the 40s, 50s, 60s
20 and early 70s that the rights were clearly established 11:44
21 across US jurisdictions and encoded, for instance, in
22 the statement of facts.

23
24 But in my experience with respect to the relationship
25 between tort rights and what we would call perhaps data 11:44
26 processing rights or information privacy rights, the
27 relationship has been tenuous. One of the, perhaps *the*
28 classic element of a tort is an injury, an injury that
29 can be demonstrated, and the classic forms of injury

1 are physical or pecuniary. Under American law privacy
2 has been conceptualised as a psychological injury and
3 not as a dignitary injury of the sort that is my
4 understanding that European law uses to conceptualise
5 at least privacy and perhaps data protection as well. 11:45
6 And the relationship has been that it has been
7 difficult to fit a private plaintiff tort-based
8 physical analogue world theory of injury into a digital
9 world, particularly where the injuries that may exist
10 may be, even though large in the aggregate, may be 11:45
11 individually small and diffuse across time or across
12 multiple potential defendants or at least injured
13 parties.

14 52 Q. Now there was more than a hint of criticism of you on
15 Monday for not being aware of a number of cases that 11:46
16 were identified but not furnished to you, do you know
17 how many decisions since Spokeo was decided last May
18 have cited the case, how many Federal Court decisions?

19 A. I would, I do not have precise numbers, but I would
20 suspect that many, many cases have cited Spokeo for the 11:46
21 simple fact - I believe that Mr. Gallagher suggested
22 that a relatively small number may have done so in the
23 data breach context - but in the general context
24 I would suspect that any time a Federal Court was
25 deciding a question of standing in any area of the law, 11:46
26 because Spokeo was the Supreme Court's latest word on
27 standing, but particularly in any case in which a
28 Federal Court was deciding an issue of standing in
29 which there was an allegation of standing based upon

1 the violation of a statutory injury, it would be
2 essential to site Spokeo. So I would suspect that
3 number would be relatively large, but I do not, to my
4 knowledge, have information on this.

5 53 Q. So there is 456 cases citing it since it was decided 11:47
6 and 185 cases dealing with data privacy. Before --
7 **MR. GALLAGHER:** Is that evidence? I'm just not sure
8 what the status is for that.

9 **MR. MURRAY:** we will give evidence of that if
10 Mr. Gallagher requires it, but I'm sure by the time we 11:47
11 do so the number will have increased. I'm sure
12 Mr. Gallagher's witnesses will have read all of these
13 cases and they will be able to provide the court with
14 the up to date figures when they are giving their
15 evidence, Judge, if it's of relevance to the court. 11:47
16 I don't say that it is. Mr. Gallagher thinks it is of
17 relevance, that's why I raise it.

18
19 54 Q. Before I can you ask you to look at the cases that
20 Mr. Gallagher told you about but didn't show to you, 11:48
21 Prof. Richards, is there anything else you wish to stay
22 about the Nickelodeon case which you have now had an
23 opportunity I think to read?

24 A. I would say that, and this is a blank copy rather than
25 the marked-up copy that I have looked at, I believe 11:48
26 that the injury that was being discussed, that the
27 court used a particular phrase of "*disclosure of a*
28 *legally protected interest*". To my mind that seemed
29 rather circular to the Spokeo analysis. Because a

1 legally protected interest would be one that the law or
2 that Congress has recognised, but that would merely
3 require one to ask the **Spokeo** question all over again
4 about concreteness. Since **Spokeo**, whilst it was not
5 clear about some things, did appear to be clear, 11:48
6 Justice Ginsburg points out first that concreteness now
7 does appear to be a separate element of the standing
8 inquiry in some contradistinction to prior cases on
9 this point; and, second, that courts now have a test
10 that they would need to apply in order to go through 11:49
11 this analysis.

12 55 Q. Just in that regard, if you look at paragraph - sorry,
13 the text just below footnote 62, which in fact is on
14 page 8, the last sentence there:

15 11:49

16 *"Google noted that Congress has long provided*
17 *plaintiffs with the right to seek redress for*
18 *unauthorised disclosures of information that, in*
19 *Congress's judgment, ought to remain in private."*

20 11:49

21 And in relation to the breach of which Mr. Robins
22 complained in the **Spokeo** case, was that a matter for
23 which Congress had provided a remedy?

24 A. I would say that the breach of which Mr. Robins had
25 complained, Congress had no tradition of providing a 11:50
26 specific remedy. The difficulty in that case was there
27 was a general remedy for all violations of procedural
28 and substantive rules in a statute.

29 56 Q. Yes. But there was a remedy --

1 A. There was a remedy, yes.

2 57 Q. -- prescribed by Congress?

3 A. There was.

4 58 Q. Yes, now I'm going to hand you up, you were referred by
5 Mr. Gallagher to four cases. He did, I should correct 11:50
6 myself, he did provide you with one additional case,
7 which was the Syed case, that was also a case under the
8 Fair Credit Reporting Act decided on 20th January, a
9 month ago, by the Ninth Circuit where it was decided
10 that there was standing under Spokeo to bring a 11:50
11 particular category of Fair Credit Reporting Act claim,
12 it's a very short judgment. Is there any comment you
13 wish to make on it having had an opportunity to review
14 it, Prof. Richards?

15 A. I have not reviewed Syed. I was unclear about the 11:50
16 rules during my gap and that I wasn't sure if I was to
17 allowed to look at the transcripts of oral arguments
18 because there might be concerns that I would, that a
19 witness might adjust one's testimony. So I have not
20 looked at the transcript. 11:51

21 59 Q. Okay.

22 A. So whilst I remember Nickelodeon, which is a television
23 channel in America, I did not remember the name of this
24 case.

25 60 Q. All right. well I'm going to ask you to pass from that 11:51
26 because it is, as I said, a very short ruling, I'm
27 going to ask you to look at three other cases which
28 Mr. Gallagher identified: Moody -v- Ascenda, Hillson
29 -v- Kelly and Adams -v- Fifth Third Bank (SAME HANDED

1 TO THE COURT) (SAME HANDED TO THE WITNESS). You won't
2 have seen these, Prof. Richards. Now, I'm going to ask
3 you to look first at the Adams case please. Sorry,
4 excuse me, I'm going to ask you to look first at the
5 Moody -v- Ascenda case, Prof. Richards.

11:52

6
7 This is a decision from the District Court for the
8 Southern District of Florida decided on 10th October.
9 In fact there were two decisions of that name on that
10 day, but I think this is the one referred to. Both of
11 them concerned plaintiffs who sued because the
12 defendants had procured consumer reports about them
13 without complying with the relevant protections under
14 the FRCA, is that -- FCRA, excuse me.

11:52

15 A. FCRA.

11:53

16 61 Q. Sorry, my mistake. And is that a type of cause of
17 action of which you have heard before or complaint that
18 you have heard before?

19 A. I'm sorry, I got tripped up by the name of the statute.

20 62 Q. Yes, I am sorry. So they are both suing because they
21 complained the defendants procured consumer reports
22 without complying with provisions in the Fair Credit
23 Reporting Act?

11:53

24 A. Yes. The FCRA, or FCRA [phonetics], or the Fair Credit
25 Reporting Act places restrictions upon the ability to
26 access credit reports.

11:53

27 63 Q. Now, in dealing with the issue of standing, and
28 standing was, as Mr. Gallagher suggested, held to be
29 found in that case; the court engaged in some

1 discussion of the extent to which there was a split in
2 the circuits on this issue. And this was again a case
3 where the plaintiff had a complaint of a breach of the
4 statute, the same statute as in Spokeo, but the
5 question is whether the particular injury asserted 11:54
6 there was sufficient to generate Article III standing.
7

8 And if you look, Prof. Richards, on page 4, on the
9 right-hand side of the page you'll see the court says:
10 *"The court recognizes the split in persuasive authority 11:54*
11 *as to this issue."* And it starts off Meza -v- Verizon.

12 **MS. JUSTICE COSTELLO:** Sorry, which paragraph is this?

13 **MR. MURRAY:** I am terribly sorry, Judge, page 4 on the
14 right-hand side of the page there's a paragraph that
15 begins *"The Court"*. 11:54

16 **MS. JUSTICE COSTELLO:** Yes.

17 **MR. MURRAY:** Excuse me, Judge, I'm sorry: *"The Court*
18 *recognizes the split in persuasive authority as to this*
19 *issue. Compare Meza -v- Verizon (holding that*
20 *Plaintiff 'adequately alleges two concrete injuries (an 11:54*
21 *informational injury and a privacy invasion) through*
22 *violations of the relevant statutes'."*

23
24 Then a second case Perrill -v- Equifax: *"(Considering*
25 *this history and Congress's judgment, the Court finds*
26 *an invasion of privacy within the context of the FCRA*
27 *constitutes a concrete harm that meets the*
28 *injury-in-fact requirements. The Court is not alone in*
29 *this holding.) (Citing cases)."*

1 Then he is asking you to compare those with the
2 following:

3
4 "Smith -v- Ohio State, holding that plaintiffs who
5 allege their privacy rights were invaded and they were 11:55
6 misled as to their FCRA rights as a result of the
7 defendant's alleged FCRA breaches did not suffer an
8 injury-in-fact because they did not suffer a concrete
9 consequential damage."

10
11 And Fisher -v- Enter Holdings: "Holding that
12 allegations that a prospective employer violated the
13 FCRA by obtaining a consumer report without giving
14 plaintiff proper notice is not a concrete injury
15 because 'all plaintiff alleges is that the disclosure 11:55
16 did not comply with the statute'.

17
18 However, upon careful consideration, the Court is
19 persuaded by the reasoning of the cases which have
20 found the Spokeo standing requirement satisfied in this 11:55
21 case."

22
23 And then they refer to a decision of the Eleventh
24 Circuit in which the Eleventh Circuit had held that, in
25 relation to the same types of provisions, that there 11:55
26 was Article III standing.

27
28 So do you have any observation to make in reference to
29 the comments there about the splits between the

1 different circuits and different courts in relation to
2 whether this breach of data rights creates Article III
3 standing, Prof. Richards?

4 A. Well, students will sometimes come to me with a similar
5 question on standing doctrine, either in class or my 11:56
6 office, and I will tell them the same three words each
7 time which is 'welcome to standing'. This is a general
8 problem with, as I talk about in my report, the
9 indeterminacy of standing doctrine past the three
10 elements that can be clearly stated and the subparts 11:56
11 now to injury-in-fact. And this split in authority, as
12 courts try to work out what Spokeo means, perhaps
13 experiencing some of the analytical difficulty that
14 Prof. Solove had in explicating what Spokeo actually
15 held and what the consequences of that are for 11:57
16 concrete - sorry, for particular cases - I'm not
17 surprised by this.

18
19 In fact it has been my impression, as someone who
20 follows the law, that the courts were in some confusion 11:57
21 on this point. But I did not think it was necessary to
22 read all of those cases in order to give that testimony
23 to this court.

24 64 Q. Okay.

25 A. And this is a confirmation of my belief. 11:57

26 65 Q. The next case that Mr. Gallagher referred to in this
27 context is Hillson -v- Kelly, I'm going to ask you to
28 look at that, a decision of the US District Court for
29 the Eastern District of Michigan handed down on 23rd

1 January and this again is a Fair Credit Reporting Act
2 case.

3
4 Here again standing Article III standing was found, but
5 can I ask you to look on page 3 paragraph No. 4 and 11:57
6 here the court says:

7
8 *"Given the guidance in Spokeo, the court is concerned*
9 *about whether the plaintiffs and the class they seek to*
10 *represent have suffered a 'concrete' injury. (This 11:58*
11 *case was at one point stayed pending the decision in*
12 *Spokeo). As noted, Plaintiffs here allege that Kelly*
13 *violated the statute by including both a waiver and a*
14 *disclaimer in a form that should have only disclosed*
15 *that Kelly would procure a consumer report for 11:58*
16 *employment purposes and sought authorization to do so.*
17 *Plaintiffs' claim, however, is not that Kelly's*
18 *inclusion of the waiver and disclaimer in the form*
19 *caused them to not understand the disclosure. Nor do*
20 *they claim that, in signing the form, they did not*
21 *understand that they were authorizing Kelly to obtain*
22 *their consumer report. Indeed, in their motion for*
23 *preliminary approval, Plaintiffs acknowledge that there*
24 *is no 'indication, or any plausible scenario, in which*
25 *members of the Settlement Class suffered actual*
26 *damages'.*

27
28 *so the jurisdictional question before the court reduces*
29 *itself to this: under circumstances where the*

1 *Plaintiffs were not (by their own admission) actually*
2 *damaged, is an alleged violation of the standalone*
3 *disclosure requirement of the statute a claim of a*
4 *'bare procedural violation' that is not 'concrete'*
5 *enough under Spokeo? Or does it constitute concrete,* 11:59
6 *intangible harm? The Sixth Circuit has not answered*
7 *this question - he says - and the courts are divided."*
8

9 And he then goes through quite a lengthy discussion of
10 the view taken by different courts in different 11:59
11 jurisdictions. And if you go over the page to page 4
12 paragraph 5, it says, having referred to a case Thomas
13 -v- FTS where standing was found:
14

15 *"Faced with facts similar to those in Thomas the court* 11:59
16 *in Shoots reached a different conclusion regarding the*
17 *concreteness of the plaintiff's injury. Shoots claimed*
18 *that the defendant had violated, again the same*
19 *statute, by including extraneous information. Although*
20 *acknowledging the Supreme Court's decision."* 12:00
21

22 And he refers to a number of standing cases: "The
23 court found unpersuasive the claim that he had suffered
24 informational or privacy injury sufficient for Article
25 III standing. Regarding the claimed privacy injury, 12:00
26 the court explained that had shoots alleged the
27 extraneous information in the form 'confused him in
28 some way', or that the background check 'had directly
29 harmed' him, 'a case could be made'."

1 But he hadn't alleged either of those things and they
2 continue in that vein.

3
4 And the third case, and I'll just let the stenographer
5 change. The third case, Adams -v- Fifth Bank, this is 12:00
6 a decision of the United States District Court for the
7 Western District of Kentucky which apparently you
8 should've read, which was decided on 10th February.
9 And I'll ask Mr. Young to hand up a copy of that to
10 you. And this was also a case under the Fair Credit 12:01
11 Reporting Act. And I think you will see similarly
12 there, the court acknowledged - and if you turn to page
13 two you will see this -- sorry, page three, and it's
14 page three the second paragraph on the right-hand side
15 - a consideration of *other* approaches adopted in 12:01
16 different districts and in one case, I think, circuit
17 as to whether similar claims could generate Article III
18 standing.

19
20 So could you perhaps -- I'm sorry, there's one final 12:02
21 authority, which Mr. Gallagher did *not* refer to, but
22 which I think gathered these together, which is called
23 Beck -v- McDonald (Same Handed). This is a decision of
24 the Fourth Circuit from earlier this month, 6th
25 February. And here the plaintiffs' data was stolen and 12:02
26 they sought to mount a claim -- I think they were
27 veterans. Data, sensitive personal data was stolen and
28 they sought to advance a claim that they had standing
29 because of an increased risk of identity theft caused

1 by that breach, and again it was a breach of the
2 relevant statute. In that case, standing -- are you
3 familiar with this type of an issue? You, I'm sure,
4 haven't read the --

5 A. I'm actually familiar with this case. When 12:03
6 Mr. Gallagher asked me to name the title of a case on
7 Monday, the name of the case slipped my mind, but the
8 fact that it was Judge Diaz, who was a District judge
9 sitting by designation and that the court had examined
10 Spokeo. But that was not responsive to the question. 12:03

11 66 Q. Sorry, you're quite right; yes, you did refer to a
12 judgment of Circuit Judge Diaz, although you didn't
13 refer to it by name.

14 A. District judge. She is -- occasionally, to fill out
15 vacancies on appellate panels -- 12:03

16 67 Q. I see.

17 A. -- trial judges will sit by designation in different
18 circuits as appellate judges. And that's what happened
19 here.

20 68 Q. So if you could just explain to the court then what 12:03
21 issue presented itself here and what the conclusion
22 was?

23 A. I read this case some time ago. I do recall that the
24 court did examine Spokeo, but beyond that, without
25 refreshing my recollection, I wouldn't want to -- 12:04

26 69 Q. Very good. Well, let's just look then --

27 A. -- say more.

28 70 Q. -- Prof. Richards, to page six. And there's a
29 discussion here of Clapper. It explains - and this is

1 on the right-hand side, the second paragraph -

2
3 *"Clapper's discussion of when a threatened injury*
4 *constitutes an Article III injury-in-fact is*
5 *controlling here. Before explaining why, we address* 12:04
6 *the plaintiffs' contention that the District Court*
7 *misread Clapper to require a new, heightened burden for*
8 *proving an Article III injury-in-fact. To the*
9 *contrary, Clapper's iteration of the well established*
10 *tenet that a threatened injury must be 'certainly* 12:04
11 *impending' to constitute injury-in-fact is hardly*
12 *novel."*

13
14 Then they say:

15
16 *"We also reject the plaintiffs' claim that 'emotional* 12:04
17 *upset' and 'fear [of] identity theft and financial*
18 *fraud' resulting from the data breaches are adverse*
19 *effects sufficient to confer Article III standing.*
20 *That assertion reflects a misunderstanding of the* 12:05
21 *Privacy Act and is an extension of Doe -v- Chao".*

22 **MS. JUSTICE COSTELLO:** I think it says "overextension".

23 **MR. MURRAY:** Excuse me, Judge, "*an overextension of Doe*
24 *-v- Chao."* The court then proceed today consider the
25 increased risk of identity theft arising from the 12:05
26 breaches. And if you'd turn to page ten - and I'm
27 sorry, Judge, that it's taken me a little bit longer
28 than I'd like, I have been working from a different
29 version to the one you've been given - if you go to

1 page eight and at the very top, the second full
2 paragraph:

3
4 *"The Plaintiff's counter that there is 'no need to*
5 *speculate' here because they have alleged - and in the* 12:06
6 *Beck case the VA's investigation has concluded - that*
7 *the laptop and pathology reports had been stolen. We*
8 *of course accept this allegation is true. But the mere*
9 *theft of these items without more cannot confer Article*
10 *III standing."* 12:06

11
12 And they then proceed to explain how they are being
13 invited to engage in the same attenuated chain of
14 possibilities as was referred to by the court in
15 Clapper. And at the bottom of the page they say: 12:06

16
17 *"The Plaintiffs insist that the District Court require*
18 *them to show 'concrete evidence that [their] personal*
19 *information had already been misused', thus forcing*
20 *someone in their possession 'to wait for the threatened* 12:06
21 *harm to materialise in order to sue'. We disagree.*
22 *The district court sought only to hold the Plaintiffs*
23 *to their respective burdens to either 'plausibly plead'*
24 *factual allegations or 'set forth particular*
25 *evidence'."*

26
27 And proceeded then to say that:

28
29 *"The Plaintiffs allege that: (1) 33% of health-related*

1 *data breaches result in identity theft; (2) the*
2 *Defendants expend millions of dollars trying to avoid*
3 *and mitigate those risks."*

4
5 And so forth. And in the next paragraph it's
6 explained:

7
8 *"These allegations are insufficient to establish a*
9 *'substantial risk' of harm. Even if we credit the*
10 *Plaintiffs' allegation that 33% of those affected by*
11 *data breaches will become victims of identity theft, it*
12 *follows that over 66% of veterans affected will suffer*
13 *no harm. This statistic falls far short of*
14 *establishing a 'substantial risk'."*

15
16 And they then quote authority following -- applying
17 that. Then if you go over the page, where they deal
18 with the cost of -- sorry, just over the next column.
19 *"The Plaintiffs' other allegations fare no better"*,
20 that's at the top, still on page nine, where they're
21 dealing with the same allegation. They say:

12:07

22
23 *"Contrary to some of our sister circuits, we decline to*
24 *infer a substantial risk of harm of future identity*
25 *theft from an organisation's offer to provide free*
26 *credit monitoring services to affected individuals. To*
27 *adopt such a presumption would surely discourage*
28 *organizations from offering these services to*
29 *data-breach victims."*

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So from that, I suppose, very short survey of cases, one of which you referred to and the others of which were referred to by Mr. Gallagher, Prof. Richards, what would you say, or what would you conclude the state of federal standing law on data breach cases is? 12:08

A. I would conclude that it is uncertain and there is uncertainty about what constitutes harm, in particular how to reconcile the answer to what constitutes harm with the injury-in-fact doctrine, particularly the injury-in-fact subpart of standing doctrine, particularly in light of recent Supreme Court developments. 12:08

When I was drafting my report, I was trying to think of a way to bring some analytical clarity to an area of law that is practically confused and frequently criticised, not just for its indeterminacy, but as I note in my report, for allegations - which I do not make in my report - but allegations that the justices are -- or courts have the ability to use standing doctrine to avoid deciding cases on the merits. 12:09

What I would say is that, in direct response to Mr. Murray's question, is that the state of the law after Spokeo is exactly as I would've imagined it to be having read Spokeo and followed this not at a granular, reading every case level, as I explained on Monday, but at a slightly higher level of abstraction. 12:09

1 71 Q. well, Mr. Gallagher put it to you on Monday that if you
2 can establish that your information was used or
3 disclosed or interfered with, you automatically have
4 standing. And you said that wasn't true. Now, could
5 you explain *why* that is so? 12:10

6 A. well, I think for some of the reasons that we have seen
7 in these cases. what I believe I said on Monday and
8 what I say in my report, what I tried to maintain was
9 that what is important is that the elements of standing
10 doctrine be satisfied. And that is the standard by 12:10
11 which courts must determine these cases. And that
12 requires a showing of injury-in-fact, of actual harm,
13 of concrete *and* now particularised injury,
14 redressability and causation. And I think it is
15 difficult to reduce standing to a proposition that is 12:10
16 more simple than that.

17 72 Q. Mr. Gallagher also put it to you that the Nickelodeon
18 and ACLU/Clapper cases had held that the *interference*
19 *with the data* constituted harm. Is that a correct
20 interpretation of those decisions in your view? 12:11

21 A. Based upon my reading of them to date, it is not.

22 73 Q. And why do you say that?

23 A. Because interference alone - and again I'm still
24 somewhat unclear about what interference means - but as
25 I understand interference, it means any accessing of 12:11
26 the data cannot be enough under current doctrine, that
27 some finding of injury-in-fact, which courts in privacy
28 cases in particular often equate to the word "harm",
29 must also be found. But at a minimum, I think it *is*

1 clear that under the Supreme Court's governing and, I
2 think, universally agreed test that injury-in-fact must
3 be required. And that merely begs the question which
4 we have perhaps regrettably been begging for quite some
5 time in these proceedings about what injury-in-fact in 12:12
6 practice actually means.

