

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 FRIDAY, 24th FEBRUARY 2017 - DAY 11

11

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**INDEX**

<b>WITNESS</b>	<b>PAGE</b>
<b>PROF. PETER SWIRE</b>	
DIRECTLY EXAMINED BY MR. GALLAGHER .....	7
CROSS-EXAMINED BY MR. MURRAY .....	35
THE HEARING CONTINUED AFTER LUNCH .....	91
CROSS-EXAMINED BY MR. McCULLOUGH .....	152
RE-EXAMINATION OF PROF. SWIRE BY MR. GALLAGHER .....	184

1 THE HEARING RESUMED AS FOLLOWS ON FRIDAY, 24TH FEBRUARY  
2 2017

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

5 **REGISTRAR:** Matter at hearing, Data Protection 11:01  
6 Commissioner -v- Facebook Ireland Ltd. and another.

7 **MR. GALLAGHER:** Prof. Swire, please.

8 **MS. JUSTICE COSTELLO:** Mr. Murray, you had indicated  
9 that you were going to have some issues in relation to  
10 Prof. Swire or are you not having some issues? 11:01

11 **MR. MURRAY:** well, Judge, I would propose to revisit  
12 that later in the day with your leave because I think  
13 some of the facts are a little bit unclear, but I will  
14 revisit that later. Thank you, Judge.

15 **MR. GALLAGHER:** Judge, one thing I should say about 11:02  
16 Prof. Swire. He has to go back to the States today,

17 I think there's a reasonable chance he will finish, but  
18 some chance that he won't finish his evidence. He is  
19 committed to teaching for five hours on Tuesday, he's  
20 been here for a week, and he has to do that. He could, 11:02

21 if his evidence hasn't finished, deal with the matter  
22 by video conference on Tuesday morning, if that was  
23 satisfactory to the court, or else he could be back, he  
24 would fly back in on Wednesday. He would ideally

25 prefer not to give his evidence on Wednesday, unless he 11:02  
26 had to because of the jet lag, and he would make  
27 himself available on Thursday. I mean we would  
28 continue with the rest of the matter, it's not ideal,  
29 but he has accommodated everybody.

1           **MS. JUSTICE COSTELLO:** No, no, I appreciate that and  
2           the parties have been very good.

3           **MR. MURRAY:** Judge, absolutely. I mean we fully  
4           understand. We have seen Prof. Swire, he has been here  
5           for, well it feels like ten days, I am sure it's not           11:02  
6           that long. I am sure it feels longer for him.

7           **THE WITNESS:** It's lovely in Dublin.

8           **MR. MURRAY:** So, Judge, I will be as briefly as I can  
9           in the circumstances.

10          **MS. JUSTICE COSTELLO:** It's not a case for cutting           11:03  
11          corners, this particular case.

12          **MR. MURRAY:** well, no. But if I have not finished,  
13          Judge, I will take instructions as to whether we can do  
14          this by videolink, I am not sure Mr. McCullough --

15          **MS. JUSTICE COSTELLO:** There is also the issue about           11:03  
16          the technicalities of which court will be available to  
17          us for videolink, as you know.

18          **MR. MURRAY:** Yes. I think this court actually --

19          **MS. JUSTICE COSTELLO:** Is this one?

20          **MR. GALLAGHER:** I think this is one of the ones.           11:03

21          **MR. MURRAY:** Yes, I have certainly had it done in this  
22          court.

23          **MS. JUSTICE COSTELLO:** You are more familiar than I,  
24          I do know it has been a problem in the past.

25          **MR. MURRAY:** And if not, if for whatever reason           11:03  
26          videolink is not the best way when we get to the end of  
27          today, we will certainly accommodate Prof. Swire at any  
28          time that suits him.

29          **MS. JUSTICE COSTELLO:** It's an evening flight I am

1 assuming, I mean we could work a bit later, but we'll  
2 play that by year.

3 **MR. MURRAY:** Certainly, Judge, thank you.

4 **MR. GALLAGHER:** Is it tomorrow you are going?

5 **WITNESS:** My flight is first thing in the morning 11:03  
6 tomorrow.

7 **MS. JUSTICE COSTELLO:** Thank you. I mean I have to  
8 bear in mind the stamina of people as well.

9 **MR. MURRAY:** Of course, Judge, yes.

10 **MS. JUSTICE COSTELLO:** Not to be unreasonable. 11:03

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

12

13 **PROF. PETER SWIRE, CONTINUED TO BE DIRECTLY EXAMINED BY**  
14 **MR. GALLAGHER AS FOLLOWS:**

15 11:04

16 1 Q. Prof. Swire, I think you were speaking to the, I'll  
17 call it the joint expert report or identification of  
18 agreement or disagreements but I'll call it report just  
19 for ease of reference. You had dealt with page 13, the  
20 effect of Section 702, as to whether it was less strict 11:04  
21 or more strict, and I think on page 14 it deals with  
22 access to communications under Section 702. I think in  
23 substance you have dealt with those issues in terms of  
24 the targeting procedures that need to be followed and  
25 you have also explained the MCTs, so I think we can 11:04  
26 move from that to page 17.

27

28 You'll see there there's a reference to PPD and  
29 feasibility and that the experts disagree about "the



1 President of the United States. For military people,  
2 and some of the NSA people are uniform, that's an  
3 ordinary order from the Commander in Chief, so military  
4 line of authority. For civilian employees the  
5 President is part of the, he is the leader of the 11:06  
6 Executive Branch, has given an order to do a certain  
7 thing. If you violate it you are subject to the  
8 penalties that come as an employee who has violated a  
9 direct order which could lead to job termination or  
10 various kinds of consequences like that. 11:06

11 3 Q. On page 20, in relation to the US privacy régime,  
12 I think you take a different view with regard to the  
13 significance of the sectoral element, that it doesn't  
14 all, protection doesn't all flow from one comprehensive  
15 source, and could you briefly address that or give the 11:07  
16 court your view on that?

17 A. So I think here we talked yesterday about a company  
18 like Facebook would be subject to multiple kinds of  
19 litigation. There could be a private right of action  
20 for people whose records were revealed. There could be 11:07  
21 government criminal prosecution if they broke the law.  
22 There could be Federal Trade Commission, in the form of  
23 action for deceptive trade practice. There could be  
24 actions by a state Attorney General or more than one  
25 for deceptive practices. This is an example of where 11:07  
26 Facebook would face multiple legal risks of enforcement  
27 if they were to violate their promise connected with  
28 returning records.

29 4 Q. Could I ask you then perhaps to turn to page 33 which

1 deals with the standing doctrine and at the same time  
2 perhaps direct you and the court to your report and  
3 chapter 7 of your report and page 38 of that report.

4 A. Yes, sir.

5 Q. The first matter I want to ask you about is Amnesty -v- 11:08  
6 Clapper and could you explain to the court your  
7 assessment of its significance in terms of standing?

8 A. Right. So I went back and re-read Amnesty -v- Clapper  
9 this week as part of the preparation for testifying.

10 When the case came out, as someone in the field I was 11:08  
11 very disappointed in the five to four ruling. I was on  
12 the side of the four justices who thought there should  
13 be standing. I re-read it this week and I was struck  
14 by a number of details in the majority opinion I hadn't  
15 focussed on so much before the enormous amount of work 11:08  
16 we have done for this case.

17  
18 My view is that the majority makes a more detailed case  
19 for why there isn't standing than I had appreciated  
20 before. The first reason is, besides the facial 11:09  
21 challenge that's been mentioned, it was facial, not as  
22 applied.

23 6 Q. **MS. JUSTICE COSTELLO:** Not as?

24 A. Not as applied. I am sorry, in American legal, if I am 11:09  
25 challenging a statute in the United States as  
26 unconstitutional, it could be a facial challenge, it  
27 got passed yesterday, it's a facial challenge. Or it  
28 could be the way the agency does it in practice, that's  
29 called an as applied challenge. There's a fairly

1 strong presumption that it's better to get the facts  
2 and do it as applied, but if it's important enough you  
3 challenge it up front under a facial challenge.  
4 I think there's something similar in Irish law, I've  
5 been told. 11:09

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

7 A. Okay. So the first thing is that, we spent all this  
8 time on targeting, well Section 702 can only target  
9 non-US persons. The plaintiffs in the Clapper case  
10 were all US persons. So, by statute, none of them were 11:09  
11 targets of the surveillance. Then the speculation that  
12 a non-target would have his or her communications  
13 touched is more speculative because we know that they  
14 are outside the zone of those who are being targeted  
15 outside the lawful activities of the statute. So 11:10  
16 that's one thing I notice.

17  
18 Another thing I noticed is the court spent quite a bit  
19 of time talking about other judicial review that  
20 existed if we didn't have this case going forward. It 11:10  
21 specifically noted that companies like Yahoo or other  
22 service providers would be able to sue for  
23 constitutionality, and we have discussed how that kind  
24 of claim did happen in the FISA court.

25 11:10  
26 Beyond that it talked about how the FISC, the Foreign  
27 Intelligence Surveillance Court, had full judicial  
28 review powers as a federal court and was doing it with  
29 all of the access to classified information that we

1 have discussed yesterday during my testimony.

2  
3 So this raises a question in my mind about how much the  
4 point of a remedy here is to have an individual bring  
5 the claim, which is one sort of remedy, versus how much 11:11  
6 the point of protection of fundamental rights comes  
7 from independent review by a judge for  
8 constitutionality. Because in this case the court was  
9 pointing to the fact that there was independent review  
10 of constitutionality by federal judges with appeal to 11:11  
11 the Supreme Court in that line, and in that context of  
12 having judicial review they didn't add this additional  
13 path of judicial review.

14  
15 And then the last thing I noticed -- 11:11

16 **MS. JUSTICE COSTELLO:** when you use judicial review,  
17 you mean judicial surveillance in the sense we have  
18 heard about the FISC court?

19 A. Judicial review in American law would be, there is a  
20 judge who is reviewing the constitutionality here. 11:11

21 **MS. JUSTICE COSTELLO:** Yes, it's a term of art for  
22 particular type of proceedings in this country, so  
23 I just wanted to clarify.

24 A. Oh, okay.

25 **MS. JUSTICE COSTELLO:** No, no. 11:11

26 A. Is that clear enough?

27 **MS. JUSTICE COSTELLO:** No, absolutely, thank you.

28 A. Okay. So we have federal judges checking for  
29 constitutionality and doing so with the factual details

1 that the FISC has as contrasted with the relative lack  
2 of details of knowledge as applied that the Supreme  
3 Court would have had in that proceeding.

4  
5 Then the last point I'd observe, my whole chapter on 11:12  
6 hostile actors has focussed me on why the government  
7 says we neither confirm nor deny when people try to ask  
8 questions about surveillance activities. Well it turns  
9 out in Clapper, and this I hadn't noticed when I read  
10 it back when it came out a few years ago, the court 11:12  
11 goes on in some detail about how bad an idea it would  
12 be to allow standing for outside people to test whether  
13 they were under surveillance. And the court goes on to  
14 explain something along these lines, in my words, not  
15 their words: The court says well let's - I'm going to 11:12  
16 now give an example that's numerical that they didn't  
17 give, but I think it will just make the point.

18  
19 Let's say there is ten plaintiffs, five of them turn  
20 out to be under surveillance, so they get standing; 11:12  
21 five of them don't turn out to be under surveillance so  
22 they don't get standing. Now you have created a  
23 mechanism through these court appeals to find out who  
24 is under surveillance. And that's exactly the Alice  
25 and Bob kind of examples that I give in my Chapter 8 on 11:13  
26 hostile actors. It allows people on the outside to  
27 ping the court system to try to map out who is being  
28 surveilled by e-mail, by chat, for this kind of  
29 individual, for that kind of individual. And so the

1 court majority in Clapper goes through this in a way  
2 that I hadn't remembered as quite consistent with my  
3 chapter 8 analysis.  
4

5 So for all those reasons I went into re-reading this 11:13  
6 the way I had felt when I originally read it, which of  
7 course that there should be standing, we need to have  
8 ways to challenge this, and I was struck by the details  
9 of the case, how the majority had a much stronger case  
10 than I had realised before we went through this 11:13  
11 analysis.

12 7 Q. I think you have also considered ACLU -v- Clapper;  
13 isn't that correct?

14 A. Right.

15 8 Q. And you might give the court your views on that? 11:13

16 A. Right. So I re-read and that's where standing was  
17 granted after the Supreme Court case. And the facts  
18 there to my mind were quite different in important  
19 respects. When it comes to targets, it was known that  
20 they were not targets in the Amnesty case. But it is 11:14  
21 known, now that we have had the Snowden revelations and  
22 the Verizon order, that tens or hundreds, a million  
23 Americans were targets under this telephone metadata  
24 programme, the Section 215 programme. So we have gone  
25 from speculative, whether anybody has a potential 11:14  
26 injury-in-fact to documented that millions and millions  
27 of people have injury-in-fact.

28  
29 Also the nature of the surveillance programme, under

1 702 the Supreme Court said there's speculation about  
2 whether there was individual targeting. In the Second  
3 Circuit case the whole point of the 215 database is to  
4 connect the dots, to have the connections of this phone  
5 record with this phone record with the other person's 11:14  
6 phone record. And so the documentation of the Verizon  
7 order talked about comprehensive nature. So we have  
8 millions and millions of targets and we know that  
9 everybody was in it because it is comprehensive and so  
10 the facts there are that people did have standing as 11:15  
11 opposed to the speculative, no targets situation in the  
12 previous case.

13  
14 So factually that's quite a different: Are these  
15 individual affected by the surveillance? Answer 11:15  
16 clearly yes in the latter case; answer highly  
17 speculative in the earlier case.

18 9 Q. I think section 215 that provided for that broad  
19 surveillance of the metadata, that was repealed by the  
20 Freedom Act; isn't that correct? 11:15

21 A. Yes. The review group recommended that it be repealed  
22 that I was on and then Congress repealed it in 2015.

23 10 Q. Yes. I think you have also considered the Spokeo case,  
24 but, before dealing with the detail of the Spokeo case,  
25 I want to ask you did you have an involvement in 11:15  
26 relation to the FCRA and Congress' consideration of the  
27 FCRA and the issues relating to it?

28 A. Yes. So the Fair Credit Reporting Act is one of the  
29 areas as a privacy law expert I have worked in. It was

1 amended in 1996 and at the time I wrote as a professor  
2 making observations about it. The last time it was  
3 amended was 2004, there was a big overhaul, and  
4 I testified in Congress on the Fair Credit Reporting  
5 Act at that time. And so I have a background in the 11:16  
6 statute.

7 11 Q. Can you comment then on Spokeo in the light of the  
8 issues of which you are aware and the significance of  
9 that decision in terms of standing?

10 A. So I re-read Spokeo this week, it's been a fun week for 11:16  
11 extra reading. So I have three observations. I'm  
12 sorry, I've been here all week.

13 **MS. JUSTICE COSTELLO:** No, we are not getting many  
14 laughs.

15 A. Okay. The first thing is that my experience from 11:16  
16 having worked on that statute as being amended and from  
17 general knowledge is that there's quite a lot of errors  
18 in credit reports. The Federal Trade Commission did a  
19 report in 2013 that I looked at to confirm my  
20 recollection. In that report the Federal Trade 11:16  
21 Commission found that about 5% of people's credit  
22 reports had material mistakes, mistakes that might have  
23 led to a change in their credit rating, and that about  
24 20% of the credit reports had some mistake when you  
25 looked into it in detail. Credit reports are highly 11:17  
26 detailed things so there's at least some mistake in  
27 about 20% of things. That matches my own understanding  
28 and that matches my understanding of why the standard  
29 in the statute at Spokeo is whether the company had

1 taken reasonable measures and whether it had wilfully  
2 failed to take those reasonable measures. In other  
3 words, it's not a strict liability statute. It's not a  
4 statute where the credit reporting agency makes a  
5 mistake and is liable. The credit reporting agency has 11:17  
6 to take reasonable measures and it gets sued if it  
7 wilfully fails to do that. That's the first point.

8  
9 The second point is that the kind of error here is a  
10 quite unusual mistake, it's that the person had a 11:17  
11 better report than the facts sustained. And in  
12 thinking about that I thought of the term of a bank  
13 error in your favour, right. So if I wanted to  
14 challenge a bank for sloppy accounting, it had given me  
15 extra money in my account and then I sued, 'I can't 11:18  
16 believe they put an extra €100 in there', that's an odd  
17 kind of case and complaint to make.

18  
19 But that's essentially what the complaint is here, that  
20 the person was employed and had good credit. And so 11:18  
21 when you look at the traditional form of injury or  
22 mistake, that's not the one you are usually thinking  
23 about and it's not the one that was statute was  
24 primarily focussed on providing for. The statute was  
25 basically there to make sure, if there was a mistake 11:18  
26 and I couldn't get my mortgage loan, that it would be  
27 corrected.

28  
29 Then the third observation is that the individual had a

1 different remedy under the statute. So the Fair Credit  
2 Reporting Act is, if I think there's a problem with my  
3 credit history with the company Spokeo, one of the main  
4 features of the Act is I can access my credit report,  
5 I get a free copy by right every year. If I look at 11:18  
6 the report and there's a mistake in it I have a right  
7 to seek amendment of it. The credit reporting agency  
8 is under a strict set of rules about how they have to  
9 amend it if there's a mistake.

10  
11 And so in this case the question before the court was  
12 are we going to allow a class action for Spokeo's  
13 activities. The fact was that the person got a good  
14 credit report and that the main way you fix that is you  
15 go to the company and say 'please correct my credit 11:19  
16 report'. But instead of asking for 'please correct my  
17 credit report', the person was asking for a class  
18 action against the company for attorneys' fees and  
19 damages.

20  
21 So the claim was a peculiar claim given my experience  
22 in the statute. The court decided that it was not  
23 going to allow that peculiar kind of claim to go  
24 forward. And my understanding is it did *remand* it so  
25 that, if there was some particular showing of an 11:19  
26 individual harm, that the person would have a chance in  
27 subsequent proceedings below to do that. But as a type  
28 of injury it's a very odd injury under the statute.

29 12 Q. Now Prof. Richards says that that decision is of

1 significance and he says real significance in relation  
2 to standing in the context of the government  
3 surveillance that is the subject matter of these  
4 proceedings, could you tell the court what your opinion  
5 is on that? 11:20

6 A. Well, I agree with some things, many things  
7 Prof. Richards said and one of them is that standing is  
8 often indeterminate and very fact based. He said  
9 things along those lines and talked about 'well that's  
10 standing' when he explains it to his students or 11:20  
11 something of that nature. And so what I have described  
12 just now is my fact based analysis of these three cases  
13 having looked at them carefully this week.

14  
15 My own reading of Spokeo is that it makes a lot of 11:20  
16 sense in terms of the Fair Credit Reporting Act,  
17 there's no reference to national security surveillance  
18 in it. Myself as a lawyer, I would find it not to be  
19 very helpful in understanding national security,  
20 I would look at the Clapper cases. It does make sense 11:20  
21 as a sort of odd case under the Fair Credit Reporting  
22 Act.

23 13 Q. In that context how important is the statutory or how  
24 important are the statutory provisions, the statutory  
25 context in considering the question of standing? 11:21

26 A. Well, my reading of Spokeo is that it's about, it  
27 really involves reading the statute, the Fair Credit  
28 Reporting Act, and whether this is an injury-in-fact  
29 under the Fair Credit Reporting Act. So that's a

1 statutory question. It's done within the general  
2 context of the constitutional authority of course to  
3 only do cases in controversy, so there is always a  
4 constitutional dimension. Courts can only do what  
5 courts can do. But my own reading is that it's about 11:21  
6 the nature of statutory remedies in a statutory  
7 structure.

8 14 Q. And does the Spokeo case alter the views which you  
9 expressed in your report on standing?

10 A. Does the Spokeo case alter it? 11:22

11 15 Q. Yes.

12 A. No, it doesn't.

13 16 Q. I now want to move to a separate matter, Professor, and  
14 that is the Ombudsman or Ombudsperson, excuse me. And  
15 you might find it of assistance to have Book 1 of the 11:22  
16 agreed European materials, Judge, which contains the  
17 annex of the Adequacy Decision and which describes the  
18 Ombudsperson and if the witness could be given that it  
19 might just assist.

20 A. Thank you. And I also discuss this at page 7-5 in my 11:22  
21 own report.

22 17 Q. Yes.

23 A. Thank you.

24 18 Q. We need that and we also need, I think, the agreed  
25 expert report. 11:22

26 A. I'm sorry, so within the Privacy Shield materials, can  
27 you point me to what page or section?

28 19 Q. Yes, I can. It is Annex A and it's at page 73, 72 it  
29 begins and 73.

1 A. All right, okay.

2 20 Q. So you will see 207 'slash' the number?

3 A. Yes, I see 207 slash. And then 73?

4 21 Q. 73, yes.

5 A. Okay, I'm working towards it. 11:23

6 **MS. JUSTICE COSTELLO:** Is this the one that has

7 *"submitting requests"* about a third of the way down?

8 A. So I am seeing 72 and then 73.

9 **MR. GALLAGHER:** Yes, Judge, 73, *"submitting requests"*,

10 exactly. 11:23

11 A. Okay, I have it there.

12 22 Q. It just begins on the left-hand side. Really what

13 I want to ask you is, perhaps not by reference to the

14 detail, but so that you have it there if you require

15 it? 11:23

16 A. Mm hmm.

17 23 Q. But what in your view is the significance of this

18 Ombudsperson régime and in particular what benefit or

19 improvement does it effectuate to the pre-existing

20 position? 11:23

21 A. So the Ombudsperson structure is, let's see how to say

22 it. There was a, in the discussions of the Privacy

23 Shield and after Safe Harbour, there's a concern about

24 how would an individual in the EU get some sort of

25 answer about assurance whether their rights are being 11:24

26 protected in the national security surveillance. The

27 procedure that came up is essentially that somebody in

28 the EU administration, sorry in the EU structure of it,

29 will make a request to the person in the State

1 department. And the request is that we have a  
2 particular European individual who has expressed  
3 concern about their rights.  
4

5 Then the person in the State department is tasked with 11:24  
6 going to find out about it. And they have to go see,  
7 do the investigation to see whether there is any  
8 violation of protections. If there is, they have to  
9 fix it or wait until it is fixed; and if there's not a  
10 problem then they come to the determination there's not 11:25  
11 a problem.  
12

13 Then there's a response back and the answer back is  
14 'I'm the Ombudsperson, I've done the investigation' and  
15 either there was no problem or it has been fixed. So 11:25  
16 at the end of that statement, and that's a standard  
17 statement, no matter who asks that's the standard  
18 statement back; so at the end of that the European  
19 person will get an answer that is either there was  
20 never a problem or, if there was, it's now been 11:25  
21 rectified. And that's an answer back to the idea that  
22 maybe a person isn't getting a remedy and isn't getting  
23 protected under the US system.  
24

25 This fits with the hostile actors discussion, the 11:25  
26 neither confirm nor deny discussion that is in my  
27 report. You can imagine a different system where there  
28 is ten requests, the first nine come in and the next  
29 day they say 'we have no records, don't worry about

1 it'. The tenth one comes in and, oh, it's a big  
2 complicated problem, there's some big investigation.  
3 At the end of the investigation taking some period of  
4 time the answer is 'now we have fixed it'. Well, that  
5 would provide a lot of information about how the first 11:26  
6 nine were different from the last one. The people  
7 querying the national security system would have  
8 discovered something interesting about that tenth  
9 person.

10  
11 Rather than have that done there is a standard answer  
12 and when the answers are done they are put in the  
13 federal register publically for everyone in the world  
14 to see, but it's done in a way where we have protected  
15 the right is the idea but we haven't released the 11:26  
16 national security secret. So that's what I take to be  
17 the key point is that there is a mechanism for  
18 upholding the right and there is a mechanism for  
19 protecting the national security secret.

20 24 Q. **MS. JUSTICE COSTELLO:** Just taking a logical 11:26  
21 possibility that --

22 A. Yes.

23 **MS. JUSTICE COSTELLO:** -- there is an infringement and  
24 it's not corrected.

25 A. Well then the United States government would not be 11:26  
26 able to say that in the Federal Register and then in  
27 the annual Privacy Shield review the Commission or  
28 whoever would come and say 'we have noticed that for  
29 these three there's been no statement, we submitted it

1 ten months ago and we have heard no answer back'. And  
2 the US government would say 'that's correct' and then  
3 the Commission would be on notice that there was  
4 problem in relation with those three requests?

5 25 Q. **MS. JUSTICE COSTELLO:** And then we are left where? 11:27

6 A. Well then you are left with, you know the Commission  
7 would go through its Privacy Shield process of  
8 negotiating, of being concerned, of negotiating country  
9 to country or EU to the United States about it. There  
10 would be then at that chance, and I don't know what the 11:27  
11 procedures would be under EU law, perhaps some story to  
12 be told under EU law about a problem, it might be done  
13 through the Commissioner or through some other  
14 mechanism, I don't really know the answer.

15 11:27  
16 But the point there is that the US government is  
17 officially certifying in public that such and such is  
18 the case. If it can't certify to that, a signal flag  
19 goes up that there is something there for the  
20 Commission and for the EU to worry about and that's 11:27  
21 what you get out of it. It's not a judge.

22  
23 But one thing about it not being a judge is that, and  
24 this is something, reading Prof. Richards, he said  
25 'well it's not a judicial proceeding'. We have talked 11:28  
26 about all this standing stuff. If it were a judicial  
27 proceeding we would have to go through all this  
28 elaborate discussion of who has standing or who doesn't  
29 and there might be standing problems if you insisted on

1 judicial procedure in the United States. But this way  
2 you don't even have a standing issue. The State  
3 department is not an Article III court, the State  
4 department is part of the US government and so they can  
5 go ahead and do things even if there is no standing and 11:28  
6 so there's an answer to the lack of standing, it's what  
7 it is. You are trying to create various ways to  
8 accommodate two legal systems and people can come to  
9 the view they come to about it.

10  
11 But it's a way for there, even in the absence of  
12 showing an injury of fact, it's a way to be able to get  
13 an answer from the system that a person's right is  
14 being protected.

15 **MS. JUSTICE COSTELLO:** Thank you. 11:28

16 26 Q. **MR. GALLAGHER:** Can I ask you then, with specific  
17 reference to that, to just look at the submitting  
18 request procedure on page 73?

19 A. Yes.

20 27 Q. The request is initially submitted to: "*The*  
21 *supervisory authorities in the Member States competent*  
22 *for the oversight of national security and/or the*  
23 *processing of public data by public authorities.*" 11:29

24  
25 And then the request is submitted by them to the 11:29  
26 Ombudsperson; isn't that correct?

27 A. Yes, it goes from the national supervisory authority to  
28 the EU centralised body. This EU centralised body or  
29 individual complaint handling body notifies the

1 Ombudsperson.

2 28 Q. Yes. And therefore the interaction in relation to the  
3 complaint is done through an official supervisory body  
4 that obviously has a status that an individual data  
5 subject wouldn't have; isn't that correct? 11:29

6 A. Well they have expertise in data protection, they are a  
7 supervisory authority. And they would, if there is  
8 some problem, the participation of the data protection  
9 supervisor would mean the Article 29 committee and the  
10 commission would learn about it very quickly. 11:30

11 29 Q. And if you would be kind enough to go to page 74 and  
12 item C?