7 74 Q. He also put it to you that ACLU -v- Clapper and
8 Nickelodeon both established that mere access to the
9 data constitutes harm. Is that your interpretation of
10 the law? 12:12

11 A. That is not my interpretation of the law of standing,
12 for similar reasons to ones which I've just given.

13 75 Q. He also referred towards the end of the afternoon on
14 Monday to what he described as three well recognised
15 remedies. It's not entirely clear to us what these 12:12
16 were, but we think the reference was to use, disclosure
17 or collection. And he put it that standing is not a
18 problem, he said, in relation to those three remedies.
19 Now, in fairness, just to be clear, Mr. Gallagher was
20 saying subtract the issue of notice from this and 12:12
21 assume that people are aware that there has been use,
22 disclosure or collection. From your analysis of the US
23 locus standi law and Article III law, can it be said
24 simply that if there's been use, disclosure or
25 collection that there would be standing? 12:13

26 **MR. GALLAGHER:** Judge, I object to that question. That
27 was put in the context of government surveillance. And
28 Mr. Murray is now putting it in a different context and
29 misrepresenting what I said.

1 76 Q. **MR. MURRAY:** No, I accept that. And I hadn't
2 intended -- (To witness) I should've made it clear
3 Mr. Gallagher asked the questions, you will recall, in
4 the context of national surveillance. So in that
5 context, could you address the question of standing 12:13
6 for -- he describes the three remedies and I think he
7 was referring to use, disclosure or collection.
8 **MR. GALLAGHER:** Judge, he described it, he answered it
9 and he agreed with it. Now he's being cross-examined
10 on it. And that's not the purpose of re-examination. 12:13
11 He's not entitled to do that.
12 **MR. MURRAY:** Judge, it wasn't even clear what question
13 was being asked. And I think in fairness to everybody,
14 including the court, we need a clear record of what
15 exactly the witness' position is. It was a very - and 12:14
16 I don't mean this in any critical way - but there was a
17 confusing cross-examination towards the end, with a
18 wide range of terms being used - "interference",
19 "access", "data breaches" - and I think the court needs
20 clarity on what exactly the witness' position, is in my 12:14
21 respectful submission
22 **MS. JUSTICE COSTELLO:** well, perhaps if we break it
23 down into the three points. If you put what was put to
24 him on Monday from the transcript, if you can access
25 that, and his answer and then maybe break it down, if 12:14
26 that's what you're seeking to deal with.
27 77 Q. **MR. MURRAY:** Yes, thank you, Judge. (To witness) So
28 it's page 135. What Mr. Gallagher put to you was this:
29 "*In the context*" - and this is on line 12 - "*In the*

1 *context of three of the well recognised remedies" - and*
2 *this is the question - "standing is not a problem*
3 *provided you have notice or other information that*
4 *establishes the interference." And your response to*
5 *that question, in fairness, was that: "I would never* 12:15
6 *say that standing is not a problem." And there was a*
7 *debate between you and Mr. Gallagher about the effect*
8 *of Clapper and notice and so forth.*

9
10 Just in relation to these three well recognised 12:15
11 remedies, on the assumption that they are - and we can
12 deal with them sequentially; use, disclosure or
13 collection - that standing, as the question was put by
14 Mr. Gallagher, is not a problem provided you have
15 notice? 12:15

16 A. I would say with respect to collection - and this
17 relates to the distinction that I attempted to draw on
18 Monday to collection of the contents of telephone calls
19 and collection of the contents of e-mails and
20 collection of other kinds of data that are either 12:15
21 broader or newer in technological origin than those -
22 that what one needs to establish is the violation of a
23 legally protected interest such that injury-in-fact,
24 harm, an actual injury that is concrete. And that
25 would require one to run through the standing test. 12:16
26 And I would suggest that for collection, it is not
27 clear that that is necessarily the case.

28
29 I do wish to be clear, lest my evidence be

1 misconstrued, that I am not at all saying that it is
2 impossible. It is my position, as I point out in the
3 report, that there *will* be cases in which standing is
4 going to be found. But my report and my evidence as I
5 intend to give it in these proceedings is that standing 12:17
6 is omnipresent - I believe Prof. Vladeck refers to it
7 as placing substantial obstacles in the path of
8 plaintiffs. And to be clear, as I understand the
9 experts' note, there is no disagreement amongst the
10 experts about the elements of standing or the fact that 12:17
11 standing will sometimes be available under factual
12 circumstances and legal circumstances and sometimes not
13 be available.

14
15 With respect to use, I think the same analysis would 12:17
16 apply, particularly if Spokeo, which excluded a use
17 from failure to provide reasonably accurate procedures
18 from the injury-in-fact requirement.

19
20 Then with respect to disclosure, I would reach a 12:18
21 similar conclusion. And I would draw the court's
22 attention in this respect to the FAA -v- Cooper case
23 decided by the Supreme Court a few years ago in which
24 it held that the requirement of the Privacy Act, which
25 prohibits against a subset of government disclosures of 12:18
26 information in records contained in a system of
27 records, the statute refers to actual damages and the
28 court held that, because of sovereign immunity reasons,
29 psychological injury would not constitute actual

1 damage. In those cases, pleading a disclosure by the
2 government of information that only produced
3 psychological injury, in my opinion, would not be
4 sufficient to state a colourable claim of an
5 injury-in-fact. 12:18

6
7 Moreover, as I point out in my report - and I want to
8 be clear what I'm saying and not saying here, because I
9 don't wish to take a position upon European law - but
10 insofar as European law protects dignitary injuries 12:19
11 under Articles 7 and 8, I do not believe that under
12 Cooper's narrow reading of the harms available under
13 the Privacy Act for remediation via a cause of action
14 that a dignitary harm would fall within physical or
15 pecuniary categories; it would be, in my opinion, 12:19
16 treated like a US court as akin to a psychological
17 injury. But I also do wish to be clear that that does
18 require some -- two degrees of speculation on my part,
19 both in respect of the substantive content of the
20 European law and also with the actions of courts in the 12:19
21 future. But that is my best reading of the law as I
22 understand it today.

23 **MR. MURRAY:** Thank you very much, Prof. Richards.

24 **MS. JUSTICE COSTELLO:** Thank you. At this stage you're
25 definitely free to go. 12:20

26 A. Thank you.

27 **MS. JUSTICE COSTELLO:** Thank you very much for your
28 assistance.

29 **MR. MURRAY:** Thank you, Judge. The next witness is

1 Mr. Serwin.

2

3 **MR. ANDREW SERWIN, HAVING BEEN SWORN, WAS DIRECTLY**
4 **EXAMINED BY MR. MURRAY AS FOLLOWS:**

5

12:20

6 78 Q. **MR. MURRAY:** Now, Mr. Serwin, I'm going to ask that you
7 be given a copy of the affidavit you swore.

8 **MS. JUSTICE COSTELLO:** Can you confirm which book that
9 is please, Mr. Murray?

10 **MR. MURRAY:** Excuse me?

12:21

11 **MS. JUSTICE COSTELLO:** which book is that in?

12 79 Q. **MR. MURRAY:** Oh, Judge, once again I'm sorry. Trial
13 book two. And you'll find, Judge, the affidavit at tab
14 one. (To witness) So, Mr. Serwin, hopefully you will
15 have in front of you your affidavit.

12:21

16 A. I do.

17 80 Q. Your first memorandum.

18 A. Yes.

19 81 Q. And your second memorandum.

20 A. Yes.

12:21

21 82 Q. And I think there is also, as an appendix or exhibit to
22 the affidavit, a biographical summary, is that right?

23 A. Yes.

24 83 Q. So you're a partner, I think, in the firm of Morrison
25 and Foerster?

12:21

26 A. I am.

27 84 Q. And I think that's a national firm in the United
28 States, with offices in a large number of cities?

29 A. It is.

1 85 Q. And does it have offices abroad as well, is it a...
2 A. It does. A few, yes.

3 86 Q. Okay. Could you just briefly summarise for the court,
4 Mr. Serwin, your qualifications and your experience?
5 A. Sure. I'm a graduate - 1992 - of the University of 12:22
6 California, San Diego. I went to law school at
7 University of San Diego in 1995, graduated, was
8 admitted to the bar in 1995 in California. I started
9 really in a litigation practice when I first started
10 out. Towards the -- after about five or six years of 12:22
11 my career, started looking at privacy and doing more US
12 based privacy. And since that point I've been doing,
13 I'd say, almost exclusively for some period after that,
14 privacy in the US, privacy litigation, as well as data
15 security, as we call it, in the US as well. So that's 12:22
16 primarily my practice. Within that, I'd say I do a lot
17 of what we call HIPAA, or health work in the US as
18 well. But those are the main areas that I practice in.

19 87 Q. I think in your biographical summary you outline a
20 number of publications of yours in this area and if you 12:23
21 could just briefly address those please?
22 A. Sure. The main one is I've written a three-volume book
23 on privacy. I am a US lawyer, I am a US qualified
24 lawyer, I'm not a European qualified lawyer by any
25 stretch. I do cover global laws in one of the volumes, 12:23
26 but it's -- the book, frankly, is intended for a US
27 audience with inhouse counsel to sort of serve, in
28 essence, as a first stop. You know, I'm certainly not
29 an expert in everything in the book, even on the US

1 side, let alone globally - I am a US lawyer.

2
3 I've written as well on privacy litigation, I've
4 written several law reviews, one of which was on
5 privacy litigation. And I've written a book on health 12:23
6 care privacy as well, which is at some level derivative
7 of my broader privacy book, but it's a smaller section,
8 that if people are interested in health care privacy
9 they can look at that and some of the laws that are in
10 the US on that point. 12:24

11 88 Q. Now, you refer in your affidavit to being instructed by
12 the Data Protection Commissioner in April of this year.
13 And could you explain what you were asked to do please?

14 A. Yes. I was asked to provide an independent expert
15 report as if it were going into a court that outlined 12:24
16 really the potential causes of action in the US for an
17 EU citizen if their data was gathered, illegally
18 gathered by the United States Government and looking
19 solely at what the causes of action would be against
20 the government, as well as individuals of the 12:24
21 government that were potentially available. And
22 included within that was an examination of some of the
23 contours of US law as well as some of the limits in US
24 law as well.

25 89 Q. And at that stage, of course, these proceedings hadn't 12:24
26 been instituted. What was the purpose as you
27 understood it of the initial consideration that you've
28 been asked to give?

29 A. I understood that the Data Protection Commissioner was

1 going to examine this document and then make a
2 determination as to whether US law provided adequate
3 remedies or not for Europeans.

4 90 Q. Now, your first memorandum is in fact dated the same
5 day as the Commissioner's decision. Was this the first 12:25
6 version of the first memorandum?

7 A. It was not the first final. And we can thank the
8 Supreme Court in Spokeo for that. So I'd completed the
9 memo in, on May 11th and the Spokeo decision, I
10 believe, came down on 16th May and I felt it was 12:25
11 something that should've been addressed, or should be
12 addressed in the memorandum. So I added that in and
13 then reissued this with the date of 24th when I signed
14 it. But it was the same memorandum as was before with
15 an addition of the Spokeo decision. 12:26

16 91 Q. And you'd furnished that on 11th May, is that correct?

17 A. Yes, it is.

18 92 Q. Now, just very briefly, Mr. Serwin, I'm going to ask
19 you to turn to your first memorandum. And I think this
20 has been opened to the court already by Mr. Collins 12:26
21 what feels like a long time ago. But the report deals
22 with various, in the first instance, statutory
23 provisions - FISA, it deals with the Privacy Act, it
24 addresses the Judicial Redress Act, the ECPA. And then
25 a number of other statutes are dealt with more briefly 12:26
26 - the Freedom on Information Act, Computer Fraud and
27 Abuse Act and the Right to Financial Privacy Act.

28
29 Then you proceed to deal with the issue of standing,

1 which the court has just been hearing about. Could you
2 perhaps just summarise your conclusions on the standing
3 issue?

4 A. Yes. There's obviously been a lot of change in
5 standing recently - obviously the Spokeo decision 12:27
6 changed during this process. We've been through the
7 three elements obviously, which are injury-in-fact,
8 causation and redress. I think the take-away on
9 standing, not to try to summarise the discussion that's
10 been had over the last several days, but plaintiffs -- 12:27
11 the Supreme Court seems to be certainly not expanding
12 standing - Clapper, I think, was a narrowing; Spokeo, I
13 think, has created some, as we've seen, consternation
14 in the lower courts about how it would be interpreted
15 and I don't certainly read that as an expansion in any 12:27
16 way, I think it could be read as a narrowing,
17 particularly when you're relying on a statutory cause
18 of action, which were many of the causes of action I
19 cover in this memo. I think you have to be thinking
20 about whether it does narrow a cause of action based 12:27
21 upon a statutory cause of action around when you look
22 at the concreteness element of standing.

23 93 Q. Okay. And I'll just perhaps ask you to take one small
24 extract from your report at page 15. Having outlined
25 the elements of standing and referenced the decisions 12:28
26 in Clapper and the Spokeo case, you say on page 15,
27 section C:

28
29 "*Lower courts vary in their interpretation of standing*

1 *in the data privacy context. The Ninth Circuit has*
2 *found that individuals who had their personal*
3 *information stolen, but not misused, suffered a*
4 *sufficient injury to confer standing under Article III.*
5 *The Ninth Circuit's interpretation of Article III*
6 *standing is broader than many other courts that have*
7 *found that cases arising out of alleged data breaches*
8 *fail for a lack of standing, unless there is a showing*
9 *of misuse of data. The Seventh Circuit has held that*
10 *at least at the motion to dismiss stage, a plaintiff*
11 *could establish standing, based upon allegations that*
12 *the court felt created an 'objectively reasonable*
13 *likelihood' that injury would occur... On the other*
14 *hand, the First Circuit has found that a plaintiff's*
15 *failure to allege that his or her information was*
16 *actually acquired by a third-party is fatal to the*
17 *plaintiff's claims."*

18
19 You then proceed to explain that:

20
21 *"The Ninth Circuit has also taken a broad view with*
22 *respect to whether standing can be established through*
23 *statutory rights, where the statutory cause of action*
24 *does not require proof of actual damages."*

25
26 And you refer to the Jewel case.

27
28 *"... the plaintiffs' allegations of specific violations*
29 *of ECPA and FISA, as well as the First and Fourteenth*

1 *Amendments, coupled with the allegation that their*
2 *communications were part of the alleged warrantless*
3 *wiretapping, were sufficient for the Ninth Circuit to*
4 *find standing under Article III, since Article III*
5 *standing can exist in certain cases based upon the*
6 *violation of a statutorily created right. The Supreme*
7 *Court's recent decision in Spokeo may alter the lower*
8 *courts' analysis on this issue. Based on this ruling,*
9 *a plaintiff must allege that statutory violations*
10 *caused a concrete and particularised harm in order to*
11 *satisfy the Article III standing requirement. However,*
12 *a 'real risk of harm' may be sufficient to establish*
13 *standing in some circumstances" --*

14
15 I'm sorry, Ms. Hyland helpfully corrects me:

12:30

16
17 *"A 'risk of real harm' may be sufficient to establish*
18 *standing in some circumstances, and it is yet to be*
19 *seen whether lower courts will alter their analysis in*
20 *light of this decision."*

21
22 I think having provided that report, you then
23 proceeded, Mr. Serwin, to deliver a second report,
24 which is at tab three. And could you perhaps outline
25 why you were asked to produce *this* report? And at this
26 stage, of course, the proceedings had been instituted.

12:30

27 A. Yes, I was asked to review the pleadings really to
28 date, as well as the other expert reports that had been
29 filed by the parties. I believe I reviewed one that

1 has now been excluded as well. But I'd reviewed those
2 and I was asked to, in essence, provide a supplement
3 based upon where the case stood and certain,
4 particularly I'd say Prof. Vladeck's, but reviewing all
5 of it and just responding to certain issues that had 12:31
6 been raised with my initial memo and report.

7 94 Q. So you begin off, I think, by looking at the Schuchardt
8 case?

9 A. Yes.

10 95 Q. And if you could briefly explain to the court why you 12:31
11 included that?

12 A. Yes. Well, I felt that the cases that involved, I'll
13 call it government monitoring for lack of a better
14 term, particularly regarding standing were particularly
15 relevant and this one was one that came out after my 12:31
16 original memorandum. It does find Article III standing
17 at the pleading stage. And I think that's an important
18 thing to note here, is that there's, you know, what the
19 level of standing is at the motion to dismiss, as we
20 would call it, stage versus what it can or what it is 12:31
21 later as the burden of proof shifts for plaintiffs as
22 the case gets further.

23
24 This case certainly did find that at least at the
25 pleading stage that they'd adequately pled standing. 12:31
26 But the court also noted that it was not saying
27 explicitly, if you look at the middle paragraph of page
28 two, that the plaintiff actually had standing to sue.
29 And so I felt it was important to put this case before

1 the court, because it does find Article III standing at
2 the motion to dismiss stage. It does raise some
3 questions, I think, for the case down the road, but it
4 certainly did find standing and I felt, given the
5 factual basis of it, that it was important that the 12:32
6 court had it before it.

7 96 Q. And you explain in fact at the top of page three, in
8 the second sentence, that you and Prof. Vladeck broadly
9 agreed on Article III and to the extent there are some
10 differences in your views, they're differences that 12:32
11 largely result in a difference in emphasis on which
12 cases one is relying upon and the procedural posture of
13 some of those cases. And you observe that
14 Prof. Vladeck acknowledges the Clapper case, indeed
15 expressing his personal concerns regarding the 12:32
16 decision.

17
18 There was also an issue raised, I think, following your
19 first memorandum about Rule 11 of the Rules, the
20 Federal Rules of Civil Procedure. And if you could 12:33
21 just perhaps briefly explain to the court what Rule 11
22 is and what *you* see its relevance as?

23 A. Yeah, Rule 11 is, in essence, a rule that requires an
24 attorney putting any pleading before a court to have
25 either a good faith basis or believe that after a 12:33
26 reasonable opportunity, if you will, for discovery that
27 there will be a good faith basis for the pleading and
28 the positions in the pleading. And the reason in my
29 first memorandum I raised the Rule 11 issue in the

1 context of Clapper, which is where I do raise it, is in
2 Clapper you had a case where the plaintiff had, you
3 know, no knowledge that monitoring had happened --
4 97 Q. **MS. JUSTICE COSTELLO:** This is the Clapper and the --
5 not ACLU? 12:33
6 A. I'm sorry, the Supreme court Clapper, yes. So in the
7 Supreme Court Clapper case you had a situation where
8 the court basically said 'Look, we -- 'the statute was
9 just passed, you couldn't have known, couldn't have
10 been monitored yet' -- 12:33
11 98 Q. **MS. JUSTICE COSTELLO:** It was speculative?
12 A. It was speculative. And the issue I saw candidly was:
13 If you're in a situation where someone comes to you and
14 says 'I think I was monitored by the government
15 illegally, I want to sue them' and you ask 'what 12:34
16 evidence do you have?' and the answer is 'I just think
17 I was, I don't know', I think a question has to be
18 asked. I certainly didn't say in my original memo, my
19 report or *this* report that there would be sanction
20 sought. I do think it's at least a question one has to 12:34
21 ask, given that much of this monitoring can be secret
22 and one doesn't always know it's occurring. And so
23 that was really the point I was raising with Rule 11.
24 99 Q. **MR. MURRAY:** And what position does that put the
25 attorney in, where that situation you've just described 12:34
26 occurs, the client says 'I think I've been monitored'
27 and they have *no* evidence of any kind of that; what
28 position does that put the attorney in?
29 A. The attorney has to make a judgment call. And again I

1 certainly never say in any of the reports that, you
2 know, on its face an attorney couldn't file the claim.
3 But I think, you know, any attorney would ask the
4 question of 'Okay, how can I go forward with this?' if
5 literally it's a situation where we have no evidence at 12:34
6 all and the client simply thinks they may have been
7 monitored or wants to sue and they don't, they simply,
8 you have no evidence to back it up.

9 100 Q. Okay. There were certain comments made in
10 Prof. Vladeck's report about the Administrative 12:35
11 Procedure Act and your failure to address that in your
12 initial memorandum. And you consider those comments in
13 the next section of the report. Could you perhaps just
14 briefly explain what your position was in relation to
15 the APA? 12:35

16 A. Yes. My first memorandum, as it states really, I was
17 trying to look at what I thought were the most likely
18 and effective causes of action if these were going to
19 be filed in the US. I saw the what I'll call the 2712
20 claims, which is the claims where the federal 12:35
21 government has waived sovereign immunity under 18 USC
22 2712, which is really FISA predominantly, but also
23 ECPA, as I know the court has heard about, as being
24 some of the more important claims and I think likely
25 claims. 12:36

26
27 The case Prof. Vladeck cites, ACLU -v- Clapper - and
28 this is the Second Circuit Clapper -- I'm sorry,
29 Clapper -v- ACLU; you'll note in page five of my

1 memorandum, in the middle paragraph I note that the
2 court said that 18 USC 2712, which is the FISA cause of
3 action I first examine, explicitly withdrew the right
4 to sue under the APA for certain governmental actions
5 regarding surveillance. 12:36

6
7 I believe there's a - Prof. Vladeck and I both cite
8 this case, but neither of us for this proposition - I
9 think the Jewel 2013 case, it's a District Court case
10 out of the Northern District, also, I believe, 12:36
11 dismisses an APA claim, saying that, in essence,
12 'You've sued under 2712', therefore, because the
13 government has not permitted injunctive relief by not
14 including it within 2712, the APA injunctive relief
15 claim there was not permitted. 12:37

16
17 So the first point really was I saw the 2712 remedies,
18 the FISA remedies, the ECPA remedies as being really
19 the more important remedies. I do think there are a
20 few other issues, but, you know, one of the main issues 12:37
21 was that the APA is really directed towards agency
22 action. And that tends to be, I think, things like
23 regulations or opinions from a federal agency. There
24 is a case that I cite that does say that the monitoring
25 by the NSA was not final agency action and that is 12:37
26 cited in footnote 18 of my report, from the Sixth
27 Circuit, which does say that plaintiffs have not
28 alleged sufficient agency action to state a claim under
29 the APA.

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The case Prof. Vladeck cites, certainly it doesn't address that issue - and I'm not saying it needed to - it does permit an APA claim. To me, there was another issue and I think it goes to sort of --

12:38

101 Q. Just before you move on to that other issue, could you perhaps just explain what "agency action" means, what the phrase means?

A. I believe it's defined in that case. But it tends again to be an action -- I tend to think of it more as really regulations issued by a federal agency, an opinion issued by a federal agency. The distinction that this court drew was the monitoring, at least when it was done, as it was discussed in the Sixth Circuit, went to it was agency conduct; so it was what the agency did, not something it put in a ruling or put in an opinion. So that was the distinction I saw.

12:38

12:38

102 Q. Sort of a regulatory, a distinction between something that's regulatory and something that's operational, is that the...

12:38

A. I think that's a good way to put it, yes.

103 Q. And of course, the United States Supreme Court **Clapper** case was a challenge to the facial validity of a statute, isn't that right, and it was proceed --

A. The Second Circuit.

12:39

104 Q. Oh, sorry, the Second Circuit.

A. Yeah, the Second Circuit **Clapper** was a facial to the statute on unconstitutional grounds.

105 Q. Okay. Sorry, you were about to make a further point?

1 A. Well, I think, so there's another issue and there is --
2 the Second Circuit Clapper case looks at monitoring
3 under what I think is being called in this case 215,
4 which is the bulk, was the alleged bulk collection, and
5 it finds that Congress did not intend to preclude 12:39
6 review of that and so permits the APA claim to go
7 forward.

8
9 There is a case from the District Court of Columbia
10 that does find, go the other way. Obviously it's a 12:39
11 Circuit Court versus a District Court. The District
12 Court case was taken up, so the claim in District Court
13 case then went to the DC circuit on appeal. The DC
14 circuit found that the APA claim was not valid, but was
15 going to enter an injunction on other grounds and did 12:40
16 enter an injunction on other grounds regarding
17 surveillance. The court in DC, the District Court of
18 Appeal -- I'm sorry, the DC Court of Appeal vacated the
19 injunction and remanded the case, did not touch the
20 holding on the APA. 12:40

21
22 And so the reason I felt that it was important to cite
23 the claim in District Court case is there is an
24 exclusive venue provision in the Judicial Redress Act
25 that requires a European to file the claim in the 12:40
26 District Court of Columbia District Court. And so
27 while I recognise that obviously a Circuit Court versus
28 a District Court and one with negative history is not
29 exactly of an equal trade, if you will, I did think it

1 was relevant to point out that at least one District
2 judge in the district where a European would likely
3 file their claim because they might have a Judicial
4 Redress Act claim *had* gone the opposite way on the
5 Second Circuit Clapper decision. 12:41

6 106 Q. **MS. JUSTICE COSTELLO:** Can you explain what you meant
7 there by "negative history"? Is that because they were
8 overturned?

9 A. They were overturned on a different issue. So they --

10 107 Q. **MS. JUSTICE COSTELLO:** It's a different issue? 12:41

11 A. Yeah. And so it went up. And I don't read the
12 appellate decision as touching the APA; in fact what
13 they did is found, ironically, that the plaintiffs
14 lacked standing to get an injunction under Article III
15 and remanded the case back. 12:41

16 **MR. MURRAY:** So, Mr. Serwin, if you could just answer
17 any questions from Ms. Hyland.

18
19 **MR. SERWIN WAS CROSS-EXAMINED BY MS. HYLAND AS FOLLOWS**

20
21 **MS. HYLAND:** Good afternoon, Mr. Serwin. 12:41

22 A. Good afternoon.

23 108 Q. So can I just take you back then to, I suppose, your
24 interactions with the DPC, the Data Protection
25 Commissioner. We will come back to US law, but perhaps 12:41
26 if we could just go to Europe in the first instance.
27 So I think you said you were retained on 5th April
28 2016, is that right?

29 A. Yes, I believe that's right, yes.

1 109 Q. And did you ever come to Ireland to discuss the matter
2 with her?

3 A. I did not come to Ireland prior to this year.

4 110 Q. Yes. And did she ever visit you in the States? In
5 other words, did you ever have a face to face 12:42
6 discussion or meeting about this whole issue, this
7 matter?

8 A. We did not.

9 111 Q. And did you have any, I suppose, telephone
10 conversations? How did your interaction generally go? 12:42

11 A. We had a video conference, I believe, right as I
12 delivered the May 11th report to sort of say here's
13 what, you know, my opinions were. But I believe that
14 was really the main interaction.

15 112 Q. So that was one video conference? 12:42

16 A. Yes.

17 113 Q. And how long do you think that lasted?

18 A. I would estimate maybe an hour or so.

19 114 Q. Okay, can I take you back a little bit and just ask you
20 what were the materials that she gave you when she was 12:42
21 briefing you?

22 A. When I -- in the initial point?

23 115 Q. Yeah, absolutely. At the very beginning.

24 A. I don't believe I had really any materials at that
25 point, because -- I don't believe I did. 12:43

26 116 Q. I see. So did you have some kind of letter of
27 instruction or something like that?

28 A. Yes.

29 117 Q. Can you tell us, and maybe in a little bit more detail

1 than you did in the affidavit - or maybe the affidavit
2 is the sum total of it - what exactly was your brief in
3 terms of what she was asking you to do?

4 A. Really my affidavit was, is what I was asked to do, in
5 paragraph five. 12:43

6 118 Q. Yes. And I think you set that out there in paragraph
7 five, don't you? And I think one of the things she asks
8 you at subparagraph (b), she asked you to look at the
9 application of the remedies in practice, didn't she?
10 And did you do that? 12:43

11 A. I believe I did, yes.

12 119 Q. Yeah. And did you then at any stage between 5th April
13 and 24th May, did you get any additional materials from
14 her apart from the briefing letter?

15 A. I don't believe I did, no. 12:44

16 120 Q. You didn't. What about the submission made by
17 Mr. Schrems?

18 A. I believe I had the -- I'm sorry, which submission?

19 121 Q. So Mr. Schrems had made a submission to the Data
20 Protection Commissioner, he'd made a complaint. 12:44

21 A. I don't believe I had seen that at the time, no.

22 122 Q. I see. Because just you say, I think, at paragraph
23 three that -- you have your affidavit there, do you?

24 A. Yes.

25 123 Q. You say that: 12:44

26

27 *"The matters arose in the context of the Commissioner's*
28 *investigation of a complaint received from Mr. Schrems,*
29 *details of which were furnished to me."*

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And just what do you mean by that?

A. I mean I understood that the Commissioner was looking at -- I understood there was a complaint.

124 Q. Yes. 12:44

A. I don't honestly at this point recall whether I looked at it or not. But I understood the context of this, which was there was a complaint against Facebook, that she was going to have to do an assessment of adequacy and look at what was, what the contours were of US law. 12:45

125 Q. I see.

A. And I would note in there, obviously I don't review the facts of the Schrems case or make any factual findings or legal conclusions. I understood my job is to sort of provide a neutral non-factual, if you will, view of US law that didn't apply in any way to the facts of what Mr. Schrems had alleged or anyone else could or couldn't allege. 12:45

126 Q. Yes. And one of the things, if you go to 5(a), you identify the remedies in fact available to EU citizens. 12:45
And you didn't deal in any way with, I suppose, recourse by EU citizens, indirect recourse if I can call it that. So, for example, you didn't deal with oversight by the various agencies, isn't that right?

A. That is correct. 12:45

127 Q. Yes. And you didn't deal with, for example, other remedies that would be directly, if you like, linked, such as the right of the telecommunications companies to challenge decisions and to challenge requests for

1 data, isn't that right?

2 A. Yeah, my focus again was really, to put it probably in
3 simpler terms, remedies that the EU citizen could
4 access themselves directly. So anything that they
5 couldn't access directly by their own, you know, 12:46
6 initiation was not within the scope of what I
7 understood I was to do.

8 128 Q. Yes. And you didn't, also, describe to her the, if you
9 like, entitlement to collect information and then the
10 remedy for breach, did you? 12:46

11 A. I'm sorry, I don't understand your question.

12 129 Q. So you focused on remedies, but you don't, I think,
13 paint a picture of the general legislative scheme under
14 which it's permissible to collect data and then the
15 remedy for it. 12:46

16 A. I focused on the remedies, that's correct.

17 130 Q. In other words, in a sense you had half the picture;
18 you had the remedy, but you don't set out what the
19 actual entitlement to access is?

20 A. Again, my focus was on what the remedies and causes of 12:47
21 action were. But I did not go into that detail, no.

22 131 Q. And I think you did understand that she was looking at
23 adequacy as compared to the EU; did you understand
24 that?

25 A. I understood she was going to be looking at adequacy in 12:47
26 the EU, yes.

27 132 Q. Yes. And did you ever raise any issue about what she
28 was comparing the US situation against?

29 A. No, I did not.

1 133 Q. Can I just ask you then please to go to Mr. O'Dwyer's
2 affidavit? So I'll just identify the books that it
3 might be helpful for you to have close by. You have
4 book two, I think, don't you, which is your own book?
5 And then I think book one as well, which is her 12:47
6 decision, the DPC's decision, if you have that there.

7 A. Yes.

8 134 Q. And can I just ask you to look please at tab 12? So,
9 Judge, this is book one --

10 **MS. JUSTICE COSTELLO:** Yes, I have it. Thank you. 12:48

11 135 Q. **MS. HYLAND:** Thank you. And it's the affidavit that was
12 filed by Mr. John O'Dwyer, who's a Deputy Commissioner
13 in the Office of the DPC. (To Witness) There's just
14 two parts of this that I'll just ask you to look at.
15 The first is, can I ask you to turn to paragraph 112 12:48
16 please? And you'll see that at paragraph 112 -- in fact
17 if I could ask you possibly to look first, I think, at
18 paragraph 110. You'll see at the bottom of the page it
19 states, the last sentence:

20 12:49

21 *"Once those applications are determined" - these were*
22 *amici applications - "it will be appropriate to proceed*
23 *immediately to the hearing of the Plaintiff's*
24 *application for a reference and it is for that reason*
25 *that this application is now being issued."* 12:49

26

27 At paragraph 111 he says that:

28

29 *"... the Commissioner has been concerned by suggestions*

1 *made by the Defendants... that it will be necessary for*
2 *pleadings to close and for documentation to be*
3 *furnished or discovered in advance... The Commissioner*
4 *does not accept these suggestions.*

5
6 *112. The views reached by the Commissioner in the Draft*
7 *Decision will be at the heart of this application for a*
8 *reference. The Draft Decision is self-explanatory and*
9 *speaks for itself. If the Defendants or any amici*
10 *disagree with the Draft Decision or any part of it,*
11 *they will have an opportunity to indicate their*
12 *position to this Honourable Court in the context of*
13 *this application for the making of a reference. No*
14 *other procedural steps such as further exchange of*
15 *pleadings or discovery-are required to enable this*
16 *exchange to take place. It is the Commissioner's*
17 *position that the application for a reference for a*
18 *preliminary ruling will be able to proceed immediately*
19 *upon determination of the various amici curiae*
20 *applications."*

21
22 And that affidavit was sworn on 1st July, and obviously
23 you won't know this, but in court an application was
24 made that the hearing about whether or not there should
25 be a reference would be done before the end of July. 12:50

26
27 Now, can I ask you, did you know that your opinion and
28 your opinion alone as to US law would be, first of all,
29 the sole basis for her decision? Did you know that?

1 A. I knew it would be considered. I don't think we had a
2 discussion as to whether it would be, if she was doing
3 anything else. But I knew that it would be considered,
4 yes.

5 136 Q. And did you know whether there was any other experts 12:50
6 going to be asked or any other views canvassed?

7 A. I did not know, no.

8 137 Q. I think you can see here that at this point the 12:50
9 Commissioner's approach was that there should be no
10 other evidence such as we have now, there should be no
11 other material and that the court should be asked to
12 make a reference solely on the basis of her decision
13 and, therefore, on the basis of your material. Would
14 you accept that from what you've seen?

15 A. Looking at it -- I mean, obviously I'm not a lawyer 12:50
16 here, so I can only read that and see what it says, so
17 honestly, I probably cannot answer your question,
18 because I don't understand the procedures here.

19 138 Q. Very good. Did you accept that it was a very weighty 12:51
20 responsibility on you to be giving an opinion on the
21 adequacy of US law, as it were, alone as far as you
22 knew?

23 A. Well, I don't think I was giving an opinion on the 12:51
24 adequacy of the US law. Again, I laid out what I saw
25 were the potential remedies in it. So I did not, as I
26 note in my report, did not make a finding on adequacy
27 at all, I simply tried to lay out what I thought were
28 the most likely causes of action in the US.

29 139 Q. Sorry, you're quite right about that. Did you consider

1 it a weighty responsibility then to be the person, the
2 sole person as far as you knew, that was providing the
3 factual material to allow the DPC to make this
4 determination?

5 A. I would say I took it obviously very seriously. I 12:52
6 didn't know whether there would or would not be other
7 people. But to answer your question, I certainly took
8 this seriously, yes.

9 140 Q. Are you aware and were you aware then of the
10 implications of an invalidation of the SCC decisions? 12:52

11 A. I didn't know what the track would be, you know, for
12 the case, I didn't know exactly what would be the net
13 outcome. I understood obviously the broader context of
14 this in this case, but I didn't really form a belief
15 about whether SCCs would or wouldn't be invalidated. 12:52

16 141 Q. And did you know that the issue the DPC was looking at
17 in the context of *your* advices was the validity of the
18 SCCs?

19 A. Yes, I believe I did.

20 142 Q. You did. Now, can I just go back to paragraph three, 12:52
21 where you say that the details of Mr. Schrems'
22 complaint were furnished to you? And I think - I'm
23 sorry, I may be wrong about this - but I think you said
24 that they were in summary form, as opposed to the
25 actual complaint, is that right? 12:53

26 A. You know, honestly I believe that's the case. I know I
27 had details about it and obviously I had details, but I
28 don't remember how I got them at this point.

29 143 Q. Yes. Can I just make sure I understand; do you think

1 it was simply a letter of instruction that you got,
2 with no additional separate materials or do you think
3 it was a letter of instruction *with* additional
4 materials?

5 A. I believe I got a letter of instruction. And if I got 12:53
6 materials, I think it would've been separate. But
7 honestly, I don't recall.

8 144 Q. How long do you think the letter of instruction was?
9 A. I don't -- honestly, I don't have -- I can't estimate
10 it. Several pages. But I don't... 12:53

11 145 Q. Yes. But not several lever arch folders?
12 A. I'm sorry?

13 146 Q. It wouldn't have been, for example, several lever arch
14 folders **(INDICATING)**?

15 A. No. 12:53

16 147 Q. Not that kind of size.
17 A. And I believe, I think there were details of the case,
18 thinking back, I believe there were details of the case
19 in the letter of instruction.

20 148 Q. *In* the letter of instruction? 12:54
21 A. Yes, I believe that to be the case.

22 149 Q. And did you know that there was a complaint by
23 Mr. Schrems against Facebook?
24 A. Yes.

25 150 Q. You did. And did you know that submissions had been 12:54
26 made by Mr. Schrems and by Facebook in the context of
27 that complaint?
28 A. I believe I did at the time, yes.

29 151 Q. And did it ever occur to you to ask the Commissioner

1 whether submissions on US law - the point that you were
2 advising on - would be sought from Mr. Schrems and
3 Facebook?

4 A. I didn't. Because again, at the point at which I did
5 my initial report, there was no litigation on file, so 12:54
6 I didn't know what, you know, I didn't know what the
7 process would be. It didn't -- I didn't know whether
8 there would or wouldn't be or what the process was over
9 here, so it didn't occur to me to say, you know, 'what
10 is the process in Irish court if a case is filed? 12:54

11 152 Q. All right. So leaving aside litigation though, because
12 even though I know that you were asked to treat your
13 report as if it would be used in litigation, but
14 leaving aside that, because when you were asked to
15 submit your report - as you say, there wasn't any 12:55
16 litigation; this was, if you like, a regulatory process
17 and you knew that there'd been a complaint from
18 Mr. Schrems, you knew there'd been a response from
19 Facebook - in relation to that, at that point in time,
20 given the importance of the issue, did it occur to you 12:55
21 to ask the DPC whether she was going to seek
22 submissions on the point you were being asked to look
23 at from Facebook and Mr. Schrems?

24 A. I did not ask the DPC to do that, no.

25 153 Q. Were you concerned that you were giving advice about 12:55
26 the state of US law and that the DPC would proceed to
27 make a decision on the basis of that advice without the
28 Complainant and the Respondent being given an
29 opportunity to perhaps see your advice?

1 A. I didn't know whether it would be provided or not or
2 what the process would be.

3 154 Q. So you don't know whether it was or was not provided?

4 A. I think it was eventual -- I think it was provided in
5 the course of this case. But, you know, I don't have 12:56
6 an exact date in my head. I know it eventually was.

7 155 Q. And you're correct about that; your report was provided
8 to Facebook in the context of this litigation, I think
9 when your affidavit was filed. Is that right?

10 A. I think it might've -- I'm not sure, I think it 12:56
11 might've been before that. Well, it had to be before
12 that, because my report was filed after Prof. Vladeck's
13 and Prof. Vladeck responded to my first report, so
14 inherently he had to have had it.

15 156 Q. Yes. So you think it's sometime around October 2016, 12:56
16 something around that?

17 A. I can't speculate, I just know it would be before
18 Prof. Vladeck turned in his report.

19 157 Q. Okay. Can I just ask you to go back to Mr. O'Dwyer's
20 affidavit that you were looking at a moment ago? And 12:56
21 you'll see there that -- if I could just ask you to
22 turn back a number of pages please and just to look at
23 paragraph 80. Do you see that? And you'll see at
24 paragraph 80 he swears that:
25

26 *"For the sake of completeness, I add that, during the*
27 *course of the Commissioner's investigation, the*
28 *Commissioner's Office was contacted by the United*
29 *States government and was furnished with documentation*

1 *that had previously been supplied by the US government*
2 *to the Commission, in support of what is known as the*
3 *Privacy Shield Framework."*

4
5 Do you see that there?

12:57

6 A. I do.

7 158 Q. Did you know that when you were doing your work?

8 A. I did not know that when I prepared my first report.

9 159 Q. Yes.

10 A. I subsequently, I believe, had read the O'Dwyer
11 declaration. So I did know that at that point I'd not
12 seen that.

12:57

13 160 Q. Sure. And does it surprise you -- in fact, just for
14 the sake of completeness, I'm going to ask you just to
15 look at the DPC decision, which is at tab 18 if we just
16 keep on going through that book. And I'm just going to
17 draw your attention to a footnote where the DPC
18 identifies that the material had indeed been provided
19 by the US Government. And if I can just -- I may come
20 back to that after lunch if I can't locate it quickly.
21 I thought it was footnote 22, but I may be wrong about
22 that. Yes, I think it *is* footnote 22, although my
23 footnotes are letting me down. So I'll come back to
24 that.

12:57

12:58

25
26 But in any case, I think it is accepted in -- yes, I'm
27 being told it's page 29. Yes, so can you see page 29
28 of that draft decision?

29 A. Page 29?

12:58

1 161 Q. Yeah, page 29, exactly. And then paragraph 60. I'm so
2 sorry, that's in relation to the Privacy Shield. But I
3 think elsewhere she acknowledges that material had been
4 provided by the US Government. But I'll come back to
5 that after lunch, I'll find the reference. 12:58
6
7 But can I just ask you, in respect of the
8 non-disclosure by the DPC in relation to the material
9 that had been provided to her - in other words, she
10 didn't tell you that the material had been provided by 12:59
11 the US Government to her, is that right?
12 A. I don't recall that, no.
13 162 Q. Are you surprised by that?
14 A. No. I think for my work, again I was looking at it as
15 a civil lawyer in the US who would be trying to figure 12:59
16 out what claims to bring against the United States
17 government in these circumstances.
18 163 Q. Yes. And I suppose I'm wondering why you're assuming
19 that the US Government material *wouldn't* be relevant to
20 that question? 12:59
21 A. I don't know that I'm assuming -- because I think I'd
22 be looking at what the -- I mean, in theory I guess it
23 could've been. I don't know what was produced.
24 164 Q. Yes.
25 A. But obviously, you know, most of the time when you file 12:59
26 a complaint in the United States, you wouldn't have
27 materials from the US Government on what statutes or
28 causes of action to bring. So I think that was really
29 -- again, my focus was the available statutory material

1 that you would look at in filing a complaint.

2 165 Q. But I think you're assuming that the US Government
3 material wasn't relevant to that by saying that you're
4 not surprised it wasn't provided to you?

5 A. I'm not assuming it, I just, I guess the assumption I'm 13:00
6 making is in a normal case, if I were a lawyer looking
7 to file a claim, I wouldn't *have* that material. I
8 can't say whether it was relevant or not, but it's not
9 something you would have when you're preparing a
10 complaint typically to file in a US District Court. 13:00

11 166 Q. No, of course not. But that's not what you were being
12 asked to do, was it, in this case? well, I see it's
13 just one o'clock, sorry, Judge.

14 **MS. JUSTICE COSTELLO:** Yes, I think we might take that
15 up when you've found your footnote. 13:00

16 **MS. HYLAND:** Yes, exactly. Thank you, Judge.

17 **MS. JUSTICE COSTELLO:** Two o'clock.

18

19

20 (LUNCHEON ADJOURNMENT) 13:00

21

22

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29

1 THE HEARING CONTINUED AFTER LUNCH AS FOLLOWS:

2
3 MS. JUSTICE COSTELLO: Good afternoon.

4 REGISTRAR: At hearing, Commercial Court action, Data
5 Protection Commissioner Plaintiff -v- Facebook Ireland 14:02
6 Ltd. and Maximilian Schrems.

7 MS. JUSTICE COSTELLO: Yes, Ms. Hyland.

8 167 Q. MS. HYLAND: Thank you, Judge. Mr. Serwin, just in
9 relation to the paragraph that I couldn't find,
10 I wonder could you just go back to the affidavit of 14:02
11 Mr. O'Dwyer please?

12 A. Okay.

13 168 Q. It's at Tab 12 and I think it's paragraph 42. I am so
14 sorry, it's in the DPC decision; isn't that right?
15 Yes, so it should be Tab 17. And you'll see there that 14:03
16 there's a reference to, at the bottom of paragraph 42,
17 do you see that? The DPC says:

18
19 *"For the sake of completeness I also note that I have*
20 *received unsolicited submissions from the US government 14:03*
21 *comprising copies of material submitted by the United*
22 *States to the European Commission in support of the*
23 *Privacy Shield framework."* You see that there?

24 A. I do.

25 169 Q. Yes. And can I just ask you to look at one of those 14:03
26 documents please. If I can ask you, Judge, I am just
27 going to ask the court to look at Book 13 and the
28 witness to look at Book 13 and that is the agreed EU
29 Irish authorities. And if I can just ask you --

1 A. I don't have Book 13, I apologise.

2 170 Q. You don't have that, I am sorry, that is just being
3 given to you now, yes. Do you have that, Mr. Serwin?

4 A. I don't yet, I am sorry.

5 171 Q. Sorry, you are just waiting for that. And, Mr. Serwin, 14:04
6 I think just before lunch you were --

7 A. I have the book, I'm sorry, what tab?

8 172 Q. You have it, yes. So if I could ask you to look at
9 Tab 13, 1-3, and that is what's known as the Privacy
10 Shield and then I'm going to ask you to turn to page -- 14:04

11 A. I am sorry, Tab 13 it looks like it is --

12 173 Q. It should be a Commission implementing decision; is
13 that right?

14 A. Oh, yes, it is, I am sorry.

15 174 Q. And there is annexes to that and if I could ask you to 14:04
16 look at page 91 of that, I beg your pardon, page 207,
17 and you will see the page numbers are on the right-hand
18 side, L207/91, do you see that?

19 A. Yes.

20 175 Q. Yes. So I'll ask you to come back to that in a moment, 14:05
21 but I think you said that you wouldn't have thought
22 that the US materials would be something that you would
23 have expected the DPC to look at; is that right, is
24 that what you were saying before lunch?