13 A. Yes.

14 30 Q. You will see that once a request has been completed -  
15 sorry, (e), excuse my eyesight: "*Once a request has* 11:30  
16 *been completed as described in section 3 of the*  
17 *memorandum the Privacy Shield Ombudsperson will*  
18 *provide, in a timely manner, an appropriate response.*"

19

20 And I think you, in reply to the judge, said 'well if 11:30  
21 they're not able to say that there's been no violation  
22 or that there's been a violation and remedied, then  
23 they are not in a position to give a response' and is  
24 that something that would be taken up then in the  
25 annual review of the operation of the Privacy Shield by 11:30  
26 the Commission who could assess the significance of  
27 that or the extent to which that undermines the  
28 protections?

29 A. Well, I can't say what the Commission would do, but the

1 Commission would have notice of that.

2 31 Q. Yes.

3 A. And the Commission has its obligation to review  
4 regularly under the Schrems 1 decision so, yes.

5 32 Q. Now I want to move from that, if I may, to just some, 11:31  
6 I have identified some materials, we needn't spend time  
7 on them, that are to be found in the books on US  
8 materials, Judge. And the first document that I want  
9 to refer to or the first documents are in book, my  
10 Book 3 but it's divide 50 and on. 11:31

11 A. So 50, you said?

12 33 Q. 50.

13 A. Yes. Yes, I see that.

14 34 Q. In 50 you see "*CIA intelligence activities procedures*  
15 *approved by the Attorney General pursuant to Executive* 11:32  
16 *Order 12333*"?

17 A. Yes.

18 35 Q. And to identify 51: "*Procedures. The Department of*  
19 *Defence manual procedures governing the conduct of DOD*  
20 *intelligence activities*"? 11:32

21 A. Yes.

22 36 Q. Then in the next divide: "*Procedures for the*  
23 *availability or dissemination of raw signals*  
24 *intelligence information by the National Security*  
25 *Agency*", that's to other agencies, I think; isn't that 11:32  
26 correct?

27 A. Yes.

28 37 Q. All of those were matters that you referred to in  
29 evidence yesterday but that's to where they are to be

1 found?

2 A. Yes, these appear to be the correct public versions of  
3 these documents.

4 38 Q. Then the report that you yourself was involved in is to  
5 be found in divide 55, the report and recommendations 11:32  
6 of the President's review; isn't that correct?

7 A. Yes, this is a very wonderful document.

8 39 Q. And can I take you to Book 4 then and divide 57 first.  
9 A. Yes.

10 40 Q. And you referred yesterday to recommendations being 11:33  
11 made by the PCLOB, that there were assessment reports  
12 in that. In fact there's a later assessment report  
13 than the one here, but this is an example of the  
14 assessment of the recommendations on whether or not  
15 they are being implemented, that was of January 29, 11:33  
16 2015?

17 A. Correct.

18 41 Q. And can you recollect what the latest one is or do you  
19 remember?

20 A. I know there were two of them. 11:33

21 42 Q. Yes.  
22 A. My guess is this is the 2015 and there later was a  
23 2016.

24 43 Q. Yes, okay. And you referred yesterday, if you go to  
25 divide 59, to the rules of procedure of the FISC which 11:34  
26 you said were available and I think they are to be  
27 found in divide 59?

28 A. Yes.

29 44 Q. And then in divide 61 a report of the Director of the

1 Administrative Office of the US courts on activities of  
2 the FISC court for 2015?

3 A. Yes.

4 45 Q. would you explain to the court what that is?

5 A. That's one of the newly required statistical reports. 11:34  
6 So, for instance, on the third page of this document  
7 which is Tab 61, there's discussions about applications  
8 under different statutory authorities and how many  
9 orders were granted and how many orders were modified.

10 46 Q. Yes. 11:34

11 A. And also on the next page there's discussion on how  
12 often the amici have been named and who they are, how  
13 often they have been used in cases and who they are.

14 47 Q. Sorry, could I ask you to go back to Book 2 then of  
15 that, and I'll do it by divide because I think they 11:35  
16 slightly differ, and if you go to divide 48.

17 A. 48 is in Book 2?

18 48 Q. In mine it's in Book 2 but it just might not be in  
19 yours, it's safer to go by divide I think.

20 A. I'm looking. 11:35

21 **MS. JUSTICE COSTELLO:** In mine it's Book 3.

22 A. So I have Exhibit B "*Minimisation Procedures*".

23 49 Q. **MR. GALLAGHER:** Exactly.

24 A. Okay.

25 50 Q. And you might just explain to the court what that is? 11:35  
26 A. Yes. So the title says what it is. These are the  
27 minimisation procedures used by the NSA when they  
28 acquire information under section 702. It talks about  
29 how they take the information and minimise it which is

1 significantly to reduce the amount of US persons'  
2 identified data in the file.

3 51 Q. And those were procedures that were once classified but  
4 are now made available; is that correct?

5 A. Correct. 11:36

6 52 Q. And then if you go to the next divide, 49?

7 A. Yes.

8 53 Q. You have "*United States Signals Intelligence Directive,*  
9 *USSID SP0018*"?

10 A. Yes. 11:36

11 54 Q. And "*Legal Compliance and US Persons Minimisation*  
12 *Procedures*"?

13 A. Yes.

14 55 Q. And that's an example of NSA and Central Security  
15 Services, Signals Intelligence Directive, Office of the 11:36  
16 General Council and it says:

17

18 "*It prescribes policies and procedures and it assigns*  
19 *responsibilities to ensure the missions and functions*  
20 *of the US are conducted in a manner that safeguards the* 11:36  
21 *constitutional rights of US persons.*"

22

23 And those are the procedures that you also refer to,  
24 I think; is that correct?

25 A. Right, observed because I didn't say this in the 11:37  
26 report. USSID 18 is the way it is pronounced and  
27 referred to as a very, very famous document within the  
28 National Security Agency and related. It's the subject  
29 of annual training and a great deal of focus to make

1           sure that this particular document is followed and has  
2           been for a long time.

3    56   Q.    Yesterday there was a reference you couldn't find and  
4           I was unable to assist you and it was in relation to  
5           the procedure for amicus curiae in the FISC court and   11:37  
6           the basis on which they are appointed, and if you would  
7           be kind enough to get out your report at chapter 5  
8           page 33, I think that may have been the reference that  
9           you were looking for, paragraph 155?

10       A.    I'm looking. You are saying chapter 5-33 talks about   11:37  
11       amicus?

12    57   Q.    53, excuse me. 5-53, I do apologise, 155.

13       A.    Yes, okay.

14    58   Q.    Is that of assistance to you?

15       A.    I'm looking at it.   11:38

16    59   Q.    Yes.

17       A.    So paragraph 155 on page 553, it talks about how the  
18           statute, the USA FREEDOM Act in 2015, created this  
19           panel of independent experts:  
20  
21   11:38  
22           *"Going forward the FISC must appoint an amicus in any  
23           matter in the court's judgment - spelled wrong, sorry -  
24           presents a novel or significant interpretation of the  
25           law."*

26   11:38  
27           I said 'significant' yesterday and the statutory term  
28           is 'novel' or 'significant interpretation of the law':  
29           *"The duty to appoint an amicus applies in any FISC  
          proceedings, including NSA applications for*

1           *surveillance authorisations."*

2   60   Q.   And 156 I think sets out the expertise for the amici;  
3           is that correct?

4           A.   So this statute sets out criteria for selecting amici  
5           and the first criterion on the list is that there be           11:38  
6           expertise in privacy and civil liberties.

7   61   Q.   Yes. And then in 157 the duty of the amici when  
8           appointed?

9           A.   When the amici are appointed to a case, an amicus for a  
10          case, the job of that person is to: "*Present legal*           11:39  
11          *arguments that advance the protection of individual*  
12          *privacy and civil liberties and they are security*  
13          *cleared to get access to classified information and*  
14          *they must also have access to the materials they need*  
15          *to litigate such as legal precedent, application,*           11:39  
16          *certification and the rest."*

17   62   Q.   Yes. And I think your report makes clear that those  
18          are all changes that were brought about by the USA  
19          FREEDOM Act; is that correct?

20          A.   That's correct. There was inherent authority of the           11:39  
21          FISC to appoint amici prior, but this regularised it  
22          and said that the court shall do that in specified  
23          circumstances.

24   63   Q.   Two other matters. One, I think you are aware that the  
25          Venice Commission has commented on this hostile actor           11:39  
26          phenomenon that you spoke about, I'm sure the court  
27          know what the Venice Commission is, but maybe just for  
28          the record that you would explain what the Venice  
29          Commission does and then mention what they say about

1 the hostile actor phenomenon?

2 A. Yes. So the Venice Commission is a creation of the  
3 Council of Europe. My understanding is that it's an  
4 organisation designed how to foster democracy and rule  
5 of law in our changing world. I reviewed the 2007 and 11:40  
6 2015 versions of the Venice Commission report. I sent  
7 to counsel a quote from the 2007 that I don't have in  
8 front of me, I don't know how best, I can try to do it  
9 from memory or?

10 64 Q. You can try and do it from memory, if you don't mind. 11:40

11 A. From memory, and I am sure that everyone will get  
12 copies of this eventually, but I was very struck,  
13 basically exactly the hostile actor point I make.  
14 I think they even used the words like 'of course there  
15 should not be anything done when you are providing 11:41  
16 these individual remedies that reveal the national  
17 security secrets or who is under surveillance'.  
18 There's a quote very close to the exact point that  
19 I have made in chapter 8 and I saw that after I wrote  
20 chapter 8 so I drew it to counsel's attention when 11:41  
21 I saw that.

22 65 Q. I am afraid your errant counsel can't -- I've been  
23 assisted, thank you. The quote I think that you refer  
24 to is: "*Plainly though legitimate targets of a*  
25 *security or intelligence agency should not be able to* 11:41  
26 *use a complaint system to find out the agency's work.*"  
27

28 And it's the 2007, I think, version of the report;  
29 isn't that correct?

1 A. Right. When they say 'plainly though' I was struck by  
2 the sort of 'of course' nature, that you don't want to  
3 have a mechanism that's going to reveal to the actual  
4 targets of surveillance whether they are under  
5 surveillance.

11:42

6 66 Q. And the final matter, Professor, is the issue that  
7 arose yesterday. You gave evidence that you didn't  
8 think that any of your opinions had been changed  
9 following the interaction with the US government, did  
10 you have an opportunity overnight to get that  
11 investigated on your behalf and to see the results of  
12 that investigation?

11:42

13 A. So since we -- like this matter was drawn to me in  
14 court at the end of the proceedings yesterday. After  
15 court, with the people who staffed me on it, we have  
16 gone back and looked at every single one of the  
17 comments. My recollection was correct. None of my  
18 opinions, no 'my opinion is' or 'my view is', none of  
19 those were changed in any way. The first one on the  
20 list was what I described which is I had left out a  
21 particular exception to one surveillance authority and  
22 we put it in.

11:42

23 **MS. JUSTICE COSTELLO:** This is the one about the  
24 embassies?

25 A. This is the one about the embassies. There were a  
26 number of others, all of them were in the level of  
27 technical and correction, to try to get the words  
28 precisely correct. None of them changed the import  
29 except to be more precise.

11:42

1 67 Q. **MR. GALLAGHER:** Professor, can you tell the court  
2 whether anybody has interfered in any way with your  
3 report or altered in any way any of the contents of  
4 your report.

5 A. If it's reference to the US government's role, 11:43  
6 I submitted it for declassification review, as I said  
7 yesterday. Nothing was changed for that reason. And  
8 then the lawyers who did the declassification review,  
9 who have to be knowledgeable in order to do it, offered  
10 comments to the law firm Gibson Dunn. Gibson Dunn 11:43  
11 then, without me being in contact with the government,  
12 relayed those comments which I have now, which I looked  
13 at. And then I made my independent judgment whether to  
14 take the comments once I looked at them and did the  
15 research on them. So there was no interference. There 11:43  
16 was what I thought of as assistance by knowledgeable  
17 people to try to get it even more correct.

18 **MR. GALLAGHER:** Thank you very much, Professor. You  
19 might answer Mr. Murray.

20 11:43

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

23

24 **MR. MURRAY:** Good morning, Professor.

25 **THE WITNESS:** Good morning. 11:44

26 68 Q. Professor, your report discloses a large number of  
27 occasions on which you have testified before  
28 Congressional committees, the Belgian parliament?

29 A. The Belgian Privacy Authority which was asked by the

1 Article 29 working party to have a hearing after the  
2 Safe Harbour case.

3 69 Q. Yes. And what we would describe as regulatory  
4 authorities, I think you have testified before the FCC?  
5 A. Federal Communications Commission, Federal Trade 11:44  
6 Commission, yes.

7 70 Q. I think you in fact testified before at least one of  
8 those in the course of the summer, in June?  
9 A. So in June last year I testified in front of the US  
10 Senate Commerce Committee about the Federal 11:44  
11 Communications Commission. Previously in the year  
12 earlier, in April, I was at, what they called a  
13 workshop and I was under oath there, I believe, yes,  
14 for the FCC.

15 71 Q. Have you testified as an expert witness in a court of 11:44  
16 law before?  
17 A. First time.

18 72 Q. This is your first time?  
19 A. Yes.

20 73 Q. I see. 11:44  
21 A. Well the first time I have testified orally. I twice  
22 before prepared expert reports.

23 74 Q. Of course. Where did you prepare those expert reports,  
24 what was the litigation in which you did that?  
25 A. So the litigation -- I don't have the documents in 11:45  
26 hand.

27 75 Q. I understand.  
28 A. One of them was a fair credit reporting case. This was  
29 done, I know it's before 2008, somewhere in the

1 2006/2007 range and I was asked to testify about  
2 procedures, about the details of how credit reports get  
3 fixed or don't get fixed.

4 76 Q. Mm hmm.

5 A. I gave my testimony and the plaintiff dropped the case. 11:45  
6 And then, so we are 2017, so in 2015 there was a case  
7 brought about the privacy of bankruptcy records in the  
8 United States.

9 77 Q. Mm hmm.

10 A. And that was an issue I had worked on when I was in 11:45  
11 government to try to make sure that personal  
12 information wasn't released in the course of these  
13 bankruptcy case, records. Again I issued an expert  
14 report explaining how protections were in place for  
15 privacy and security, and subsequent to that the 11:46  
16 plaintiff dropped the case.

17 78 Q. I see. So you have a 100% record on plaintiffs  
18 dropping their cases when they see your reports?

19 A. Those are the two instances of experience I have.

20 79 Q. I see. Were they in federal court? 11:46

21 A. Hmm, the more recent one was in federal court. The one  
22 in 2006 or 2007 I believe was in federal court, I think  
23 that's where the Fair Credit Reporting Act happens.

24 80 Q. All right. So just help us, I presume that the federal  
25 rules of civil procedures have a provision for expert 11:46  
26 testimony and how it is to be presented?

27 A. I try to follow all the rules. I'm not a litigator so  
28 I don't...

29 81 Q. I see.

1 A. But I follow whatever rules I am supposed to follow.

2 82 Q. Okay. But you don't recall, when you prepared your  
3 earlier reports, whether you were guided by particular  
4 rules as to what you were supposed to do or say?

5 A. My hesitancy was the following: when I was in law 11:47  
6 school I studied the federal rules of procedure and  
7 there's things in that book called the federal rules of  
8 civil procedure.

9 83 Q. Mm hmm.

10 A. I don't remember for testifying whether the specific 11:47  
11 rules were in that book called the federal rules of  
12 civil procedure or that there were other rules I was  
13 subject to.

14 84 Q. Fair enough. But there is rules?

15 A. There is rules, yes. 11:47

16 85 Q. Okay. And just to correct me if I'm wrong, let me  
17 outline the position here to see if it's the same here:  
18 As an expert you're allowed give opinion evidence?

19 A. That's my understanding.

20 86 Q. Exceptionally because nobody else is allowed to give 11:47  
21 opinion evidence, generally?

22 A. Correct.

23 87 Q. Okay. You are allowed give opinion evidence because  
24 you are an expert in a particular area or field?

25 A. Okay. 11:47

26 88 Q. And the court is entitled to hear and receive and act  
27 upon your expert evidence?

28 A. That's my understanding.

29 89 Q. Okay. And I think you are also conscious of the fact

1           that it's very important in that connection that you  
2           are independent?

3           A.    Correct.

4    90   Q.    Because the court needs to know that you are  
5           independent before it can act on your opinion evidence, 11:48  
6           you know all of that?

7           A.    (Indicating)

8    91   Q.    Okay. I think you will be not be surprised to hear  
9           that it's also important that the court knows and that  
10          it has disclosed to it anything that might reasonably 11:48  
11          be seen to affect your independence?

12          A.    Yes.

13    92   Q.    You know that?

14          A.    Yes, go ahead.

15    93   Q.    well... 11:48

16          A.    No -- so the rules on independence.

17    94   Q.    Yes.

18          A.    I have been taught are different in Ireland than they  
19          are in the United States.

20    95   Q.    Okay. 11:48

21          A.    And so when I was reached out to about being engaged as  
22          an expert here, I was told that there are different  
23          rules on independence and I have sought the guidance of  
24          counsel about what I should do to do that.

25    96   Q.    Of course, okay. well, we're not concerned about the 11:49  
26          difference of the rules on independence save that you  
27          have to be independent and you obviously understand  
28          that and, secondly, you have to disclose anything that  
29          might leave open to reasonable doubt your independence

1 so that it's known?

2 A. As I said in this case I sought counsel for guidance  
3 about what I should disclose and how I should proceed.

4 97 Q. Well, you sought guidance from counsel. But, just to  
5 be clear, you know that, that you have to disclose 11:49  
6 anything that might reasonably affect your  
7 independence?

8 A. Hmm, I don't know whether those are the exact words in  
9 the standard in Ireland or in the United States, but  
10 I am trying to follow the rules and do what I am 11:49  
11 supposed to do.

12 98 Q. All right. Well let's look at them another way,  
13 Professor. Do you think the judge, do *you* think the  
14 judge is entitled to know when the court receives your  
15 report whether there is anything about *you* or your 11:49  
16 professional experience or the report that *might* affect  
17 your independence?

18 A. I think I should give the judge the information she  
19 would need in order to determine my independence.

20 99 Q. Okay. Now just so we understand what happened in 11:50  
21 relation to the disclosure that you made in the witness  
22 box yesterday. Approximately three, maybe four weeks  
23 before you submitted your report to the court, which  
24 was on 2nd November, you submitted a draft of part of  
25 what ultimately became the report to the Office of the 11:50  
26 Director of National Intelligence?

27 A. Correct.

28 100 Q. Okay. And that's an agency of the United States  
29 government?

1 A. Correct.

2 101 Q. Is that part of the Department of Justice or the NSA?

3 A. No, it's neither of those.

4 102 Q. It's an independent entity?

5 A. It's an office that reports directly to the President. 11:50

6 103 Q. All right. And it was sitting on somebody's desk for  
7 three or four weeks because they didn't come back to  
8 you until 48 hours before your deadline; is that right?

9 A. Hmm, so pre-publication review we're asked to give  
10 enough time to the government so that they do all the 11:51  
11 other things they have to do in life, they have time to  
12 review it and come to a professional view and then give  
13 answers back if there is something that needs to be  
14 changed.

15 104 Q. Anyway they got back to you 48 hours or so before your 11:51  
16 deadline?

17 A. Correct. I first learned anything about the comments  
18 on November 3rd. I filed it on November 3rd.

19 105 Q. I see.

20 A. November 1st and November 3rd. 11:51

21 106 Q. Okay, fair enough. And this was mediated through  
22 Gibson Dunn?

23 A. Yes. So what we did was, to try to come up with  
24 something that would be as clearly independent and  
25 documented as we could. 11:51

26 107 Q. Okay.

27 A. So I didn't ever talk to the government, didn't know  
28 the lawyers who did the review. They gave it to  
29 counsel. Rather than having any direct contacts,

1 counsel them read them to me.

2 108 Q. Okay. Gibson Dunn are Facebook's attorneys?

3 A. They are Facebook's attorneys.

4 109 Q. But the reason that the draft went to the Director of  
5 National Intelligence was nothing to do with Facebook, 11:52  
6 it was due to your clearance and prior experience in  
7 having access to?

8 A. That's right.

9 110 Q. Okay. And the reason the Director of National  
10 Intelligence got back to you or back to Gibson Dunn 11:52  
11 with comments was similarly nothing to do with  
12 Facebook, it was to do with you because it was to you  
13 that they wished to pass on these comments, is that  
14 fair?

15 A. Well, there is two things here. One is that there has 11:52  
16 to be a declassification review, I am required by law  
17 to do that. The second is, when the lawyers did the  
18 declassification review, as expert lawyers they saw  
19 different imperfections in the report.

20 111 Q. Mm hmm. 11:52

21 A. A citation mistake or something small and then they  
22 passed those along as well as the message that there  
23 was nothing that violated declassification.

24 112 Q. I see. I understand, and that indeed was very helpful  
25 of them to spend their time correcting your errors. Is 11:53  
26 that a service made generally available by the lawyers  
27 in the Office of the Director of National Intelligence?

28 A. My understanding is that it's common practice in  
29 declassification review, not only to make sure there is

1 no secrets being disclosed, but, if there is any  
2 errors, to point that out to the person writing --

3 113 Q. I see.

4 A. -- in the hopes that we don't have those errors  
5 propagated. 11:53

6 114 Q. I see.

7 A. And one reason for that is that if somebody has been  
8 given access to classified information there can be a  
9 belief that there is authority associated with that,  
10 right because I learned all these things in a 11:53  
11 classified setting, and so there could be an inference,  
12 let's say there is some misstatement, that that's a  
13 sort of authorised misstatement or incorrect statement  
14 of the law.

15 115 Q. Yes. And that might in some way be pinned back to the 11:53  
16 government because it might be thought by some  
17 misconceived listener that you, as someone who had had  
18 this who clearance or experience spoke for them?

19 A. I think that would be one concern.

20 116 Q. I see. 11:54

21 A. Also for the usefulness of the individual not making a  
22 mistake.

23 117 Q. Okay. So anyway they got back to Gibson Dunn, they got  
24 back in writing?

25 A. They sent written comments to Gibson Dunn. 11:54

26 118 Q. Did they track them on your draft or did they send a  
27 separate note or memorandum?

28 A. My recollection is they did a track changes in word --

29 119 Q. Ah.

1 A. -- to the document that we had sent them in October.  
2 Between October and November we had continued working  
3 on it, so the draft had evolved, but on the parts that  
4 they saw, the substance was very similar.

5 120 Q. Hmm, all right. They tracked the changes on the 11:54  
6 version you had sent them. The version of the report  
7 had moved on because you were continuing to do your  
8 work obviously as your deadline arrived and these  
9 changes, what do you say, there were three, four  
10 changes tracked on the document? 11:54

11 A. No, there was a larger number.

12 121 Q. Oh, I am sorry, I misunderstood you. I thought there  
13 was a thing about an embassy and one or two other. How  
14 many changes?

15 A. So overnight we, with the people that have staffed me 11:55  
16 on it went through the list.

17 122 Q. Yes.

18 A. I have seen the list, it wasn't numbered. The number  
19 was, I don't know how best, I don't know whether to go  
20 back and try to find the document or whatever, but the 11:55  
21 number was more than 20 and less than 40.

22 123 Q. I see, between 20 and 40 changes suggested. But they  
23 were changes from the government to you mediated  
24 through Gibson Dunn, nothing to do with Facebook?

25 A. Nobody from Facebook to my knowledge ever saw the 11:55  
26 changes.

27 124 Q. Okay, fair enough. And did you adopt all of the  
28 suggested changes?

29 A. No.

1 125 Q. Okay. Can you remember which changes you did not  
2 adopt?

3 A. Hmm so -- I don't, I have my notes from the changes and  
4 I don't have them in front of me.

5 126 Q. Okay. 11:56

6 A. I don't know how best to proceed because I don't...

7 127 Q. All right. Well, I can help you with that.

8 A. Because I run the risk of saying something incorrect.

9 128 Q. Of course, and I don't want to put you in that  
10 position. One way to proceed is to give them to us so 11:56  
11 that we can see them. Do you have a difficulty with  
12 that as the person who has a sole interest in this?

13 **MR. GALLAGHER:** I don't think that's a question for the  
14 witness. There is issues of privilege that arise in  
15 relation to that, Judge. 11:56

16 **MR. MURRAY:** well very interesting ones indeed for a  
17 communication if a third party, the US government. If  
18 Mr. Gallagher is going to say there is a common  
19 interest between his client and the United States  
20 government, that's something that we can certainly 11:56  
21 consider.

22

23 But my understanding from what the witness has just  
24 said is that the reason he sent the report to the  
25 government was because of his relationship with it, his 11:57  
26 prior relationship, I should say, in fairness and the  
27 reason the government sent it back was for the same  
28 reason. It was simply mediated through Gibson Dunn,  
29 nothing to do with Facebook.

1 Now, if Mr. Gallagher says, and I don't want to be  
2 unfair to Mr. Gallagher, it's not a straightforward  
3 question. If Mr. Gallagher says that there may be  
4 issues of privilege well so be it, but one just wonders  
5 how they could arise in communications to a third party 11:57  
6 absent a common interest. But maybe, I don't want to  
7 be unfair to Prof. Swire, nor do I want to detain him.  
8 But certainly let's forget about, forget about Facebook  
9 for a moment, and Mr. Gallagher may have an issue  
10 around that; you personally, Prof. Swire, forgetting 11:57  
11 about Facebook, if Facebook said 'this is fine' would  
12 you personally have any difficulty with sharing those  
13 with us?

14 A. I would not personally have any difficulty.

15 129 Q. Okay, thank you. Now Mr. Gallagher did say yesterday 11:57  
16 that the fact that the report had been submitted for  
17 vetting to the United States had been disclosed in the  
18 report, in your report?

19 A. He said that, yes.

20 130 Q. And is that true? 11:58

21 A. Yes, in the biographical chapter, Chapter 2, it said  
22 that as with the review group, which was subject to  
23 declassification review, my statement in this  
24 proceeding is subject to declassification review.

25 131 Q. Okay. well, I mean the biographical review, in 11:58  
26 fairness to you, is where you would expect to find a  
27 disclosure of this significance, so perhaps you can  
28 just point us to where we find it?

29 A. It's page 2-7 of my report, it's footnote 19.

1 132 Q. Oh, sorry, it's a footnote. Sorry, Mr. Gallagher did  
2 say that. So can we look at, that's 1 slash 27 in the  
3 first chapter, yes?  
4 A. No, it's the second chapter, the biography chapter is  
5 chapter 2. It's paragraph 34. 11:58  
6 133 Q. So it's chapter 2, it's 2/27; is that right?  
7 A. It's page 2-7, it's paragraph 34.  
8 134 Q. I don't appear to have a page 2 -- 2-7. So paragraph  
9 34 is where it is:  
10  
11 *"when we completed our report of over 300 pages in late*  
12 *2013 we met with President Obama to discuss the 46*  
13 *recommendations. The five members were unanimous in*  
14 *the report and recommendations. To build trust we*  
15 *decided the whole report would be made public. The* 11:59  
16 *government reviewed our report only to ensure there was*  
17 *no leak of classified information. We had complete*  
18 *editorial control."*  
19  
20 where is the disclosure about this report, this report? 11:59  
21 A. The footnote to that.  
22 135 Q. Sorry, the footnote.  
23 A. It says: *"As with the review group report my*  
24 *submission to the court is reviewed by the US*  
25 *government to ensure that no classified information is* 11:59  
26 *leaked, but I retain complete editorial control."*  
27 136 Q. I'll just let the stenographer change. We can talk  
28 about the location of your disclosure at a later point,  
29 Prof. Swire. But I don't see any reference there to

1 the fact that the US Government got back to you with 20  
2 to 40 comments, some of which you accepted in your  
3 report. Is that elsewhere?

4 A. That's not stated in the report.

5 137 Q. why is that not disclosed to the court? 12:00

6 A. I tried to say what had happened and it didn't occur to  
7 me to list that. But I'm glad to say it. You know, I  
8 was trying to get accurate. We had somebody with  
9 knowledge providing -- for instance, one of the  
10 mistakes that I saw overnight when I reviewed it is 12:00  
11 that I talked about the Confidential Information  
12 Procedures Act and the correct term is *Classified*  
13 Information Procedure Act. And so we made that change  
14 in the report.

15 138 Q. well now, Prof. Swire, you were glad to say it in the 12:01  
16 witness box yesterday. Do you *know* that if we had not  
17 served a notice to cross-examine you, you would not *be*  
18 in the witness box and the court would not *know* that  
19 the US Government, which is a party with an *obvious*  
20 interest in these proceedings, had suggested changes to 12:01  
21 your report which you had accepted? Did you *know* that,  
22 Prof. Swire?

23 A. Did I know that I would only be cross-examined if you  
24 served notice? Yes, I knew that.

25 139 Q. Yes. And it is only *because* you were in the witness 12:01  
26 box yesterday, which happened *because* we served a  
27 notice to cross-examine, that the disclosure was made  
28 that the United States Government had an input into  
29 your report.

1 A. That's correct.

2 140 Q. Yes. Well, can you please help us, Prof. Swire, as to  
3 how this state of affairs came about?

4 A. Well, I disclosed in the report that it was submitted  
5 to the government. I'm required to submit it to the 12:02  
6 government. I understand my main task as being to  
7 assist the court in an accurate description of US law.  
8 As people who are researching on my team found things  
9 as we went along, I made corrections. In this case,  
10 there were corrections, such as the Classified versus 12:02  
11 Confidential Information Procedure Act, that came as a  
12 result of the lawyers doing the declassification review  
13 saying 'Here's a mistake of this sort'.

14  
15 As I said yesterday in my statement I confirmed 12:02  
16 overnight, no opinion of any sort in my report was  
17 changed based on the government submission, all of the  
18 sentences were the same. They were highly detailed  
19 clarifications, such as the terms about Section 702,  
20 certifications, directives, court orders, applications; 12:02  
21 those are technical terms where, in good faith, I'd try  
22 to write it as well as I can and sometimes when an  
23 expert sees it, they say 'well, that's not quite  
24 right'.

25 12:03  
26 Another example of a change was in describing the  
27 Judicial Redress Act. I said EU persons would have  
28 access to their data. And that's similar to the  
29 European term "personal data". The suggested edit from

1 the government was it should say "to their covered  
2 records", that's a more precise statutory term. So I  
3 struck the word "data" and put in the word "covered  
4 records".

5  
6 Those are the sorts of changes that were made. In each  
7 case I received the comments and my team and I went  
8 back and looked at the specific words in the statute or  
9 wherever it was and made an independent decision, I  
10 made an independent decision 'Yes, we should call it 12:03  
11 the correct term in the statute', 'Yes we should put in  
12 "covered records" instead of the vaguer word "data".'

13  
14 One reason I remember that third authority in addition  
15 to law enforcement and national security about 12:04  
16 embassies is that that was, in my view, the most  
17 significant change. There was a sort of actual legal  
18 provision I hadn't been aware of. That was the big  
19 change in the report. And the number of changes, in my  
20 view, had to do with quite a detailed and lengthy 12:04  
21 report, as others have observed, and in the course of  
22 that, trying to get it right. And when I *have*  
23 information about how to make it more accurate, I  
24 considered my duty to the court was to make it more  
25 accurate. 12:04

26 141 Q. Prof. Swire, you are a practicing attorney. You are in  
27 court giving evidence about *the law*. Do you think that  
28 the court had a right to be told that your report had  
29 been changed following suggestions made by the United

1 States Government, a party with an *acute* interest in  
2 the outcome of this case?

3 A. When I wrote this, I thought I was giving a disclosure  
4 that indicated what had happened. I'm delighted to go  
5 into more detail about it. I was trying to get the 12:05  
6 stuff -- I was trying to get the report accurate. I  
7 didn't -- when I wrote the report - and this is a sign  
8 of me writing it on myself - I, for instance, had not  
9 at that point gone back to every contact with Facebook  
10 in other settings where there was any financial matter. 12:05  
11 I'm glad to have done that. I would've done it earlier  
12 if I had known to do it.

13  
14 And this was, in my case, not trying to hide from the  
15 court, this is I'm writing a story about US -- not a 12:05  
16 story, I'm writing a report about US law and here's my  
17 background and here's what we did. And so I provided  
18 more information. Once I saw the other witnesses'  
19 report, such as Prof. Richards mentioned the Future  
20 Privacy Forum, until he saw that, it hadn't occurred to 12:05  
21 me to mention that I was active in the Future Privacy  
22 Forum - it was on my CV, but I hadn't thought to say  
23 that Facebook is one of the over 100 companies that  
24 supports the Future Privacy Forum. Once I saw it, I  
25 was glad to supplement the disclosure. 12:06

26 142 Q. Prof. Swire, I don't propose to interrupt you when  
27 you're answering *any* of my questions, I will let you  
28 answer them as you think fit, but I don't believe you  
29 had answered the question I asked you, which was: Do



1 believe, are involved in this case in some way or  
2 other, they helped me rewrite my report. Should I  
3 disclose that to the court?' That would've been one  
4 thing. Did you ask that question of anyone?

5 A. I asked, I asked Gibson Dunn 'How should we proceed 12:07  
6 here? I want to make sure we're doing it in ways that  
7 will be considered acceptable.' And on the basis of  
8 that, they said 'You should have no contact with the US  
9 government, not receive the document from the US  
10 Government. We're going to have this procedure where 12:08  
11 Gibson Dunn mediates it so that we can document that  
12 there was no improper contact with the US Government'.  
13 And subject to all that, we went through that procedure  
14 and I wrote my report.

15 146 Q. And Gibson Dunn didn't tell you you should disclose 12:08  
16 fact that the government have suggested changes?

17 A. No, they did not. If they had suggested it, I would've  
18 followed their suggestions as to procedure.

19 147 Q. I see. And Gibson Dunn, of course, are Facebook's US  
20 attorneys, is that right? 12:08

21 A. That's correct.

22 148 Q. But they do have an involvement in this case; they  
23 appear to have been the point of contact for the  
24 instruction of other witnesses as well.

25 A. As far as I know. 12:08

26 149 Q. Including witnesses in the UK.

27 A. I don't know that directly, but okay.

28 150 Q. Gibson Dunn, of course, themselves had obviously the  
29 draft of your report some three to four weeks before



1           *expert, or of any person connected with the expert, in*  
2           *any business or economic activity of the party*  
3           *retaining that expert, including any sponsorship of or*  
4           *contribution to any research of the expert or of any*  
5           *University, institution or other body with which the*  
6           *expert was, is or will be connected."*

7  
8           Do you see that?

9           A.    I see it.

10   155   Q.    So you didn't comply with that, obviously?

12:10

11           A.    I had not read the rule and I did not comply with it.

12   156   Q.    Did it not occur to you as a practicing attorney in a  
13           jurisdiction where there are rules governing expert  
14           evidence that in this country there was a possibility  
15           we might have rules as well?

12:11

16           A.    My practice was I knew that I didn't understand or have  
17           experience in the rules for Ireland for how such things  
18           proceed and I asked the people who had hired me 'what  
19           am I supposed to do here?' And I followed that.

20   157   Q.    And who are the people who hired you?

12:11

21           A.    Gibson Dunn.

22   158   Q.    And how would they know what the Irish rules are?

23           A.    Well, I was spending a lot of time doing research on  
24           the report and I was hoping that I would be properly  
25           instructed in the right format and in the right ways to  
26           hand in everything for the report.

12:11

27   159   Q.    Including, I see, research on Irish law.

28           A.    We did research on Irish law as part of this.

29   160   Q.    Now, "I" has moved to "we"?

1 A. Sorry. So within Alston & Bird, I was in full control  
2 of the report.

3 161 Q. Mm hmm.

4 A. I had junior attorneys doing research on my behalf.

5 162 Q. Mm hmm. 12:11

6 A. The original reading on state secrets that refers to  
7 Irish law was done by one of those attorneys. I then  
8 asked for those to be provided to me and checked over  
9 the materials and checked over the initial draft of the  
10 readings and -- 12:12

11 163 Q. I see.

12 A. -- did my edits.

13 164 Q. And is this attorney a qualified Irish lawyer?

14 A. The attorney is not an Irish lawyer.

15 165 Q. So let me just understand this - and I think it's in 12:12  
16 section eight of your report; you've a section in the  
17 report on Irish law, prepared by an unidentified  
18 attorney in your office, given to you and then  
19 reproduced in your report to this court. Have I missed  
20 any stage in the chain of production? 12:12

21 A. Well, given to me in draft. And then, as I do with my  
22 other research, I look at it carefully, I read whatever  
23 I feel I need to read in the footnotes or whatever to  
24 be sure that there's accurate statement there and then  
25 we get, I get a draft. And then there's a process 12:13  
26 afterwards we call site checking where a different  
27 attorney checks the footnotes to make sure that it  
28 accurately stands for --

29 166 Q. Okay, so 1987 Irish Reports, one, two, three, that sort

1 of check?

2 A. And for substance also.

3 167 Q. And --

4 A. So it's not only that the page number is correct, but  
5 that the document stands for the proposition in the 12:13  
6 text.

7 168 Q. Okay, I understand. But you are the expert, you know  
8 your obligations. So you read the cases that are  
9 discussed in this?

10 A. I read some of the cases and not -- I didn't read all 12:13  
11 of every case. Because sometimes there's a particular  
12 section that's relevant. If you're reading a case on  
13 standing and then there's parts on the merits, you  
14 might read the part on standing -- I might read the  
15 part on standing and not read the part on merits that 12:13  
16 are irrelevant to the standing issue.

17 169 Q. But you personally read Irish cases or parts of Irish  
18 cases, *personally*?

19 A. Yes.

20 170 Q. Did you? Name one. 12:13

21 A. So in the state secrets part there was, there's  
22 discussion of two different kinds of secrets. And my  
23 ability to -- this is material I read months ago. But  
24 there were -- I could look at my report; is that...

25 171 Q. Well, I think as you will have gathered, I'm trying to 12:14  
26 get you to tell me without looking at your report.

27 A. Right. I don't remember the names of cases from  
28 Ireland, as I don't from the other countries that I  
29 research.

1 172 Q. Okay. You're not a qualified Irish lawyer?  
2 A. No.

3 173 Q. Okay. So a non-qualified Irish lawyer does research  
4 for you -- sorry, an attorney not qualified in Irish  
5 law does research for you, an attorney not qualified in 12:14  
6 Irish law, to go into a report which you present as the  
7 report of an expert to the court, correct?  
8 A. That's correct.

9 174 Q. And are you an expert in Irish law?  
10 A. Can I speak a little bit longer in response so I can 12:14  
11 give context as --

12 175 Q. Oh, as long as you like.  
13 A. So yesterday we talked about my experience in EU data  
14 protection law, which includes graduate studies in  
15 Brussels, that includes writing a book on European 12:15  
16 Union data protection law. I am not a certified lawyer  
17 in any EU jurisdiction and I don't claim to be, but for  
18 more than 20 years I've been working on areas connected  
19 to these different aspects of European law, as well as  
20 US law, related to this. And so in the course of 12:15  
21 making constrained summary statements about certain  
22 topics in European law for the state secrets, in part I  
23 was really trying to make a specific point, which is:  
24 Here's how the US state secrets part works and here, at  
25 a summary level of a couple of paragraphs each, is the 12:15  
26 striking similarities with France and with Germany and  
27 with Ireland and with the UK. And consistent with how  
28 I've done research on international comparative law in  
29 other settings, I felt comfortable when I've

1 double-checked the materials to be able to make  
2 relatively summary statements about 'This doctrine  
3 exists under this country's law as well'.  
4

5 I would not try to go into court and argue the cases of 12:16  
6 whether this precedent or that precedent applies, but I  
7 believe within the realm of me being a professor who's  
8 written about many things that making constrained  
9 statements of 'Here are the general outlines under a  
10 different country's law' is something that I do and 12:16  
11 have done in many circumstances.

12 176 Q. And you were doing that as an expert in what?

13 A. In this case, I was talking about US law first; 'Here's  
14 how state secrets works in the United States'. And I  
15 was comparing it to European Union practice, which I've 12:16  
16 done in other settings, by giving pretty summary short  
17 statements of the clear existence of certain doctrines  
18 in different European countries.

19 177 Q. But the way this is done, Professor, is that the  
20 attorney in your office goes off and does the research, 12:17  
21 gives you a draft, perhaps copies of some of the cases  
22 or extracts from the cases?

23 A. Yes.

24 178 Q. And you put those into a report for the court. You  
25 have no *notion* of the legal context in which those 12:17  
26 decisions were made, *no notion*, let alone being an  
27 expert.

28 A. Well, I don't claim to be an expert in Irish law. What  
29 I do claim is a lot of experience in comparative law

1 and in EU law around these topics. And I thought it  
2 would be of service to the court when I make statements  
3 about how these concerns about state secrets and  
4 national security law in the United States exist that I  
5 put it in context for how, 'Here's the French law, 12:17  
6 here's the UK law' and I included Irish law.

7 179 Q. Because you did this for a number of jurisdictions, and  
8 presumably for all of them your report was prepared in  
9 the same way?

10 A. In essentially the same style. 12:17

11 180 Q. Yeah.

12 A. One lawyer would have the first responsibility to pull  
13 materials. I'd review the materials.

14 181 Q. Yeah. How many assistants did you have working on this  
15 case -- sorry, on your report? 12:18

16 A. So for this case there were - I'm just listing the  
17 names in my head at this stage. There were four  
18 attorneys doing primary research, there was one senior  
19 lawyer who was double-checking to make sure the process  
20 was going well and that everything was running 12:18  
21 smoothly, there were three attorneys who came in late  
22 in the process to check all the flip notes and make  
23 sure citations were correct.

24 182 Q. So how many is that altogether?

25 A. I think I said four plus three plus one, so that's 12:18  
26 eight.

27 183 Q. Did you have any other assistants?

28 A. There was secretarial support.

29 184 Q. And were all of these attorneys in *your* firm?

1 A. All of these attorneys are in my firm, yes. They were  
2 hired by my firm.

3 185 Q. Did you pay them or was their time billed to Facebook?  
4 A. The billing was done as one bill from the law firm of  
5 Alston & Bird. And all of the activities in Alston & 12:19  
6 Bird were under my direction and I confirmed all the  
7 materials before they went into the report.

8 186 Q. All right. When were you instructed to write this  
9 report?

10 A. I believe it was in June. June 2016. 12:19

11 187 Q. Early June? Late June?  
12 A. I don't have a recollection of the date.

13 188 Q. And it was, at least a substantial part of it was in  
14 near final form by early October?

15 A. Yes, so by early October, because of the 12:19  
16 declassification review, I prioritised getting any  
17 sections of the report that involved possibly  
18 classified materials done to give the US government  
19 time to have the time to do its review.

20 189 Q. Yeah. And in that time, or at least between your 12:19  
21 instruction - it might've been early June or it  
22 might've been late June - we have a report of 146,750  
23 words, yeah?

24 A. I haven't counted them, but thank you for doing it.

25 190 Q. Yeah. 351 pages? 12:20  
26 A. Yes.

27 191 Q. 201 cases cited?  
28 A. Yes.

29 192 Q. And 48 law review articles cited?

1 A. I'll take your word for the numbers.

2 193 Q. Nine textbooks?

3 A. Yeah.

4 194 Q. 42 government reports and 114 newspaper articles?

5 A. Okay. 12:20

6 195 Q. Were you doing anything else, Professor, between your  
7 instruction and the delivery of this magnum opus?

8 A. So I have two observations. One is that many parts of  
9 this report are either things or based on things I've  
10 written previously. So the Review Group report, the 12:20  
11 2004 FISA article, the testimony of more than 40 pages  
12 from 2015 cover a very large fraction of the  
13 substantive points that are in this report. Those were  
14 also extensively footnoted. And that provided a large  
15 framework for the points that I filled in after that. 12:21

16 196 Q. Were you doing anything else?

17 A. Yes, I was doing other things.

18 197 Q. Yeah. You were attending your Congressional or  
19 Regulatory Committees, you were doing your day job as a  
20 professor, your night job as an attorney - or is it the 12:21  
21 other way around?

22 A. I consider this to be research that overlaps with my  
23 professor and law firm activities.

24 198 Q. Took some time off in August?

25 A. Yes, I did. 12:21

26 199 Q. Yeah. And did you read all of the cases that are  
27 referred to in the report?

28 A. I did not read all the cases in full that are referred  
29 to in the report.

1 200 Q. Did you read all of the cases in the report in part?  
2 A. I... so there -- I think what would happen, so the  
3 process that I would go through is did -- here's an  
4 example; there's a footnote for the fact that under  
5 ECPA there is a cause called Suzlon - S-U-Z-L-O-N - I 12:21  
6 just remembered that I hadn't been aware of. And so  
7 what we had was a statutory cite that said under the  
8 plain language, a non-US person can sue under ECPA. I  
9 didn't have a case support for that. So I said 'Go see  
10 if there's any case support for that'. And one of the 12:22  
11 attorneys went and found the case. I looked at it, I  
12 looked at the syllabus of the case, which is the  
13 summary, and it clearly says this is it. And then I  
14 said 'Okay, we have a cite for Suzlon for the fact that  
15 non-US persons can do this. 12:22  
16  
17 The belief that this would be correct was in part based  
18 on my direct checking of that sort, in part because we  
19 had expert attorneys working on the different initial  
20 research, in part because we had a partner named Jim 12:22  
21 Harvey who was working with the associates to make sure  
22 the process was good and complete at every step and in  
23 part because we had citation checking by different  
24 lawyers after the fact to make sure that the citation  
25 was correct and that it supported the proposition in 12:23  
26 the case.  
27 201 Q. Were you preparing an expert report, Professor or  
28 editing an anthology?  
29 A. I believed I was providing an expert report on US law

1 relevant to the charge letter I was given to assist the  
2 court to understand US law.

3 202 Q. Large parts of it being written in first draft by all  
4 of these various assistants in your firm?

5 A. So my experience here in many other reports that I've 12:23  
6 written informed this. The process -- I have a full  
7 time legal researcher at Georgia Tech that's a lawyer.  
8 And with them, for instance, for them, for when I do  
9 law review articles now, having worked in the field for  
10 many years, the typical thing would be if you were the 12:23  
11 person, I would meet with you, we'd say we're going to  
12 write about this particular topic, non-US person rules  
13 for remedies, 'Here's some things I know, here's my  
14 outline, here's the three parts we have to do etc.'  
15 like that. 'On part two, I don't know as much about 12:24  
16 the background. Could you go deeper into part two and  
17 try to find research about that' and all that. And  
18 then 'Based on the outline we just did, can you come  
19 back to me with a draft?' They come back to me with a  
20 draft. I look at it and say 'Okay, I get this and 12:24  
21 this, but I don't get this other part, so let's go  
22 deeper into that'. And then when I had a decent draft,  
23 I would rewrite the whole thing in my words so that it  
24 became my tone, my consistent view of things, saying  
25 things that I was comfortable saying. 12:24

26  
27 One of the reasons, in my experience, that this has  
28 worked as well is that I have a rule with my assistants  
29 of no adjectives. So for instance, in a lot of

1 writing, if it says 'It's a broad loophole'/'It's a  
2 narrow loophole', what I say is 'I want to have  
3 objective footnoteable things for each statement. So  
4 say for this law there are three exceptions, don't  
5 characterise them. Have the three exceptions, have the 12:24  
6 footnote, have the footnote available on the web so  
7 anybody can check it'. So I didn't like footnotes  
8 unless it was available on the worldwide web. And then  
9 we can check and have confidence that there are three  
10 exceptions and that the sentence as stated is correct. 12:25  
11

12 Now, I'll just go for a minute more on why, I believe,  
13 in my experience, this has been accurate. Last year in  
14 January I published a report on a different topic about  
15 broadband internet privacy. And this was a report of 12:25  
16 120 pages, another big document, it was on detailed  
17 materials. I submitted this eventually to the FCC in  
18 connection with the Rule 90 (Inaudible), but what I did  
19 at the time when we had a draft was I said 'This is  
20 tricky material. I'm going to put it up publicly on 12:25  
21 the internet and solicit public comments' and say 'I  
22 know that there's controversy about the issues here,  
23 I'm just trying to get the facts straight. If anybody  
24 has any comments, could you please send them in?' we  
25 posted that. Two groups did independent studies on the 12:25  
26 same report. At the end of that, we changed -- I  
27 changed, but from my report where I was lead author,  
28 one sentence in the 120 page document; there was one  
29 sentence where I'd made it broader than I thought was

1 accurate based on the comments we'd received.

2  
3 And that's similar, in my experience, to what happened  
4 in this case. So we have this long document, we had  
5 the experts' report. And yesterday when I began my 12:26  
6 commentary - my commentary, my testimony, whatever - we  
7 had two items where I felt that the original statement  
8 wasn't correct - this is after the experts with very  
9 different perspectives had worked over this stuff; one  
10 of them was about the transit authority under 12333 and 12:26  
11 one of them was a sentence about the Fourth Amendment  
12 that I thought was too broad. And then when I found  
13 that out, I brought that to your attention. And those  
14 are, maybe we'll find out more in cross-examination  
15 whether there are sentences I should amend, but after a 12:26  
16 lot of experts spent a lot of time look at it, those  
17 were the two sentences they found that had  
18 inaccuracies.

19 203 Q. Well, thank you, Prof. Swire, that's a very helpful  
20 explanation of how you went about this. And you 12:26  
21 adopted the same methodology for this report, as you  
22 said, as you did in your experience in writing other  
23 reports, with your assistants?

24 A. So I did the same methodology and I asked the lawyers  
25 could we post this publicly to get the same kind of 12:27  
26 early scrutiny and make sure it's all accurate. And  
27 they told me that wasn't the way it was done for court  
28 here. But I made a request to have a public notice of  
29 what I wrote and an opportunity for the ACLU or anybody

1 else to criticise it so we could be as accurate as  
2 possible. And that's what I did the previous time,  
3 when I *had* that opportunity. I didn't *have* that  
4 opportunity here.

5 204 Q. Are you proposing to publish this report as a textbook 12:27  
6 or a...

7 A. I've considered publishing it when we're done.

8 205 Q. Yeah.

9 A. It wouldn't be this report, it would be material based  
10 on this report in some form that would be of interest 12:27  
11 maybe --

12 206 Q. Well, that, if you don't mind me saying so,  
13 Prof. Swire, is precisely how it reads. I want, just  
14 to try and assist the judge as we look at the legal  
15 questions of US law, I want to see can we define what 12:27  
16 exactly the points of agreement and disagreement are.  
17 I know obviously there's been the experts' meeting, but  
18 perhaps I'm going to ask you to help me refine some of  
19 these points a little. If you *disagree* with any  
20 proposition I advance, we will come back and look at it 12:28  
21 later, but what I want to do for the court's assistance  
22 is to have as short as we can an identification of  
23 what's in issue and what isn't.

24 A. Okay.

25 207 Q. I want to do that to a large extent by reference to a 12:28  
26 series of propositions. First of all, you very fairly,  
27 let me say, Professor, and properly explain in your  
28 report that you're not purporting to express any view  
29 of the meaning of Article 47 of the Charter or the

1 meaning of the word "adequacy" in the Directive or the  
2 meaning of the word "equivalence" as it's used in the  
3 European jurisprudence. You know those are matters of  
4 law for the judge to decide and it would be wrong of  
5 you as an expert to express a view on their meaning and 12:29  
6 I understand you not to do so.

7 A. So what I *have* tried to do is bring my experience in EU  
8 data protection law over a lot of years to inform my  
9 discussion so that my background in US surveillance law  
10 would be understandable and put into context, at least 12:29  
11 for the European --

12 208 Q. Yes. And as I said, Professor, I will not interrupt  
13 any of your answers, but I just want you to indicate  
14 whether I'm right or wrong. And we can come back and  
15 discuss these later. But you're not expressing your 12:29  
16 view on the law? No.

17 A. I'm not expressing a legal conclusion of EU law.

18 209 Q. Okay, yeah. But you do, in fairness, have your own  
19 opinion that, looking at the remedies in the context of  
20 surveillance, that it's not appropriate to just look at 12:29  
21 judicial remedies, that you have to look at other types  
22 of remedies and take a broader view, it's your view you  
23 have to take account of criminal prosecutions, of the  
24 possible role of regulatory bodies like the FTC and  
25 FCC, it's your view that you must take account of the 12:30  
26 press, Congressional oversight and the range of other  
27 matters that you very helpfully identified in your  
28 report, isn't that right?

29 A. So the word "must", just as a lawyer, has more than one

1 meaning. So --

2 210 Q. Fair enough.

3 A. And --

4 211 Q. It's your opinion that those are matters which one  
5 should take account, is that an unreasonable -- 12:30

6 A. It's my opinion that in order to understand protections  
7 of fundamental rights, such as privacy, that this set  
8 of things you just described are relevant to that.

9 212 Q. Yes. And it's in that context that you express your  
10 own views as to, I don't want to use the word 12:30  
11 "adequacy" for obvious reasons, but your own views of  
12 the sufficiency of protection perhaps is a way of  
13 putting it in US law?

14 A. Yes.

15 213 Q. Okay. Now, Prof. Vladeck, in his report - and we'll be 12:30  
16 hearing from him next week as to whether this remains  
17 his position - but in his report he says that the  
18 prevailing assumption is that "*non-citizens lacking*  
19 *substantial voluntary connections with the United*  
20 *States are not protected by the Fourth Amendment.*" 12:31  
21 I'll just read at that that to you again, in  
22 fairness --

23 A. No, I heard it, it's okay.

24 214 Q. So is that a statement with which you agree or  
25 disagree? 12:31

26 A. So I think that this is almost exactly what we put in  
27 writing in the part about the Fourth Amendment in the  
28 experts' report. So that was item no. 25 on page 19 of  
29 the joint experts' report. So if we look at -- shall I

1 wait a moment or should I go ahead?

2 215 Q. No, you go ahead.