25 A. I didn't really have an expectation. I mean I wasn't 14:05
26 aware they had been delivered.

27 176 Q. Yes.

28 A. What I was saying is that, in the context of filing a
29 lawsuit, I wouldn't expect to have materials from the

1 US government if I were filing a lawsuit against the US
2 government.

3 177 Q. No, of course not, and perhaps I didn't phrase the
4 question correctly. But what I am asking you is: Do
5 you think that, given that the DPC was coming to a view 14:05
6 on the adequacy of US law and she was relying on *your*
7 opinion in circumstances where she got material from
8 the US government should she have looked at it?
9 A. Should she have looked at it is your question?

10 178 Q. Yes. 14:06
11 A. You know, I can't really assess what she would or
12 wouldn't do in determining adequacy, if that's your
13 question?

14 179 Q. Yes. Well I am asking you, I suppose, as a lawyer, do
15 you think it was something she should have looked at, 14:06
16 given that she is looking at US law?
17 **MR. MURRAY:** well, judge, I am reluctant to interrupt
18 the cross-examination, but the witness is not being
19 tendered as an expert in Irish procedural law. He has
20 given expert view on the substantive content of US law. 14:06

21 180 Q. **MS. HYLAND:** Very good. Can I ask you to look please
22 at that letter there from Mr. Litt. This is a letter
23 from General Counsel Robert Litt, office of the
24 Director of National Intelligence, do you see that?
25 A. My page, and I may be on the wrong page, it's L207/28? 14:06

26 181 Q. It should be dash 91.
27 A. Okay. I'm looking at the wrong, I apologise.

28 182 Q. Don't worry. Yes, I think if you go, if you keep on
29 going to, it should be L207/91?

1 A. Yes, I do see that. Yes, I apologise.

2 183 Q. You have that. And are you familiar with who Mr. Litt
3 is?

4 A. I know he is a member of the United States government,
5 I don't know his title off the top of my head. 14:07

6 184 Q. Yes. You see the date of the letter is 22nd February
7 2016 and can I just ask you to look at the first
8 paragraph please where he says that:
9

10 *"Over the last two and a half years in the context of 14:07*
11 *negotiations for the EU-US Privacy Shield, the US has*
12 *provided substantial information about the operation of*
13 *US intelligence community signals intelligence*
14 *collection activity. This has included information*
15 *about the governing legal framework, the multi-layered 14:07*
16 *oversight of those advices, the extensive transparency*
17 *about those activities and the overall protections for*
18 *privacy and civil liberties in order to assist the*
19 *European Commission in making a determination about the*
20 *adequacy of these protections as they relate to the 14:07*
21 *national security exception to the Privacy Shield*
22 *principles. This document summarises the information*
23 *that has been provided."*

24

25 Now I asked you before lunch did you identify to the 14:07
26 DPC the legal framework under which surveillance was
27 operated and you said you didn't; now you can see here
28 that that has been addressed in this letter, do you
29 think it's a relevant matter when looking at the

1 adequacy of remedies to understand the governing legal
2 framework?

3 A. Again I can't offer an opinion on what would or
4 wouldn't be proper under EU law in looking at adequacy.

5 185 Q. I'm not asking you to give an opinion on EU law, 14:08
6 I understand that that is not your specific area of
7 expertise, although you have written on it, I am asking
8 you, in the context of the DPC seeking to understand US
9 law and its adequacy, should she have looked at and
10 should you have advised her on the legal framework? 14:08

11 A. Again I was asked to advise on the private remedies
12 that were available and that's what I did. I can't
13 really offer an opinion on what gets wrapped up into an
14 adequacy determination.

15 186 Q. Yes. But aren't you in a world where it's, if you 14:08
16 like, not like an ordinary decision-making process
17 because of the necessary secrecy about decisions?

18 A. There certainly is an element of secrecy that has to be
19 there, but again my expertise is really on the civil
20 remedy side which is what I was asked to opine on and 14:09
21 that's what I have opined on.

22 187 Q. Do you mean it's the civil remedies generally for
23 privacy breaches or in a national surveillance context?

24 A. Well my opinions in this case were in the national
25 surveillance context and those are the opinions that 14:09
26 I gave regarding the civil remedies in that context.

27 188 Q. And do you have experience and expertise in the
28 national surveillance context?

29 A. I have some. I mean I'm not a, I mean I am a civil

1 litigator, that's what I do. But I certainly am not an
2 expert in the oversight side of the surveillance of
3 foreign intelligence.

4 189 Q. When you say you are a civil litigator, does that in
5 some way exclude litigation in the national 14:10
6 surveillance sphere?

7 A. I don't think it excludes it. I mean I certainly could
8 bring, I file and defend civil litigation in the
9 privacy sphere is what I do.

10 190 Q. And what about in the national surveillance sphere, 14:10
11 specifically that sphere?

12 A. I have not filed a case in the national security
13 sphere.

14 191 Q. Yes. And what about defended a case in that sphere?

15 A. I don't represent the government. I have defended ECPA 14:10
16 cases and similar cases but I don't defend the
17 government, no.

18 192 Q. And when you say you have defended ECPA cases, do you
19 mean in the national surveillance sphere or generally
20 in the privacy sphere? 14:10

21 A. Generally in the privacy sphere.

22 193 Q. And have you defended any ECPA cases in the national
23 surveillance sphere?

24 A. I don't believe I have, no.

25 194 Q. Now can I just ask you to go back to that paragraph, 14:10
26 you will see there the multi-layered oversight of those
27 activities. And again I would ask you, given that you
28 were giving an opinion specifically in the national
29 surveillance sphere and given that this is a sphere

1 where notification is a difficult issue, would you
2 agree with that proposition?

3 A. It can be, yes.

4 195 Q. Yes. In that context isn't oversight very important?
5 A. Again I don't really think I can offer an opinion on 14:11
6 that. what I offered an opinion on really was the
7 civil remedy side of this. Oversight is a component of
8 it, I don't think I can make a value judgment as to its
9 importance in that context.

10 196 Q. Can one evaluate adequacy of remedies without looking 14:11
11 at oversight in this context?

12 A. Again I can't, as I understand the context, it's an
13 adequacy question under EU law and I can't really offer
14 an opinion on how one would assess adequacy under EU
15 law. 14:11

16 197 Q. No, it's an adequacy, can I put it to you that what you
17 are being asked to look at was adequacy of remedies in
18 the US context, you have been asked to opine on the
19 nature of the remedies in the US context; isn't that
20 right? 14:11

21 A. I think there is a distinction. I did not offer an
22 opinion in any way under US or EU law about the
23 adequacy of the remedies. I tried to identify what
24 remedies I thought would be relevant, so I think there
25 is a distinction. 14:12

26 198 Q. Yes. But you were also asked to talk about, I think,
27 the contours and the restrictions on remedies; isn't
28 that right?

29 A. Yes.

1 199 Q. Yes. So doesn't that inexorably lead to, I suppose, a
2 conclusion about whether or not those restrictions mean
3 that the remedies are adequate or not?
4 A. I don't think so. Again I was trying to identify where
5 a plaintiff could or couldn't lay out a cause of 14:12
6 action. I wasn't trying to look at the oversight.
7 I almost was assuming in essence that you had, you
8 could meet the standards and you had an act that you
9 could get into court with at some level and so I didn't
10 look at oversight and I wouldn't think it would be part 14:12
11 of it, no.

12 200 Q. And do you think the DPC looked at oversight?
13 A. I don't know.

14 201 Q. Did the DPC look at indirect recourse or remedies?
15 **MS. JUSTICE COSTELLO:** I think, Ms. Hyland, that's 14:12
16 straying out outside. I mean he is giving evidence of
17 what he did in relation to US law.
18 **MS. HYLAND:** Very good. Can I ask you then please to
19 look at the page, I think if you just turn on, near the
20 end you will get to page 207/102, do you see that? 14:13
21 I think we started on page 91 and you go on to page
22 102, if you could.

23 A. It starts with "*as an example of these efforts*"?
24 202 Q. Well, no, there's a heading "*redress*", do you see that?
25 A. I do, yes. 14:13

26 203 Q. Yes. Now can I ask you first of all, I should have
27 asked you this at the start, did you ever see, have you
28 seen this letter before?
29 A. I believe this is part of the Privacy shield exhibits.

1 I did review the Privacy Shield exhibits at some level
2 when I did my supplemental report.

3 204 Q. Yes.

4 A. So I believe I have.

5 205 Q. Yes. But before you provided your main report, had you 14:13
6 seen this letter?

7 A. No.

8 206 Q. No. I presume when you were doing your main report you
9 had the assistance of people working in your firm, is
10 that correct to say? 14:14

11 A. I did. I had some associates pull research together
12 for me.

13 207 Q. Yes. Can I just ask you to look please then at the
14 parts on redress. And you'll see there that there's an
15 identification of redress and it says: 14:14
16

17 *"US law provides a number of avenues of redress for*
18 *individuals who have been the subject of unlawful*
19 *electronic surveillance for national security purposes.*
20 *Under FISA the right to seek relief in US court is not 14:14*
21 *limited to US persons. An individual who can establish*
22 *standing to bring suit would have remedies to challenge*
23 *unlawful electronic surveillance under FISA."*

24

25 And then there is an identification of the three, 14:14
26 I think, or four in fact, different grounds there under
27 FISA, the 1810, 2712, 1806 and 1809. And in fact they
28 are very, it's a very similar summary to the summary
29 that you have in your own report, I think it's fair to

1 say, do you agree with that?

2 A. I would have to look at my report.

3 208 Q. Yes, of course. I think you have your report there and
4 if I could direct you to the relevant passage. So
5 I think it starts at (a), do you see on page 2, and 14:15
6 then it goes on, page 3 onwards. And I think you deal
7 with many of the same topics that are identified here.
8 So do you see there, if I can ask you to start looking
9 at page 2(a)(i), do you see that, 18 USC 2712?

10 A. Yes. 14:15

11 209 Q. Yes. Then turning on, No. 2 USC 1810, do you see that?

12 A. Yes.

13 210 Q. In your own report I'm asking you to look at, yes. And
14 then 1806. I think those are all identified there, as
15 are, I think, an additional one which is in relation to 14:15
16 1809, do you see that, the last line there?

17 A. I don't think I identify 1809.

18 211 Q. Sorry, I beg your pardon, that's what I am trying to
19 identify, that there is an additional one in the Bob
20 Litt letter. The 1809 in other words is identified in 14:16
21 the Bob Litt letter, but it wasn't identified in your
22 report?

23 A. Yes, that's correct. Because it covers criminal
24 penalties and that wasn't within the scope of what
25 I was opining on. 14:16

26 212 Q. Yes. And then if you look at the next paragraph:
27
28 *"EU citizens have other avenues to seek legal recourse*
29 *against US government officials."*

1 And what's identified there is the Computer Fraud and
2 Abuse Act and the Electronic Communications Privacy Act
3 and the Right to Financial Privacy Act. And again if
4 I could just ask you to go a little bit further on in
5 your report, one sees those same statutes identified. 14:16
6 So I think at page 9 you identify ECPA and I think then
7 at page 11 you identify the Computer Fraud and Abuse
8 Act and then at page 12 you identify the Right to
9 Financial Privacy Act. Do you see that?

10 A. I do, yes. 14:17

11 213 Q. Yes. And then there's also, going back to the Bob Litt
12 letter, there's a reference to the Freedom of
13 Information Act and you also identify that at page 10
14 of your materials; isn't that right?

15 A. Yes. 14:17

16 214 Q. Yes. And I suppose what I'm asking you, having regard
17 to the contents of that letter and the contents of your
18 report, would you accept that it was a relevant matter
19 for the DPC to have had regard to this letter in
20 particular given its focus on US law and given the task 14:17
21 she was carrying out?

22 A. It is certainly something that could be -- well again
23 I can't go behind the DPC and really look at what, how
24 one would do the adequacy analysis. I simply was
25 trying to lay out what I thought were the most likely 14:17
26 causes of action and to the extent this has relevance
27 under law that I don't really, you know cannot opine
28 on, I can't really say.

29 215 Q. I see. Because can I just ask you to look at the DPC's

1 decision and you will see that in her decision --

2 A. which tab is that, I apologise.

3 216 Q. I am so sorry. So this is Tab 18 of a separate book

4 that you've been looking at, I think it's Tab 18.

5 A. Yes, it is. 14:18

6 217 Q. Yes.

7 A. Just give me a moment to get this, I apologise.

8 218 Q. Sorry, we're jumping around a bit from book to book.

9 A. Are we done with the Litt letter or do we need it?

10 I'll keep it there. That's fine. 14:18

11 219 Q. Perhaps for the time being we can put it away. No, I'm

12 not going to come back to it now, so keep it perhaps

13 somewhere you can find it if needs be, but, no, I think

14 we are finished with that for the moment. So, yes,

15 this is just back to Book 1. 14:18

16 A. Yes.

17 220 Q. And you will see that the DPC at paragraph 52 of her

18 decision please,

19 A. Yes.

20 221 Q. And you will see there that she does in fact make 14:19

21 reference to a Draft Decision on the Privacy Shield by

22 the European Commission, do you see that, the writing

23 in italics?

24 A. I do see that, yes.

25 222 Q. And again I'm putting to you that, given that she did 14:19

26 look at some material in respect of the Privacy Shield,

27 that it would have been useful for you, for example, to

28 have the US material, would you accept that?

29 A. Well, again I can't say what is in the US material

1 since I haven't seen it.

2 223 Q. Yes.

3 A. So again I tried to take an independent view of what
4 I would file were I to have a European citizen come
5 into my office and say 'I believe this happened, what 14:19
6 are the causes of action'. So I can't really speculate
7 on whether looking at something would be helpful or not
8 if I don't know what it is.

9 224 Q. Yes. Was it of concern to you that the DPC hadn't
10 identified the comparator for you? In other words, you 14:20
11 were being asked to look at US remedies in the sphere
12 of national surveillance but you had no idea against
13 what they were to be compared, was that a concern to
14 you?

15 A. I wasn't doing a comparison. Again I was trying to 14:20
16 identify the remedies that I thought would be the most
17 relevant and most probable under US law and so, because
18 I can't really offer opinions on EU law, I wouldn't
19 really have the basis to know whether those were or
20 were not valid. 14:20

21 225 Q. Yes. Can I just move on to EU law then?

22 A. Mm hmm.

23 226 Q. Just in relation to your writings on EU law because
24 that is an area where you have written as part of your
25 three part book, the third part of it I think is in 14:20
26 relation to international; isn't that right? I'm going
27 to hand up copies of extracts from the book please
28 (SAME HANDED TO THE COURT) (SAME HANDED TO THE
29 WITNESS), just to look at what you have written about

1 EU law.

2

3 I wonder could you just identify to the court this book
4 and just maybe tell the court a little bit about it.

5 A. Sure. This is the, it looks like the third volume of 14:21
6 my treatise with Thompson Reuters that covers
7 international law. And again the book, you know I am a
8 US lawyer, what I have tried to do is a book directed
9 to the US market, at least lay out some source
10 materials as I understand them to try to help in-house 14:21
11 counsel really at least see what a baseline is of some
12 of the provisions. I don't get into, I don't think, a
13 lot of analysis of it because frankly, I mean to the
14 extent I do, I'm not really - I don't practice in the
15 EU, so it's really out there as a resource to try to 14:21
16 help US lawyers. But I don't see it as a definitive
17 work that would be relied upon in the EU --

18 227 Q. Yes.

19 A. -- or other countries for that matter.

20 228 Q. Well, I presume it is relied on in some respects in 14:22
21 other countries because it is part of your three part
22 series?

23 A. Again it's a book in English that I think the market,
24 the vast majority of the market really is US lawyers,
25 just trying to get a baseline. I mean I think 14:22
26 I include, and I am sure you have the table of contents
27 there. For example, I think I include Qatar.
28 I certainly wouldn't want to go practice in Qatar so
29 I have tried to identify where I can source material in

1 English or translations just to give people sort of a
2 running start if you will.

3 229 Q. Yes. I think you might be referring to what we call
4 Qatar?

5 A. I am sorry, that is the American pronunciation, 14:22
6 I apologise.

7 230 Q. Not at all. Can I just ask you --

8 **MS. JUSTICE COSTELLO:** I don't know which is the right
9 one.

10 A. I don't know either, but I'll go with the Irish one 14:22
11 here.

12 231 Q. **MS. HYLAND:** Yes, it may not be the right
13 pronunciation. Can I just ask you to look at page 32
14 of the extract that I have handed in to you. You will
15 see there there's a heading the "*EU Data Directive*", do 14:23
16 you see that?

17 A. I do.

18 232 Q. Now just before that, though, there's the heading the
19 "*Safe Harbour programme*" and you refer, just at the
20 line before the heading, you say: "*This would be an* 14:23
21 *open issue.*"

22

23 I think you say under 2.5: "*Companies that are subject*
24 *to the FTC or Department can enter the Safe Harbour*
25 *programme and then receive data from the EU.*" 14:23
26

27 Now this book is June 2016; isn't that right?

28 A. That is when it was published, yes.

29 233 Q. Yes. You see the second page of it, you will see

1 and 2016, so to be completely honest with you my
2 updates were not as probable fulsome as they otherwise
3 would be.

4 235 Q. Yes. Thank you, Mr. Serwin. I think as professionals
5 we all understand how difficult it can be keeping up 14:25
6 with the law sometimes.

7
8 Can I just ask you about page 32 and 33, this is in
9 relation to the data, the EU Data Directive. You'll
10 see there at page 33 you refer to, this is the last 14:25
11 sentence, you say:

12
13 *"It does not, however, apply to the processing of*
14 *personal data in the course of an activity which falls*
15 *outside the scope of Community law to processing 14:25*
16 *operations concerning public security defence, State*
17 *security, the activities of the State in areas of*
18 *criminal law."*

19
20 Mr. Serwin, do you agree with me that the activities of 14:25
21 national surveillance authorities are not subject to
22 the scope of the EU data Directive in the EU?

23 A. Again that is what, you know I have written what I have
24 written. I can't, I don't feel comfortable in a
25 European court offering opinions on European law, 14:26
26 particularly given the scope of what I was asked to do
27 here.

28 236 Q. Yes.

29 **MS. JUSTICE COSTELLO:** Ms. Hyland, I appreciate that

1 you are allowed to cross-examine the witness in
2 relation to consistencies of his views and those such
3 matters, but for good or ill, and we may all have our
4 own views on that, I am afraid I'm the one who has to
5 decide what EU law means in this court.

14:26

6 **MS. HYLAND:** Of course, Judge.

7 **MS. JUSTICE COSTELLO:** So his opinions as to what they
8 are.

9 **MS. HYLAND:** Yes.

10 **MS. JUSTICE COSTELLO:** It's not the right or wrong,
11 it's the consistency you may cross-examine on.

14:26

12 **MS. HYLAND:** Yes. Very good, Judge. So, Mr. Serwin,
13 I wonder then can I ask you to turn please to the
14 report that you did and there's just a couple of things
15 I wanted to ask you about it.

14:26

16
17 I think you have already been looking at this in brief
18 with Mr. Murray. I think at the very first page you
19 say "*it provides a non-exclusive overview*", do you see
20 that?

14:27

21 A. Yes, I do.

22 237 Q. Yes. And what did you mean by that, just explain that
23 maybe to the court.

24 A. Yes, and I would read it in context with the second
25 sentence as well. What I was trying to say is, as
26 I have said earlier, I tried to identify what I felt
27 were the most likely and most effective causes of
28 action without, you know I tried to list what I thought
29 would fit within that category. I didn't exclude

14:27

1 anything I thought would be relevant, but I also didn't
2 want to say that I was providing an exclusive list of
3 everything anyone could ever come up with.

4 238 Q. And did you discuss that with the DPC?
5 A. Hmm, the DPC certainly saw the memo -- 14:27

6 239 Q. Yes.
7 A. -- with that heading. I don't remember if there was a
8 specific discussion about it. But I believe that we,
9 you know again I never thought I could nor would
10 I think any lawyer would want to say this is the entire 14:28
11 universe of everything that anyone could ever think of.
12 And that's really, I was trying to again convey, I was
13 trying to find the most likely potential causes of
14 action and that's what I think I did.

15 240 Q. Yes. Can I just ask you, you said I think you had 14:28
16 given a draft to her on 11th May and then --
17 A. It wasn't a draft.

18 241 Q. If it wasn't a draft, what was it?
19 A. It was a final, it was what I thought would be the
20 final. 14:28

21 242 Q. Yes.
22 A. Except then the Spokeo case came out on the 16th.

23 243 Q. Yes.
24 A. And so I added the Spokeo case.

25 244 Q. You added that. 14:28
26 A. So I would not consider that a draft.

27 245 Q. Did she get any drafts from you?
28 A. I think I had sent a draft prior to the 11th, but
29 I don't remember the exact details of that.

1 246 Q. I see. Can I just ask you then please to go to section
2 2 which is headed up "*remedies available to EU citizens*
3 *under US law*", it's at page 2. This is in relation to
4 wilfulness and I think the footnote you identify that
5 wilfulness covers both knowing and reckless violations 14:29
6 of a standard; isn't that right, this is in relation to
7 1806a?

8 A. Yes.

9 247 Q. Yes. And can I ask you, if, for example, an employee
10 in the NSA took highly classified documents and left 14:29
11 them on the bus, do you think that would come within
12 the definition of reckless?

13 A. I think it could, yes.

14 248 Q. Yes.

15 A. I mean, you know -- I think, it's somewhat of a fact 14:29
16 specific determination, but I couldn't exclude the
17 possibility that that would be wilful, yes.

18 249 Q. Yes. And you fairly say that the Fikre court rejected
19 the argument that wilfulness requires a showing that
20 the government agents engaged in conduct with the 14:30
21 conscious objective of committing a violation; isn't
22 that right?

23 A. Yes, that's correct.

24 250 Q. Very good. You then, a number of paragraphs on, you
25 say that: "*The requirement for wilful violation serves* 14:30
26 *as a limitation to anyone, including an EU citizen, in*
27 *bringing a suit under this provision*"?

28 A. Yes.

29 251 Q. I suppose what that means is that if there's an honest

1 mistake, if you like, there would be no liability; is
2 that correct?

3 A. What I was trying to say, what I was saying there is it
4 certainly would exclude strict liability or negligence.
5 I mean I think wilfulness is higher than negligence, 14:30
6 it's lower than intentional. And so just like any
7 element of a cause of action obviously is some form of
8 limitation, so the fact that there is something above
9 strict liability or negligence is some form of
10 limitation. 14:30

11 252 Q. Yes. Obviously in respect of these three different
12 causes of action, all of which may be found I think
13 under 2712; isn't that right?

14 A. I don't want to nitpick, I think the waiver of
15 sovereign immunity is in 2712 I think is probably the 14:31
16 appropriate way to say it but, yes.

17 253 Q. I think in fact if you go to 2712 you actually see each
18 of those sections are identified in 2712, maybe we
19 might just briefly look at 2712.

20 A. No, they certainly are. 2712 doesn't contain the 14:31
21 violations, it references those sections.

22 254 Q. Absolutely.