3 A. Okay. So this is the scope of the application of the  
4 Fourth Amendment. And I believe you just quoted from  
5 the same quote that we have here: "*Non-citizens lacking* 12:32  
6 *substantial voluntary connections to the United States*  
7 *are not protected by the Fourth Amendment.*" And in the  
8 consensus language on the right-hand side,  
9 Prof. Vladeck says: "*To the extent that Vladeck's*  
10 *earlier testimony stated that the Fourth Amendment* 12:32  
11 *applies in such circumstances, he amends the testimony*  
12 *to say the Supreme Court has not addressed the issue*".

13 216 Q. Sorry, Professor, I know what's in that document, we  
14 had it yesterday. I'm asking you just to agree or  
15 disagree with the formula I read to you. "*The* 12:32  
16 *prevailing*" -- I'll read it to you again. You either  
17 agree or disagree with this.

18 A. Yes, I'm -- okay.

19 217 Q. "*The prevailing assumption is that non-citizens lacking*  
20 *substantial voluntary connection with the United States* 12:32  
21 *are not protected by the Fourth Amendment.*" Do you  
22 agree or disagree with that?

23 A. So --

24 218 Q. And if you disagree, we'll come back and examine it in  
25 detail later. I just want to try and assist the court 12:32  
26 in identifying what we agree or disagree on.

27 A. Right. And this is precisely the topic that, in the  
28 experts' group, we were trying to figure out where  
29 there's agreement or disagreement. And in that report,

1 the statement that we made was that we do not have  
2 clear Supreme Court guidance on that. I do know that  
3 there are cases before the Supreme Court this term.  
4 And so "prevailing view"? I don't know that I ever came  
5 to an opinion previously on it. He stated it in his 12:33  
6 report and so there's prevailing... If we say more  
7 likely than not then I think the answer would be  
8 prevailing, yes.

9 219 Q. Okay, so we'll just bring some clarity on this. "*The*  
10 *prevailing assumption is that non-citizens lacking* 12:33  
11 *substantial voluntary connections to the United States*  
12 *are not protected by the Fourth Amendment*"; agree or  
13 disagree?

14 A. So on that, more likely than not, is that what most  
15 people think? I think the answer is yes. 12:33

16 220 Q. Yes, okay. Agree?

17 A. Agree.

18 221 Q. Okay. Thank you. Now, do you agree that under the  
19 rules for Article III standing, it is *not* sufficient  
20 for a plaintiff -- 12:34

21 **MS. JUSTICE COSTELLO:** Sorry, do you mean the third  
22 amendment or Article III?

23 **MR. MURRAY:** Article III.

24 A. Article III is the role of the judges.

25 222 Q. **MR. MURRAY:** Article III standing, Judge, yes. 12:34  
26 (To witness) Do you agree that under the rules for  
27 Article III standing, it is *not* sufficient for a  
28 plaintiff who seeks relief in federal court to  
29 establish an objectively reasonable likelihood that his

1           communications will be interfered with?

2           A.     Em --

3   223   Q.     We've discussed Clapper this morning and I'm going to  
4           come back to the detail of Clapper. But that perhaps  
5           abstracted proposition of law -- 12:34

6           A.     Right.

7   224   Q.     -- I invite you to agree or disagree with. Would you  
8           like me to read it again?

9           A.     No. Can you tell me what the quote is from, just so I  
10          can have some context? 12:34

11   225   Q.     Well, the quote is from the note I'm reading in front  
12          of me.

13          A.     Ah. Well, so I'll say this on standing: I wrote two  
14          pages in my report on standing. I'm an American law  
15          Professor who's been around standing and have taught to 12:35  
16          it to my students. I have given you my detailed  
17          reading of three of the key cases. And I have not made  
18          a general study of all the Circuit or District Court  
19          cases of standing - and there's a tremendous amount of  
20          complexity and detail in that that I -- I have not read 12:35  
21          a lot of the cases that have been mentioned in the  
22          court. So given that, I'm glad to give it a try, but I  
23          want to just qualify my level of expertise here to what  
24          it is. So please go ahead, sir.

25   226   Q.     "I have given you my detailed reading of three of the 12:35  
26          key cases. And I have not made a general study of all  
27          the Circuit or District Court cases of standing." Is  
28          that what you just said?

29          A.     I agree with that. Yes, I think I said something like

1           that. And it's true.

2   227   Q.   All right, okay. In fact I deduced from your evidence  
3           in response to Mr. Gallagher this morning that you read  
4           Clapper during this week --

5           A.   Again. 12:36

6   228   Q.   -- and that you read it when it came out. I got the  
7           impression, and please correct me if I'm wrong, that  
8           you did *not* read it before you wrote your report.

9           A.   I don't know if I read the whole thing. I certainly  
10          went back to it and looked at it, but I can't say I 12:36  
11          read every word of it again the way I read every word  
12          of it again this time.

13   229   Q.   So you didn't read it carefully?

14          A.   I don't currently -- I cannot say that I read it all  
15          the way through as part of this report. It's a long 12:36  
16          case.

17   230   Q.   No, you didn't read it carefully?

18          A.   I can't say that I didn't. I did a lot of work on this  
19          case, as you've said, and I don't want to say I did  
20          something I didn't do. 12:36

21   231   Q.   Okay. well, we'll look and see what you say about it  
22          later. It's not sufficient for a plaintiff who seeks  
23          relief in federal court to establish an objectively  
24          reasonable likelihood that his communications will be  
25          interfered with; agree or disagree? 12:36

26          A.   So I think that that goes to the first of the three  
27          prongs, if I'm understanding correctly, and you'd have  
28          to satisfy the other prongs. But I'm not sure that's  
29          the particular issue you're pointing to.

1 232 Q. It's a negative; it is *not* sufficient for a plaintiff  
2 who seeks the relief in federal court to establish an  
3 objectively reasonable likelihood that his  
4 communications will be interfered with.

5 A. So - and this is my effort to respond the best I can to 12:37  
6 your thing - there would have to be some sign of  
7 redressability, I believe. So if there has to be  
8 redressability then what you've stated would not be  
9 sufficient.

10 233 Q. Okay. well, just imagine I establish the other prongs 12:37  
11 but I do *not* establish an objectively reasonable  
12 likelihood that my communication will be interfered  
13 with; have I got standing?

14 A. You now *have* or have *not* established --

15 234 Q. Have I got standing? 12:37

16 A. So if you have -- I'm sorry, there's a lot of "nots" in  
17 here. I'm trying to do the best I can, Sir.

18 235 Q. Okay. well, I see, Professor. The phrase that I'm  
19 giving to you is one from Clapper, it is the  
20 plaintiff's case in Clapper as recorded in the report 12:38  
21 which you read about this week and in respect of which  
22 you're giving evidence as an expert in US law. If I  
23 come to court and say 'Judge, I have an objectively  
24 reasonable likelihood that my communications will be  
25 acquired under section 1881(a)', am I going to be told 12:38  
26 *on that ground alone* that I do not have standing?

27 A. I believe the answer is no.

28 236 Q. I will *not* be told that? The court will say 'oh' --

29 A. Can I try to say it -- you know, I'm trying to answer

1           your question, I'm trying to -- so if I, as a  
2           plaintiff, establish an objectively reasonable belief  
3           that my communications have been interfered with --  
4 237 Q.     Likelihood. Reasonable, objectively reasonable  
5           likelihood. 12:39  
6           A.     Okay. So if I, as a plaintiff, establish an  
7           objectively reasonable likelihood my communications  
8           have been - is the word "interfered with"?  
9 238 Q.     That my communications *will* be interfered with.  
10          A.     And "will be" is, you know, not 20 years in the future, 12:39  
11          but imminent enough?  
12 239 Q.     Yes.  
13          A.     Then my understanding is that sounds like the  
14          injury-in-fact, yes.  
15 240 Q.     Does it? Okay. So disagree. Now, do you agree that 12:39  
16          there is no provision in US law in the surveillance  
17          context, the national security context with which we're  
18          concerned, whereby persons whose data has been accessed  
19          by the government must be advised of that fact?  
20          A.     There's no general notice requirement. 12:39  
21 241 Q.     Thank you. So we agree on that. Do you agree that  
22          because there is no *general* notice requirement, many  
23          people who have been surveilled will never know of that  
24          fact?  
25          A.     I agree. 12:40  
26 242 Q.     And do you agree that people who *do not know* that they  
27          have been surveilled will have difficulty establishing  
28          standing under Article III?  
29          A.     Under most scenarios we can think of, yes. Right.

1 243 Q. You agree that they will have difficulty?  
2 A. If an individual doesn't know that he or she's being  
3 surveilled, they'll have difficulty establishing  
4 standing, yes.

5 244 Q. Okay. I *think* you agree, but again I want to try and 12:40  
6 gather these together, under FISA the private data of  
7 an EU citizen can be seized, accessed and retained by  
8 the US Government without the US Government having  
9 obtained a warrant in respect of that EU citizen  
10 following proof of probable cause? 12:40  
11 A. Right. So there's two different provisions, so there's  
12 at traditional FISA where there has to be a showing to  
13 the judge that there's probable cause the person is an  
14 agent of a foreign power.

15 245 Q. Absolutely. 12:41  
16 A. And that's not a warrant in US law, that's a FISA  
17 order.

18 246 Q. Mm hmm.  
19 A. Then under Section 702, we've talked in great detail,  
20 there's a certification for the year and then there's a 12:41  
21 directive in an individual case. So there's no  
22 warrant.

23 247 Q. There's no warrant. And people, EU citizens'  
24 information can be accessed without any such prior  
25 warrant being granted under Section 702? It's obvious, 12:41  
26 not a matter of dispute --

27 A. There's no such, there's no warrant under either of  
28 those things.

29 248 Q. Yeah. Just so that we again --

1 A. Right.

2 249 Q. -- have what we agree on together. I think you  
3 accept -- well, excuse me, *do* you accept that to  
4 establish standing you must prove an injury which is  
5 concrete and particular? 12:41

6 A. Particularised, yes, I think.

7 250 Q. Do you agree that you *cannot* satisfy the requirements  
8 of Article III by alleging a bare procedural violation?

9 A. There was language to that effect in Spokeo. And I  
10 don't know whether that would be true in all settings, 12:42  
11 but in the Spokeo case there was language to that  
12 effect.

13 251 Q. Okay, fair enough. would you agree with this  
14 proposition: The mere fact that a statute has been  
15 violated does not *in itself* mean that there's a 12:42  
16 concrete and particularised injury?

17 A. Do I agree that that's a statement of US law?

18 252 Q. Yes.

19 A. I agree with it.

20 253 Q. Do you agree that that *may* be the case, even though the 12:42  
21 statute confers a cause of action for breach of the  
22 provision?

23 A. So again this is similar to language in Spokeo. we  
24 could argue about the word "breach". The main point is  
25 that there might be certain kinds of violations that 12:42  
26 would not be enough to trigger a private right of  
27 action.

28 254 Q. Okay. And would you agree that in deciding whether an  
29 injury is concrete and particular, the question of

1           whether the law has traditionally provided a remedy for  
2           that injury is relevant?

3           A.    There's certainly Supreme Court statements to that  
4           effect.   Different justices have different views about  
5           how much the history of that harm is relevant. 12:43

6   255   Q.    But you as an expert, giving expert evidence as to what  
7           US law provides, would you agree that in deciding  
8           whether an injury is concrete and particular, the  
9           question of whether the law has traditionally provided  
10          a remedy for that injury is relevant? 12:43

11          A.    I agree it has been found relevant by some justices of  
12          the Supreme Court.

13   256   Q.    Ah, well now, hold on.  We're trying, Professor - and  
14          there may be a misunderstanding here; I'm not asking  
15          you what justices of the Supreme Court has found, have 12:43  
16          found, and in fact the court doesn't require you to  
17          tell them, because we can read the judgments ourselves.  
18          My understanding is that you're here as an expert in US  
19          law to proffer *your* opinion as an expert on what the  
20          United States law *is*.  Correct? 12:44

21          A.    Yes.

22   257   Q.    Okay.  So you've a view as to what the law of the  
23          United States is in your area of expertise?

24          A.    Yes.

25   258   Q.    Okay.  So I'm asking you - and this applies to *a11* of 12:44  
26          the questions I've asked you - that your opinion as an  
27          expert, *is* it your opinion as an expert that in  
28          deciding whether an injury is concrete and particular,  
29          the question of whether the law has traditionally

1 provided a remedy for that injury is relevant, yes or  
2 no?

3 A. Judge, can I explain my view here? There's been quite a  
4 bit of debate in the Supreme Court between different  
5 parts of the court about how much weight to put on the 12:44  
6 fact that there was this kind of injury, let's say, in  
7 the 1790s when the Constitution was --

8 259 Q. **MS. JUSTICE COSTELLO:** when you say "different parts",  
9 you mean different judges?

10 A. Different justices. So in the -- there's a case called 12:44  
11 **Jones** which has to do with surveillance in public, it's  
12 a Fourth Amendment Supreme Court case. It ended up  
13 being a nine to nothing decision. Five of the justices  
14 emphasised how similar the injury was to trespass as  
15 understood back in the 1790s. Four of the justices 12:45  
16 said 'That's really not the question at all. We have  
17 different kinds of harms under the different kinds of  
18 technology today. And so finding a specific hook in a  
19 traditional common law injury is not a key factor in  
20 our decision'. And so that's the five majority, four 12:45  
21 in concurrence.

22

23 And that's why when there's language about finding a  
24 particular harm sort of going back to English common  
25 law, there's been quite a bit of debate between the 12:45  
26 justices about how much weight to give to that.

27 260 Q. **MR. MURRAY:** Okay. And **Jones** is a case about whether  
28 you need - correct me if I'm wrong --

29 A. A warrant, yes.

1 261 Q. -- a warrant to put a tracker on somebody's car, is  
2 that right?

3 A. That's right.

4 262 Q. Yeah. And the majority decided that this was an  
5 analogue to a common law interference with property? 12:46

6 A. Trespass on property, yes.

7 263 Q. But in your opinion, if I arrive in your office and say  
8 'I want you to tell me what the law of this, the  
9 federal law on this issue is' and I know that the first  
10 thing you'll say is, because it's what we all say, 12:46  
11 'well, it depends' and 'It could go either way' --  
12 **MR. GALLAGHER:** Mr. Murray can speak for himself on  
13 that.

14 **MR. MURRAY:** I won't disclose --

15 A. Yes, the one handed lawyer does not exist, yes. Right, 12:46  
16 okay.

17 **MR. MURRAY:** -- I won't disclose how many of  
18 Mr. Gallagher's opinions I've read in the last 20  
19 years, 15 years.

20 **MS. JUSTICE COSTELLO:** They're subject to privilege, I 12:46  
21 suspect.

22 **MR. GALLAGHER:** Exactly. I'll have a complaint to the  
23 Bar Council.

24 264 Q. **MR. MURRAY:** And the comment I made is not divorced  
25 from their standard template. (To witness) But after 12:46  
26 you've said 'It depends' and 'I don't know' and 'It  
27 could go either way', if you've an aggressive client  
28 with a large chequebook who says 'I want you to tell me  
29 the answer to this question in your opinion, I won't

1 sue you if you are wrong, I just want you to tell me  
2 your professional opinion'. Now, will you please apply  
3 that test to this question: In deciding whether an  
4 injury is concrete or particular, the question of  
5 whether the law has traditionally provided a remedy for 12:47  
6 that injury is relevant; agree or disagree?

7 A. And what I would say to that client is that predicting  
8 the votes of the Supreme Court, I believe it is  
9 relevant. I think that's an incorrect view of the  
10 Constitution. 12:47

11 265 Q. I see, okay. So we'll split our predictive function  
12 from our academic function. But given that you're  
13 being paid to predict what will happen in my case, the  
14 answer is yes?

15 A. Correct. 12:47

16 266 Q. Okay, thank you. And can we apply *that* test, the one  
17 you've just articulated, you've articulated it well and  
18 very clearly, can we apply that test to all the  
19 questions I'm going to ask you today about your opinion  
20 of US law, Professor, please? 12:47

21 A. So just to clarify what you're asking, you're asking me  
22 to make a predictive statement --

23 267 Q. Exactly.

24 A. -- and not a statement of what I think the law should  
25 be -- 12:48

26 268 Q. Correct.

27 A. -- and where it will go over time or something like  
28 that?

29 269 Q. Absolutely. I want you to predict what the law of the

1 United States is and how a court is likely to decide  
2 it, in your opinion.

3 A. Okay.

4 270 Q. Now, this is obvious again, I don't think it's the  
5 subject of dispute, but just so we are *absolutely* clear 12:48  
6 and the court has these matters together, you're not  
7 giving evidence about European law, but you know a bit  
8 about it?

9 A. Correct.

10 271 Q. Clearly. 12:48

11 A. Yeah.

12 272 Q. And you understand that under the law of the European  
13 Union, there's a *right*, a Charter *right* to data  
14 privacy, a right to the protection of personal data and  
15 you know that European Union law starts from the 12:48  
16 premise of a right not to have your data accessed,  
17 used, disclosed, retained, a right of fair processing  
18 and so forth?

19 A. Yes.

20 273 Q. You agree with that? 12:48

21 A. Yes.

22 274 Q. And it's not to say, and I'm not putting it in these  
23 terms for the purposes of *this* principle, but we'll  
24 come back to it, it's not to say, to comment on it one  
25 way or the other, but American law is *different in* 12:49  
26 *structure* in this regard?

27 A. Yes.

28 275 Q. There's no right to data privacy so described or in the  
29 same way in the United States Constitution, but there

1           are rights, express or implied, under the United States  
2           Constitution which, in certain circumstances, provide  
3           protection for data privacy, is that a --

4           A.    I agree with that.

5   276   Q.    Yeah.  And some of those rights may be derived from the 12:49  
6           Fourth Amendment insofar as search and seizure requires  
7           probable cause and the like and some of them may be  
8           derived from the First Amendment insofar as *some*  
9           invasions of data privacy might also have a chilling  
10          effect on speech, is that... 12:49

11          A.    I agree with that.

12   277   Q.    Okay.  And then that is supplemented in American law by  
13          a range - I'm not going to use the word "fragmented" -  
14          but a range of different statutory provisions which  
15          provide privacy or data privacy protection in certain 12:50  
16          circumstances?

17          A.    I agree.

18   278   Q.    Now, you've read and obviously very carefully  
19          considered the first report of Mr. Serwin?

20          A.    I've read it, yes. 12:50

21   279   Q.    Yeah.  Does that answer mean that you haven't *carefully*  
22          considered it?

23          A.    I'm not always good at memorising everything, but I'll  
24          do my best to -- if I've read it more than once?  Yes.

25   280   Q.    Okay.  well, it's not a memory test and I'm not going 12:50  
26          to play games with you in terms of what he said or  
27          didn't say, I just want to establish that prior to  
28          writing your report, you considered Mr. Serwin's first  
29          report - he prepared two?

1 A. I received it after, at some point during the  
2 preparation of my report, yes.

3 281 Q. Okay. So you had it?

4 A. I had it before I submitted my report to the court.

5 282 Q. Okay. And you read it? 12:51

6 A. Yes.

7 283 Q. Okay. And you considered it?

8 A. Yes.

9 284 Q. And I'm sure you read it carefully?

10 A. Yes. 12:51

11 285 Q. So you read and carefully considered it prior to your  
12 report?

13 A. Okay.

14 286 Q. Okay. Did you read the decision in Spokeo before you  
15 furnished your report? 12:51

16 A. I believe I read press accounts about it, but hadn't  
17 read the full text.

18 287 Q. Ah.

19 A. "Press" meaning I have my inbox with current privacy  
20 news items and so I would read the one-paragraph 12:51  
21 summary sometimes of things.

22 288 Q. Okay. Well, it's a decision of the United States  
23 Supreme Court handed down on 18th May. Right?

24 A. I don't have the date, but it sounds right.

25 289 Q. Well, the United States Supreme Court presumably 12:51  
26 doesn't hand down cases related to data privacy issues  
27 every day of the week?

28 A. No, sir, it does not.

29 290 Q. No. So this is a significant enough event. Mr. Serwin

1 was aware of it the day it happened and indeed thought  
2 it sufficiently important to issue a new report to take  
3 account of it. You hadn't even *read* it?

4 A. I can't tell you under oath that I *didn't* read it. I  
5 will say - and this is relevant to what I cover and 12:52  
6 what I don't cover - that I'm not, I don't get the  
7 daily reports of all the Supreme Court cases. In my  
8 study of what I work on, a lot of it is not about  
9 Supreme Court case law or Circuit Court case law, a lot  
10 of it's on other issues, including technology and legal 12:52  
11 issues that come from the administrative side. So I do  
12 not read any -- I do not read a substantial number of  
13 Supreme Court cases every year.

14 291 Q. All right. So it's quite possible you *hadn't* read it  
15 before the time -- before you delivered your report, 12:52  
16 you don't know?

17 A. As I said, I believe that I read a summary of it at  
18 least, but I don't know if I read more than that.

19 292 Q. But this is a case concerned with *remedies* in the  
20 American federal legal system for data breach, in which 12:53  
21 it's found there's no Article III standing. And you're  
22 writing a report about data remedies in US law in which  
23 you've a section about standing. Why didn't you get a  
24 copy of the decision to read what the United States  
25 Supreme Court had said on the topic? 12:53

26 A. I felt that my assistance to the court was providing  
27 the materials that I provided here in detail. I did  
28 two pages on standing because I found out in the course  
29 of the materials that that was something others were

1 talking about. But in order to explain the safeguards  
2 of personal information as I understand it in the  
3 American system, I went into great detail and did a lot  
4 of reading on many other topics.

5 293 Q. Well, it's very funny you say that, Prof. Swire, 12:53  
6 because one of the mysteries of your report is that you  
7 do not disclose in it what it is you were asked to  
8 *address* by Facebook.

9 A. Yes.

10 294 Q. So can you tell us now please what is it Facebook asked 12:54  
11 you *to address* in your expert report?

12 A. So I reviewed the charge letter within the last week or  
13 so, to go back to it, that we had right at the start  
14 and the way I --

15 295 Q. I'm sorry, you used a phrase there which I'm certainly 12:54  
16 not familiar, the "charge letter".

17 A. Oh, I'm sorry. I was charged to do a certain thing, I  
18 was instructed to give a report on a certain scope.  
19 That's what I intended to convey by that.

20 296 Q. Yeah. 12:54

21 A. The way that I explained it to the people working with  
22 me is my job is to explain US surveillance law to a  
23 European Union legal audience. And so in my experience  
24 it's been very confusing and difficult for many people  
25 in the United States *and* the EU to understand this 12:55  
26 complicated system of FISA and the rest, and so I tried  
27 to put out in a systematic way 'Here's how there's  
28 protections around personal information that come up in  
29 the national security investigations, here's what the

1 different safeguards are, here's what the different  
2 problems are'. And that's what I tried to explain in  
3 my report.

4 297 Q. Well, are you saying that in your charge letter Gibson  
5 Dunn said 'Dear Prof. Swire, could you please *explain*  
6 US surveillance law to a European legal audience?' Is  
7 that what you were asked to do?

12:55

8 A. That's a paraphrase that catches a fairly close  
9 approximation. I think -- again, so I'll try to say my  
10 best recollection of the words in the letter. But it  
11 was an along the lines of the following: 'Tell us what  
12 the constitutional statutory administrative practical  
13 public disclosure and other safeguards are that apply  
14 to information that's collected in the course of  
15 national security investigations'.

12:55

12:56

16  
17 And what I do remember was that it went beyond  
18 constitutional and sort of legal case to being the  
19 things such as the documents that Mr. Gallagher was  
20 asking me later today - what is the agency policy on  
21 signals intelligence and what are the 12333 -- you  
22 know, what are all the different administrative  
23 procedure and agency protections? Because in my  
24 experience, those are extremely important to the actual  
25 structure of how the data is handled and the safeguards  
26 are extremely important to coming to some view about  
27 how carefully the data is handled.

12:56

12:56

28 298 Q. Were you asked to express your view as to the remedies  
29 available to US -- to EU citizens whose data was

1 accessed by the government in the United States?

2 A. To the best of my recollection, that was part of it

3 also.

4 299 Q. Sorry, that was part of it?

5 A. That was part of it also. 12:57

6 300 Q. Well, that's not part of what you just read out there.

7 So can you please help us and tell us with some

8 particularity what it is you were asked to do?

9 A. I've explained to the best of my recollection -- I

10 explained to you the basic mental idea I had that 12:57

11 explained what I was trying to do; how was the data

12 safeguarded for EU citizens. And that includes after

13 the fact there may be remedies. But it includes, as

14 the data goes through the data cycle, what are the

15 different protections as it happens. 12:57

16 301 Q. Were you *expressly* asked to address remedies?

17 A. To the best of my recollection, the word remedies was

18 in there.

19 302 Q. Remedies. Okay. And standing is a fairly important

20 part of remedies, is it not? 12:57

21 A. I don't remember if the word "standing" was in the

22 letter.

23 303 Q. Were you given a copy of the DPC decision?

24 A. Yes.

25 304 Q. Did you read it? 12:57

26 A. Yes.

27 305 Q. And you will have seen from it that standing features

28 prominently in the DPC reasoning, isn't that right?

29 A. That's correct.

1 306 Q. Okay. So standing was an important part of what you  
2 had been asked to address, correct?

3 A. Well, so it was - we've just gone through it - it was  
4 important in the DPC's opinion, I agree with that --

5 307 Q. Yeah. 12:58

6 A. I believe that - and this is similar, for instance, to  
7 the similar material I put out in my testimony to the  
8 Belgian authority a year ago - that explaining how the  
9 system works and how different that is from some of the  
10 statements about the US system in the previous round of 12:58  
11 litigation was a useful thing I could do in this report  
12 so the court would have the benefit of having that  
13 background.

14 308 Q. I understand. Remedies and standing were part of what  
15 you knew you had to address in your report? 12:58

16 A. That's correct.

17 309 Q. Okay. And you have a section on standing.

18 A. Yes, I do.

19 310 Q. You knew that standing featured prominently in the DPC  
20 decision. 12:58

21 A. Yes.

22 311 Q. It was, therefore, going to be important to the court  
23 in the context of these proceedings?

24 A. I -- okay.

25 312 Q. You agree? 12:59

26 A. So I don't have a view in Irish law of exactly how much  
27 the court is going to do *exactly* the issues and only  
28 the issues in the DPC's draft opinion. I don't have an  
29 answer on that.

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**MR. MURRAY:** It's just one o'clock, Judge.

**MS. JUSTICE COSTELLO:** Very good. We'll take it up at two o'clock.

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

12:59

**(LUNCHEON ADJOURNMENT)**

1 THE HEARING CONTINUED AFTER LUNCH AS FOLLOWS:

2  
3 MS. JUSTICE COSTELLO: Good afternoon.

4 REGISTRAR: In the matter of Data Protection  
5 Commissioner -v- Facebook Ireland Ltd. and another. 14:02

6  
7 CONTINUATION OF CROSS-EXAMINATION OF PROF. SWIRE BY  
8 MR. MURRAY

9  
10 MR. GALLAGHER: Sorry, Prof. Swire, please. 14:02

11 MR. MURRAY: Good afternoon, Professor.

12 WITNESS: Good afternoon.

13 313 Q. I'm going to move on.

14 A. Could I raise one thing for clarity from this morning  
15 where I said something incorrectly and I would like to 14:02  
16 correct it.

17 314 Q. Please do.

18 A. Okay. Your Honour, during the break I went back to  
19 look at the listed changes and the number was different  
20 than what I said this morning, so I don't want to be on 14:02  
21 the record as saying an incorrect number.

22  
23 Doing the complete list of the proposed changes and  
24 actual changes made, the actual number of changes made  
25 was 70 approximately. Some examples are there was a 14:03  
26 link not working in a footnote, something written as  
27 February 17th for a date and it was February 20th, a  
28 case name was spelled incorrectly. There is a whole  
29 series of small things, but I said a smaller number

1 this morning and I didn't want that to be...  
2 315 Q. Okay. Well thank you, Professor, we appreciate that.  
3 So 70 changes and hopefully Facebook will agree to  
4 provide us with that and your evidence that these are  
5 mere technical changes can hopefully be confirmed in 14:03  
6 that.  
7  
8 Now, professor, I'm going to move on to the Fourth  
9 Amendment and could I ask you please to look at your  
10 report. 14:03  
11 A. Yes.  
12 316 Q. Page 1-7, paragraph 20.  
13 A. Yes.  
14 317 Q. And I want to read this paragraph to you, please:  
15 14:03  
16 *"For protection against government access to personal*  
17 *data, the Fourth Amendment to the US Constitution which*  
18 *prohibits unreasonable searches of person, houses,*  
19 *papers and effects plays a particularly important*  
20 *role."* 14:04  
21  
22 And clearly that's correct: *"Foreign intelligence*  
23 *searches on a US person or on a non-US person who is in*  
24 *the US remains subject to the Fourth Amendment because*  
25 *such searches must meet the overall Fourth Amendment 14:04*  
26 *test that they be reasonable."*  
27  
28 And can I just ask you to stop there. Is it your  
29 evidence that a non-US person who has not established

1 any connection with the US by residence for a period  
2 but is merely there temporarily, is it your evidence  
3 that a non-US person in that situation can invoke the  
4 Fourth Amendment before the United States courts?  
5 A. So I'll state what I think you just said and I'll give 14:04  
6 my and if it's incorrect we'll -- so if you or someone  
7 in this country were to go to the United States and a  
8 search were done on you while you were in the United  
9 States, my evidence is that the Fourth Amendment would  
10 apply. 14:05  
11 318 Q. It *would* apply?  
12 A. Correct.  
13 319 Q. Yes. And is there any legal authority which so states?  
14 A. Hmm, I am confident that is the law in practice.  
15 I don't have the case name in my head for establishing 14:05  
16 that.  
17 320 Q. But you believe that there is a decision of the federal  
18 courts that so holds?  
19 A. I am confident there are decisions that so hold, yes.  
20 321 Q. Well, if we look at footnote 17 you cite a case called 14:05  
21 **In Re Sealed** case, is that a case which so holds?  
22 A. I would need to look at it to confirm. But this is  
23 part of my limitations as a human being, I don't  
24 remember every case, but if it's there that means that  
25 we have checked that it is there, and I have checked 14:05  
26 that it is there, so that would be such a case.  
27 322 Q. Well maybe the best way if you just tell us what that  
28 case was about?  
29 A. Ah. So for -- should I go, is it in the folders and we

1           could look at it?

2   323   Q.   No, I'm asking you to tell us what the case is about,  
3           Professor?

4           A.   And the answer is that I don't know from the title In  
5           Re Sealed case what the case is about. 14:06

6   324   Q.   Well, I'm sorry. We're now talking about the *Fourth*  
7           Amendment which is the bedrock of constitutional  
8           protection in this area. We're talking about a  
9           statement that you have made in your report to the  
10          court and a legal authority which you have cited in 14:06  
11          support of that statement and I am asking you to tell  
12          us what the case is about and you don't know and I have  
13          asked you to tell us some case that establishes the  
14          proposition and until I referred you to the footnote  
15          you didn't know either, is that a fair summary of where 14:06  
16          we are?

17          A.   Yes.

18   325   Q.   Thank you. Now let's move on: "*These constitutional*  
19          *protections apply to searches conducted in the US,*  
20          *including on data transferred to the US.*" 14:06

21

22          Can I ask you to stop there?

23          A.   Yes.

24   326   Q.   Is that right or wrong?

25          A.   That's incorrect based on the amendment that we talked 14:06  
26          about earlier today.

27   327   Q.   Well now it's not incorrect based on the amendment --

28          A.   Sorry.

29   328   Q.   -- we talked about earlier today?

1 A. No.

2 329 Q. It's incorrect?

3 A. It's not my view, I believe that sentence is incorrect.

4 330 Q. Okay. So could you explain to us how it came about  
5 that a error of such an important kind in this case 14:07  
6 made its way into your report please?

7 A. So this is an instance where I have worked on Fourth  
8 Amendment, I have focussed on how it operates in a  
9 variety of settings. I have known that the practice  
10 for the courts and for the agencies has been that if 14:07  
11 somebody is in the United States that at that point  
12 when the search happens, if you're at the hotel in New  
13 York City that there is a search. That's things that a  
14 professor with experience in the area I was confident  
15 of. 14:07  
16

17 It turns out I had not focussed on the specific  
18 instance where the search happens in the United States  
19 but the individual is not in the United States. And it  
20 was in the course of reading Prof. Vladeck's work after 14:08  
21 I did this that I became aware that there's particular  
22 debate about that instance and I had not focussed on  
23 that instance here.

24 331 Q. But it turns out, Professor, to use your language, that  
25 you had not focussed on an issue that is central to 14:08  
26 this case, an EU citizen in the EU whose data is in the  
27 US, what else is this case about except that situation?

28 A. So that's a -- so I think, what I would say is that  
29 there is the Verdugo case, which I have read and which

1 is cited here and in the other people's things, which  
2 is on facts that are different from a data search in  
3 the United States. What I have said is that we do not  
4 have an authoritative case that I'm aware of, or that  
5 Prof. Vladeck is aware of, that has held specifically 14:09  
6 about this question of searches done in the United  
7 States where the individual has not established any  
8 connection to the United States.

9  
10 And so it's a particular area of the law where there's 14:09  
11 no Supreme Court case, and where I hadn't directed my  
12 attention to, I had not directed my attention to the  
13 level I have now that we have done this work.

14 332 Q. But, Professor, how did it happen that you didn't  
15 direct your attention to the position of an EU citizen 14:09  
16 whose data is in the United States and was seized, how  
17 did it happen that you didn't direct your attention to  
18 that question?

19 A. Hmm, I think what happened here is I thought that the,  
20 without having done the particular research to find out 14:09  
21 that there hadn't been such a case, I was under the  
22 view that I knew that a search done in the United  
23 States triggered Fourth Amendment and I had not seen  
24 law review article or debate or whatever that said 'but  
25 it's different if the search is done in the United 14:10  
26 States and the person is not physically in the United  
27 States', I just hadn't seen that.

28 333 Q. How could you make these statements in your report to  
29 the court without going and checking the law which is

1 your area of expertise?

2 A. Well, there's no case on point. That's the statement  
3 that Prof. Vladeck and I each said at the end. We  
4 don't have a case that talks directly to it --

5 334 Q. Well, excuse me. 14:10

6 A. -- and so researching the negative is extremely  
7 difficult.

8 335 Q. Excuse me please, Professor. What the agreed statement  
9 says is you don't have a United States Supreme Court  
10 case, is that not what the agreement statement says? 14:11  
11 It doesn't say you don't have a case?

12 A. That's correct.

13 336 Q. Yes. So you're wrong there again? Did you look to see  
14 if there -- well maybe you'll help us because we don't  
15 know: when lawyers in the United States try to 14:11  
16 ascertain the position under a matter of federal  
17 constitutional law, presumably you start off looking to  
18 see if there's a Supreme Court decision which is  
19 apposite and binding?

20 A. That is certainly something you could start with. 14:11

21 337 Q. That's where you begin?

22 A. Yes.

23 338 Q. And if there's none you move and look and see if  
24 there's decisions in the circuits; is that right?

25 A. Other things you would do is look for treatise, 14:11  
26 authorities, law review articles, secondary sources  
27 where somebody has done a study of it, yes.

28 339 Q. All right. So if you are going to make a proposition  
29 to the court which you *know* is central to the issues

1 with which the court is concerned here, viz US legal  
2 remedies for EU persons whose data is in the US, if you  
3 are going to make such a statement do you not go and  
4 research all of the available cases to see and  
5 commentaries to see if there is anything that supports 14:12  
6 the proposition you include in your report?

7 A. I did a lot of research for this case. I had people  
8 assisting me who did a lot of research for this case.  
9 I tried very hard to be accurate in many different  
10 specific places in this case. In this area I focussed 14:12  
11 on section 702, the statutory things, the many other  
12 things in the report. I did not do as much research in  
13 this area as I now wish I had.

14 340 Q. But you didn't research this point at all and you cite  
15 it as authority for the first part of your proposition, 14:12  
16 a case about which you are unable to tell the court  
17 anything? But you weren't just making this as an  
18 aside, can I ask you to look at footnote 18 please:

19  
20 *"In some European writing about US law, there has been 14:13*  
21 *confusion about the effect of the US Supreme Court*  
22 *cases defining the scope of the protection afforded by*  
23 *the Fourth Amendment such as United States -v-*  
24 *Verdugo-Urquidez. As discussed in more detail in*  
25 *chapters 3 and 4, the Fourth Amendment applies to 14:13*  
26 *searches performed in the US, including for data*  
27 *transferred from the EU."*

28 A. Right. So I don't agree with that statement.

29 341 Q. No, either. Well, you see, Professor, I don't know

1           that it's quite this easy, that you simply tell us you  
2           don't agree with that statement. This is a report  
3           prepared by you *for the court*, solemnly attested by you  
4           on oath in affidavit, you are now telling us that a  
5           statement of law that you make you equivocally and           14:13  
6           categorically was wrong and that you did not research  
7           the point prior to making it?

8           A.    I was wrong on this point.

9   342   Q.    When did you discover you were wrong?

10          A.    No later than when the experts meeting happened,           14:14  
11          I don't remember before then.

12   343   Q.    So it's possible you found out before then?

13          A.    It's possible. You asked my question, I'm trying to  
14          remember. I know that it came up in the experts  
15          meeting. I was looking at Prof. Vladeck, Ms. Gorski,           14:14  
16          my own statements there. And in the course of looking  
17          at that I came to the view that there was more  
18          complexity there that I had not known about.

19   344   Q.    Well, how did you find out you were wrong?

20          A.    Hmm, so what I do recollect is in that meeting, and           14:14  
21          I don't know how much we are supposed to talk about  
22          what happened in the meeting.

23   345   Q.    No, I don't want to know what happened in the meeting?

24          A.    Right.

25   346   Q.    If you're telling us now, which is not what you told me           14:15  
26          the first time I asked you, that you found out at the  
27          meeting, fine, but if you're telling us if you find out  
28          *before* the meeting, I'm asking you to tell us how you  
29          found out, what was it that alerted you to your error?

1 A. So in reviewing, after I submitted my testimony I saw  
2 Prof. Vladeck's testimony for the first time.  
3 Professor Gorski's testimony was supplied to me very  
4 late before I sent it and I read it but quickly and  
5 didn't, I was so busy trying to finish my own document 14:15  
6 that in the short amount of time I didn't do the sort  
7 of thorough vetting of her report that one would do  
8 typically. So between --

9 347 Q. **MS. JUSTICE COSTELLO:** Sorry which report do you mean  
10 there, Ms. Gorski's? 14:15

11 A. Yes. And so it had been submitted, I was rushing to  
12 finish by November 3rd, I looked at it and said I have  
13 to finish writing my thing, that's roughly what  
14 happened.

15 14:16

16 And so I don't, I can't tell exactly when in re-reading  
17 her report and reading Prof. Vladeck's report and/or in  
18 the meeting with the experts but along the way of that  
19 I became aware that other experts had made statements  
20 that I learned from so when the expert meeting happened 14:16  
21 I was very clear I wanted to change my statement on  
22 this point and I did change my statement.

23 348 Q. How did you change your statement?

24 A. Well, I took this to be, I took the experts report to  
25 be 'I'm now clarifying what Swire believes on this 14:16  
26 point'.

27 349 Q. Did you write this paragraph in your statement?

28 A. I did write the paragraph in the statement. The  
29 summary, yes, absolutely.

1 350 Q. Did you write, did you read the decision In Re Sealed  
2 case to which you refer?  
3 A. Hmm -- oh, that's 2002, yes, I read that case. Now  
4 I know what case it is. It was the first declassified  
5 case, it was the DC circuit case by Judge Silverman 14:17  
6 about the wall coming down between the FISA foreign  
7 surveillance and the criminal investigation. I have  
8 written about it in my 2004 article, now that I see  
9 what it is, yes.

10 351 Q. And does that case, Professor, say that foreign 14:17  
11 intelligence searches, searches on a US person or a  
12 non-US person in the US are subject to the Fourth  
13 Amendment?  
14 A. So now I have refreshed my recollection, the In Re  
15 Sealed case was not a good hint, 2002 was a very good 14:17  
16 hint. So this was the first case where the FISA  
17 Appeals Court gave an opinion. So that was an  
18 important thing. It's the first published opinion by a  
19 Court of Appeals on FISA, and I write about that in  
20 detail in my 2004 article on the Foreign Intelligence 14:17  
21 Surveillance Act.  
22  
23 So that was the first authoritative statement at the  
24 Court of Appeals level of how FISA operates and how the  
25 Fourth Amendment operates. And so it was on that basis 14:18  
26 that I thought this was authoritative because it was in  
27 the Court of Appeals in the FISA context and so I was  
28 citing to the best authority we have for this important  
29 statement.

1 352 Q. Does it address that issue?  
2 A. To the best of my recollection it does.  
3 353 Q. It does.  
4 A. That's the best of my recollection from a 2002 case,  
5 yes. 14:18  
6 **MR. GALLAGHER:** I think the witness should be entitled  
7 to refer to the case.  
8 **MR. MURRAY:** Oh, certainly.  
9 **MS. JUSTICE COSTELLO:** well in due course. But he is  
10 entitled to conduct his cross-examination. 14:18  
11 354 Q. **MR. MURRAY:** I just want to ask one other question.  
12 Thank you, Professor. So can I ask you to go forward  
13 please to page 3-4 and look at footnote 13. *"In my*  
14 *experience"*?  
15 A. Could I just finish reading it because it's a long 14:19  
16 footnote, is that okay?  
17 355 Q. Well, I was going to read it out.  
18 A. Okay, that's fine. Please go ahead.  
19 356 Q. *"In my experience, there has been some confusion about*  
20 *the way the Fourth Amendment applies to non-US persons.* 14:19  
21 *Briefly, the Fourth Amendment applies to searches and*  
22 *seizures which takes place within the US (such as on*  
23 *data transferred to the US), and to searches against US*  
24 *persons (US citizens as well as permanent residents)*  
25 *that take place outside of the US. For foreign* 14:19  
26 *intelligence collected in the US, such as personal data*  
27 *transferred from the EU by a company, the Fourth*  
28 *Amendment continues to apply, because all searches must*  
29 *meet the overall Fourth Amendment test that they be*



1 360 Q. We have a copy of it for you.

2 A. Yes, okay.

3 361 Q. If there is any particular aspect of that, in fairness  
4 to you, given that you are familiar with it, that you  
5 would like to draw our attention to please do so. 14:21

6 A. No, I think I have explained the reason for me citing  
7 to the case which is all searches must meet a  
8 reasonableness test and I have explained that I made a  
9 mistake about what counts as a search. So if the data  
10 comes in from outside the United States it's not a 14:21  
11 search and that's the mistake I made.

12 362 Q. Now what you said this morning - sorry, excuse me -  
13 what you said yesterday was that: "*If anyone in the*  
14 *room goes to the United States you get Fourth Amendment*  
15 *protection*"? 14:21

16 A. That's the point about being physically in the United  
17 States.

18 363 Q. Yes. So what's the legal authority for that?

19 A. Hmm, so this is where my ability to cite every case is  
20 not as wonderful as I wish it were. But I believe you 14:21  
21 would see that in Verdugo, though Verdugo is not a  
22 factual situation where's the search was done inside  
23 the United States.

24 364 Q. All right. So it's the Supreme Court decision in  
25 Verdugo that establishes that non-US citizens and non - 14:22  
26 sorry, excuse me. It is Verdugo, are you saying that  
27 Verdugo establishes that a person who is neither a US  
28 citizen nor a permanent resident of the US, and you  
29 understand what I mean by that phrase?

1 A. Yes, I do.

2 365 Q. A person with a close connection, that such a person  
3 can rely upon the Fourth Amendment, does Verdugo  
4 establish that?

5 A. I believe that to be US law and I do not know if that's 14:22  
6 the best authority for that proposition.

7 366 Q. Oh, I see, sorry.

8 A. It's my recollection but I...

9 367 Q. Okay. Well maybe then we will take a look at Verdugo  
10 which is, I think, in Book 2 of the authorities and 14:22  
11 hopefully someone can furnish the professor with it.

12 A. (SAME HANDED TO THE WITNESS) it's in this one, Book 2?  
13 This is small Book 3.

14 **MS. JUSTICE COSTELLO:** Do you recall which tab it is,  
15 Mr. Murray? 14:23

16 **MR. MURRAY:** It's Tab 41, Ms. Hyland says, Judge.

17 A. Okay.

18 368 Q. Okay. I'm going to perhaps explain my understanding of  
19 this case to you. You are familiar with the facts,  
20 Professor? Professor? 14:23

21 A. Yes, this is the search in Mexico is the key fact here.

22 369 Q. Correct. And I'm going to suggest to you that the  
23 reasoning of the courts, simply as I understand it, was  
24 that the Fourth Amendment in its terms was directed to  
25 a class of persons who had become part of the national 14:23  
26 community or developed a sufficient connection with the  
27 United States to be considered part of that community,  
28 is that?

29 A. I am sorry, I was reading and I didn't hear, could you

1 say it again? Apologies.

2 370 Q. Yes, of course. It's my understanding that what this  
3 case decides is that the Fourth Amendment in its terms  
4 was directed to a class of persons who had become part  
5 of the national community or had developed a sufficient 14:24  
6 connection with the United States to be considered part  
7 of that community?

8 A. Okay.

9 371 Q. Is that an incorrect understanding of the case?

10 A. I'm glad to go with that at this point. 14:24

11 372 Q. Well, no, I am sorry. I'm not interested -- excuse me?

12 A. As far as I -- I am sorry, I didn't mean to be  
13 difficult.

14 373 Q. No, no. I just suggested --

15 A. In its terms the people -- yes. 14:24

16 374 Q. Well let's look then at page 265, please. And we see,  
17 maybe about a third of the page up, while the  
18 textual --

19 A. You said 265, I am turning to it, yes.

20 375 Q. 265, about a third of the page up, after quoting from 14:24  
21 Article 121: *"while this textual exegesis is by no*  
22 *means conclusive it suggests that 'the people'*  
23 *protected by the Fourth Amendment, and by the First and*  
24 *Second Amendments, and to whom rights and powers were*  
25 *are reserved in the Ninth and Tenth Amendments, refers 14:25*  
26 *to a class of persons who are part of a national*  
27 *community or who have otherwise developed sufficient*  
28 *connection with this country to be considered part of*  
29 *that community."*

1 And then if you go to the next page, the very last  
2 sentence: *"The available historical data show,*  
3 *therefore, that the purpose of the Fourth Amendment was*  
4 *to protect the people of the United States against*  
5 *arbitrary action by their own government; it was never* 14:25  
6 *suggested that the provision was intended to the*  
7 *restrain the actions of the Federal Government against*  
8 *aliens outside the territory."*

9  
10 And I don't think there is any issue -- 14:25

11 A. Right.

12 376 Q. -- in what we're talking about at the moment about  
13 that, although we'll come back to it in another context  
14 later.

15  
16 Then if you go page 271, and it's midway down this page  
17 that I want you to look at, Professor. After citing a  
18 number of cases what the opinion of the court says is:

19  
20 *"These cases, however, establish only that aliens* 14:26  
21 *receive constitutional protections when they have come*  
22 *within the territory of the United States and developed*  
23 *substantial connections with this country."*

24  
25 And then Plyler is quoted: *"The provisions of the* 14:26  
26 *Fourteenth Amendment 'are universal in their*  
27 *application, to all persons within the territorial*  
28 *jurisdiction'."*

1           *"The Bill of Rights is a futile authority for the alien*  
2           *seeking admission for the first time. Once an alien*  
3           *lawfully enters and resides he becomes invested."*

4  
5           And then: *"Respondent is an alien who has had no* 14:26  
6           *previous significant voluntary connection with the*  
7           *United States, so these cases avail him not."*

8  
9           Is there a misinterpretation of the decision, is there  
10          a -- 14:26

11          A. I've been reading -- I apologise. I'm trying to read  
12          and listen at the same time and I'm doing a bad job.

13   377   Q. Yes.

14          A. Where do you want me to direct my attention please.

15   378   Q. Well, Professor, I am terribly sorry about this, but it 14:26  
16          appears almost as if you are reading this for the first  
17          time. This is a case that has featured in the  
18          discussion in court for the last week, do you know what  
19          the various parts of the judgment say?

20          A. I have read it. I have not reread it this week. 14:27

21   379   Q. When have you last read it?

22          A. I don't know for sure, at some point in preparation for  
23          this case. But I don't know.

24   380   Q. Had you read it before you prepared your report?

25          A. I believe so. I at least read summaries and 14:27  
26          discussions of it and I don't remember if I read the  
27          whole thing.

28   381   Q. I was putting it to you, Professor, that the passage  
29          that I had quoted on page 271?

1 A. Yes.

2 382 Q. Starting after Yick Wo -v- Hopkins?

3 A. Mm hmm.

4 383 Q. Suggested that only aliens within the state, within the 14:27  
5 territory who had developed a substantial connection  
6 could avail of the provision?

7 A. Right. And then on the next page, when they are  
8 talking about INS -v- Lopez-Mendoza, a majority of  
9 justices assumed that the Fourth Amendment applied to  
10 illegal aliens in the United States. 14:28

11 **MS. JUSTICE COSTELLO:** Is that a separate judgment, is  
12 that Justice Stevens' judgment?

13 **MR. MURRAY:** It's not, I made the same mistake. They  
14 put his name in capital letters when they are talking  
15 about him. 14:28

16 A. No, this is in the majority opinion.

17 **MS. JUSTICE COSTELLO:** Thank you very much. No, it is  
18 just it looks, in our reporting style, I am just  
19 asking.

20 A. It looks like that, right. So there was a previous 14:28  
21 decision in INS -v- Lopez-Mendoza, this is in the  
22 middle of 272.

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

24 A. And in that case a majority of justices assumed the  
25 Fourth Amendment applied to illegal aliens. The court 14:28  
26 says we cannot fault the Court of Appeals for placing  
27 reliance on that case and then they talk about where it  
28 applies and where it doesn't apply.

29 384 Q. **MR. MURRAY:** Okay, Professor. Do you want to say

1 anything else about the Verdugo case before I move on?

2 A. No.

3 385 Q. Okay. Professor, I want to talk to you now about the  
4 decision in Spokeo. You have read this case now?

5 A. Recently, yes. 14:29

6 386 Q. It didn't feature in your report because you hadn't  
7 read it?

8 A. It didn't feature in my report, that's right.

9 387 Q. It did feature in Mr. Serwin's report?

10 A. Yes. 14:29

11 388 Q. But even that being the case you still didn't read it?

12 A. Correct.

13 389 Q. And can you give us an explanation for that?

14 A. I think my explanation is I worked hard, I wrote a lot  
15 of things and I read a lot of things and I didn't read 14:29  
16 everything.

17 390 Q. All right, Professor. I had understood from your  
18 evidence this morning, and please correct me if I'm  
19 wrong, that you appear to be relating the Spokeo case  
20 very much to the legislation which was in issue, do you 14:29  
21 believe it applies *outside* the scope of that  
22 legislation?

23 A. Well, I'd say just as a general matter of, while you're  
24 reading a Supreme Court opinion, that facts and the  
25 holding are in the position of the particular facts in 14:30  
26 the legislation there and then lawyers look to that as  
27 precedent for other cases, that's the standard way  
28 I think to say it.

29 391 Q. Do you think the decision has any role in cases in

1           which it is alleged that there have been breaches of  
2           legislation conferring privacy or data privacy rights?  
3           A.    Is that the question?  
4   392   Q.    Yes.  
5           A.    So what I said this morning, which I'll answer your       14:30  
6           question, is that in my experience standing cases are  
7           best understood in a particular factual setting, a  
8           judge looks at the concrete situation and comes to the  
9           view the judge comes to. In this case it was a  
10          particular statute and the court came to the view it       14:31  
11          came to. It would be natural in the next statutory  
12          case for lawyers to look at that and the two parties  
13          would then argue about how relevant, how similar or  
14          distinct the situation were. But, yes, other statutory  
15          claims, I believe the lawyers would look to that and if   14:31  
16          it would help their case they would cite to Spokeo for  
17          support.  
18   393   Q.    Yes. I think all people in court, or at least in the  
19          front part of it, understand the process that you have  
20          just described, Professor?                                       14:31  
21          A.    Okay, yes.  
22          **MS. JUSTICE COSTELLO:** I hope you're not excluding me,  
23          Mr. Murray.  
24          **MR. MURRAY:** I did say in the front part of the court,  
25          Judge.   14:31  
26          **MR. GALLAGHER:** It was ambiguous certainly, Judge.  
27   394   Q.    **MR. MURRAY:** we understand how this process operates  
28          but thank you for the explanation. What I'm more  
29          interested is your professional or your expert opinion

1 as to whether the Spokeo rationale applies to cases  
2 involving statutes which confer rights of privacy or  
3 data protection?

4 A. Hmm, I am just trying to understand the words and give  
5 a good answer here. So the rationale would be that 14:32  
6 there needs to be the proper concrete and  
7 particularised finding under the statute of  
8 injury-in-fact, I think that's roughly a statement of  
9 that. And to that extent in the next statutory case  
10 I believe it would be appropriate to look to see if 14:32  
11 there's the correct concrete and particularised.

12 395 Q. All right. well, how do you think this relates to  
13 claims where a person say that their data rights, as  
14 they would be described in Europe, their rights under a  
15 statutory code, having their data not used in a 14:32  
16 particular way, not accessed in particular  
17 circumstances, does Spokeo operate to prevent them from  
18 claiming?

19 A. So two things I said about Spokeo today is that it  
20 wasn't the kind of harm the statute was supposed to 14:32  
21 address, at least not the typical harm, and that there  
22 was a full remedy under the statute. So if there was a  
23 next privacy claim where the privacy statute was not  
24 supposed to protect against that kind of harm and there  
25 was full redress in another way, then I don't think, 14:33  
26 then I think you would get a similar outcome, if it's  
27 not the same redress or if there's the kind of harm the  
28 statute is trying to protect against, then I think the  
29 plaintiff would have a strong claim for being covered

1 by the statute.