23 A. Yes.

24 255 Q. But it identifies with particularity the sections,
25 doesn't it? 14:31

26 A. I believe it does, yes.

27 256 Q. Yes. And doesn't it also deal with breaches of ECPA as
28 well?

29 A. It does.

1 257 Q. Yes. Isn't it absolutely under 2712 that the United
2 States government is the defendant?

3 A. Yes.

4 258 Q. Yes. So there's no issue about sovereign immunity in
5 this context? 14:31

6 A. 2712 is a waiver of sovereign immunity.

7 259 Q. Yes, exactly. And can I just ask you to look at 2712c
8 so I'm just going to ask you to look --

9 **MS. JUSTICE COSTELLO:** which book of materials will we
10 find this at? 14:32

11 **MS. HYLAND:** I am so sorry, it's Book 14. Can I just
12 perhaps, there is two books, because we're moving on to
13 the US materials, Book 14, 1 and 2, I hope they are the
14 same, and there's been some confusion about the
15 numbering of the booklet. 14:32

16 **MS. JUSTICE COSTELLO:** It's the tabs will help me.

17 **MS. HYLAND:** I see, I am sorry.

18 **MS. JUSTICE COSTELLO:** No, no. It starts at 19 and go
19 through to 33.

20 **MS. HYLAND:** Yes. So it starts at 1, Judge, of the 14:32
21 material, and I hoping my tabs are the same, but it
22 will go to Tab 49 I think the two books that I have,
23 that comprises books 1 and 2.

24 A. And I have 1 and 2 and go to 33.

25 **MS. HYLAND:** Book 1 to 3, Judge, that you have, yes, 14:32
26 exactly. I think we have the same tab numbers. Judge,
27 we have the same tab numbers, happily.

28

29 260 Q. So I'm just going to ask you to look please,

1 Mr. Serwin, at -- so I'm going to ask you to look at
2 Tab 6?

3 A. Okay.

4 261 Q. I think it's some pages in.
5 A. It looks like page 617. 14:33

6 262 Q. Exactly, exactly. Can I ask you to go to, you'll see
7 (a) and I think that's where we see with particularity
8 the various sections of FISC identified; isn't that
9 right?

10 A. Yes. 14:33

11 263 Q. Yes. And then can I just ask you to look down to the
12 bottom of that column, you'll see 2712c, do you see
13 that, under the heading "*administrative decision*"?

14 A. Yes.

15 264 Q. Yes. 14:33

16 **MS. JUSTICE COSTELLO:** Sorry, I'm not with you.

17 **MS. HYLAND:** Sorry, Judge.

18 **MS. JUSTICE COSTELLO:** I'm on the page, we have two
19 columns, Tab A; is that right? In two tabs?

20 **MS. HYLAND:** Two columns, exactly. There's a heading 14:33
21 2712 "*civil actions against the United States*", I don't
22 know if the court has that, on the right-hand column.

23 **MS. JUSTICE COSTELLO:** I've got "*unlawful access,*
24 *stored communications*".

25 **MS. HYLAND:** Okay. So there's an internal pagination 14:34
26 617.

27 **MS. JUSTICE COSTELLO:** Oh, 617.

28 **MS. HYLAND:** I am sorry, Judge. It's divide 6.

29 **MS. JUSTICE COSTELLO:** Yes, I have. "*Civil actions*",

1 yes, thank you.

2 **MS. HYLAND:** Exactly, thank you. Do you see there,
3 Mr. Serwin, at the bottom of that column there is a
4 heading (c) "*administrative discipline*", do you see
5 that? 14:34

6 A. I do.

7 265 Q. Yes. And are you familiar with that?

8 A. I am.

9 266 Q. What does it say?

10 A. "*If a court or appropriate department or agency 14:34*
11 *determines that the United States or any of its*
12 *departments or agencies has violated any provisions of*
13 *this chapter, and the court or appropriate department*
14 *or agency finds that the circumstances surrounding the*
15 *violation raise serious questions about whether or not 14:34*
16 *an officer or employee acted wilfully or intentionally*
17 *with respect to the violation, the department or agency*
18 *shall, upon receipt of a true and correct copy of the*
19 *decision and findings of the court or appropriate*
20 *department or agency, promptly initiate a proceeding to 14:35*
21 *determine whether disciplinary action against that*
22 *officer or employee is warranted. If the head of*
23 *department or agency involved determines that*
24 *discipline action is not a warranted, he or she shall*
25 *notify the Inspector General with jurisdiction over the 14:35*
26 *department or agency concerned and shall provide the*
27 *Inspector General with the reasons for such*
28 *determination.*"

29 267 Q. Yes. So in brief I suppose can you just describe, what

1 do you see the function of that provision being?
2 A. I think that if in essence a -- it allows actions to be
3 taken against an individual employee of the United
4 States government if there's a certain violation of
5 2712. 14:35

6 268 Q. Yes. And I think it goes so far as to say that when
7 there is a proceeding to see whether disciplinary
8 action is needed and if it's decided that disciplinary
9 action is *not* warranted, the head of the department has
10 to notify the inspector general and give the inspector 14:36
11 general the reasons for that determination; isn't that
12 right?

13 A. That appears to be correct, yes.

14 269 Q. And do you think that that reflects, if you like, the
15 seriousness with which this statute takes a breach of 14:36
16 the relevant provisions?

17 A. I think, look you have a waiver of sovereign immunity
18 against the United States government, I think that is
19 probably a more significant one, but I think that is a
20 significant one too. 14:36

21 270 Q. Yes. And can I just ask you to look back up then to
22 paragraph 4, the same column, and it starts with the
23 words, "*notwithstanding any other provision of law*", do
24 you see that?

25 A. Yes. 14:36

26 271 Q. And perhaps, could you just identify what that section
27 is about?

28 A. I read it as saying that the procedure set forth in
29 those statutes, which I believe, what I cite to

1 earlier, are the exclusive way that materials governed
2 by those sections can be reviewed, I presume by a
3 court.

4 272 Q. Yes. And isn't it the case that in Clapper -v- ACLU
5 this was the section that was the subject of some 14:37
6 discussion by the Court of Appeals; isn't that right?

7 A. The Second Circuit Clapper?

8 273 Q. Yes, ACLU.

9 A. Yes. I believe it was, yes.

10 274 Q. And can you recall what was the conclusion on that or 14:37
11 if you want I can refresh your memory?

12 A. One of the conclusions I know was that 2712 acted as
13 blocking claims for injunctions under the
14 Administrative Procedures Act where 2712 was in play,
15 but beyond that I probably want to look at the opinion. 14:37

16 275 Q. Yes, of course and we can come to that. But I can just
17 put it to you, Mr. Serwin, that the government did make
18 the argument that because there was an identification
19 of those relevant sections here, that the APA was not
20 applicable and the court held that in fact, because 14:37
21 there was such a particular identification, it was
22 only, the APA was only not applicable where those
23 particular provisions were at issue and it didn't
24 preclude the application of the APA in other
25 circumstances, do you think that's a fair summary of 14:38
26 what they said?

27 A. I think, as I read Second Circuit Clapper it was under,
28 and I know we know it as 215, I think it's 1861, but
29 I could be wrong. Because that wasn't covered in 2712

1 the court there concluded that there was no intent to
2 preclude injunctive relief. So I think it more looked
3 at was the statute that was being litigated in that
4 case listed or not. They concluded it wasn't because
5 the review wasn't really intended for 215 cases because 14:38
6 I think notice wasn't provided in those cases. In
7 particular with the Second Circuit Clapper case, it's a
8 case involving bulk collection. So the bulk collection
9 there, I think the government never intended those
10 things to come out. They came out due to an illegal 14:39
11 leak. And so, as I read what the opinion did, it said
12 215 was never considered to be part of 2712; therefore,
13 there's no waiver of sovereign immunity or intent to
14 preclude an injunction because the waiver was only
15 partial in 2712, that's really the issue here. 2712 14:39
16 doesn't permit injunctive relief against the
17 government.

18
19 In other cases they have held because of that, and
20 I think implicit in Second Circuit Clapper but also in 14:39
21 Jewel, the 2013 Jewel case, it says that because 2712
22 doesn't permit injunctive relief, where 2712 is in play
23 the APA is not in essence. So I think it's more the
24 opposite.

25 276 Q. You said the APA was not, were you going to say it was 14:39
26 not?

27 A. Not in play, I am sorry. It wasn't, as I read Jewel
28 and as I read Second Circuit Clapper even, where you
29 have a remedy under 2712 the government specifically

1 hasn't waived sovereign immunity for injunctive relief
2 because injunctive relief is not a remedy under 2712.
3 And so Jewel affirmatively I believe says you cannot
4 get APA injunctive relief in a case where 2712 claims
5 are pled.

14:40

6
7 The Clapper case I think somewhat does it implicitly
8 because it says the claim at issue in that case was
9 under 215, which I believe is not listed in the section
10 we're talking about, and as a result in that case the
11 government said there was intent to preclude review
12 under the APA. The claim in District Court case which
13 again has the negative history attached to it does
14 given a different way on that precise issue.

14:40

15
16 Again I think, I'm not sure, the only issue I take with
17 your question is I think, I'm not sure they said it is
18 only these things, in that case wouldn't have cause to
19 reach that. I think what they really said is because
20 215 isn't listed in 2712, therefore there was no intent
21 to preclude.

14:40

22 277 Q. Yes. I think, Mr. Serwin, they said something like the
23 "*shards of legislative provisions*" that were identified
24 by the government, i.e. the relevant legislative
25 provisions here were not enough to preclude the
26 application of the APA, would you agree with that?

14:41

27 A. That -- I would want to read the exact words to see if
28 shards were in there, but I think that's a fair --

29 278 Q. Happily we have the exact words in court.

1 A. Yeah, I am sure you do. But I think that's a fair
2 characterisation.

3 279 Q. Yes. I think it is also true to say that ACLU wasn't
4 about injunctive relief, I was also about a declaration
5 that the statute had not been complied with; isn't that 14:41
6 right?

7 A. Yes. I mean my focus and my comments were on -- and
8 that's I think one of the differences frankly in that
9 case versus what I was looking at. That was a
10 programmatic challenge to say the way the government 14:41
11 conducted itself under 215 violated the Constitution.
12 It was frankly an entity challenging it, not an
13 individual. And it certainly could have been I assume
14 brought by an individual, there's nothing that would
15 preclude that. But to me that seemed like more of an 14:41
16 effort by the ACLU to say 'we think what you are doing
17 is unconstitutional at a programmatic level, we are
18 challenging it', which is a little different I think in
19 scope obviously than what I was looking at per se which
20 is individual remedies again where I saw 2712 as being, 14:42
21 I think, the primary remedy.

22 280 Q. But the court in fact didn't decide in ACLU on
23 constitutional grounds, did it?

24 A. No, it actually -- but I thought your question was what
25 was the basis of the challenge. 14:42

26 281 Q. I see.

27 A. And I think that was the basis.

28 282 Q. Yes.

29 A. They got into mootness and there was the whole issue

1 obviously of, the statute was actually changing when
2 the case was there but, yes.

3 283 Q. Because I think just when Mr. Murray was asking you
4 some questions, initially you did identify it as a
5 constitutional challenge. In fact it was a 14:42
6 constitutional challenge and a challenge in respect of
7 the statute; isn't that right? There was a breach of
8 statute alleged?

9 A. I think that's right, but I think again the challenge
10 was perhaps how they did it was unconstitutional. 14:42
11 I would want to look at the opinion.

12 284 Q. We can come back to it. I can tell you, Mr. Serwin,
13 that ultimately the court said they didn't have to
14 decide the constitutional issue because the statutory
15 issue was determinative? 14:43

16 A. Right.

17 285 Q. Can I just ask you then, on Day 6 on the transcript at
18 page 42 Judge Costello asked a particular question and
19 I am going to put that question to you, if I may, and
20 the question was if there was an operative in a 14:43
21 national security context, and I will just quote the
22 words, the question effectively: If he had a negative
23 approach, for example, to gay people and discovered
24 that a well known person in the EU was engaging in an
25 activity that he didn't approve of and he leaked it on 14:43
26 purpose, can I ask you, that question was posed by the
27 judge, and can I ask you to reflect on that question
28 and to consider would the provisions that you have
29 identify would they respond to that type of activity?

1 A. I am sorry, can you repeat the first part, I lost the
2 first part of that question.

3 286 Q. Of course. So in substance, let us say there was a
4 malicious leak from the NSA by one of the operatives
5 for reasons of prejudice or whatever else and they 14:44
6 decided to leak material in order to damage somebody,
7 in that situation would the provisions that we have
8 just been looking at under 2712 would they be
9 operative, would they apply to that kind of activity?

10 A. I think they could, yeah. I mean it would depend on 14:44
11 the facts, but I think it certainly could.

12 287 Q. Of course, yes. Very good. Can I just ask you then to
13 go back and look at your report please and you'll see
14 that at page 2 and page 3 you set out provisions of
15 2712. Then the last paragraph, before we come to 1810, 14:44
16 the last paragraph you go on and you say:

17
18 *"Section 106(a) and 305(a) also provide that*
19 *information acquired under PISA concerning any United*
20 *States person may be used and disclosed only in*
21 *accordance with certain minimization procedures.*
22 *Section 405(a) also provides further provisions that*
23 *must be complied with for use and disclosure of*
24 *information acquired from pen registers or trap and*
25 *trace devices concerning United States persons.*
26 *Because the minimization procedures or further*
27 *provisions apply only to United States persons -*
28 *defined as U.S. citizens and lawful residents or U.S.*
29 *corporations - EU citizens who are not U.S. citizens or*

1 *residents would not be able to bring a claim under*
2 *section 2712 for non-compliance with these minimization*
3 *procedures or further provisions."*
4

5 And you will see, and we'll come to the DPC decision at 14:45
6 the end of looking at American law, but you will see
7 that considerable reliance was placed by the DPC in the
8 decision in respect of that. Can I ask you to clarify
9 first that what you were talking about in that
10 paragraph there was separate and distinct from the 14:45
11 remedies that you had identified under 2712; in other
12 words, that that paragraph didn't, if you like,
13 condition the remedies you had already identified under
14 2712?

15 A. What I was saying is there is certain claims that a US 14:45
16 person could claim that an EU person could not. I will
17 also note, if you look at page 17 of my report, the
18 second to last paragraph. I talk about the remedies
19 and how they may be different for US and EU citizens
20 and you will note the last sentence there after 14:46
21 footnote 103 says: "*The two differences in remedies*
22 *available to EU citizens are likely not material."*

23 288 Q. Yes.

24 A. So I wanted, again because I knew this point could be 14:46
25 going in front of the court, I tried to note things to
26 be as balanced as I could. I felt it was important to
27 note that, but also to give context in the conclusion
28 to say, while it is different, I didn't see it as a
29 material difference.

1 289 Q. Yes. So, in other words, if you like they were
2 additional rights that US persons might have which
3 weren't available to EU persons, but they didn't
4 infringe on, if you like, the main rights under 2712
5 that you had been talking about, is that fair to say? 14:46

6 A. I think it's fair to say that there's a slightly
7 broader scope of conduct that US citizens can bring
8 claims on than EU citizens but not a material one.

9 290 Q. Yes. Do you see your sentence: "*Section 405(a) also*
10 *provides further provisions that must be complied with*" 14:47
11 and so on, do you see that sentence?

12 A. Yes.

13 291 Q. And there's a footnote then, USC 1845, do you see that?

14 A. Yes, and that deals with, I believe, the trap and trace
15 and pen registers. 14:47

16 292 Q. Yes. Did you give the DPC any side information or
17 additional information in relation to that?

18 A. No, I did not.

19 293 Q. So she didn't know any more than what was there?

20 A. Not from me, no. 14:47

21 294 Q. Okay. Because I'll put it to you later that she placed
22 fairly heavy reliance on this part of your report and
23 I just want to ensure that it is the case that she
24 didn't have any additional material beyond which is
25 provided for? 14:47

26 A. I can't say what she did or didn't have From anyone
27 else. I can only say this was what I gave her.

28 295 Q. I am sorry, I should have said from you?

29 A. Yes.

1 296 Q. Thank you. Can I just then please go on to USC 1809
2 and I think that is in relation to a felony; isn't that
3 right? I think you identify there that you hadn't
4 referred to 1809, and maybe we might just look very
5 briefly at 1809, if you could go back to the 14:48
6 legislation book where you were looking at 2712, and
7 you'll see that, if I could just ask you please to go
8 to Tab 3 of that book. And you'll see there under 1809
9 there is a criminal offence; isn't that right?

10 A. It's entitled "*criminal sanctions*", yes. 14:48

11 297 Q. Criminal sanctions, exactly, yes. Can I then also ask
12 you while we're here to also look at 1806 please. And
13 1806, I think you may have mentioned that, am I correct
14 in that?

15 A. Yes, I did mention it; 14:49

16 298 Q. On page 4 you mentioned it, didn't you? Yes, that's
17 right. And if you just look at 1806, can you just
18 summarise to the court what does 1806 provide?

19 A. In essence 1806 provides an exclusionary remedy in
20 cases where you have a violation of certain statutes. 14:49
21 The penalty there is that the government cannot use
22 illegally obtained information. It's a very common
23 I would say issue under US law, most of the time with
24 the illegally wiretaps. There is some kind of
25 exclusionary remedy so the government can't use 14:49
26 illegally obtained information if it violates the
27 statute.

28 299 Q. Yes. Do you think it's an important, if you like,
29 piece of the jigsaw, clearly it's not a direct remedy,

1 but do you think it's an important piece of the jigsaw
2 in terms of safeguards and oversight?

3 A. Again I didn't opine on safeguards and oversight.
4 I felt even though the memo, my memo focussed on civil
5 remedies, I felt that I should include it in sort of 14:50
6 the, in being complete because it did tie into 2712.
7 I don't practice criminal law so I can't really assess
8 how important it is or isn't. I assume it has some
9 importance, but it wasn't really in the scope of what
10 -- I included it because I thought it should be 14:50
11 included in the interest of sort of independence to the
12 court, but I didn't see it as core to my report in the
13 sense that wasn't what I was asked to do.

14 300 Q. Can I ask you a different question: Do you see it as
15 relevant, given the case law that effectively makes it 14:50
16 very important for persons who are seeking standing to
17 have some knowledge of the programmes that are at
18 issue?

19 A. I don't. Because I suspect, and I will admit I am
20 speculating a bit here, but I suspect the number of 14:51
21 criminal prosecutions in the United States where
22 evidence is used in the foreign intelligence base
23 compared to the number of people that may have their
24 information monitored without notice is probably small.
25 So I don't, I can't really assess the importance in the 14:51
26 sense of saying it's critical or not. It certainly is
27 important if the government is trying to use that
28 information against someone in a criminal case.
29 I don't think it ties into standing because that's

1 certainly, the way that a person would have notice is
2 they are being prosecuted for a crime. It isn't as if
3 the government came and said 'hey, by the way, we were
4 monitoring you' and therefore you get to exclude it.
5 I read it as saying where someone is trying to
6 introduce evidence and you already know you were
7 monitored because you are being prosecuted, it had
8 relevance there, but I don't know that it ties into
9 standing.

14:51

10 301 Q. what about this: The disclosure by the government will
11 require them to identify the programme, when
12 information like that is in the public domain,
13 potential litigants can use that information to assist
14 in their claim for standing, didn't we see that in ACLU
15 -v- Clapper, we saw it in Amnesty, there's a number of
16 different cases where you see plaintiffs doing that,
17 don't you?

14:52

14:52

18 A. well, you see it but based on the leaks, we'll call it,
19 with Edward Snowden. So I think the challenge in this
20 space now candidly is, that information is out there
21 and there has obviously been, without getting into the
22 merits of which version of it is true or not, the
23 reality is I suspect, there have been changes to
24 surveillance law since those disclosures. I think the
25 government, I don't know that it would have to disclose
26 the programme if it disclosed necessarily that it was
27 monitoring someone. That's not, I will freely admit,
28 not my core expertise. But I don't accept that
29 necessarily because you disclose in a criminal case you

14:52

14:52

1 would have to disclose the programme, I'm not sure
2 that's true. I can't say it's not true.

3
4 But I think ultimately the problem with notice and
5 standing in the US comes down to, you know if you came 14:53
6 in my office and said I believe I was monitored by the
7 United States government and couldn't provide any
8 evidence at all or reason to think it how do I know,
9 how do you know and I think 1806 doesn't change that.

10 302 Q. Can I just ask you to look at the case of Wikimedia -v- 14:53
11 NSA, so go into those books of American law, Tab 27 and
12 I think this is a 2015 case.

13 A. Yes, I'm there.

14 303 Q. Can I put it to you that this case is an example of how 14:54
15 criminal challenges may be important in establishing
16 standing. This was a case, you'll see there on page 1
17 of that memorandum opinion, this is the latest in a
18 series: "*The recent series of constitutional*
19 *challenges to the National Security Agency's data*
20 *gathering efforts.*" 14:54

21
22 Actually, just while I'm on it, would you agree that
23 this is a very vibrant active space, if you like, this
24 issue of challenging surveillance programmes in the
25 United States over the last five or ten years? 14:54

26 A. Certainly five, yes.

27 304 Q. Yes.

28 A. I think it certainly became much more vibrant after the
29 revelations.

1 305 Q. Yes.

2 A. Alleged revelations by Edward Snowden.

3 306 Q. Yes, although there were some important cases before
4 that, weren't there?

5 A. Absolutely. I mean for example, the ACLU case I cite 14:54
6 for saying that overseas wiretap was not, did not fall
7 within the APA was, I think, 2007. So there obviously
8 were cases going on back then, yes.

9 307 Q. Exactly. I think the Bates decisions, the FISA court
10 decisions, there is the two decisions of the FISA court 14:55
11 itself in 2011, are you familiar with those decisions?

12 A. I have seen them before, I would want to look at them.

13 308 Q. Yes.

14 A. But I am familiar with them, yes.

15 309 Q. Yes. They were decisions where the FISA court was 14:55
16 reviewing the application by the government for orders
17 and refused some of those orders?

18 A. Yes, which is, I think, more to the your, the point you
19 were discussing earlier which is the oversight piece of
20 it. It's not within this, but those are, as 14:55
21 I understand them, oversight cases.

22 310 Q. Precisely. But can I come back to, I suppose, the
23 individuals remedies piece and the importance of
24 criminal activities and prosecutions and in particular
25 1806. Can I just ask you to look at page 21 and you 14:55
26 will see here that the basis of standing is directly
27 linked to a criminal prosecution and - I beg your
28 pardon - is directly linked to, yes, a criminal
29 prosecution. You'll see there that the plaintiffs are

1 seeking to distinguish themselves from the Clapper case
2 and I think they are referring to the Amnesty -v- Clapper
3 Clapper there because in fact they are very similar
4 plaintiffs who are in the Amnesty -v- Clapper case.
5 You'll see under the heading (d): "*Although six of the* 14:56
6 *nine plaintiffs in this case*", do you see that, "*were*
7 *plaintiffs in Clapper*"?