2 396 Q. I see. Well could we perhaps just test that against a  
3 number of propositions just so the court can understand  
4 how this case relates to standing in the cases with  
5 which the court is concerned. I think you'll accept, 14:33  
6 or would you accept, that prior to Spokeo the rule was  
7 that a plaintiff could satisfy Article III standing by  
8 alleging a statutory violation, do you think that's a  
9 correct statement of the law?

10 A. I believe it would be but with the qualifications that 14:33  
11 there might be some de minimis or not really what's  
12 violated by the statute kind of violations that  
13 wouldn't lead to the action.

14 397 Q. Would you agree with this statement: what Spokeo holds 14:34  
15 is that a plaintiff can't just do that, he has to come  
16 in and show *real* harm, would you agree with that  
17 statement or disagree with it?

18 A. I remember the words, particularised and concrete. If  
19 *real* was one of the words the court also used, which it  
20 might have, then I'd agree that that's what the court 14:34  
21 said.

22 398 Q. So if you have a piece of allocation that confers data  
23 privacy rights of whatever kind, a plaintiff who comes  
24 to court and says 'my privacy has been violated'  
25 without more, could not bring a claim because of 14:34  
26 Spokeo? Now, I'm not putting words in your mouth,  
27 I just want to understand exactly what you are saying;  
28 he couldn't bring a claim without more, he would have  
29 to prove *real* harm?

1 A. I think -- so, yes, those are words that are correct.  
2 If the privacy statute is there to make sure there's  
3 not disclosure when there shouldn't be, then the  
4 disclosure in my view would be the harm, or if the  
5 government is not supposed to look at the e-mail then 14:35  
6 the looking at the e-mail is the harm.

7 399 Q. Well, how about this statement: "*It's not enough to*  
8 *say it's just an invasion of privacy in the air, you*  
9 *have to show how your privacy was violated and how you*  
10 *were harmed*"? 14:35

11 A. Right. And in Spokeo the court's writing in the  
12 context where the person had a particularly positive  
13 credit report in a statute that's trying to stop people  
14 from being hurt by negative credit reports.

15 400 Q. Hmm. 14:35

16 A. And so it's sort of upside down from the usual  
17 situation where the statute is there to try to protect  
18 something, the person says 'I'm not being protected by  
19 that', and that's when you get to win.

20 401 Q. Mm hmm. 14:35

21 A. But if the statute is trying to protect something in a  
22 certain way and it's something different from that,  
23 then the court may find that's not what the statute  
24 protects.

25 402 Q. It's all just a bit unclear, isn't it? 14:36

26 A. I believe standing cases are often unclear.

27 403 Q. Right.

28 A. And we have had multiple experts testify to that.

29 404 Q. The Spokeo case appears to make it, to introduce even a

1 greater lack of clarity, do you agree?

2 A. It's a recent case that introduces new words that  
3 hadn't been as heavily emphasised as before.

4 405 Q. But the problem, as you know from sitting here, is that  
5 in privacy cases the Spokeo case on one view suggests 14:36  
6 it's not enough to say 'you accessed my data', it's not  
7 enough to say 'you used my data', you have to prove  
8 *harm* to have Article III standing and the mere  
9 invasion, the mere retention and gathering of data  
10 isn't a concrete injury, do you think those arguments 14:36  
11 are stateable or as I think the American phrase used  
12 during the week was *colourable* by another witness?

13 A. Right. I believe those would be colourable arguments  
14 and I believe the other side would be able to say with  
15 quite a bit of force that when the kind of protection 14:36  
16 the statute is there to protect against, that is going  
17 to work.

18 406 Q. Hmm.

19 A. When it's not the kind of protection the statute is  
20 intended for, then that's outside the scope. 14:37

21 407 Q. But you have defendants in data cases all around the  
22 United States applying to strike out claims on the  
23 basis that Spokeo bars them, there seem to have been a  
24 large number of such cases and many of the courts have  
25 acceded to those applications? 14:37

26 A. And this is where my focus on where I do study and my  
27 focus on where I don't study comes in. I have not gone  
28 and read the many cases that he refers to, I believe  
29 that's the case, but I haven't read those cases.

1 408 Q. Okay. Well were you aware that Facebook is being sued  
2 in a class action suit in the northern district of  
3 California by plaintiffs who allege breach of a state  
4 statute called the Illinois Biometric Information  
5 Privacy Act, have you heard of that suit? 14:38  
6 A. No.

7 409 Q. Okay. Do you have familiarity with these statutes  
8 which I think are in a number of states?  
9 A. I am somewhat familiar with the Illinois biometric  
10 statute. 14:38

11 410 Q. You are?  
12 A. Yes.

13 411 Q. Okay. And this is, biometric information is unique?  
14 A. Fingerprints, eye scans, these kind of things.

15 412 Q. Yes, exactly. The statute provides certain procedures 14:38  
16 which must be followed before someone who has or  
17 collects this data uses it in particular ways or stores  
18 it, isn't that in very general terms?  
19 A. That is correct, general, yes.

20 413 Q. It imposes a statutory obligation to provide certain 14:38  
21 information to a person before you obtain the biometric  
22 information, you have to tell them it will be stored?  
23 A. I think there is a notice, there is some notice  
24 requirement.

25 414 Q. Exactly, okay. And the complaint in the case is that 14:38  
26 Facebook was applying facial recognition software to  
27 their photos and analysing it. The case I think was in  
28 the newspapers, but maybe you have never heard of it?  
29 A. I understand how there could be such a case. I don't

1 remember reading accounts of such a case.

2 415 Q. So you were not aware therefore that after Spokeo came  
3 out Facebook went to the judge in the northern district  
4 and asked him to strike out the case on the grounds the  
5 plaintiffs had no Article III standing because of 14:39  
6 Spokeo?

7 A. I was not aware.

8 416 Q. Okay. well, we have a transcript of the argument in  
9 that case, I'm going to ask you to look at it. (SAME  
10 HANDED TO THE COURT) (SAME HANDED TO THE WITNESS) 14:39

11 A. Thank you.

12 417 Q. And I should say, Professor, obviously I'm sure  
13 Facebook has a defence to this case, I'm not suggesting  
14 otherwise. My interest in it is not that and not even  
15 whether the submissions they make are right. what I'm 14:39  
16 concerned that the judge understand in practical terms  
17 is how Spokeo is being used in cases of data breach.

18  
19 So if you go to page 4 and I think Ms. Goldman is  
20 counsel for Facebook: "*Prior to Spokeo the rule in the 14:40*  
21 *Ninth Circuit was that a plaintiff could satisfy*  
22 *Article III standing by alleging a statutory violation.*  
23 *He said if these statutory rights are violated,*  
24 *therefore I have standing and what Spokeo holds is that*  
25 *a plaintiff cannot just do that, he has to come in and 14:40*  
26 *show real world harm."*

27  
28 what's the real world harm if, in breach of the  
29 national surveillance laws, we're considering data is

1 handled in a way that's consistent with that?

2 A. Are you asking about the facial recognition and  
3 biometrics?

4 418 Q. No, I'm talking now about, I'm trying to use that  
5 phrase "*real world harm*" in the context with which you 14:40  
6 are concerned, what's the real world harm?

7 A. So I was reading this and trying to make sense out of  
8 it because it's new material to me. I was wondering if  
9 I could just briefly make a comment on this and then  
10 respond? 14:41

11 419 Q. Of course.

12 A. I teach about, you know I am aware of biometric  
13 statutes and have written about concerns about  
14 fingerprint databases not being protected well and  
15 such. And so in a fingerprint or other facial 14:41  
16 recognition setting, if I were on the side of the  
17 plaintiff I would say, and my biometrics had gone into  
18 this database, once they are there they might be  
19 breached and that risk of breach put me at risk of not  
20 being able to use my fingerprints again because they 14:41  
21 have been compromised. And so just myself I would have  
22 sympathy in that case for saying that that's a harm  
23 that comes from improper collection of biometrics. So  
24 that's why I -- I was just trying to understand the  
25 biometric case. 14:41

26 420 Q. No, absolutely. Well maybe let's help you if I ask you  
27 to go to the next page.

28 A. But do you want me to go to national security?

29 421 Q. I want you to look at the next page and then perhaps we

1 will come back?

2 A. Yes.

3 422 Q. Because there counsel gives examples: "*Did you lose*  
4 *money? Did the defendant embarrass you in a way that*  
5 *will support a lawsuit in federal court? Was your* 14:42  
6 *personal information exposed to the public in a way*  
7 *that humiliated you? what is your actual harm?"*

8 A. Yes.

9 423 Q. Now similar arguments could be made, I think you'll  
10 accept, if there were a breach of the national, of the 14:42  
11 national security surveillance statutes --

12 A. Yes, I do agree.

13 424 Q. -- with which we are concerned?

14 A. That kind of risk of breach of sensitive behaviour is a  
15 reason for concern and it's a reason to have these 14:42  
16 privacy protections, I agree with that.

17 425 Q. Yes. But if a plaintiff is to sue for a breach of  
18 these statutes, it would appear that defendants are not  
19 shy about raising these Article III standing points,  
20 they will come and they will say 'well hold on, so what 14:42  
21 if we held on to your information for a year longer  
22 than we should have, so what if we processed it in a  
23 way that the statute doesn't permit, so what if we  
24 passed it from the NSA to the FBI when we shouldn't  
25 have done so, so what if we obtained it other than in 14:43  
26 compliance with the FISA order, what's your real harm?  
27 Did you, was your personal information exposed to the  
28 public? No. Were you humiliated? No. What's your  
29 actual harm?' The argument is there to be made in

1 exactly the same way?

2 A. Right. And my view in the biometric case, not having  
3 the facts, but my view is that for a fingerprint to be  
4 breached would clearly be a harm.

5 426 Q. Okay. 14:43

6 A. So then if there is some risk of breach at some point,  
7 if the risk becomes important enough. And, similarly,  
8 if there's a breach of intelligence information that  
9 shouldn't happen, that would be a reason to say harm,  
10 and we had things like ACLU -v- Clapper that says that 14:43  
11 phone records were there, and at some point there's  
12 enough risk of that breach that there would be harm.

13 427 Q. But what's the harm for someone whose data was taken,  
14 should have been destroyed and in breach of the statute  
15 wasn't, what's their harm? 14:44

16 A. So I would say that the harm could include that they  
17 were, their information, perhaps embarrassing, but  
18 their information was being held by the NSA and they  
19 were under surveillance by the NSA and that's been  
20 revealed. 14:44

21 428 Q. The information is on a server in the NSA or it's in  
22 somebody's filing cabinet and it's there for a year  
23 longer than it should have been, what's the harm?

24 A. And similar to the fingerprint being in a database, one  
25 concern is the risk of breach. We have seen many 14:44  
26 breaches and that's at least one concern and that's  
27 then a place to fight over, that the risk there is  
28 significant enough that -- yes.

29 429 Q. Then you have to have the right, rather like the cases

1           which we saw with Prof. Richards, there is a risk of  
2           identity theft for instance in some of the fair trade  
3           or fair?  
4           A.    Fair credit.  
5   430   Q.    Fair credit report cases? 14:44  
6           A.    Yes.  
7   431   Q.    And that's not held to be sufficient in some of the  
8           circuits, a risk of identity theft. So what I am  
9           asking you, Professor, please in order to assist the  
10          court is what is the harm, within the formulation that 14:45  
11          we see counsel for Facebook agitating here, what's the  
12          harm in these data?  
13          A.    In the biometric situation?  
14   432   Q.    No, in the surveillance legislation with which we are 14:45  
15          concerned. Just take this one example, my information  
16          has been retained for a year more than it should have  
17          been under the relevant regulations or legislation?  
18          A.    Well so I have a couple of observations. One is, my  
19          testimony goes on at length about the fact that if it's  
20          found in the oversight proceedings that it was kept too 14:45  
21          long, the FISA court says purge those records and  
22          that's the practice. So we have administrative  
23          controls overseen by a court to say, if you break the  
24          rules, then we're going to make you purge the  
25          information. That's one kind of thing that happens 14:45  
26          under the law.  
27   433   Q.    I may have framed the question badly so please forgive  
28          me?  
29          A.    Yes.

1 434 Q. I'm asking you *this* question: If I am an EU citizen  
2 whose information has been seized under these  
3 provisions and it has been retained for longer than it  
4 should have been?

5 A. Mm hmm. 14:46

6 435 Q. And I want to sue, and I'm told by my lawyers Spokeo  
7 says you have to prove harm, am I not going to be  
8 barred by Spokeo because I have not suffered the type  
9 of harm which appears to be envisaged in these types of  
10 arguments? 14:46

11 A. And this goes to how closely a Fair Credit Reporting  
12 Act case with all the things we have talked about would  
13 turn out to be a precedent that would apply in a  
14 national security setting. No, as lawyers they are  
15 quite different factual settings. 14:46

16 436 Q. Oh, well...

17 A. Then, you know, one person would say it's the same  
18 thing, the other person would say it's different and  
19 the lawyers would -- but I do think that a much closer  
20 analogy would be ACLU -v- Clapper, the Second Circuit 14:46  
21 Clapper, where you could be asking what's the harm of  
22 having all these people's phone records in the database  
23 and the answer there was that there was standing.

24 437 Q. But there was standing because there had been a seizure  
25 of which those plaintiffs were entitled to complain 14:47  
26 under the Fourth Amendment, Professor, and European  
27 citizens, we agree, cannot?

28 A. Well okay. The fact that there's a particular legal  
29 basis for it is different from whether there is the

1 right kind of harm in standing. The point I was making  
2 about ACLU -v- Clapper is the right kind of harm and  
3 standing, not what the particular legal claim is based  
4 on.

5 438 Q. If we just go down the page, Ms. Goldman: "*In the wake* 14:47  
6 *of Spokeo courts all around the country have been*  
7 *dismissing claims holding that bare statutory violation*  
8 *is no longer enough.*"

9  
10 Does that sound right in your experience? 14:47

11 A. Well, that's -- as I said I haven't been reading all  
12 these district court cases, that's not where I focussed  
13 my energy.

14 439 Q. You don't know, okay. You don't know.

15 A. I don't know. 14:47

16 440 Q. Have you been reading the circuit court cases?

17 A. On standing, not particularly so.

18 441 Q. No. Then the next page, page 6 line 7: "*It's not*  
19 *enough to say the defendants scanned the photo of me as*  
20 *a template on its database, you have to show that as a* 14:48  
21 *result of that you are identified in some embarrassing*  
22 *situation, lost your job or you tried to sell your*  
23 *biometric information, you were unable to do so because*  
24 *Facebook cornered the market and added value. You have*  
25 *to show real world injury.*" 14:48

26  
27 Do you see that?

28 A. Yes.

29 442 Q. And then go over the page, page 7.

1 A. After the judge says she is sceptical, that Spokeo is a  
2 big change in the law.

3 443 Q. Oh, no, the judge is sceptical. Go over the page.

4 A. Yeah.

5 444 Q. *"Well, we would not say - said Ms. Goldman - that the 14:48*  
6 *cases all hold that invasions of privacy are sufficient*  
7 *after Spokeo."*

8

9 And then she quotes some other cases, the Northern  
10 District of Illinois in McCullough -v- Smarte Carte, 14:48  
11 that a bare BIPA violation does not satisfy Article  
12 III. She said - that's the judge:

13

14 *"I understand you have these statutory rights, but*  
15 *there's a difference between a statutory right and an 14:48*  
16 *injury flowing from the violation of that right and*  
17 *it's not enough to say it's just an invasion of privacy*  
18 *in the air, you have to show how your privacy was*  
19 *violated and how you were harmed."*

20 14:49

21 Do those sort of statements reflect United States law  
22 after Spokeo in your opinion?

23 A. As I say I haven't read all the cases. They reflect  
24 what defence counsel says when they are trying to stop  
25 a case. I don't have a view of how often that argument 14:49  
26 wins or loses.

27 445 Q. I see, but I wasn't asking you that. I was asking you  
28 the statement: *"You have to show more than just an*  
29 *invasion of privacy in the air, you have to show how*

1           *your privacy was violated and how you were harmed."*

2

3           I'm asking you is that a correct statement of the law  
4           of the United States Article III standing *in your*  
5           *opinion?*

14:49

6           A.    So in my opinion that would not be a statement that  
7           comes from my own reading of Spokeo.

8   446   Q.    I see.  You can see that it's an argument certainly  
9           that was sufficiently cogent for counsel to advance  
10          before a court, it's a *colourable* argument, they  
11          believed?

14:49

12          A.    I believe it's an *colourable* argument.

13   447   Q.    Okay.

14          A.    I would say it's an overreading of the way I explained  
15          Spokeo.

14:49

16   448   Q.    Very good, okay.  Thank you.  You did actually  
17          consider, as you said this morning, the question of  
18          standing in your report and your consideration begins  
19          at page 7-38 and it's not very long?

20          A.    Mm hmm.

14:50

21   449   Q.    You refer to Clapper and you note that the DPC had  
22          referred to it -- I am terribly sorry, Professor, we  
23          are at paragraph 87 page 738.

24          A.    I'm there.

25   450   Q.    So your consideration of standing I think runs, it's  
26          about two pages in total; is that right?

14:50

27          A.    That's about right.

28   451   Q.    Yes.  So:  "*The Data Protection Commissioner has filed*  
29          *an affidavit which states the standing admissibility*

1           *requirement of the US federal courts operate as a*  
2           *constraint on all forms of relief in the US. This*  
3           *statement refers to the discussion of the US Supreme*  
4           *Court case Clapper in the DPC's Draft Decision. In*  
5           *Clapper, Amnesty International and other plaintiffs* 14:51  
6           *brought a constitutional challenge to Section 702 the*  
7           *day after it entered into force."*

8  
9           I think there was some suggestions in the course of,  
10          confusion yesterday or the day before, it wasn't the 14:51  
11          day before, they said it was the day after:

12  
13          *"The Supreme Court dismissed the challenge because it*  
14          *found the plaintiffs did not show an injury that*  
15          *granted them standing to sue."* 14:51

16  
17          Now can I just stop there. So you were fully aware and  
18          fully understood that the DPC decision, which I presume  
19          you knew was central to these proceedings, did you?

20          A. Yes, I read the DPC decision. 14:51

21   452    Q. No.

22          A. And, yes, so when -- it was the referral that led to  
23          this court, so yes.

24   453    Q. Yes. You knew the DPC had referred to and relied upon  
25          Clapper, but you don't appear to have gone and read it 14:52  
26          carefully and analysed it before preparing this report?

27          A. Well, I made my statements here about standing. I had  
28          read it. The statement that you just read I'm entirely  
29          comfortable is an accurate description of the case.

1 454 Q. No, no, I understand that, I am asking you about  
2 something slightly different. You did not go and read  
3 the case carefully the way you have done before giving  
4 your evidence now when you were preparing this part of  
5 your report? 14:52

6 A. That's the best of my recollection, yes.

7 455 Q. Yes. In fact you didn't go and read the case again at  
8 all; isn't that right?

9 A. That I don't know, I don't remember that.

10 456 Q. You don't know? 14:52

11 A. Right.

12 457 Q. So can we just stop, Professor, and see where we are on  
13 this. Mr. Serwin referred to the decision of the  
14 United States Supreme Court in Spokeo, a very recent  
15 decision in his report and you didn't read that? 14:53

16 A. Correct.

17 458 Q. You have a consideration in your report of the Fourth  
18 Amendment which you accept to be *incorrect*, which you  
19 accept you did not research, and involving a  
20 proposition which is unsupported by any authority; 14:53  
21 isn't that correct?

22 A. Hmm I think that's an accurate statement of what we  
23 went through, yes.

24 459 Q. Yes. And we now see another decision of the United  
25 States Supreme Court relied upon by the Data Protection 14:53  
26 Commissioner is given, to say the most cursory  
27 attention by you in the course of your researches for  
28 this case -- sorry, in your researches for your report;  
29 isn't that right?

1 A. I think cursory is not an accurate statement of what is  
2 reflected here which talks about there was this holding  
3 in Clapper and then here are subsequent cases that are  
4 cited in footnote 292, a case cited in footnote 293 and  
5 it says that this has not been a per se ban when there 14:54  
6 have been more facts, the courts have indeed found  
7 standing post Clapper.

8 460 Q. Did you read all of those cases?  
9 A. I certainly read in them all and whether I read every  
10 word I don't know. 14:54

11 461 Q. You certainly read, what?  
12 A. I am sorry.  
13 **MS. JUSTICE COSTELLO:** In them all.

14 A. If there's a 50 page opinion and there's a section  
15 that's relevant to my task, I might read that section 14:54  
16 and not read other sections. That's what I mean to  
17 say.

18 462 Q. **MR. MURRAY:** Do your assistants, when they write up  
19 their research, they give you sheets of paper with  
20 parts of the judgment, is that the way it works? 14:54  
21 A. So they would attach the case typically as a file along  
22 with the draft, that would be a very common way it  
23 would happen.

24 463 Q. So they'd write the draft, they'd attach the case?  
25 A. After I have given them direction and said here is what 14:54  
26 we need to do.

27 464 Q. I see.  
28 A. Then it may come back as a research memorandum which  
29 I then engage with and try to figure out well what

1 should we make of this topic and turn it into testimony  
2 or it may be that it's a specific paragraph or whatever  
3 where I say give a draft of it.

4 465 Q. It would be a mistake, you say in the next sentence, to  
5 read more -- sorry, next paragraph: "*To read more into* 14:55  
6 *Clapper*. *In one sense, I agree with the quotation from*  
7 *the DPC, in the sense that a plaintiff does have to*  
8 *establish standing to sue in order to get relief from a*  
9 *US court,"* hardly a remarkable concession?

10 A. Yes. 14:55

11 466 Q. "*The case should not, however, be read to create a per*  
12 *se ban on cases involving US foreign intelligence or*  
13 *counterterrorism programmes."*

14  
15 who said anywhere that the case involved a per se ban 14:55  
16 on cases involving foreign intelligence or  
17 counterterrorism programmes?

18 A. I don't quote anybody or cite anybody there. I'm  
19 trying to explain what a case stands for and doesn't  
20 stand for and I then go on to explain how that 14:55  
21 proceeds.

22 467 Q. "*Two lower courts, for instance, have found that*  
23 *individuals had standing in the foreign intelligence*  
24 *realm to challenge section 215 telephone metadata*  
25 *programme. Another court found, in a counterterrorism* 14:56  
26 *setting, that an individual had standing to challenge*  
27 *suspected placement on the terrorist watch list. The*  
28 *facts and law of the individual case will determine*  
29 *whether an individual has standing to sue."*

1 A. Yes.

2 468 Q. And then you refer to the concern the Supreme Court  
3 articulated about, is it a "*vector of attack*" is the  
4 phrase that you use?

5 A. That's one phrase I use, yes. 14:56

6 469 Q. That's one of the phrases you use?

7 A. Yes.

8 470 Q. In fact, just while we are on it, you do use some  
9 phrases, the "*vector of attack*" and that's a reference  
10 to people who exercise their right to go to court, is 14:56  
11 it, a vector of attack?

12 A. I teach cyber security and it's a term -- one of the  
13 different ways that you can attack a computer system  
14 and so you come in through this port or you come in  
15 through this other way and that's referred to as a 14:56  
16 vector of attack and I make the comparison to cyber  
17 security attacks.

18 471 Q. Yes. No, I think you describe bringing proceedings as  
19 a vector of attack, yes, in the "*golden era of*  
20 *surveillance*", another one of your phrases? 14:57

21 A. Yes, where I have expressed concerns about too much  
22 surveillance power, yes. "*Golden age*", for what it's  
23 worth.

24 472 Q. "*Golden age*". So then you refer to that and then you  
25 say: "*It hasn't prevented individuals from bringing*  
26 *lawsuits against companies that commit privacy*  
27 *violations, even in the absence of out-of-pocket*  
28 *damages.*" 14:57  
29

1 And you refer to some cases in that. And then you say,  
2 at paragraph 91, something interesting, you say: "*In*  
3 *addition, the doctrine of standing addressed in Clapper*  
4 *pertains only to the US federal courts, and thus at*  
5 *most impacts judicial remedies.*"

14:57

6 A. Yes.

7 473 Q. You appear to view judicial remedies as a relatively  
8 small part of this whole fabric, is that a fair  
9 comment?

10 A. I agree with paragraph 91. What I have said yesterday  
11 in connection with the automobile example is, when you  
12 are trying to protect safety in a car you want to make  
13 sure the engineering is good and then you want to have  
14 good remedies after the fact. And I said when you are  
15 trying to do information systems and protect privacy,  
16 you want to make sure the engineering is good and then  
17 make sure there is remedies after the fact. And so  
18 then I point to the other things that lead to having  
19 good engineering is the way I describe it.

14:57

14:58

20 474 Q. I see.

14:58

21 A. So...

22 475 Q. Which, although you didn't have the time to research  
23 your consideration of the Fourth Amendment, you had the  
24 time to address it at some length in the course of your  
25 report?

14:58

26 A. The Fourth Amendment?

27 476 Q. No, the other examples, the multiple ways, the PCLOB,  
28 the free press administrative agencies?

29 A. Yes.

1 477 Q. These all receive lengthy consideration in your report?  
2 A. They do.

3 478 Q. They do. Can I ask you to look at the decision in  
4 **Clapper**, please, that's the United States Supreme Court  
5 decision. 14:58

6 A. Yes. Do you have a reference to a binder number?

7 479 Q. I don't.

8 **MS. JUSTICE COSTELLO:** I think it's Tab 16.

9 A. 1-6 or 6-0?

10 **MS. JUSTICE COSTELLO:** 1-6. 14:59

11 A. Thank you. Yes.

12 480 Q. **MR. MURRAY:** So can we look at what this case decided,  
13 Professor.

14 A. Yes.

15 481 Q. And can I ask you first of all to turn please to page 14:59  
16 1146.

17 A. I'm there.

18 482 Q. So if you look at the last paragraph on the left-hand  
19 side of the page?

20 A. I'm just seeing "*on the day when*" instead of "*the day* 14:59  
21 *after*". I don't know if that's what you are going to  
22 lead me to, but go ahead.

23 483 Q. No. "*After both parties*", the last paragraph:  
24

25 "*Moved for summary judgment, the district court held* 14:59  
26 *the respondents do not have standing. On appeal,*  
27 *however, a panel of the Second Circuit reversed. The*  
28 *panel agreed with respondent's argument that they have*  
29 *standing due to the 'objectively reasonable likelihood'*

1           *that their communications will be intercepted at some*  
2           *time."*

3

4           Do you remember I asked you about that phrase this  
5           morning, you asked me where I got it from? 15:00

6           A.    Okay.

7   484   Q.    Yes.  That's where it came from.  That was the basis on  
8           which the Second Circuit decided that these plaintiffs  
9           had standing, but you didn't know that?  Did you?

10          A.    Hmm, I did not remember those exact words in a way 15:00  
11          where I could put my finger on them.

12   485   Q.    Okay.  But you see I asked you about this and you  
13          answered, eventually, when I said to you, "*if I as a*  
14          *plaintiff establish an objectively reasonable*  
15          *likelihood my communications have been*", is the word 15:00  
16          *interfered* with?

17          A.    Intercepted, I think.

18   486   Q.    Will be interfered with, I said.  I didn't use the word  
19          "*intercepted*", I said *interfered* with?