8 A. Yes.

9 311 Q. "*The plaintiffs have identified two differences related*
10 *to the new parties: Two clients of an NACDL attorney* 14:56
11 *have received notice that they are targets of Section*
12 *702 surveillance and Wikimedia engaged in over one*
13 *trillion communications.*"

14
15 Do you see there that they identify NACDL attorney 14:56
16 Dratel: "*With respect to the first difference,*
17 *plaintiffs argue that they adequately allege an actual*
18 *injury because the government acknowledged that NACDL*
19 *attorney Joshua Dratel's client, Hasbajrami, was*
20 *subject to Section 702 surveillance and another Dratel*
21 *client, Sabirhan Hasanoff, was prosecuted on the basis*
22 *of officially acknowledged 702 surveillance.*"

23
24 You see there that they go on to say that: "*As a*
25 *result of this government acknowledged surveillance,* 14:56
26 *Dratel's own international Internet communications were*
27 *likely intercepted and retained because he almost*
28 *certainly communicated with or about the targeted*
29 *foreign individuals in the course of representing his*

1 *clients. As plaintiffs note, it is similar to a*
2 *hypothetical mentioned in Clapper, in which the*
3 *government monitors target's conversations with his or*
4 *her attorney."*

5
6 *And: "The Supreme Court in Clapper described such a*
7 *scenario as having a stronger evidentiary basis for*
8 *establishing standing."*

9 A. But I think this case, doesn't it dismiss on standing
10 grounds? 14:57

11 312 Q. It does dismiss, absolutely, but it dismisses on a
12 different basis. Because if you go down you'll see
13 there that what they say is that this case was only
14 about Upstream. That was the only thing that was being
15 challenged by wikimedia here. And you will see, if you 14:57
16 keep on going down the page, you will see that what the
17 court decides is:

18
19 *"In neither of Dratel's cases did the government*
20 *indicate whether the information at issue was derived 14:57*
21 *from PRISM or Upstream surveillance, and no factual*
22 *allegations in the AC plausibly establish that Upstream*
23 *Surveillance rather than PRISM was used to collect the*
24 *information."*

25 14:57
26 So you are absolutely right they did, but isn't the
27 point a more general one which is that 1806 is
28 important because where the government prosecutes and
29 where the government relies upon 702 surveillance and

1 there's a motion to dismiss, that at that point in time
2 the surveillance is in the open --

3 A. No.

4 313 Q. -- and is therefore relevant to standing?

5 A. No, because -- let me take a step back. I think the 14:58
6 key in your question is the government prosecuting,
7 that's how someone would find out, and I think that's
8 an issue on standing. So I don't think the
9 exclusionary remedy, as I read your question, is the
10 important part. The important part is does someone 14:58
11 actually know that they have been surveilled. So
12 I think that to me, I would take a step back in the
13 chain which is someone being criminally prosecuted
14 would be relevant for standing because they would then
15 know you would have issues on standing. You wouldn't 14:58
16 have the age old question of how do you, the issues
17 that we have all talked about, how do you know if you
18 don't know. I don't think the exclusionary remedy is
19 the important piece of that, it's part of the
20 consequence, but it's part of the consequence of 14:58
21 criminal prosecution.

22 314 Q. But the criminal prosecution is the important piece as
23 you see it?

24 A. The important piece is how does someone, an individual 14:59
25 determine they've been the subject of surveillance by
26 the US government and criminal prosecution is one way
27 that can happen, I think.

28 315 Q. Yes. I think it's fair to say, isn't it, that criminal
29 prosecutions do shine a light on the government's

1 activities when the government is using the information
2 that's been targeted?

3 A. You know again I'm not a criminal lawyer in the US, but
4 I would, you know in my civil capacity agree that that
5 is. Not everything has to be disclosed, but more has 14:59
6 to be disclosed than if there is not a criminal
7 prosecution.

8 316 Q. Yes. Can I just ask you to look at a case that I think
9 is an example of that. This is a case, Judge it's not
10 in the books, so I am sorry to hand you up a loose 14:59
11 copy, but it is only, it doesn't have to be, if you
12 like, retained after this, it's just to give,
13 I suppose, an example of (SAME HANDED TO THE COURT)
14 (SAME HANDED TO THE WITNESS) the proposition that I'm
15 putting to Mr. Serwin. 14:59
16

17 And this is the case, Mr. Serwin, of USA -v- Mohammed
18 Osman Mohamud, do you see that? Do you have that?

19 A. I don't have it yet.

20 317 Q. Sorry, it should have been handed up to you, you are 15:00
21 the only person who didn't get it.

22 A. I will have it soon, thank you.

23 318 Q. The person who needs it more than most, I think. Can
24 I just ask you to turn over, so you will see that this
25 was, 5th December 2016. In fact maybe you can help me 15:00
26 here, I have difficulties with the dates on these US
27 decisions, does filed mean that is the date of the
28 decision?

29 A. As I would interpret it seeing the argument submitted

1 in this case, yes.

2 319 Q. Yes, thank you. You will see there there's a summary
3 and this was a conviction of Mr. Mohamud, who attempted
4 to -- oh, sorry, there is a stenographer change.

5
6 And you'll see there that he was convicted and I think
7 he got a 30 year sentence for attempting to detonate a
8 bomb during the annual Christmas tree lighting ceremony
9 in downtown Portland, Oregon. And there was an
10 entrapment offence which we don't need to delay here. 15:00

11 And then you'll see that: 15:01

12
13 *"The panel held" - this is the third paragraph - "the*
14 *district court did not err in denying Mohamud's motion*
15 *to suppress... information collected pursuant to*
16 *Section 702 of [FISA]."* 15:01

17
18 Then the last paragraph on that page that the 702
19 acquisition did not violate the Fourth Amendment.

20
21 *"The panel noted that all this case involved was the*
22 *targeting of an overseas foreign national under 702,*
23 *through which Mohamud's e-mail communications were*
24 *incidentally collected. The panel held that no warrant*
25 *was required to intercept the overseas foreign*
26 *national's communications or to intercept a US person's*
27 *communications incidentally. Assuming that Mohamud had*
28 *a Fourth Amendment right in the incidentally collected*
29 *communications, the panel held that the search was*

1 reasonable under the Fourth Amendment. The panel wrote
2 that declassified facts foreclosed the argument that
3 the discovery in this case strayed from protecting the
4 country from a terrorist threat into the conduct of
5 foreign affairs. Because no retention and querying of
6 the incidentally-collected communications is at issue
7 in this case, an argument regarding reasonableness was
8 outside the scope of this court's review. The panel
9 held that under the third-party doctrine, Mohamud had a
10 reduced expectation of privacy... The panel held that
11 Foreign Intelligence Surveillance Court-approved
12 targeting and minimisation procedures, which were
13 followed in practice, sufficiently protected Mohamud's
14 privacy interest."

15
16 And I don't think we need to go through, Mr. Serwin --

17 A. The only thing I will just note - and I'm happy to sort
18 of note that - if you look at the summary, there was an
19 asterisk, which is that -- I mean, I'm sure it's
20 accurate, but it's technically not part of the opinion 15:02
21 of the court.

22 320 Q. Oh, yes.

23 A. And so I don't want to make you go through it, I just
24 want to note for the court that it's not technically
25 the opinion. 15:02

26 321 Q. Yes, absolutely.

27 A. I'm sure it's consistent with the opinion.

28 322 Q. No, no, that's very helpful to identify that. So if I
29 just turn to page 36, where one sees the actual opinion

1 itself. And I suppose I'm putting to you, Mr. Serwin,
2 that one sees here a detailed analysis of the legality
3 of Section 702 collection through the medium of a
4 criminal trial. And I'm just going to ask you to look
5 at, as it were, headings. You'll see there "Legal
6 Background", there's a reference to FISA, to the 2008
7 Act, there's a reference to Clapper. Page 37, there's
8 a reference to Fourth Amendment violations, there's a
9 reference to Upstream or targeting. On page 37 you'll
10 see there:

15:03

15:03

11
12 *"At our request post-argument, the government*
13 *declassified certain facts about Mohamud's*
14 *surveillance. Through the monitoring of a foreign*
15 *national's e-mail account, the United States government*
16 *learned that Mohamud was in contact with that foreign*
17 *national, who was located overseas. This contact – a*
18 *limited number of e-mails between Mohamud and the*
19 *foreign national – was used to obtain a FISA warrant to*
20 *surveil Mohamud and his activities. None of these e-*
21 *mails was introduced at trial."*

22
23 Then there's a reference, a heading: *"No Warrant*
24 *Required to Intercept Overseas Foreign National's*
25 *Communications or to Intercept US Person's*
26 *Communications Incidentally."* And, Mr. Serwin, I know
27 you -- or you may have been here in fact on the first
28 two days of the trial, but that is material that the
29 court has been brought through, the various legislative

15:03

1 provisions.

2 A. I was not here, but --

3 323 Q. You were not here? You missed that?

4 A. Yeah.

5 324 Q. Then you'll see over the page there's a reference to 15:04
6 Verdugo-Urquidez, again a case that the court has been
7 taken through, at page 39. The next page, page 40,
8 there's a reference to the FISA review court in the
9 directives pursuant to Section 105B of FISA. And so
10 on. Then if I could just ask you to go to the last 15:04
11 page -- sorry, the second last page, page 49. This is
12 the conclusions of the report:

13

14 *"In sum, even assuming Mohamud had a Fourth Amendment*
15 *right in the incidentally collected communications, the*
16 *search was reasonable. Thus, we hold that the*
17 *application of 702 did not violate the Fourth Amendment*
18 *under the particular facts of this case."*

19

20 And I suppose, can I just ask you, Mr. Serwin, would 15:04
21 you agree that this case, in a sense, supports what you
22 already said, which is that criminal prosecutions can
23 be a very important, and use of surveilled material can
24 be an important part of shedding light on the
25 government's activities first? 15:05

26 A. I'd say criminal -- you know, again what I'd say is
27 criminal prosecutions certainly can solve the notice
28 problem for standing I think is really what I would be
29 prepared to say. I think beyond that, obviously

1 criminal prosecutions certainly could reveal things
2 about programmes or surveillance, but it's beyond this
3 -- you know, I don't practice criminal law, so it's
4 hard for me to say what criminal -- routinely is closed
5 in these cases. I do think, obviously, from my civil 15:05
6 perspective, where you're prosecuted and the government
7 says they've surveilled you, I don't think notice is a
8 problem any more there.

9 325 Q. Yes. And can I just summarise what I think the joint
10 expert report said on this? It was page 26 of the joint 15:05
11 experts report - I don't know if you have that in fact?
12 Oh, that's just being handed to you.

13 A. I do now.

14 326 Q. And this is the product of the meeting that you --

15 A. Yeah. Page 26? 15:06

16 327 Q. Yes, it's page 26 I think. And it's in relation to
17 1806. And this is in relation to the -- yes, it's
18 paragraph 13, as it were --

19 A. Yes.

20 328 Q. -- the significance of the suppression remedy. And I 15:06
21 think the agreement is:

22
23 *"... 1806 could be an important means of obtaining*
24 *accountability for unlawful government surveillance;*
25 *and (2) that the only adversarial rulings by US courts*
26 *on the legality of surveillance under FISA 702 to date*
27 *have come through 1806."*

28
29 In fact I think the Mohamud case that I just put to you

1 was one of those cases. Do you think that's -- would
2 you agree with that?

3 A. Looking at it, it looks to be, yes.

4 329 Q. Yes. And then we go on:

5

6 *"The experts also agree that the United States has*
7 *failed in the past to comply with its notice*
8 *obligations under 1806, although we disagree about the*
9 *likelihood that such violations of the notice*
10 *requirement are still occurring today".*

11 A. Yeah. And let me just say this - I'm not trying to
12 dispute that conclusion - but if you look at, the sort
13 of the scope of what I have affirmatively said here
14 obviously is narrower. I'm not disputing that, I
15 just -- there's parts of that that I don't feel are 15:07
16 within my expertise to offer opinions, particularly
17 with Ms. Gorski and I think, you know, Prof. Vladeck
18 had certain opinions. And so I'm not up here saying I
19 disagree, I just am not, I'm not in a position to agree
20 with some of those statements, particularly, you know, 15:07
21 some of it about the government has failed to comply.
22 I don't have a basis to say that or not, I'm not
23 drawing a conclusion they have or haven't.

24

25 I do take your point though that obviously, you know, 15:07
26 again, where the government uses a criminal
27 prosecution, it necessarily has to reveal at least some
28 things about its surveillance in connection with that
29 person.

1 330 Q. Yes. So the second part of that, the agreed summary,
2 you say you don't have any particular knowledge. This
3 is in relation to --
4 A. I didn't have a basis -- honestly, I mean, part of the
5 challenge of this expert report, my portion of it, if 15:08
6 you will, was narrower in some ways and I touched some
7 issues that the other experts had more expertise on and
8 dealt with more. And so I didn't feel it was -- I'm
9 not trying to say I'm disagreeing that's what this
10 says, I'm just saying there's certain parts of it where 15:08
11 I couldn't offer an opinion either way and simply said
12 then that's what the agreement is. But I can't offer a
13 basis to agree or disagree.
14 331 Q. Yes, okay. Thank you. Can I ask you then to look at
15 page three, 1810? Do you see that? 15:08
16 **MS. JUSTICE COSTELLO:** which booklet are we in now?
17 332 Q. **MS. HYLAND:** I'm so sorry, we're back to your report,
18 Mr. Serwin.
19 A. Okay.
20 333 Q. Sorry, Judge. 15:08
21 A. And what page?
22 334 Q. So it's page three of your report.
23 A. Yes.
24 335 Q. And you'll see there that you identify the right of
25 action under 1810. And then on the last line you say: 15:08
26
27 *"The Ninth Circuit, however, has held that Section 1810*
28 *does not operate as a waiver of sovereign immunity,*
29 *which means that the United States cannot be held*

1 reading Prof. Vladeck's report when he raised the
2 issue, I did see at least one case, which is the Jewel
3 case, that did apply sovereign immunity to individuals
4 acting in their *official* capacity. I do think there's
5 still a point - and I don't disagree with Prof. Vladeck 15:10
6 on this - that people sued probably in their personal
7 capacity might not have the 1810 immunity. But I think
8 it's a very complicated issue.

9
10 I didn't go into that, I just simply -- I, frankly, 15:10
11 assumed that everyone would be directly liable when I
12 wrote this report, without understanding that wrinkle
13 to it. But I think it's narrower than perhaps
14 Prof. Vladeck and I thought on the sovereign immunity
15 issue with individuals, because there at least are some 15:10
16 cases that I've seen published that do apply sovereign
17 immunity to individuals. So I think that's the best
18 answer I can give you.

19 337 Q. Can I just clarify, did you say that you assumed that
20 there would be an entitlement, at the time you did your 15:11
21 report, you assumed there'd be an entitlement to sue
22 individual officers?

23 A. I don't know they're in any -- you know, I put that in
24 for a reason. I mean, obviously if I thought 1810
25 didn't apply, I wouldn't have put it in. And so the 15:11
26 scope of my memo was on government liability and
27 liability of individual government actors. And so when
28 I first looked at it, I looked at 1810, saw it, was
29 aware of the Ninth Circuit cases on sovereign immunity

1 and, you know, certainly thought there could be some
2 individual liability there. As I said, having gone
3 through the expert process in the report, I did look at
4 that, because I felt it was important. And so what I
5 guess I'd say at the time is I say nowhere in here that 15:11
6 there is immunity for individuals. That is clear.

7
8 So my assumption was: If 1810 existed, it would only
9 exist really for individual liability, because at least
10 in the Ninth Circuit there's no waiver of sovereign 15:12
11 immunity for the US Government. That said, I do think
12 Jewel, which is a Ninth Circuit, it's a Northern
13 District Court case, applies the Obama case I cite to
14 individuals and says there *is* individual immunity if
15 they are sued in their individual -- or their official 15:12
16 capacity, *at least* in that case. I'm not saying
17 there's a blanket rule, I think it's a more complicated
18 issue, but I don't think it's as simple as saying there
19 is or is not immunity for individuals.

20 338 Q. Can I break that answer down? Because there's a number 15:12
21 of parts to that.

22 A. Yes.

23 339 Q. First of all, is there a difference between being sued
24 in their official capacity and being sued per se? Can
25 they still be sued even if it's not in their official 15:12
26 capacity?

27 A. I think in -- I have seen cases -- the best way I can
28 sane that, I have seen these cases where they are sued
29 in their professional capacity and their personal

1 capacity, so I think there is a difference. What that
2 exactly is, frankly, I'm not entirely sure. But I've
3 seen it done both ways.

4 340 Q. Yes.

5 A. I've not seen a case - I looked, but I didn't spend -- 15:13
6 I could not find a case where someone was dismissed in
7 their personal capacity. I don't know how that would
8 be different if it would be a conduct issue or it would
9 be just how they're sued. But I *have* seen cases where
10 in the immunity under 1810, at least in the Ninth 15:13
11 Circuit, is applied to officials sued in their official
12 capacity.

13 341 Q. Because in fact, if you look at your footnote 67 some
14 pages on, there's a case called Garland-Sash -v- Lewis
15 -- 15:13

16 A. In which footnote, I'm sorry?

17 342 Q. Sorry, it's footnote 67. And that's a case which you
18 refer to as authority for the proposition that, in the
19 context of the Computer Fraud Act, some courts have
20 held that federal government agencies and officials are 15:14
21 immune from suits involving this statute --

22 A. And let me just say that's a completely different
23 issue. And so there's two issues; there's are you a
24 person under ECPA/are you a person under the CFAA
25 versus has the government, does the government have 15:14
26 sovereign immunity? And so I think what I'm trying to
27 say there is because the -- I understand the confusion
28 here. If the government defined "person" as including
29 the United States Government, the argument would be

1 that it intended to waive sovereign immunity by
2 including itself in the definition of "person".
3
4 So this is a little different in the sense that again
5 this goes to sort of how the -- whether they fall 15:14
6 within it or not. And there's a circuit split on that
7 point.
8 343 Q. Can I just take this in bits, as it were?
9 A. Sure.
10 344 Q. In Garland-Sash -v- Lewis - we *will* come to it - there 15:14
11 was a distinction drawn by the court between officers
12 acting in their personal capacity and officers. And
13 the court held there in the case you rely on, the
14 District Court case, it held that there was a
15 preclusion against officers in their official 15:15
16 capacity --
17 A. Mm hmm.
18 345 Q. -- but it was still possible to sue the officer per se.
19 A. Yeah.
20 346 Q. Would you agree with that? 15:15
21 A. And again I will -- I believe that's accurate, yes.
22 347 Q. Okay. Then just going back then to 1810. I think what
23 you said was that you wouldn't have put it in unless
24 you believed, as it were, it was effective or it had --
25 it was potentially beneficial to a person. I think is 15:15
26 that what you said a few moments ago?
27 A. Again, when I was doing -- you know, I put it in
28 because I felt it could have...
29 348 Q. It could have?

1 A. It could have relevance, yes.

2 349 Q. Exactly. And so I think what you're saying there is
3 that although you identify that it doesn't operate as a
4 waiver of sovereign immunity in the Ninth Circuit, I
5 think what you're saying now is that "but in certain 15:15
6 cases it may well be possible either to sue the US
7 Government or to sue an individual officer", is that
8 right?

9 A. No, that's not what I'm saying. Because --

10 350 Q. Okay, what are you saying? 15:16

11 A. -- I'm not aware of an 1810 case that permits the
12 government to be sued. I'm aware of the Ninth Circuit
13 cases. What I'm saying is in fact that in the Ninth
14 Circuit the northern District Court took the 1810
15 immunity that applied to the United States Government 15:16
16 and said it applies to individuals acting in their
17 official capacity in the FISA and ECPA realm. That's
18 what I'm saying.

19 351 Q. But that's not actually what it says in your report, is
20 it? Because what you say -- 15:16

21 A. No. No, what I'm saying is after I reviewed
22 Prof. Vladeck's report -- that is not in my report. I
23 saw the Jewel case after --

24 352 Q. Okay.

25 A. Yeah. 15:16

26 353 Q. But let's go back to the time when you did your report.

27 A. Yes.

28 354 Q. And when you did your report, you were aware that in
29 certain cases sovereign immunity applied if a person

1 wanted to sue the US Government directly, is that
2 right?

3 A. I would say I was aware of this case and was not aware
4 of a contrary case saying that the US Government could
5 be sued under 1810. 15:16

6 355 Q. Yes. And what about individual officers? When you did
7 the report, did you believe that individual officers
8 could potentially be sued under 1810?

9 A. Yes. Otherwise I wouldn't have put it in my report.

10 356 Q. Well, the point is you *didn't* put it in your report -- 15:17
11 oh, sorry, you wouldn't have put 1810 in your report?

12 A. Yes.

13 357 Q. Shouldn't you have said that? Shouldn't you have said
14 that in your report? Because in fact we see the DPC
15 placing again considerable reliance on this issue. And 15:17
16 isn't it unclear in your report that there's a poss --
17 at that point time when you did the report, you
18 understood there was a possibility to sue individual
19 persons?

20 A. I don't think, again I don't think it was unclear. 15:17
21 Because the scope of my report was to talk about causes
22 of action brought against the US Government and
23 individuals employed by the US Government. So the fact
24 that it's in there and I say that there's immunity for
25 the US government, I mean, the reason I put it in there 15:17
26 was to say that, you know, obviously it is a potential
27 cause of action, it would have to be against
28 individuals.

29 358 Q. But it doesn't say that, does it?

1 A. I didn't use those words there. But again, it was
2 included. If it was just, if I thought it had no
3 application and it was -- the only application it could
4 have is for individuals that are employees of the
5 United States Government. 15:18

6 359 Q. But the DPC is not, obviously, an American lawyer,
7 isn't that right?

8 A. Yes.

9 360 Q. And she can't be, or the office can't be expected to
10 know that there is a potential right of suit against an 15:18
11 individual employee, isn't that right?

12 A. I think if I recall the draft complaint, I think she
13 does say there is a right to sue individuals. I think
14 she questioned the value of it, but I do think she --
15 it isn't as if she said nothing about it. 15:18

16 361 Q. And where did she get the basis for questioning the
17 value of it? Where did that come from?

18 A. I don't know.

19 362 Q. Do you identify that?

20 A. I don't. In my report, no. 15:18

21 363 Q. Anywhere in your report?

22 A. No.

23 364 Q. And do you perceive it to be a valuable remedy for a
24 person to be able to sue a government official?

25 A. I think it depends. I mean, now knowing that there's 15:18
26 at least this wrinkle with 1810 immunity for
27 individuals, it *may* have value, I can't say it has no
28 value. Again, certainly, you know, if I knew, if I'd
29 put the Jewel case in, if I'd have known what the Jewel

1 case held when I wrote my report, I would've still
2 included 1810. I think there's value. How much value,
3 it's hard for me to quantify. But it does have some
4 value, yes.