20          A.    Ah. 15:01

21   487   Q.    And you said: "*well it will be, you know, not*  
22          *twenty years in the future but imminent enough, yes.*  
23          *Then my understanding - you said - is that sounds like*  
24          *the injury-in-fact, yes."*

25 15:01

26           That seems the Second Circuit's formulation of standing  
27           except they held that there was standing, did they not?

28          A.    Right.  And I believe a fair reading of the case is  
29           that the five justices in the majority did not find an

1 objectively reasonable, what is the word, likelihood.

2 488 Q. Oh, I see.

3 A. So they used words like "*speculative*" etc. So they

4 have different views of the facts.

5 489 Q. Oh, I see. So as you read the judgment the United 15:01

6 States Supreme Court maintained the test the Second

7 Circuit had applied but simply found it hadn't been

8 satisfied; is that right?

9 A. I'm not saying it exactly maintained or didn't. I'm

10 saying that I don't believe a fair reading of the 15:02

11 majority is that they thought there was an objectively

12 reasonable likelihood, where they go on about there's

13 no targets involved and it might have been other

14 programmes and all the rest.

15 15:02

16 I believe a fair reading is their assessment is not fit

17 with objectively reasonable likelihood and so whether

18 they would have taken the doctrinal words from the

19 Second Circuit or not I don't have a view on, but I do

20 have a view that they didn't find an objectively 15:02

21 reasonable likelihood.

22 490 Q. I see. So am I to understand therefore that it's *your*

23 evidence that the test for standing after Clapper is

24 that applied by the Second Circuit?

25 A. In a case that's overruled I don't think you would 15:02

26 assume that they got the doctrinal statement correct.

27 I'm making a statement about the court's view of the

28 facts and reading that opinion with the facial

29 challenge and speculation and it might not be this

1 programme.

2 491 Q. I see.

3 A. I don't see a basis for them, I don't think the five  
4 justices majority is consistent with the finding of  
5 objectively reasonable likelihood. 15:03

6 492 Q. No, I do want you to adopt a clear position on this  
7 please, Professor: Is it or is it not your evidence  
8 that the Second Circuit test "*that a person will have*  
9 *standing due to the objectively reasonable likelihood*  
10 *that their communications will be intercepted at some* 15:03  
11 *time in the future*", that that is still the test  
12 applied?

13 A. Hmm, you asked me earlier to say predicting in court  
14 versus my own view.

15 493 Q. Yes. 15:03

16 A. So my own view is that objectively reasonable  
17 likelihood would and should establish standing and then  
18 I have also said that standing is done in the  
19 particular factual setting, would establish  
20 injury-in-fact sufficient for the other prongs of 15:04  
21 standing. And I have said that in the factual analysis  
22 the majority has here, my view is they didn't think  
23 that applied.

24 494 Q. I see. *would* and *should*?

25 A. Yes. 15:04

26 495 Q. It *would* and it should?

27 A. Should is my view of how the law should be interpreted.

28 496 Q. I understand what the two words mean.

29 A. And would is, if the judge got to the point where the

1 judge thought there was an objectively reasonable  
2 likelihood.

3 497 Q. Okay.

4 A. I believe there's quite a high probability, my  
5 prediction as a lawyer, if the judge came to that view 15:04  
6 my view is that the judge --

7 498 Q. I see.

8 A. -- quite likely would say that's enough to meet the  
9 injury-in-fact.

10 499 Q. Well can I ask you now to turn to page 1147, heading 15:04  
11 3(a) on the right-hand side of the page?

12 A. Mm hmm.

13 500 Q. And could I ask you to read out please what's  
14 underneath that?

15 A. *"Respondents assert that they can establish injury in 15:04  
16 fact that is fairly traceable to the statute because  
17 there is an objectively reasonable likelihood that  
18 their communications will be intercepted. This  
19 argument fails."*

20 15:05

21 That's a combined statement of fact and law. Ah. And  
22 so now they go through the doctrinal part about  
23 *"threatened injury must certainly"* --

24 501 Q. Well, no, I think we'll read it all out, Professor,  
25 please. 15:05

26 A. Okay: *"As an initial matter, the Second Circuit's  
27 'objectively reasonable likelihood' standard is  
28 inconsistent with our requirement that 'threatened  
29 injury must be certainly impending to constitute injury*

1           *in fact'."*

2 502 Q. Oh, well that sounds slightly inconsistent with what  
3 you think would and should be the test?

4 A. May I read the next sentence?

5 503 Q. Of course you can.

15:05

6 A. So the next sentence after the citation say:

7           "*Furthermore, respondents' argument rests on their*  
8           *highly speculative fears*" and then they go through a  
9 series of speculations.

10 504 Q. I know that.

15:05

11 A. And so what -- one reason I'm not a litigator is I'm  
12 not great at remembering exactly these tests in every  
13 case, and so I probably should make that admission. As  
14 a professor I study these things and I try to come to  
15 my understanding of them. What we had here was my  
16 statement that if the court objectively believed,  
17 reached that objectively reasonable, then I believe the  
18 finding would come out that way. And I said the  
19 majority think [sic] here was very speculative and  
20 I think on page 1148 the court clearly thought it was  
21 very speculative.

15:06

15:06

22  
23 Now exactly what words attach to it, it looks like  
24 I was incorrect. When it gets to the point of did the  
25 majority find objectively reasonable likelihood, my  
26 reading was correct and it was speculative and the  
27 court thought it was speculative.

15:06

28 505 Q. 'I'm not great at exactly remembering these tests', did  
29 I hear that right?

1 A. You did.

2 506 Q. I see.

3 A. I don't teach standing, I have taught standing but  
4 I don't work in the area of standing where the  
5 incredible intricacy of the words has overwhelmed my 15:06  
6 ability to keep them all straight.

7 507 Q. 'I'm not great at exactly remembering these tests in  
8 law'?

9 A. Yes.

10 508 Q. I see. I'll just let the stenographer change. You do 15:07  
11 refer throughout your report on occasion to the  
12 European Convention on Human Rights.

13 A. Yes.

14 509 Q. Article 8.

15 A. Yes. 15:07

16 510 Q. And I think you understand that Article 8 has and the  
17 Convention has some relevance under the Charter?

18 A. I'm sorry, Article 8 of the Convention --

19 511 Q. Of the Convention has some relevance to the Charter.

20 A. -- has some relevance to -- 15:08

21 512 Q. And maybe you don't know - and you're not an expert in  
22 the EU law - so I'm asking you and if you don't know,  
23 so be it and I'll --

24 A. No, I did go and read through the history of adoption  
25 of Articles 7 and 8 of the Charter where they say in 15:08  
26 the history of the creation of Articles 7 and 8 of the  
27 Charter that they come directly from Article 8 of the  
28 Convention.

29 513 Q. Okay. And indeed you express the view at one or two

1 points - I'll get you the citations if necessary;  
2 disagree with me if I'm wrong - you do suggest that the  
3 US surveillance regime could be justified under Article  
4 8. Do you recall making...

5 A. Right, so yes, I used the language of Article 8 to talk 15:08  
6 about what's necessary in a democratic society, yes.

7 514 Q. Have you ever seen commentaries to the effect that US  
8 surveillance law may fall below the standard fixed by  
9 Article 8?

10 A. Yes. 15:08

11 515 Q. You have?

12 A. There's many -- I'm sorry, this fell down. I was just  
13 closing this book. So I do know from just having been  
14 working with European Union law that there's been many  
15 criticisms of the US legal regime. 15:09

16 516 Q. Okay. But have you read commentaries suggesting that  
17 that may be the case, that the US standard may fall  
18 below Article 8?

19 A. I'm not -- a citation is not coming to mind, but it  
20 wouldn't surprise me at all to see such things. 15:09

21 517 Q. All right. Do you disclose any of them in your report?

22 A. I don't remember citing to something like that.

23 518 Q. Okay. You do, however, look, not so much at the  
24 Convention, but at the law of the individual states in  
25 the EU. 15:10

26 A. Yes.

27 519 Q. Yeah. And you know, you understand there's a dispute  
28 as to whether the test is a European test or whether  
29 it's a test by reference to the individual Member

1 States. That's a matter the judge will have to decide,  
2 not a matter for you. But you do look at the  
3 individual Member States in the context of the claim?  
4 A. Yes.  
5 520 Q. Okay. And you refer in that regard to Prof. Brown's 15:10  
6 report.  
7 A. Yes.  
8 521 Q. And there's a quotation that you have throughout your  
9 report, in fact we've counted it, 12 times. Do you  
10 know which quotation that is? 15:10  
11 A. It probably has the word "benchmark" in it.  
12 522 Q. Well, close. It's "baseline".  
13 A. "Baseline", sorry.  
14 523 Q. Okay, fair enough. So what's the quote?  
15 A. I have the key word, but -- 15:10  
16 524 Q. Ah, well, no, just look to paragraph 1.1. Sorry, I'm  
17 not trying to get you. It's not a memory test.  
18 A. I'm, sorry where am I looking?  
19 **MS. JUSTICE COSTELLO:** where are we in the report?  
20 525 Q. **MR. MURRAY:** we're at paragraph 1.1 of Prof. Swire's 15:11  
21 report. (To witness) So you see it there: "*The US now*  
22 *serves as a baseline for foreign intelligence*  
23 *standard*".  
24 A. Yes, I see it at 1.1.  
25 526 Q. All right. Do you want to just take a look at the 15:11  
26 report?  
27 A. Look at Prof. Brown's report?  
28 527 Q. Yeah. we'll...  
29 A. So...

1 528 Q. Book five, tab 66.  
2 MS. JUSTICE COSTELLO: Is that the European or the  
3 American authorities?  
4 MR. MURRAY: US, Judge.  
5 MS. JUSTICE COSTELLO: US. 66. 15:11  
6 529 Q. MR. MURRAY: If you go to page three. Do you see there  
7 at the end of the page?  
8 A. Yes.  
9 530 Q. *"In the absence of clear and specific rules in other*  
10 *countries, ironically the US now serves as a baseline* 15:11  
11 *for foreign surveillance standards, although the*  
12 *European Convention on Human Rights, which requires the*  
13 *protection of the rights of all those within the states*  
14 *party to the jurisdiction sets a higher general*  
15 *standard than the US Government's interpretation of its* 15:12  
16 *international human rights law obligations as applying*  
17 *only within its territory."*  
18  
19 Do you see that?  
20 A. Yes. 15:12  
21 531 Q. And I think there's an authoritative -- you regard  
22 Prof. Brown as an authority in this field?  
23 A. I do, yes.  
24 532 Q. You take what he says seriously on these matters?  
25 A. Yes. 15:12  
26 533 Q. Yeah, okay. Then if you go forward to paragraph 3.4 on  
27 page 16, he's a list --  
28 A. His page 16?  
29 534 Q. Yes.

1 A. Okay.

2 535 Q. He's a list of what's required under the Convention.  
3 You've read this many times, Professor - I think this  
4 report features almost as a chapter in your book, or in  
5 your report, chapter six. So he lists what it is the 15:13  
6 European Court of Human Rights requires for data  
7 protection. One of the matters at page 17 - do you see  
8 over there, the second tab:  
9  
10 *"Persons who have been subjected to surveillance should 15:13  
11 be informed of this as soon as this is possible without  
12 endangering national security or criminal  
13 investigations so they can exercise their right to an  
14 effective remedy at least ex post facto."*  
15 15:13  
16 Do you see that?

17 A. Yes.

18 536 Q. That's not the position in the United States.  
19 A. It's also not the practice in the countries in Europe  
20 based on my research. 15:13  
21 537 Q. Oh, I think that's the point that Prof. Brown is  
22 making. But he's identifying what is required under  
23 the Convention - which is relevant, as we know, to the  
24 Charter.

25 A. Yes. 15:13  
26 538 Q. Okay. Is there a reason you didn't refer to those  
27 aspects of Prof. Brown's report which you have quoted  
28 many times and referred to at great length throughout  
29 your report?

1 A. Well, as I state - and I'm going to talk for just a  
2 second and then -- so as I stated in the chapter, I was  
3 looking for some reasonably objective, well accepted  
4 way to measure US practices when measured with the  
5 practices of other countries. The methodology for 15:14  
6 Prof. Brown is he looked to four sources for basically  
7 tick-lists of what it would take to count as effective  
8 protection and surveillance. And then based on those  
9 four sources, he and his group set forth 11 criteria  
10 for what a good system would look like. And then in 15:14  
11 chapter six we took each criterion --

12 539 Q. **MS. JUSTICE COSTELLO:** This is back to your book?  
13 A. Chapter six of my report.  
14 **MS. JUSTICE COSTELLO:** Your report, yes.

15 A. Because for an American Professor to say anything about 15:14  
16 European law is subject to all the criticisms. And I  
17 was trying to think how might you or anyone else come  
18 to some view in an area where there's so much contested  
19 and the facts are unclear. And so the approach that I  
20 came to was: Let's take this very good report from 15:14  
21 someone who's trying to show what good protections look  
22 like and take the 11 criteria and then for each one say  
23 what is the US law, what reforms, if any, have happened  
24 since 2013 - because we've had a lot of reforms - and  
25 then what is the most neutral objective statement of 15:15  
26 European legal practice to compare to that?

27  
28 And that way, rather than taking some global statement  
29 of "Swire thinks this or that" you could say for

1 criterion one, two, three through 11, here's the US,  
2 here's the EU. And it wasn't me saying words, it was  
3 having block quotes from the LIBE Committee, block  
4 quotes from the, you know, Fundamental Rights Agency  
5 report, things like that from European authorities, so 15:15  
6 that I wasn't saying it, and comparing it to statements  
7 of the US law and the Review Group recommended in the  
8 reforms. And I thought that would be the best system I  
9 could find where you or anyone could come to some view  
10 of the matter. So that's why I relied on Prof. Brown's 15:15  
11 report.

12 540 Q. **MR. MURRAY:** And that's fully understood and  
13 understandable, Professor. That wasn't quite the  
14 question I was asking you.

15 A. Okay. 15:16

16 541 Q. I was just wondering how come you referred to  
17 Prof. Brown's report at some length without recording  
18 what he observes about the requirements of the European  
19 Convention?

20 A. Well, I think what I did was to refer to the report 15:16  
21 very clearly so everyone could see it. I footnote  
22 throughout my report very, very comprehensively. And  
23 then drew my attention to these conclusions about when  
24 you're comparing EU practice with the US practice, how  
25 strikingly strong the US practice is compared to the 15:16  
26 practices in the Member States. That's a different  
27 view than many Europeans, in my experience, start with.  
28 And so I was trying to show information that would let  
29 any reader, including the judge, come to some view on

1 that.

2 542 Q. Now, Professor, did anyone tell you that part of your  
3 obligation, as an expert, to the court is to present an  
4 *unvarnished* account of your sources - not just the bits  
5 that favour the case you're making, but if you come 15:17  
6 across material which is *adverse*, to reveal that also?

7 A. My approach was to write clearly, was unvarnished, my  
8 directions to the people working for me was to take out  
9 all the adjectives so we can be as objective as  
10 possible. And then there are times when there are 15:17  
11 certain statements that capture important points and I  
12 cited to those.

13 543 Q. I see. Now, you produced a report, you refer to it  
14 many times, your working -- tab 64 of that book. Your  
15 2004 report. 15:18

16 A. Yes.

17 544 Q. Just some things about that very quickly please.

18 A. Yes.

19 **MR. GALLAGHER:** I think it's an article rather than a  
20 report. 15:18

21 545 Q. **MR. MURRAY:** Thank you, yes, it is. (To witness) Just  
22 if you go to page 28 first.

23 A. Is that 1328 you mean?

24 546 Q. No. Well, I hope you've the same version of this as I  
25 do. But the pagination at the bottom should be... 15:18

26 A. So that's a different version than I have. But if we  
27 go to section headings, I could probably find it.

28 547 Q. This is "The System of Foreign Intelligence  
29 Surveillance Law", Peter Swire.

1 A. Yes.

2 548 Q. I'm terribly --

3 **MS. JUSTICE COSTELLO:** It's just the page starts at  
4 1306. If we add 28 we'll probably get it.

5 A. No, so I think I can clear this up. The version that's 15:18  
6 in the court booklet is a page, photographs of the  
7 pages as published. At an earlier stage on SSRN, which  
8 is the Social Science Research Network, I hadn't  
9 succeeded in getting the final version up and I've  
10 corrected that. So... 15:19

11 549 Q. **MR. MURRAY:** This is one source in the -- you refer to  
12 in your report with which you are extremely familiar, I  
13 think?

14 A. I certainly --

15 550 Q. So I might just read out some -- 15:19

16 A. Yes, please. Okay.

17 551 Q. Because I'm sure --

18 A. Okay.

19 552 Q. "Targets of FISA" -- this is page 28 of the version I  
20 have, just above footnote 111 -- just after footnote 15:19  
21 111.

22 A. 111. That will help me. Could I just turn to footnote  
23 111? Yes, please.

24 553 Q. "*Targets of FISA surveillance almost never learn that*  
25 *they have been subject to a wire tap or other* 15:19  
26 *observation.*" Is that a...

27 A. Now I've found it. Yes.

28 554 Q. And that remains the case?

29 A. Well, with the Snowden leaks, many people learned a lot

1 of things, including 215. But --

2 555 Q. Okay. Certainly legally that remains the case?

3 A. Yes.

4 556 Q. And at what I have marked as page 98 --

5 A. The footnotes work very well, if that were possible?

6 557 Q. What I have at page 98, which contains footnote 336,  
7 you made, at paragraph five, the recommendation:

8

9 *"Consider Providing Notice of FISA Surveillance*  
10 *Significantly After the Fact*

11 *For domestic wiretaps, the Fourth Amendment generally*  
12 *requires prompt notice to the target after the wiretap*  
13 *is concluded. For national classified information,*  
14 *even top-secret information, there are declassification*  
15 *procedures with presumptions of release... Yet for*  
16 *FISA, anomalously, the surveillance remains secret*  
17 *permanently.*

18

19 *Serious consideration should be given to changing the*  
20 *permanent nature of secrecy for at least some FISA*  
21 *surveillance. Procedures can be created that are*  
22 *similar to declassification procedures. For instance,*  
23 *especially in cases that have resulted in criminal*  
24 *prosecution, there might be a presumption of release to*  
25 *the target or the public five years after the*  
26 *surveillance concludes."*

27

28 Then you continue in relation to the presumption of  
29 release. What's the position in relation to that

1 concern today?

2 A. So what was I saying then or what I believe to be the  
3 case now?

4 558 Q. No, what is the case now?

5 A. So one change has been made in that direction. In the 15:21  
6 Review Group report we recommended terms somewhat  
7 similar to this. And that has happened for what's  
8 called national security letters, which is one type of  
9 -- and so the previous practice had been *not* to  
10 declassify those, to keep those in classified things. 15:21  
11 And President Obama issued an order a couple of years  
12 ago that changed the presumption. So for NSLs -  
13 national security letters - these are phone records,  
14 credit card records that the FBI can get - for these  
15 records now, the presumption is that they're released 15:21  
16 after three years, unless a very senior official makes  
17 a specific finding in that case not to release them.  
18 So the presumption has moved from secrecy in perpetuity  
19 to a transparency about those for national security  
20 letters. 15:22

21 559 Q. But that's the only change made in relation to that  
22 concern that you expressed?

23 A. There's been many other kinds of declassification, but  
24 there hasn't been a more general change to notice,  
25 correct. 15:22

26 560 Q. Of the kind that you recommend?

27 A. That's correct.

28 561 Q. Okay. Come back to page 82, where you'll see in fact a  
29 discussion of the NSLs. I'm terribly sorry, 315 --

1 A. Thank you.

2 562 Q. 315 is the footnote.

3 A. Yes, I'm there.

4 563 Q. *"NSLs are more worrisome from a civil liberties*  
5 *perspective because of the lack of judicial supervision* 15:22  
6 *that exists with a Section 215 order".*

7 A. Yes.

8 564 Q. *"Oversight is appropriate for NSLs and Section 215*  
9 *orders together to determine what factual settings are*  
10 *fitted to each tool. At a minimum, there should be a* 15:22  
11 *reporting on the use of NSLs and Section 215, as has*  
12 *been suggested already in Congress.*

13

14 *In terms of other possible reforms, probing questions*  
15 *are appropriate to determine whether and in what*  
16 *circumstances NSLs and section 215 orders are necessary*  
17 *at all. If the decision to keep some form of NSLs and*  
18 *section 215 is made, however, then there are various*  
19 *reforms that would cabin some of the most disturbing*  
20 *aspects."* 15:22

21

22 And then you talk about the particular issue of library  
23 records.

24 **MS. JUSTICE COSTELLO:** I'm sorry, Mr. Murray, under  
25 which heading this? My footnotes don't seem to be 15:23  
26 helping me.

27 A. There was a period where I was talking about  
28 footnotes --

29 **MR. GALLAGHER:** It's 1338, Judge, ant it's...

1           **MS. JUSTICE COSTELLO:** 1338?

2           **MR. GALLAGHER:** It's the second paragraph on the fourth  
3 line. 1338 -- 1358. Sorry, my eyesight has gone.  
4 1358, sorry. And it's the second paragraph, Judge, and  
5 the fourth line: "*NSLs are more worrisome*". 15:23

6           **MS. JUSTICE COSTELLO:** Thank you. Thank you very much.

7 565 Q.   **MR. MURRAY:** And I'm sorry, Judge. (To witness) These  
8 letters are still used very widely?

9           A.   Yes.

10 566 Q.   And what oversight is now -- what judicial supervision 15:23  
11 now exists?

12          A.   So there have been substantial changes in oversight of  
13 NSLs, national security letters. I testified in  
14 Congress on this in, roughly, 2006 or 2007, was very  
15 critical of the national security letter regime. When 15:24  
16 they re-authorized the PATRIOT Act at that time in  
17 2006, the Congress ordered the Inspector General in the  
18 Department of Justice to do comprehensive studies of  
19 the national security letters. The studies were done,  
20 they were made public, they were very critical of the 15:24  
21 FBI practices in 2006 or 2007. As a result of that, in  
22 2007 or 2008 the Department of Justice issued  
23 comprehensive new guidelines for how to make sure the  
24 NSLs were done properly and the Inspector General was  
25 tasked with repeatedly going back to make sure that 15:24  
26 these were being followed.

27

28           And so from a period where, in my view, they were often  
29 being done lawlessly without following the rules, we

1 went to a world in which there were public and detailed  
2 guidelines for how they should be issued and where the  
3 Inspector General, who's this independent watchdog  
4 within the agency, has continuing oversight  
5 responsibility. Now, that has not been judicial 15:25  
6 oversight.

7 567 Q. Exactly.

8 A. But it is a major regularisation of how it's being  
9 done. And in my view, it went a long way towards  
10 curing the worst abuses at least. But it's an area 15:25  
11 that I've continued to have concerns about. Our Review  
12 Group asked for further changes in the area --

13 568 Q. Yes.

14 A. -- the President did not agree with those suggested  
15 changes. 15:25

16 569 Q. And Executive Order 12333, am I correct in thinking  
17 that the only safeguards in relation to Executive Order  
18 12333 are in PPD-28?

19 A. Let's see. So the Executive Order itself sets forth  
20 the authorities for doing surveillance. It says 15:25  
21 itself, before PPD-28, that if you do surveillance  
22 outside of those authorities, you're violating --  
23 you're against what 12333 itself allows. So 12333 says  
24 'You're allowed to do this' and 'You're not supposed to  
25 do it outside of this'. So that's a statement from the 15:26  
26 President in an Executive Order.

27  
28 PPD-28 has a series of -- Presidential Policy Directive  
29 28 has a series of safeguards built in. Each agency

1 also has its procedures for 12333, and some of those  
2 are in the record. So for instance, the CIA had not  
3 updated its safeguards and procedures for quite some  
4 time. And one of the documents that Mr. Gallagher  
5 asked us to look at is what the CIA guidelines now say. 15:26  
6 So there's been administrative updating and attention  
7 to how to perform 12333 surveillance.

8 570 Q. I'm going to come to PPD-28 in just one moment. But  
9 insofar as you refer to some internal control in 12333,  
10 is that justiciable? 15:27

11 A. Is it justiciable?

12 571 Q. Yeah.

13 A. I'm not aware of a way in which it *would* be  
14 justiciable.

15 572 Q. Okay. Because -- 15:27

16 A. And in fact Executive Orders, by their terms, generally  
17 say that this does not create a cause of action.

18 573 Q. Exactly. As does PPD-28.

19 A. Yeah. That's standard language in presidential  
20 directives. 15:27

21 **MR. MURRAY:** Prof. Swire, thank you. If you can just  
22 answer any questions from my colleagues.

23 A. Thank you.

24

25 **PROF. SWIRE WAS CROSS-EXAMINED BY MR. MCCULLOUGH AS** 15:27  
26 **FOLLOWS:**

27

28 574 Q. **MR. MCCULLOUGH:** Prof. Swire, would it be fair to say  
29 that you have expressed strong views on the adequacy of

1 US data protection laws as against European data  
2 protection laws?

3 A. I have expressed clear views - you could call them  
4 strong views - about the comparison between the two,  
5 yes. 15:27

6 575 Q. Yes. In favour of US protection laws?

7 A. In the national security surveillance area in  
8 particular.

9 576 Q. For instance, if we look at 2.5 or 2-5 of your report.  
10 A. I'm working there, yes. 15:28

11 577 Q. Paragraph 21.  
12 A. I'm there, yes.

13 578 Q. We see that you have, on a couple of occasions,  
14 participated as a private citizen, I think...  
15 A. Yes. 15:28

16 579 Q. ... independent person in various discussions, isn't  
17 that correct?  
18 A. Yes.

19 580 Q. One of those is in relation to a meeting in Belgium, I  
20 think, isn't that right? 15:28  
21 A. Is that the meeting where Mr. Schrems and I were both  
22 on the same panel?

23 581 Q. No, that's at paragraph 22. At paragraph 21 --  
24 A. Yes.

25 582 Q. -- you attended a meeting of the Belgian privacy 15:28  
26 authority, or I suppose a discussion, a panel  
27 discussion hosted by the Belgian privacy authority,  
28 isn't that correct?  
29 A. I called in through video - it was in Europe and I was

1 in the United States. But yes.

2 583 Q. I see. And you yourself decided to make a paper for  
3 that purpose and then presented that paper in a journal  
4 to which you contribute, is that correct?

5 A. I was invited by the Belgian privacy authority to 15:29  
6 testify. They asked me to do that. And when I did it,  
7 I submitted it to the authority, I put it on the  
8 website for anyone to see. Later there was someone  
9 asked if they could put it as a chapter in a book and I  
10 said 'Here it is' and 'You can use it'. 15:29

11 584 Q. All right. And then at paragraph 22 we see that,  
12 presumably again as a private citizen, you came to  
13 Europe in January and participated in a panel  
14 discussion with Mr. Schrems, isn't that correct?

15 A. That's correct. 15:29

16 585 Q. All right. And you've also given testimony to the US  
17 Congress about these matters, I think, isn't that  
18 correct?

19 A. Various of the matters, yes.

20 586 Q. I'll just show you, if I may, an extract of what you 15:29  
21 said on that occasion (Same Handed).

22 A. Okay. Yes, sir?

23 587 Q. And we'll find your testimony in this, I think...