5 365 Q. And you know Prof. Clapper, in his report, said -- 15:19
6 **MS. JUSTICE COSTELLO:** Sorry, who are we talking about?
7 Because it's not Prof. Clapper. It's definitely not
8 Prof. Clapper.

9 A. And Second Circuit Clapper or Supreme Court Clapper?
10 **MS. HYLAND:** Yes, we'll start again. 15:19
11 **MR. MURRAY:** Three Clappers is too much.

12 366 Q. **MS. HYLAND:** Prof. Vladeck is who I meant.
13 A. Him, I know.

14 367 Q. Prof. Vladeck says in his report at paragraph 85, he
15 says that it's worth emphasising that "*in virtually* 15:19
16 *every case in which 1810 could apply, the federal*
17 *government would almost certainly indemnify the officer*
18 *defendant.*" Do you agree with that?

19 A. I can't, honestly I can't -- I don't have the basis to
20 really agree or disagree, I don't really know how the 15:20
21 government indemnifies. I think, you know, as I was
22 reading his report and reading - and you'll correct me
23 if I am wrong - was the expert you have...

24 368 Q. Prof. Swire, is it?
25 A. No, it was a Mr. Long, who goes -- 15:20

26 369 Q. Oh, John DeLong, yes.
27 A. Yeah. He gives examples, I think, of types of breaches
28 he saw at the NSA. And, you know, one of them that I
29 recall in the depths of my mind was someone using their

1 position to spy on a girlfriend who was a foreign
2 national.

3 370 Q. Yes.

4 A. There, I would not -- I mean, I can't offer this as a
5 true opinion, but I think there's a range of scenarios 15:20
6 where the government would and would not. I would
7 think with that scenario that he gives, they probably
8 would not be rushing to indemnify the individual NSA
9 person. If someone's acting in the course and scope of
10 their employment and doing what they were told, I would 15:21
11 suspect they probably would. But then I think you
12 start walking into were they really sued in their
13 official capacity or were they acting in their official
14 capacity and do you have an immunity issue? So I can't
15 disagree with Prof. Vladeck per se, but I think it's 15:21
16 going to be a fact-specific analysis of whether they
17 would indemnify each and every time.

18 371 Q. I think the cases you were talking about were the Love
19 Int., isn't that right? There was a series of cases
20 that are known as Love Int., as in Love Intelligence? 15:21

21 A. I think that's right.

22 372 Q. Yes. And isn't it the case that in that situation in
23 fact 2712 would apply anyway? So you wouldn't have to
24 worry about getting an indemnity, you would be suing
25 the US Government. Because I think there 1806(a) that 15:21
26 you previously identified would in fact apply, isn't
27 that right?

28 A. I'd have to look at those cases, but that sounds
29 correct.

1 373 Q. Yeah. And just coming back to Mr. Clapper, Mr. Clapper
2 is in fact an employee of the US Government and the
3 cases where you see Clapper as the defendant are cases
4 where the US Government is not being sued but
5 Mr. Clapper is being sued, isn't that right? 15:22

6 A. Yes.

7 374 Q. So that's an example of suing an officer rather than
8 the US Government?

9 A. Or suing both, yes.

10 375 Q. Or suing -- yes. Although they don't tend, I think, 15:22
11 those cases, to have both defendants, do they?

12 A. I've seen some where they do. I've seen them --

13 376 Q. I see.

14 A. I mean, I don't think there's a hard and fast rule.
15 I've seen a variety of ways. 15:22

16 377 Q. I see. But --

17 A. Actually, there's another, it's a District Court
18 immunity case that I can't recall off the top of my
19 head, but it involves the FBI, where they sued the FBI
20 and Loretta Lynch as the United States Attorney. So 15:22
21 it's hard for me to draw a conclusion as to who sues
22 who; it could be individuals, it could be the entities,
23 it could be both.

24 378 Q. I see. Can I just ask you then to move on, you'll be
25 happy to hear, quite a bit through your report and can 15:22
26 I ask you to go on then, I think, to where you deal
27 with ECPA?

28 A. Yes.

29 379 Q. Which is, I think, on page nine. And I think in fact

1 these provisions that you identify, they're also
2 referred to under 2712, isn't that right; that's where
3 one sees the cause of action identified in 2712?

4 A. For the government, but not for individual officers,
5 correct. 15:23

6 380 Q. Sorry, could you just clarify that answer there?

7 A. Yeah. I think - and I'm, I guess, raising this because
8 I think there was some confusion during the expert
9 meeting - if you look at -- so there's a language
10 problem that I referred to earlier and I use 15:23
11 "government agencies" here in a broad term because
12 there are, not relevant to this case, but there are
13 times where state police departments and government
14 agencies are sued under ECPA. And so if you look -
15 2712 is a remedy against the United States Government - 15:23
16 but then if you look in the paragraph below that, it's
17 the sentence that begins:

18
19 *"while certain courts have held that government*
20 *entities are liable for violations of the SCA" - that's*
21 *non-United states Government ones - " others have held*
22 *that government entities are not liable under the ECPA,*
23 *though government officials can be."*

24
25 So -- 15:24

26 **MS. JUSTICE COSTELLO:** I'm sorry, I'm not quite sure
27 what page you're on. I thought we were on page nine of
28 your opinion?

29 A. I'm on page ten. I apologise, I skipped ahead.

1 **MS. JUSTICE COSTELLO:** Oh, I beg your pardon. Thank
2 you.

3 A. I really apologise.

4 381 Q. **MS. HYLAND:** Mr. Serwin, I'm going to come to that in a
5 minute. 15:24

6 A. Sure.

7 382 Q. Before we get to that, can I just ask you more
8 generally about ECPA and then we will come to the point
9 you're talking about?

10 A. Okay. 15:24

11 383 Q. So ECPA. Generally there is, I think, as you've said
12 at the bottom of page nine, there are various crimes -
13 to intercept or procure electronic communications;
14 under the Stored Communications Act, it's illegal to
15 obtain or to prevent authorised access. And it goes on 15:24
16 to say:

17

18 *"If a person 'Intentionally accesses without*
19 *authorisation a facility through which an electronic*
20 *Communication service is provided' or 'intentionally*
21 *exceeds an authorization to access that facility'."*
22

23 You then talk about the remedies and the money damages,
24 isn't that right? Do you see that paragraph --

25 A. Against the United States Government, yes. 15:25

26 384 Q. Exactly. And what I'm asking you is that isn't that
27 also in 2712 that we've already looked at, it's the
28 same place you find it as we already looked at?

29 A. Different section, same statute, correct - I think.

1 385 Q. But it's the same section actually, isn't it? It's 2712
2 which we just looked at, do you remember that?

3 A. I think it is, yeah. You're right, because it refers
4 to the FISA sections in 119 and 121. Yes, that's
5 right. 15:25

6 386 Q. Exactly. So the FISA sections and the ECPA are put in
7 all together under 2712. And as you say, there is a
8 right against the United States Government in that
9 situation. That you describe in the paragraph starting
10 under 18/2712. That is against the USG, isn't it? 15:25

11 A. Yes.

12 387 Q. And all of the points that we identified - do you
13 remember we looked at 2712(c) in relation to the
14 administrative remedy where, if there's been a breach
15 there has to be an investigation and so on and so 15:26
16 forth; that's also applicable here, isn't it?

17 A. I believe so, yes.

18 388 Q. Can I just ask you then though to go to the next
19 paragraph? Because, Mr. Serwin, I'm putting to you that
20 the same thing has happened with this paragraph as 15:26
21 happened in relation to the paragraph I already
22 identified, which was that your report didn't make it
23 sufficiently clear that the last paragraph here,
24 starting with the words "*There is an uncertainty*", is
25 about a *separate* issue to the previous paragraph, isn't 15:26
26 that right?

27 A. It's a separate issue in the sense that the definition
28 of "person" doesn't include govern -- has there been
29 conflicting holdings about the US -- government

1 entities being liable directly under ECPA and not under
2 2712.

3 389 Q. Exactly. But in other words, when you're moving under
4 2712, there's no issue about sovereign immunity, isn't
5 that right? 15:26

6 A. Against the US Government, correct.

7 390 Q. Exactly. So that's simple, there's no problem there.
8 Would you accept that?

9 A. Yes.

10 391 Q. So when we come on to the next paragraph, i.e. there's 15:27
11 an uncertainty in the statutory language, you're
12 talking about something completely different - yes,
13 it's under the Wire Tap Act; yes, it's under the Stored
14 Communications Act, but it's not what we've just been
15 talking about in relation to 2712? 15:27

16 A. That's correct.

17 392 Q. Because later on I'm going to ask you to look at the
18 DPC decision and I'm going to put it to you that your
19 report led her, if you like, into a mistaken belief
20 that all of these things were linked to each other, 15:27
21 that in some way there was a problem about sovereign
22 immunity in respect of 2712. And I just want to you
23 clarify now that that is *not* the case, is it?

24 A. The "person" issue under ECPA does not change the 2712
25 issue. 15:27

26 393 Q. Exactly. And in your view, is that sufficiently clear
27 in your report?

28 A. I thought it was, yes.

29 394 Q. Since we're on the topic of the definition of a person

1 under the wire Tap Act, even if there is sovereign
2 immunity, isn't it the case that you can still sue the
3 US government for declaratory relief or injunctive
4 relief? It relates to the damages claim, isn't that
5 right? 15:28

6 A. Under ECPA?

7 395 Q. Yes. Well, exactly, under what you're talking about
8 here in this paragraph, the wire Tap Act. Because what
9 you say is you say:

10
11 *"There is also a split among the courts as to whether*
12 *damages are permitted against governmental entities*
13 *that violate the Act."* 15:28

14
15 In other words, you're just talking about damages
16 there, aren't you? 15:28

17 A. I think there's two issues there. Because there's also
18 the fact -- so I think we're conflating two things
19 there.

20 396 Q. I'm sorry, Mr. Serwin, would you mind repeating that? 15:28

21 A. I think we're conflating two things there. So I think
22 there *is* an issue as to whether damages are permitted
23 directly under the violation of the wire Tap Act.
24 There was a separate issue as to whether they could be
25 held liable at all in any case under the SCA. So ECPA 15:29
26 is two parts; you've got the wire Tap Act --

27 397 Q. Yeah.

28 A. -- the Stored Communications Act. And so when we refer
29 to this in the US, if I say "ECPA", I mean both, if I

1 say "the wire Tap Act" I mean what we call Title 1 and
2 if I say "SCA" I mean Title 2. And so I think what I'm
3 referring to there is actually damages being permitted
4 under government agencies that violate the Act.

5 398 Q. Yes. 15:29

6 A. Which is the wire Tap Act. Then I say certain courts
7 have held that government entities are *liable* for
8 violations of the SCA. So that's a broader thing.
9 Others have held they're not. Under ECPA, government
10 officials can't be. So there were a couple of 15:29
11 different terms used there. But the point is that how
12 "person" is used and defined in this statute matters
13 for what relief can and cannot be gotten, though as I
14 note, that government officials are liable under ECPA,
15 which is what I say. 15:30

16 399 Q. Well, does it matter? If the government officials are
17 liable, does it matter that the government isn't?

18 A. Well, I think it's both. I think you have both.

19 400 Q. You mean you have both --

20 A. You have a remedy under 2712 against the United States 15:30
21 Government --

22 401 Q. Yeah, we know that.

23 A. -- and then you have -- I think the point there is it
24 does matter, because you don't have individual
25 liability under 2712, it's a waiver of sovereign 15:30
26 immunity for the US Government. So what I'm saying
27 there is the officials themselves - it's the issue we
28 talked about under 1810 - the officials themselves are
29 just directly liable under ECPA putting 2712 aside is

1 the point.

2 402 Q. But isn't it important for the DPC to know what that
3 actually means in practice? Because you were asked to
4 give her an opinion on practice as well as law. And
5 isn't it important to describe for her there, or to 15:30
6 describe for the Office there what exactly it means
7 that government officials are liable? Because --

8 A. Oh, I think I did.

9 403 Q. Well, I think you just accepted they *can* be, they can
10 be liable. So in other words, is it the case there 15:31
11 that you don't see an important practical difference
12 between liability of *government* officials and the
13 state, and the US Government, is that right?

14 A. No, I think they're both important. Which is why again
15 I didn't stop with just 2712, the 2712 discussion. 15:31

16 404 Q. Yes, absolutely. But what I'm asking you is does it
17 matter, in the context of the wire Tap Act, these
18 provisions that you're referring to now separate from
19 2712, does it matter that the liability rests with the
20 government official, as opposed to the US Government, 15:31
21 if that *is* the case?

22 A. Well, again I think we're confusing terms here a little
23 bit. "Government entities" could be broader than the
24 US Government - some of those cases are, again, state
25 police departments. So I was making kind of a broader 15:31
26 point, I wasn't really -- I wasn't saying "United
27 States Government" there. I think the point is that
28 again you have this definition of "person" and does it
29 include governmental entities or not? what I was trying

1 to say is that if you get out of 2712 for whatever
2 reason, there is this divergence at times that I
3 thought was important to note. But in any case, you do
4 have liability of the individual government person
5 directly under ECPA which, if you didn't have that, you 15:32
6 would have no liability for that person, because 2712
7 doesn't operate as a waiver, I think, of sovereign
8 immunity against individuals.

9 405 Q. So in other words, it's a reassuring paragraph, is that
10 right? It's saying that there is no problem about suing 15:32
11 government officials, is that what you are attempting
12 to convey?

13 A. I'm saying there that government officials can be
14 liable there, yes.

15 406 Q. Yeah. And I asked you earlier on was it not important 15:32
16 for the DPC to understand when remedies are being
17 looked at, is it not important first to understand what
18 the right is, because in order to understand whether a
19 remedy is adequate or not it's important to understand
20 the whole context of right. I put that to you and you 15:33
21 said it was, if you like, outside your ambit. But here
22 in this particular paragraph, can I suggest to you,
23 Mr. Serwin, that one sees here the real problems when
24 you try and address remedies without actually
25 describing the rights. Because one cannot glean from 15:33
26 this *at all* what the rights are that we are talking
27 about.

28 A. Well, I think to the extent, I think --

29 407 Q. Just in this last paragraph I'm talking about. That's

1 all I'm talking about.

2 A. well, I think you can't take the -- I think the
3 discussion of what ECPA covers and what violations are
4 has to be read in that context. Because I didn't just
5 include that paragraph to say 'Here are remedies under 15:33
6 these statutes'; the preceding sections lay out, in
7 essence, what the violations of ECPA are. And I note
8 that in some ways it's broader than the FISA rights.
9 So I do note that, I believe, where I say that it
10 applies to wrongful collection. You'll see in the 15:33
11 first full paragraph on 10 I say:
12
13 *"For Section 2712 claims under the ECPA, wrongful*
14 *collection (and not just use and disclosure) is*
15 *actionable."*
16
17 So I do give context of what the violations are that
18 give rise to these remedies, I didn't just say 'Here
19 are remedies under ECPA'. So I think you have to read
20 this in the context of the prior paragraphs that 15:34
21 describe what the causes of action arise from.

22 408 Q. But I think 2712 is a self-contained provision whereby
23 you have the right and then you have the remedy. And
24 you describe that. But the next section, I think
25 you've already accepted that it's in respect of 15:34
26 *different* breaches, it's not in respect of 2712 --

27 A. It's not in respect of different breaches, it's just a
28 different remedy for the same breaches.

29 409 Q. well, is that right --

1 A. I think it is.

2 410 Q. -- Mr. Serwin? Because isn't it the case that 2712 says
3 that it is, if you like, a self-contained provision
4 and --

5 A. But it incorporates 119 and - I'm drawing a blank on 15:34
6 the what the section for the Stored Communication is.
7 But it incorporates the violation of the SCA and the
8 Wire Tap Act. It is a self-contained remedy for the
9 violation of other statutes. Just like with FISA, it
10 doesn't incorporate FISA into 2712, it simply says 'If 15:35
11 you violate these statutes, your remedy is X', as I
12 read it.

13 411 Q. Yes, I accept *that* all right, Mr. Serwin. But can I
14 just ask you to go back and look at 2712?

15 A. Yes. Which tab is that? 15:35

16 412 Q. It's at tab six. I beg your pardon, of the first book
17 of law.

18 A. Yes.

19 413 Q. Just so I understand this properly, is what you're
20 saying that, as it were, the obligations that are 15:35
21 identified through 2712, albeit with reference to the
22 main Act, that you both have, you have a remedy both
23 against the US Government, as we know, and that you
24 might also have a different remedy for the same
25 wrongdoing against a government entity -- I beg your 15:36
26 pardon, against a government official; is that what you
27 are saying?

28 A. It's confusing, because 2712 is actually part of ECPA.

29 414 Q. Yeah. Yeah.

1 A. So you'll see the reference to chapter 119 of this
2 title.

3 415 Q. Hmm.

4 A. I believe that is a reference to, that is the reference
5 that ties out to the Wire Tap and Stored Communications 15:36
6 Act.

7 416 Q. Hmm.

8 A. Then you have FISA. Okay?

9 417 Q. Yeah, we can leave that aside, because we don't need to
10 talk about that. 15:36

11 A. So it incorporates those other things. And so as I
12 read this section, what it's doing is saying if you
13 have a violation of chapter 119 - and if you look at my
14 report, I lay out the rights, if you will, under ECPA
15 on page nine, which is what the violations are, what 15:37
16 the *crimes* are in fact - then I say, as a result of
17 that, under 2712, these are the remedies you have. So
18 it's contained within ECPA, number one, it's not
19 self-contained; number two, it's incorporating the
20 violations of other statutes into a remedy that is a 15:37
21 waiver of sovereign immunity. That's how I read what
22 it's doing.

23 418 Q. So I suppose just to try and sum up though, then what
24 you're saying is that your final paragraph is a very
25 positive paragraph, if you like, because it's saying 15:37
26 not only do you have an absolutely accepted right under
27 2712 against the government, you may also have a right
28 against officials as well, is that right? Is that the
29 net effect of the last paragraph?

1 A. That is certainly one of the points in that paragraph,
2 yes.

3 419 Q. I see. Okay. Because I suppose what I'd put to you,
4 Mr. Serwin, is that that was not sufficiently clearly
5 expressed and that the DPC's report did not interpret 15:37
6 your report in that way. Would you agree with that?

7 A. I'd have to see the specific provision of the draft
8 decision.

9 420 Q. Okay. Well, we'll come to that. We'll come to that.
10 Can I just ask you to go on then please a little bit 15:38
11 and can I just ask you to look then at the standing
12 part of your report? And can I ask you to look -- and
13 I'm going to ask you to look at both your reports here
14 now, because obviously you have two reports, but the
15 second one, I think, is particularly in relation to 15:38
16 standing I think. So perhaps I might ask you to look
17 at them both together.

18 A. Okay.

19 421 Q. But can I just ask you first, in relation to **Clapper** -
20 and I know we've spent a long time talking about it, 15:38
21 I'm not going to detain you on it - but I just want to
22 ask you one very net question on it. You're aware that
23 it was issued the day after the Act came into force, or
24 perhaps it was the day the Act came into force; are you
25 aware of that? Sorry, this is the Supreme Court 15:38
26 decision, **Amnesty -v- Clapper**.

27 A. I think what you're saying is they sued the day before
28 the Act came in, not the decision was issued.

29 422 Q. I'm so sorry, that's exactly what I meant, yeah - on

1 the day of the Act. You're a lawyer, you're a
2 practicing lawyer, I know you've said you don't
3 practice so much or at all in national surveillance
4 area, but certainly in privacy you do practice; would
5 you advise a client to bring a challenge to an Act
6 where you know standing is going to be an issue, in
7 circumstances where the Act has just come into force?

15:39

8 A. It wouldn't be certainly my first choice if you're
9 making a facial challenge sort of on a constitutional
10 ground to say 'we don't like this programme, we want it
11 to stop'. I can understand -- I think it depends on what
12 the goal of your litigation is. If your goal is to
13 stop the programme and you know it's coming down, it
14 might make sense to do that. I think if your goal is
15 to try to get a remedy after it's occurred, that
16 probably wouldn't be my preferred choice. But I think
17 it depends on what your client's goal is.

15:39

18 423 Q. Well, if your goal is not to be struck out on the basis
19 of lack of standing, would you say that the best
20 approach is to wait until the Act actually starts to
21 operate?

15:40

22 A. I think -- I'm not sure waiting two days after would've
23 mattered. I think that was a factor they looked at,
24 obviously. I think there were other reasons - they had
25 trouble with standing, I don't think it was exclusively
26 that they had sued the day before. I think it is a
27 relevant factor though, yes.

15:40

28 424 Q. Well, it was very relevant, wasn't it? Because the
29 court said 'You're asking us to look at future harm,

1 anticipated harm, and we don't know' - sorry, the court
2 said this - 'we don't know, there's five different
3 hypothetical steps, if you like, that would have to
4 have been carried out in order for you to obtain
5 standing and we cannot second-guess that all or any of 15:40
6 them would've taken place'?

7 A. The challenge though with that statement is ultimately
8 let's say they'd waited two months and they had no more
9 information than they did the day before they sued and
10 they took, you know, they took steps allegedly to help 15:40
11 themselves not be monitored; I don't see -- I
12 understand there is a factual difference, but I'm not
13 sure the court -- I can't speculate as to what a
14 Supreme Court would've done, obviously, but I don't
15 think the plaintiffs would've been in a materially 15:41
16 better position had they waited three months and said
17 'Hey, we think we might be surveilled'/'we might not,
18 we have the same facts about what we've done and who we
19 talked to'. It wasn't good optically, I think it did
20 matter to the court, but I think they might've been in 15:41
21 the same boat had they waited several months as well.
22 Hard for me to say.

23 425 Q. Well, Mr. Serwin, can I just put it to you, it wasn't
24 -- it was much more than optically, and for this
25 reason: Isn't there a number of ways that a person, in 15:41
26 a sphere where notification is an issue, as you've
27 already identified, isn't there a number of ways that a
28 person can find out about surveillance? would you
29 accept that, there's a number of different ways?

1 A. I'm sure there's more than one. I couldn't probably
2 quantify it, but I'm sure there's more than one.
3 Obviously we've seen -- I mean, we know of at least
4 two, which are the government tells you and if there
5 are illegal leaks. I can think of at least two. 15:41

6 426 Q. Yes. And whistleblowing is one very obvious one, isn't
7 it?

8 A. I don't think it happens often, but it is one that has
9 happened, obviously.

10 427 Q. Would it surprise to you know that the Fundamental 15:42
11 Rights Agency in Europe has actually recommended that
12 there be legislation on whistleblowing, on the basis
13 that it is so helpful in respect of bringing to light
14 surveillance?

15 A. I don't know if it would surprise me. I wasn't aware 15:42
16 of that.

17 428 Q. I see. But you accept that whistleblowing is a way in
18 which information comes to light?

19 A. I wouldn't -- it is a way that information can come to
20 light, yes. 15:42

21 429 Q. And do you accept that declassification of information
22 is another way?

23 A. Yes.

24 430 Q. And do you accept that prosecution, as we've discussed,
25 under 1806 is another way? 15:42

26 A. Em --

27 431 Q. I'm sorry, 1806, I beg your pardon, a motion to dismiss
28 following a prosecution?

29 A. Let me say that prosecution is another way.

1 432 Q. Yes. And what about discovery, is that another
2 potential way, albeit with issues attendant upon it?
3 A. You know, I will say also I am certainly not an expert
4 in the state secrets doctrine. I am aware that
5 discovery can be very difficult in these cases -- 15:42
6 433 Q. Yes.
7 A. -- and so I would say that it's possible, but probably
8 not the best source. But other experts have opined on
9 that.
10 434 Q. So in view of those routes, isn't it just, I suppose, 15:43
11 speculation on your part to say that the plaintiffs
12 would have been in no better situation two months on?
13 Isn't that right?
14 A. I think I did say it was speculation. But I think --
15 again, I can't speculate as to what the Supreme Court 15:43
16 would do, but again, looking at it as a lawyer who
17 would file that case, I just have the question of if
18 you waited two months, what different facts would the
19 plaintiffs have had other than the programme was in
20 place and they still didn't know they were being 15:43
21 monitored or not? But it is pure speculation on my
22 part, yes.
23 435 Q. Yes. Well, isn't it the case that they would not have
24 been in the "immanence" box, if you like? They wouldn't
25 have had to show an imminent or future injury? 15:43
26 A. Well, but you need to show actual or imminent. And I
27 think the problem is we accept you can't show imminent
28 and I don't think you could necessarily show actual in
29 that case if you had the same facts. I don't know,

1 again I can't speculate on the Supreme Court, but I
2 understand suing before the law goes into effect
3 perhaps is not the best strategy. But I do think there
4 is a factual question there with how would they know
5 anything -- how would they have any better information 15:44
6 two days after the law went into effect?

7 436 Q. Yes. And I'm not suggesting two days after, I'm
8 suggesting longer. I suppose is it fair to say --

9 A. But how would they -- I guess the question I have is:
10 Two days/two months/a year, if they have the same 15:44
11 information, the length of time doesn't change the lack
12 of knowledge.

13 437 Q. And, Mr. Serwin, why do you assume that after a year,
14 for example, there *would* be the same information?
15 That's not a correct assumption, is it, necessarily? 15:44

16 A. It may or may not be. I mean, I think that's the
17 issue. What I'm saying is if you're a year down the
18 road and have the same information, you're probably, I
19 can't say in the same boat as Clapper, but you may be.
20 And I think that's -- you know, I don't want to rehash 15:44
21 all of the indeterminacy with standing that we've
22 already gone through, but I think that's just a
23 practical challenge.

24 438 Q. Me neither. But can I put to you that, for example,
25 cases like Valdez and Schuchardt, those are cases where 15:44
26 one sees - and yes, at motion to dismiss stage - but
27 one sees the courts resisting the motions to dismiss on
28 the basis of information that is out there, as it were?

29 A. And I guess here's the thing: Surviving a motion to

1 dismiss is not a remedy. You know, that's really what
2 this comes down to. So the Schuchardt case absolutely
3 does say at the motion to dismiss stage standing *may*
4 exist is, I believe, what they said. And then they
5 strongly question whether the plaintiff can prove it. 15:45
6 And so again, looking at this as the remedy, I
7 completely -- you know, Prof. Vladeck has laid out
8 cases, we went through this the them in the export
9 report --

10 439 Q.

Yes.

15:45

11 A.

Again, I don't want to get into them other than to say
12 I think at the motion to dismiss stage they certainly
13 are complex.

14 440 Q.

Yes. Yes.

15 A.

And I think -- but when you look at, when you get past
16 the motion to dismiss, you have the Klayman -v- Obama
17 case in the DC Court of Appeal that dismissed on
18 standing on an injunction phase, you have Clapper which
19 was summary judgment and I believe you have Jewel,
20 which was summary judgment as well, the 2015 15:45
21 unpublished Jewel decision that dismisses on summary
22 judgment on standing. And so I think what you have to
23 look at is cases may be getting further down the road
24 past the motion to dismiss stage, but you still run
25 into can you prove it when you get to a motion that is 15:46
26 not a facial challenge?

27 441 Q.

Can I ask you what happened to Klayman when it went? So
28 it was dismissed in the District Court, it went up to
29 the Circuit Court, it was remitted back, but when it

1 client and says 'I just think I was monitored, I don't
2 know', that that would involve a difficulty with Rule
3 11 for a lawyer if they proceeded to take the case on
4 that basis. Is that what you said this morning?
5 A. I'm saying you'd have to ask the question. 15:47
6 446 Q. Of course.
7 A. And again, I don't think -- I think the issue is again
8 in these scenarios where you've got no notice, I think
9 you have to make a determination as a lawyer as to
10 whether you have sufficient grounds to either file the 15:48
11 case and *have* sufficient grounds to file it or you
12 believe you will have sufficient grounds after
13 reasonable efforts, if you will, to try to discover
14 those grounds down the road.
15 447 Q. Yes. And is there one single case in all the myriad of 15:48
16 cases that we have here where any plaintiff has come in
17 and said 'I *think* I was surveilled and that's why I'm
18 here, that's the basis of my standing'?
19 A. I mean, at some level I think the Schuchardt case is
20 somewhat that; I mean, there was evidence that 15:48
21 surveillance *happened*, but I don't think there was
22 evidence it actually happened to that person. I mean,
23 I think that's what we're dealing with here, is you
24 have these broad revelations again where you have,
25 particularly where you have the 215 bulk collection 15:48
26 cases, which, you know, are alleged to be situations
27 where everyone's meta-data was collected. It's a
28 different scenario.
29

1 what I'm saying is I think it's rare that a client
2 would come in and say 'I have evidence I was actually
3 surveilled'. There may be evidence that surveillance
4 occurred, there may be evidence that bulk collection
5 may or may not have occurred, but I think there's a 15:49
6 distinction that I would draw there.

7 448 Q. But in order for a lawyer to avoid a Rule 11 breach,
8 the client doesn't need to come in and say 'I have
9 evidence and here it is', isn't that right?

10 A. No. As I said earlier, I mean, I think you have to 15:49
11 have a good faith basis to file it or you have to
12 believe after some reasonable period of time you will
13 have a good faith basis.

14 449 Q. Yes. And if a client comes in, of course the lawyer 15:49
15 has to identify what the basis for the client's belief
16 is. But in an area where notification is an issue,
17 presumably once the lawyer is satisfied that the client
18 has, if you like, a reason for their belief about
19 surveillance, whether it's from external sources or for
20 criminal prosecution or the other different ways we 15:50
21 identify it, surely that is enough to discharge the
22 Rule 11 obligation?

23 A. I think it depends on the facts. I mean, again my memo
24 didn't assume any particular factual scenario. So I
25 think, look, there's a range. There's someone comes 15:50
26 into your office and says 'I think I was surveilled, I
27 have no evidence', they were criminally prosecuted and
28 they know they were surveilled and obviously at either
29 end you know the answer. In the middle there's

1 probably a number of shades of grey. And my point in
2 raising Rule 11 really was to say because - to your
3 point - it *is* secret and because it *is* difficult to
4 know at times, it's something that I think, you know,
5 gives every lawyer some pause to say 'Is there enough 15:50
6 here?' or, you know, as I note in my report, 'will it
7 have evidentiary support after a reasonable opportunity
8 for further investigation or discovery?' That's the
9 point I was making.

10 450 Q. But isn't it really simply an articulation of the 15:51
11 principle that all lawyers are familiar with, all
12 litigators are familiar with, that one doesn't, if you
13 like, bring a claim for a client where there's
14 absolutely basis whatsoever? That's a given, if you
15 like, isn't it? 15:51

16 A. It's different. So let me use a breach of contract as
17 an example. In a breach of contract case you have a
18 contract - you know, presumably plea you have party A
19 and party B, the obligations are set forth. You
20 wouldn't file a case if someone walked in and said 'I 15:51
21 want to sue someone for breach of contract' and they
22 said 'Okay, where's your contract?' 'well, just go
23 ahead and file it', you know, 'You don't need that'.
24 So I think because, as you've noted earlier,
25 surveillance *is* genuinely -- generally a thing where 15:51
26 there are secrets, it's just more difficult than your
27 standard civil case I think.

28 451 Q. well, can I just ask you, have you ever seen a case in
29 the national security or national surveillance field

1 where there's been a breach of Rule 11?

2 A. I've never seen a government, and I don't say this --

3 I've never seen a government try to *enforce* Rule 11.

4 My point was more about would the lawyer have a basis

5 to file, would a lawyer file it, depending on what the 15:52

6 facts were? I certainly don't say that a government,

7 I've ever seen a government seek the sanction. It's

8 more of a point of saying, you know, one of the points

9 again you've made earlier is because it's secret, if

10 you don't know, how do you know, how do you satisfy 15:52

11 yourself that there's a sufficient basis to file this?

12 452 Q. And in all of the cases that we have here, is there any

13 case in which Rule 11 has been mentioned?

14 A. I haven't seen it, no.

15 453 Q. So there's not one single case. And there any other 15:52

16 case you'd like to identify, apart from the cases we

17 have in the looks, is there any other case you'd like

18 to inn identify where it has actually been invoked or

19 relied upon.

20 A. No. Again, I saw it as an issue because of Clapper and 15:52

21 where Clapper went with standing and sort of saying

22 that speculative harm is not sufficient. It just, it

23 caused me to say, in light of where that case *could* go,

24 depending on how it's interpreted and what it means in

25 the national security context, it could be an issue - 15:53

26 it could cause lawyers to pause, if you will.

27 454 Q. Can I just ask you to look at Clapper then, given that

28 you have identified -- and you are talking about

29 Amnesty -v- Clapper, aren't you?

1 A. The Supreme Court Clapper, yes.

2 455 Q. Yes. So tab 16. And can I just ask you to look at
3 what the plaintiffs identified as the basis for their
4 concern?

5 A. Which page? 15:53

6 456 Q. Sorry, it's page 1145. Do you see that?

7 A. Under B?

8 457 Q. Under paragraph B, exactly.

9 A. Yes.

10 458 Q. And can I just ask you to contrast that, if you like, 15:53
11 with what you said this morning, which is that somebody
12 comes in and says 'I think I'm being surveilled, but I
13 don't know why', or 'There's no basis for the belief',
14 or 'I just think, I don't know'? Can I just ask you to
15 look please at what they identified? 15:54

16

17 *"Respondents are attorneys and human rights, labour,*
18 *legal, and media organisations whose work allegedly*
19 *requires them to engage in sensitive and sometimes*
20 *privileged telephone and e-mail communications with*
21 *colleagues, clients, sources, and other individuals*
22 *located abroad. Respondents believe that some of the*
23 *people with whom they exchange foreign intelligence*
24 *information are likely targets of surveillance under*
25 *1881a. Specifically, respondents claim that they*
26 *communicate by telephone and e-mail with people the*
27 *Government 'believes or believed to be associated with*
28 *terrorist organizations', 'people located in geographic*
29 *areas that are a special focus' of the Government's*

1 *counterterrorism or diplomatic efforts, and activists*
2 *who oppose governments that are supported by the United*
3 *States Government."*

4
5 Now, do you think that that claim would be a cause for 15:54
6 concern for the lawyers in question in respect of Rule
7 11?

8 A. Well, it obviously, I mean it was not sufficient for
9 the Supreme Court, those facts. And I'm not saying --
10 what I'm saying is if that really, if that wasn't 15:54
11 enough, there are claims that have less factual support
12 that arguably could be. That's certainly more than 'I
13 think I was surveilled and I don't know'. I mean, they
14 have laid out there some facts - you know, not enough
15 for the Supreme Court - but some facts to say they had 15:55
16 some basis to think they *might* be. And so, you know,
17 the point is, because the court held that those facts
18 were speculative, it did cause me to have some pause.

19 459 Q. Are you suggesting that the test for standing is
20 somehow akin to a Rule 11 test? 15:55

21 A. No. No, I'm not. What I'm saying is that given the
22 lack of standing and that those facts you've identified
23 weren't sufficient, I could see cases where if you
24 don't have evidentiary support because you have no
25 reason, the client has no reason to believe they were 15:55
26 surveilled, there are cases where I could see that
27 you'd have to ask yourself the question under Rule 11
28 before filing.

1 I mean, my personal opinions are not relevant here,
2 but, you know, I look at this and I probably would've
3 predicted that Clapper, you know, Clapper could've come
4 out a different way on standing with those allegations.
5 It didn't. And whether that's right or whether that's 15:56
6 wrong, those facts seem to have some basis to
7 establish, I would've thought those facts might've had
8 a sufficient basis to establish standing prior to the
9 Supreme Court ruling. And so I think looking at that,
10 I simply said, you know, if that's not enough, there's 15:56
11 probably cases with less facts that people might want
12 to file that at least it caused me a question.

13 460 Q. Can I just ask you to consider Prof. Vladeck's report
14 and in particular the reporter's note which accompanies
15 Rule 11? So this is, just if I could ask you to look at 15:56
16 please Prof. Vladeck's report? And it's in tab two of
17 the books of expert reports. I can just read it out to
18 you if you like?

19 A. Which? Is it...

20 461 Q. So this is the -- I think your solicitor may be handing 15:56
21 that up to you. This is Prof. Vladeck's report, which
22 I think you *are* familiar with?

23 A. Yes.

24 462 Q. Because you've looked at it, isn't that right? And he
25 refers to a reporter's note. Can you just explain to 15:56
26 the court what is a reporter's note please and what
27 status it has?

28 A. Sure. Can you give me the page where it's at?

29 463 Q. Yes, of course. It's at page 29, paragraph 96.

1 A. Thank you. The reporter's notes are basically
2 information that's given behind the rules. We refer to
3 this as the FRCP or Federal Rules of Civil Procedure
4 that govern civil actions in the court. And the
5 reporter's notes are, I'll say, helpful to interpret 15:57
6 the rules, they're statements that are helpful in
7 interpreting the rules.

8 464 Q. And does anybody sign off on them?

9 A. I believe it may be the Supreme Court, although I don't
10 know off the top of my head. I know they are signed 15:57
11 off on, yes.

12 465 Q. And I'll put it to you that the Supreme Court in fact
13 sign off on them.

14 A. Yeah.

15 466 Q. And isn't it the case that Congress can change them if 15:57
16 they wish?

17 A. I would suspect they could. I don't honestly know off
18 the top of my head. But I know they are subject to
19 change and obviously the Supreme Court review.

20 467 Q. And would you accept they are authoritative? 15:58
21 A. I think they are -- I think courts could interpret
22 things differently, but I think they carry weight of
23 authority, yes.

24 468 Q. Then if I could just ask you to look, I'll just read it
25 out:
26
27 *"If evidentiary support is not obtained after a*
28 *reasonable opportunity for further investigation or*
29 *discovery, the party has a duty under the rule not to*

1 *persist with that contention. Subdivision (b) does not*
2 *require a formal amendment to pleadings for which*
3 *evidentiary support is not obtained, but rather calls*
4 *upon a litigant not thereafter to advocate such claims*
5 *or defences."*

6
7 Do you see that?

8 A. I do. And I have both concepts in my report, you'll
9 see, I think, at my page 14, where I say they have
10 evidentiary support *or* if specifically so identified 15:58
11 *will* have evidentiary support after a reasonable
12 opportunity for further investigation or discovery.

13 469 Q. Yes. And, Mr. Serwin, can I put it to you, in
14 circumstances where there wasn't one single case that
15 you could identify back in May or can identify now 15:59
16 where Rule 11 was a hurdle or an issue, wasn't it
17 incorrect of you to identify for the DPC that it was an
18 independent hurdle to plaintiffs?

19 A. No. Because I think again it's something that if
20 you're a civil lawyer filing a case, I think -- you 15:59
21 know, Rule 11 is something you consider in every case,
22 whether it's national surveillance, a civil case of any
23 kind. And so again, the point I was making is it is,
24 it does apply in every case. I think it could inhibit
25 lawyers from filing some of these cases where there's 15:59
26 not clear evidence or they have no track of feeling
27 like they could *get* clear evidence. I included it and
28 would include it again.

29 470 Q. But you were asked to talk about practice as well as

1 law. And isn't it entirely speculative what you've
2 just said?

3 A. I think it is -- I think different lawyers may have
4 different views. I don't think it's speculative that
5 Rule 11 applies to a complaint in federal court. 16:00
6 Because it does. I mean, it's any pleading that's
7 signed. So I think the question is how do individual
8 lawyers read this, react to it when you have a scenario
9 where facts are difficult to come by to begin with and
10 may be difficult to get in discovery? 16:00

11 471 Q. But it's theoretical, I think, rather than based on
12 your daily practice, isn't that right?

13 A. Rule 11 is not theoretical, no.

14 472 Q. No, no, your interpretation of what it means in an
15 apposite context? 16:00

16 A. It's my opinion on it. I mean, what I'd say is it's my
17 opinion that it *can* be an issue, yes.

18 473 Q. But not based on anything you've ever seen in relation
19 to the case law or your own experience?

20 A. I've not seen a case where the government has brought a 16:00
21 Rule 11 case. But also, you know, you can't prove the
22 negative of saying that attorneys are or are not filing
23 these cases, because you never know what cases don't
24 get filed. That's the issue.

25 **MS. HYLAND:** Judge, I see it's just four o'clock there. 16:00
26 Thank you very much.

27 **MS. JUSTICE COSTELLO:** Yes, thank you. We'll resume
28 again tomorrow at eleven. Just in relation to the
29 timetable for the case, I know that you're obviously

1 not finished, and there will be some re-examination,
2 I'm anticipating. And then we've two Facebook
3 witnesses.

4 **MS. HYLAND:** Yes.

5 **MS. JUSTICE COSTELLO:** At the rate we're going, it's 16:01
6 not a witness a day, it's a day and a bit per witness,
7 if I can put it that way.

8 **MS. HYLAND:** Yes.

9 **MS. JUSTICE COSTELLO:** And this is far too significant
10 to limit persons' cross-examination and that. So I'm 16:01
11 just thinking of our friends the amici; they had been
12 indicated that it was going to be possibly towards the
13 end of this week. What is your best estimate? Would we
14 be talking Tuesday, would we be talking Wednesday next
15 week? 16:01

16 **MS. HYLAND:** Yes.

17 **MS. JUSTICE COSTELLO:** I think we certainly should at
18 least let them know. Would you agree with me it's not
19 going to be this week?

20 **MR. GALLAGHER:** I alerted Mr. Collins this morning that 16:01
21 we hadn't perhaps made as much headway as we had
22 anticipated and I said to him it certainly wouldn't be
23 before Friday afternoon. But I think Tuesday is
24 realistic, Judge.

25 **MR. MURRAY:** Judge, will the court be sitting on Monday 16:01
26 or will we be resuming as usual --

27 **MS. JUSTICE COSTELLO:** No, no, I'm back at my usual --

28 **MR. MURRAY:** Of course. So in that case, I wonder
29 would it be Wednesday? Because we have Prof. Swire, I

1 understand Mr. Gallagher envisages spending a little
2 time in-chief with Prof. Swire, there'll be
3 cross-examination of Prof. Swire, then Prof. Vladeck,
4 and presumably he will be in-chief and cross-examined,
5 re-examination, I suspect, of both. Mr. Gallagher is 16:02
6 perhaps a better judge than I, but --
7 **MR. GALLAGHER:** well, it's difficult to predict.
8 Neither --
9 **MS. JUSTICE COSTELLO:** Of course. And I'm not limiting
10 anybody. 16:02
11 **MR. GALLAGHER:** No, no. And I fully appreciate that,
12 Judge, it's a very relevant question. Prof. Swire and
13 Prof. Vladeck will be somewhat longer in
14 examination-in-chief, not least because when they filed
15 their reports they hadn't, of course, seen the 16:02
16 supplemental Serwin or indeed the Richards report.
17 **MS. JUSTICE COSTELLO:** No, no, I'm not criticising at
18 all. I mean, that's not an issue.
19 **MR. GALLAGHER:** Yeah, just to explain that, I know
20 that. I still think that there is some prospect of 16:02
21 Tuesday, but it may be Tuesday afternoon. But I'd be
22 reluctant to lose time by saying Wednesday.
23 **MS. JUSTICE COSTELLO:** No, no, I'm not suggesting
24 losing time, no.
25 **MR. GALLAGHER:** So I think Tuesday is the more 16:02
26 sensible.
27 **MS. JUSTICE COSTELLO:** Then in relation to the running
28 order, Ms. Barrington, had you discussed this? I think
29 you were going to go --

1 **MS. BARRINGTON:** well, I think it was indicated
2 certainly at the directions hearing that my client
3 would go last --

4 **MS. JUSTICE COSTELLO:** Yes, exactly. Going last, yes.

5 **MS. BARRINGTON:** -- of the amici. I'm not sure that 16:03
6 the others have particularly agreed a running order as
7 between them, and that's something that --

8 **MS. JUSTICE COSTELLO:** well, then there was the issue
9 as to whether or not there was going to be any time
10 limit in relation to that. 16:03

11 **MS. BARRINGTON:** Yes. I think equally, at the
12 directions hearing, Judge, the parties did indicate
13 some tentative timeframes; I think Mr. Collins had
14 indicated perhaps an hour and a half and we'd certainly
15 indicate two hours and that was the maximum, I think, 16:03
16 of the timeframes given to the court, Judge.

17 **MR. MURRAY:** Mr. Collins' timeframes, "tentative" is
18 not perhaps the best word, Judge.

19 **MS. JUSTICE COSTELLO:** I was thinking at the rate we're
20 going Mr. Michael Collins will be back with us. 16:03

21 **MR. GALLAGHER:** And that will certainly add to it.

22 **MS. JUSTICE COSTELLO:** I think he's reading the
23 transcripts, so he'll know.

24 **MS. BARRINGTON:** It may be, Judge, that without their
25 affidavits there will be there will be a little less 16:04
26 time than they had --

27 **MS. JUSTICE COSTELLO:** well, no, I'm not asking you to
28 comment on the duration there.

29 **MS. BARRINGTON:** But, sorry, Judge, so far as my client

1 is concerned, we'd be very keen to keep to our
2 indication of time.

3 **MS. JUSTICE COSTELLO:** Yes. Well, very good. So if
4 you can let them know that it's certainly not this
5 week. 16:04

6 **MS. BARRINGTON:** Yes.

7 **MS. JUSTICE COSTELLO:** But to be on standby, let's put
8 it that way, for Tuesday, probably Tuesday afternoon.
9 And I will have to, obviously, inform McGovern J. that
10 we haven't done our three weeks and... 16:04

11 **MR. MURRAY:** May it please the court. Thank you,
12 Judge.

13 **MS. BARRINGTON:** May it please the court.

14 **MS. JUSTICE COSTELLO:** ... we'll hold onto this court
15 for longer. 16:04

16 **MR. GALLAGHER:** Thank you very much, Judge.

17

18 **THE HEARING WAS THEN ADJOURNED UNTIL THURSDAY, 23RD**
19 **FEBRUARY AT 11:00**

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