24 A. It looks like it might start on page 20 of 29.

25 588 Q. Thank you. I have it in a slightly different version 15:30  
26 to you. And we see that you gave evidence there about  
27 the effects of the Safe Harbour decision, I think,  
28 isn't that correct?

29 A. This was a 2011 testimony if I'm not mistaken. So this

1 was about -- the Safe Harbour was then in effect.

2 589 Q. Safe Harbour was then in place, yes.

3 A. Yes.

4 590 Q. So if we look down through your testimony, you see:  
5 *"The focus of my time today though is going to be on* 15:31  
6 *jobs"?*

7 A. Yes, I see that.

8 591 Q. *"Jobs in US businesses the effects on those. My point*  
9 *here is that support for baseline privacy principles is*  
10 *good business and good policy for the US. If we adopt* 15:31  
11 *a 'don't care about privacy' attitude, that creates*  
12 *major risks for American jobs, American exports and*  
13 *American businesses. Other countries could then decide*  
14 *the US is a noncompliance zone, they can ban transfers*  
15 *of data to the US. Foreign competitors can then use* 15:31  
16 *the US for lack of privacy protections as an excuse for*  
17 *protectionism and then insist all the information*  
18 *processing happens in their countries and not here in*  
19 *the US, where right now we have such an important*  
20 *technological edge."* 15:31

21

22 And do you see that as an aim on the part of European  
23 competitors of the US to create some form of  
24 protectionist advantage?

25 A. So, Judge, I believe -- I was testifying to the US -- 15:32  
26 I'm going to answer, absolutely. I was testifying to  
27 the US Congress and saying we should do what's good for  
28 US jobs - it's a pretty standard way to try to get them  
29 to believe in something. My view is that in Europe

1 there are many people with very sincere beliefs about  
2 privacy protection and the importance of fundamental  
3 rights. My belief is that there are also some  
4 businesses in the European Union who would be glad to  
5 have a competitive edge against the United States. And 15:32  
6 so there's a possibility of raising protectionist  
7 arguments, along with sincere beliefs that it's  
8 important to protect privacy.

9 592 Q. All right. And do you feel, as you appear to feel  
10 here, that that's part of what lies behind European 15:32  
11 espousal of data protection law and protection?

12 A. As I just said, for some people the business advantage  
13 is a reason to support strong enforcement of European  
14 rules, for many people it's a sincere belief that they  
15 think it should be protected. 15:32

16 593 Q. All right. You continue in the second last paragraph  
17 of your testimony:

18  
19 *"So we are stuck in a world where they have national*  
20 *jurisdiction and national legislation. I think the 15:33*  
21 *question then is how do we engage, how do we find a way*  
22 *for the US to best have our self-regulatory, our good*  
23 *privacy principle but our non-intrusive approaches, but*  
24 *also explain to the rest of the world how to stop this*  
25 *protectionism?" 15:33*

26  
27 And that's again a reference to that portion of the --  
28 of those in the EU who espouse privacy rights and their  
29 motivation by protectionism?

1 A. Yes. Judge, this is in testimony before the Energy and  
2 Commerce Committee. These are the members of Congress  
3 whose jurisdiction is about how do we help US commerce.  
4 In that setting, I was making an argument about how it  
5 would help US commerce if we had better privacy 15:33  
6 protection.

7 594 Q. Yes. And does that make any difference to the question  
8 I'm asking you?

9 A. So I'm trying to be responsive. So I think we should  
10 have baseline legislation if possible. And your 15:33  
11 question is -- it was something about protectionism,  
12 I'm just trying to...

13 595 Q. Sure.

14 A. Oh, we should be able to explain to the rest of the  
15 world that the United States has a good enough system - 15:34  
16 because it *would* have a good enough system - that then  
17 people who wanted to have a competitive edge would no  
18 longer have that good argument.

19 596 Q. All right. But that *is* what you feel, as I understand  
20 it. But part of what lies behind the views of at least 15:34  
21 some of those in the European Union who support data  
22 privacy is an indirect motive of supporting their trade  
23 as against US trade?

24 A. Yeah, in my experience, some European businesses would  
25 like to have the benefits of less effective competition 15:34  
26 by US competitors.

27 597 Q. I think you've also, you also wrote articles just  
28 around the time of the Safe Harbour decision, just  
29 immediately before and after it, isn't that correct?

1 A. Yes.

2 598 Q. And in those articles you were commenting upon the  
3 inadequacy of the views of the Advocate General, I  
4 think, isn't that correct?

5 A. One of the pieces made that point, yes. 15:34

6 599 Q. I'll just give you two of those articles if I may (Same  
7 Handed)? One is the...

8 A. Yes?

9 600 Q. The first is 5th October.

10 A. Yes. 15:35

11 601 Q. 2015. "Don't Strike Down The Safe Harbour Based on  
12 Inaccurate Views About US Intelligence Law".

13 A. Yes.

14 602 Q. You say:

15 15:35

16 *"Important legal decisions should be based on an*  
17 *accurate understanding of the law and facts.*  
18 *Unfortunately, that is not the case for the Advocate*  
19 *General's recent opinion finding the Safe Harbour*  
20 *agreement between the US and the EU unlawful. As the* 15:35  
21 *US mission to the EU has also noted, the opinion*  
22 *suffers from particular inaccuracies concerning the law*  
23 *and practice of US foreign intelligence law, notably*  
24 *the PRISM programme. It relies on these incorrect*  
25 *facts about PRISM to reach its conclusion, removing the* 15:35  
26 *factual basis for its overall finding."*

27

28 And that was a form of advocacy piece, I think, is that  
29 right?

1 A. This was me as a private citizen expressing my views  
2 about the Advocate General's opinion. I was advocating  
3 for an accurate understanding of the law and facts.  
4 That's what the headline says, it's what the first  
5 sentence says. The particular concern was about the 15:36  
6 Washington Post article that had said there was direct  
7 access into companies' servers and that the Advocate  
8 General's opinion relied on that as apparently a very  
9 important part of its factual predicate. And I had a  
10 different view of the facts on that based on my 15:36  
11 knowledge and experience and I thought it was important  
12 to point that out.

13 603 Q. Would it be fair to describe you as an advocate in  
14 favour of the Safe Harbour provision and against the  
15 Safe Harbour decision by the Court of Justice? 15:36

16 A. Am I an advocate for it? I helped to negotiate the Safe  
17 Harbour, it grew out of my view that it was important  
18 to have a lawful basis for transfers between the United  
19 States and Europe.

20 15:36  
21 The specific point of this article, which is very  
22 consistent with my testimony here, is that it's  
23 important for decisions in Europe about the US to be  
24 based on an accurate view of what the US actually does.  
25 And when *the* key factual finding is mass surveillance 15:37  
26 without limit in 702 - and my testimony here has been  
27 about the multiple overlying safeguards and targeted  
28 nature of 702 - that's such a big factual difference  
29 that I'm concerned that there could be incorrect

1 decisions or unfair decisions based on that. And so, I  
2 mean, I'd say I'm an advocate for accuracy here.  
3 That's what I would say.

4 604 Q. All right. And an advocate then against, as you see  
5 it, the *incorrectness* of the Schrems 1 decision? 15:37  
6 A. This article of October 5th was before the Schrems  
7 decision came out.

8 605 Q. Correct, mm hmm.  
9 A. It was a criticism of the Advocate General's opinion  
10 because in particular of this factual mistake. 15:37

11 606 Q. Then you wrote an article immediately after the  
12 Schrems 1 decision criticising *that* result, isn't that  
13 correct? That's the second article in front of you.  
14 A. I'm reviewing this article, just one second.

15 607 Q. It came out on the following day, 6th October. 15:38  
16 A. This is, the version I have -- oh, sorry, the opinion  
17 came out on 6th October. My article came out on  
18 October 13th.

19 608 Q. Your first article is on 5th.  
20 A. Correct. 15:38

21 609 Q. The Court of Justice decision is on 6th. And your  
22 second article is on 13th.  
23 A. Yes.

24 610 Q. And just look at one part of it, for instance. Perhaps  
25 we could -- 15:38  
26 A. And so the main point at the beginning of this article  
27 is how to solve the unsolvable. It emphasises the role  
28 of independent data protection authorities here and  
29 suggests that model contract clauses, among other

1 things, provide a promising way forward in the wake of  
2 the decision.

3 611 Q. Can we just look at what I *think* is the theme of this  
4 article at the foot of the second page, page two of  
5 seven? 15:38

6 A. Yes.

7 612 Q. "*The US must take European law and practice seriously.*  
8 *It will do little good to fulminate about why the ECJ*  
9 *is wrong. The Schrems decision is now the law. At the*  
10 *same time, the EU should not be able to insist on US* 15:39  
11 *practices that are stricter than what the US expects of*  
12 *its own organisation".*

13 **MS. JUSTICE COSTELLO:** I think that should be "EU".

14 **MR. MCCULLOUGH:** Yes.

15 A. Yes, that's what it says. And I agree with it. 15:39

16 613 Q. **MR. MCCULLOUGH:** Yes. And much of the rest of the  
17 article analyses EU practices and forms the view that  
18 they're worse or certainly no better than US practices,  
19 isn't that right?

20 A. I'm re-reading this as you hand it to me. (Pause to 15:39  
21 Read) And I'm just re-reading it right now.

22 614 Q. Sure.

23 A. So "*To date*", it says, for instance, on page five,  
24 "*there has been*" - near the bottom - "*there has been no*  
25 *such investigation of how US and EU surveillance* 15:39  
26 *practices compare*".

27 615 Q. Yes?

28 A. "*Nor did the court discuss the multiple changes to US*  
29 *law and the administrative process in the wake of the*

1           *Snowden revelations.*"

2

3           So my Belgian testimony talked about 24 reforms that  
4           had *not* been considered in the October decision of the  
5           European Court. So I'm saying 'Let's look at what the  
6           actual current law in practice is' and saying that if  
7           we do the comparison, it will come out, I believe. And  
8           I continue to believe quite differently than... 15:40

9   616   Q.    Sure.

10          A.    ... at least some had assumed. 15:40

11   617   Q.    And this is a strongly held view of yours as I  
12           understand it, that there is a proper comparison to be  
13           done between US law on the one hand and law in the EU  
14           Member States on the other hand?

15          A.    I believe in -- I do believe that if we're going to  
16           talk about equivalence or essential equivalence that  
17           that implies some comparison and so I believe it should  
18           be a carefully done and factually based comparison. 15:40

19   618   Q.    So the answer to that question, I think, was yes,  
20           you -- 15:40

21          A.    Yes.

22   619   Q.    All right. And whether that's a relevant comparison or  
23           not, of course, is a matter for the judge. But it's  
24           certainly a view --

25          A.    Yes. 15:41

26   620   Q.    -- that *you* hold strongly and have advocated strongly  
27           for quite some time?

28          A.    Well, I'd say advocated in the sense that that's the  
29           conclusion I've come to. I've tried to give very

1 careful footnotes and reasons for explaining why I  
2 believe that.

3 621 Q. There's just a few issues in your report I want to  
4 explore, Professor, if I may. At 3-23...

5 A. Yes. 15:41

6 622 Q. Sorry, before I go there. In your report you talk  
7 about a relatively limited number of targets, isn't  
8 that correct?

9 A. Yes.

10 623 Q. And I think you quote a figure of 94,368 targets in 15:41  
11 2015?

12 A. That's a one year total from one of the government  
13 transparency reports.

14 624 Q. Yeah. And I think the reason that you make that point  
15 is in order to demonstrate, as you believe, that it's 15:41  
16 a, relatively speaking, small number, isn't that right?

17 A. Yes.

18 625 Q. And you've seen the comments on that in the joint  
19 experts' report.

20 A. Yes. 15:42

21 626 Q. Which I just have to find. If you look at page 16.

22 A. Yes.

23 627 Q. We've seen your comment that there's 94,368 targets in  
24 one year under the section 702 programmes. And then  
25 you've seen Ms. Gorski's comments on the left-hand 15:42  
26 side.

27 A. Yes.

28 628 Q. And I think you agree that the targets that are  
29 identified by the NSA under the 702 programmes

1           invariably communicate with individuals who *aren't*  
2           targeted --

3           A.    Yes.

4   629   Q.    -- is that correct?

5           A.    Yes. 15:43

6   630   Q.    And you agree that the government likely surveys  
7           several selectors or accounts for each of those targets  
8           and that each account may communicate with many other  
9           individuals?

10          A.    Well, so there's... I'm not sure I agree with the 15:43  
11          footnote 47 sentence you just read. So we have  
12          information on targets from the government report.

13   631   Q.    Mm hmm?

14          A.    And we also have information from the company  
15          transparency reports -- 15:43

16   632   Q.    Yes.

17          A.    -- of the number of accounts that are reached.

18   633   Q.    Yes.

19          A.    And the statement that there would be multiple  
20          selectors or accounts for each target, I think, I don't 15:43  
21          understand the basis for a clear assertion of that.  
22          Because there are also -- well, anyway, so I think  
23          "*likely surveil several per person*" I think overstates  
24          the number.

25   634   Q.    All right. Certainly likely not to be restricted to 15:44  
26          just one in every case, isn't that right?

27          A.    Well, if we have -- I don't think that we have any  
28          evidence about, for a target, what the typical number  
29          of selectors is. I'm not aware of such a number

1 anywhere in the record that I've seen published.

2 635 Q. well we probably don't know, isn't that right?

3 A. I don't, sitting here, know the answer to that.

4 636 Q. If you look at page 14 of the joint experts' report,  
5 there's a number of statements that you do agree with 15:44  
6 on the right-hand side at item 14: "*The experts agree*  
7 *targeted individuals often communicate with individuals*  
8 *who are not targets.*" That's correct, isn't it?

9 A. Yes.

10 637 Q. "*The experts agree the government interprets Section 15:44*  
11 *702 to authorise the acquisition of communications to,*  
12 *from and about targets*".

13 A. Yes.

14 638 Q. So it's not just to and from, it's whatever they can  
15 find that relates -- that is *about* a target, isn't that 15:44  
16 right?

17 A. No, that's not my understanding of "about". "About"  
18 authority under Section 702 is explained in detail in  
19 the PCLOB report. And the main thing to know there is  
20 that if the government is trying to find all the 15:45  
21 communications to or from somebody, it might appear in  
22 the header part of an e-mail address, what's called the  
23 envelope, or in some instances technologically it might  
24 appear below the line in what's considered the content  
25 part of the e-mail or other communication. And PCLOB 15:45  
26 said to the NSA 'Can you come up with a better way to  
27 make sure you're doing as little "about" as possible?'  
28 And the NSA said back, roughly speaking, 'we're doing  
29 the best we can on this, but sometimes you have to go

1 below the line and look at the "about" in order to find  
2 all the ones to or from somebody'.  
3

4 So "about" could be an extremely broad thing which,  
5 anything *about* a particular person, but we know that 15:45  
6 saying it's *about* a particular person, such as Peter  
7 Swire, is forbidden under the rules - that's in the  
8 PCLOB report - and we know that the reason for "about",  
9 according to the PCLOB report, is in order to figure  
10 out whether it's to or from somebody. 15:46

11 639 Q. And we know that the government -- the experts also  
12 agreed the government acquires multi communications  
13 transactions, isn't that correct?

14 A. Yes, we've talked about that, yeah.

15 640 Q. All right. And just explain to the judge what they 15:46  
16 are.

17 A. This is where there's a series of e-mails that are  
18 forwarded from one person to another, the multi  
19 communications transactions or MCTs. And these are the  
20 ones that were found to be not strictly enough done in 15:46  
21 the Upstream programme initially, the judge found it to  
22 be unconstitutional. The NSA came back with a set of  
23 tightened up procedures and the judge found it was  
24 constitutional.

25 641 Q. **MS. JUSTICE COSTELLO:** Is this the one with the 15:46  
26 different name? No, not the different name.

27 A. This is Upstream.

28 **MR. MCCULLOUGH:** MCTs.

29 A. Upstream is MCTs, yeah.

1 642 Q. **MR. MCCULLOUGH:** Are still use indeed Upstream, isn't  
2 that correct?

3 A. It's correct that MCTs are still used in Upstream under  
4 the new procedures, yes.

5 643 Q. Yeah. I just want to show you a document that we've 15:47  
6 created, so you won't find it in any of the books.

7 A. Yes.

8 644 Q. And I will explain what it is (Same Handed). This is a  
9 document based on the transparency reports to which you  
10 just referred. 15:47

11 A. Yes.

12 645 Q. And it gives the numbers that each of the companies  
13 have given...

14 A. Yes.

15 646 Q. ... for the targets against which they're asked to 15:47  
16 search in each year. All right?

17 A. Yes.

18 647 Q. And you can see that the total for the years that we're  
19 looking at, 2013 to 2015, is just short of half a  
20 million. 15:47

21 A. If you add up -- well, these may be continuing, so I  
22 don't know if they're a half a million different. So  
23 if it was there for the first half of 2013 and it  
24 continued in effect for the second half, that might be  
25 the same person. I can't tell, but that's what I would 15:47  
26 believe is quite possibly the case. But if you add up  
27 those periods and you're willing to have that double  
28 counting then you get to half a million, yes.

29 648 Q. Assuming that's what it is. And we can assume that

1 each person or each account - because an account, I  
2 think, is an e-mail or a telephone number, isn't that  
3 correct?

4 A. My understanding of the reports - I looked at the  
5 Google and Facebook reports, for example - my 15:48  
6 understanding is that was the number of customer  
7 accounts that were being accessed.

8 649 Q. All right. And we can assume that each of those  
9 accounts will necessarily communicate with a number of  
10 other people, can't we? 15:48

11 A. Yes.

12 650 Q. So if it's a Facebook account, that Facebook account  
13 will communicate with Facebook friends, isn't that  
14 right?

15 A. Yes. 15:48

16 651 Q. If it's a Google mailbox, the mailbox may communicate  
17 with a very large number of people, isn't that right?

18 A. Yes.

19 652 Q. And of necessity, the government will have to look  
20 through all of the material relating to them also, 15:48  
21 isn't that right?

22 A. The government will have collected those under the law.  
23 There's a separate question when they collect things of  
24 which pieces are looked at for analysis purposes. But  
25 it would be in the database. 15:48

26 653 Q. Yeah. These are in fact numbers that are newly tasked  
27 for each half year, the numbers we have here.

28 A. I don't know the length of an order and what newly --  
29 I'm not sure. But okay.

1 654 Q. All right.

2 A. Yeah.

3 655 Q. And so the number that you give in fact multiplies out  
4 to a very large number of people whose data is  
5 necessarily inspected by the NSA, isn't that correct? 15:49

6 A. Well, "very large" is one of those number -- things.  
7 But what I would say is that the government has given  
8 us an annual number, such as 2014 at 90 something  
9 thousand, 2015 at 90 something thousand. And so this,  
10 I don't know if this is Section 702 or for all 15:49  
11 purposes, the numbers you've sent here, but in a year  
12 the US government has said 90,000 targets, roughly  
13 speaking, and in a year, even if you add up these  
14 together, you get numbers like 130,000/150,000. So  
15 those are the kinds of numbers of who's targeted. 15:50

16 656 Q. Mm hmm.

17 A. And then the question is how many other people have at  
18 least one communication with them? And that would be a  
19 bigger number, yes.

20 657 Q. It would be a larger number -- 15:50

21 A. Correct.

22 658 Q. -- because you have to multiply the number in each  
23 target, in each account as the case may be, by the  
24 number of people with whom it communicated, isn't that  
25 correct? 15:50

26 A. Yes, and subtract double counting and all that.

27 659 Q. And subtract double counting. All right. And you're  
28 right to say, of course, that we shouldn't use "very  
29 large" numbers - you've a prejudice against adjectives,

1 I understand.

2 A. I do.

3 660 Q. But it's a much larger number than the figure that you  
4 gave?

5 A. Yes, it's much larger than the number of targets, yes. 15:50

6 661 Q. Yes, exactly. All right. Can I just ask you one thing  
7 in that context, it's something that you were  
8 mentioning; in the Upstream surveillance programme, as  
9 I understand it, internet traffic is scanned at  
10 congested points, isn't that correct? 15:50

11 A. By "congested" you mean some place where a lot of  
12 communications come to one place?

13 662 Q. Yes.

14 A. That's my understanding.

15 663 Q. All right. And selectors are applied at that point in 15:50  
16 order to identify to, from and about, isn't that  
17 correct?

18 A. Yes.

19 664 Q. And in order to identify multi communication  
20 transactions? 15:51

21 A. So the MCTs are identified as part of that process,  
22 yes.

23 665 Q. All right. And that necessarily involves scanning the  
24 entire of the traffic that goes through that point,  
25 isn't that correct, in order to identify those that 15:51  
26 fall within the category in which the NSA is  
27 interested?

28 A. So it implies that there's a lot of collection there.  
29 whether it's 100% or not would depend on technical

1 features that I don't think we know.

2 666 Q. All right. Well, I suppose the central point is this,  
3 that the data of everybody that passes through the  
4 congestion point has to be searched, isn't that right?

5 A. Has to be -- so the filter would apply to both targets 15:51  
6 and non-targets.

7 667 Q. Yeah.

8 A. And so for wherever the filters are operating, it would  
9 be both targets and non-targets where there would be  
10 that initial filtering that happens. Then the ones 15:52  
11 that pass through the filters would go into the saved  
12 area for the NSA.

13 668 Q. All right. I just want to see if we can agree about  
14 that. They are all available to be searched in the  
15 first instance in order to identify the ones that you 15:52  
16 want to keep, is that a fair description of what  
17 occurs?

18 A. Right, so can I, just briefly? There have been big  
19 debates with good faith in more than one direction, in  
20 my view, on how to describe this. So I'll try to 15:52  
21 describe it in a way that I hope counsel will agree on.  
22

23 So one way to think about it is you've got a great big  
24 pipe with lots and lots coming through and there is  
25 some operation that's done out of that great big pipe 15:52  
26 to get a smaller amount. At the end of that smaller  
27 amount you'll have the to, from and about selectors.  
28 The PCLOB report says there's two stages - is it US or  
29 not and does it match the selector? But there's some

1 process where the big pipe gets searched and then the  
2 first time, any time anybody --

3 669 Q. **MS. JUSTICE COSTELLO:** Sorry, does that mean *everything*  
4 in the big pipe?

5 A. Well, it might be that they can see 100%, it might be 15:53  
6 they can see 70%. Just whatever the filter's attached  
7 to, right? If there's two pipes, they might get this  
8 pipe and not that pipe. But wherever the filtering's  
9 happening. It's a big pipe, it's a lot of  
10 communications. The output of that is the subset that 15:53  
11 matches 702 Upstream.

12

13 There's been a debate - and I'll roughly summarise;  
14 some people say it's collected at the big pipe level,  
15 so you have to count it as a search of everybody in the 15:53  
16 big pipe. Some people say no human being or analyst or  
17 computer programme doing anything for foreign  
18 intelligence purposes sees it until it gets to this  
19 subset. And so collection would be then the things  
20 that come out that are to, from and non-US. 15:54  
21

22 I don't want to make some conclusion about which is  
23 collection or not. I *believe* there's agreement that  
24 there's the big pipe and that the NSA touches the big  
25 pipe for purposes of doing the filtering - or at least 15:54  
26 that's my view and it's what they say in all the court  
27 proceedings - and I think there's agreement that the  
28 actual analysis of what does it mean, is there foreign  
29 intelligence purpose etc. happens on the subset.

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- So that's my effort to try to explain the big pipe and the smaller subset that actually gets then subject to the sort of analysis of the national security agency.
- 670 Q. **MR. MCCULLOUGH:** All right. Just one other point then, 15:54  
Prof. Swire; this issue about direct access to the pipe, or direct access to the communications that pass through that are searched -- sorry, that pass through the internet that are searched. It *has* been said that there's direct access to that on the part of the NSA. 15:55
- A. So here -- because the term "direct access" was in the original Washington Post story and it named specifically internet companies such as Microsoft, Facebook, Apple, Google. It was in a programme -- it was in an article that described "the PRISM programme". 15:55  
The PRISM programme is the 702 - you have an annual certification, then you have a directive to the company and specific selectors go to Facebook. What we've just been describing is the other programme under 702, that's the Upstream programme. 15:55
- So in terms of direct, my own view would be direct access to the internet backbone under Upstream is a fair reading. My view is that direct access under PRISM to Facebook and the other internet companies is 15:55  
not an accurate reading. And the Washington Post article said the PRISM programme had direct access.
- 671 Q. All right. And I suppose that brings us back then to one of the issues that was addressed in the report in

1           which you said that we don't actually know the precise  
2           technological means by which the government *secures* the  
3           information that it requires, isn't that right?

4           A.    I'm sorry, can you --

5   672   Q.    All right, if we look at page seven of the joint           15:56  
6           experts' report. They're now talking about PRISM.

7           A.    Yes.

8   673   Q.    You'll see the agreed position:  
9

10           *"Under Section 702, the government serves directives on   15:56  
11           US providers and providers are compelled to give  
12           communications sent to or from identified selectors to  
13           the government. The precise technological means by  
14           which the government permits selectors to providers and  
15           providers send data to the government, to the best of   15:56  
16           the experts' knowledge, has not been made public".*

17          A.    Yes.

18   674   Q.    All right. And does that mean that we just don't know  
19           precisely how information is transmitted from the  
20           providers to the government under PRISM?           15:57

21          A.    So here's what I intended when I agreed to that  
22           sentence; in Ms. Gorski's testimony there's discussion  
23           about we don't know whether it's sent by paper or by  
24           what other mechanism between, for instance, Facebook  
25           and the government, and what I was referring to   15:57  
26           specifically is when the government sends a directive  
27           to Facebook, the directive goes to Facebook's lawyers.  
28           But I don't know what combination of fax or e-mail or  
29           whatever is used to send the government's request from

1 the government to Facebook's lawyers.

2  
3 And similarly, when Facebook sends it back, I don't  
4 know if it's on a CD Rom or by e-mail, I don't know the  
5 precise mechanism. What I do know and believe is that 15:57  
6 there is a request -- sorry, it's sent to the lawyers  
7 for Facebook, as other government requests are, and  
8 then Facebook returns it to the government, as other  
9 requests are, once the lawyers have said it's okay to  
10 produce. So I don't know fax, CD Rom, tape drive, the 15:58  
11 mechanism of sending it back - that's what we were  
12 agreeing to there. What I do know is in PRISM that  
13 it's the legal production through the lawyers that  
14 we're familiar with in many other settings when there's  
15 a request for production. 15:58

16 675 Q. Equally, what we *don't* know, Prof. Swire, is whether it  
17 operates along the following lines: That the operators  
18 in the NSA or the FBI or whoever it is simply have to  
19 feed in the selectors once they've been agreed by the  
20 lawyers for Facebook and then the information comes 15:58  
21 straight back via a live connection. We don't know  
22 whether that's so or not.

23 A. I don't believe that's consistent with what the PCLOB  
24 report says. So that's not my own understanding of how  
25 it operates and I don't believe it's consistent with 15:59  
26 what the PCLOB report says when it gives details and  
27 says it's done the way other documents are produced.

28 676 Q. Can I just show you some of these slides of which we've  
29 heard a good deal?

1 A. Ah, the ones that were in the Washington Post, referred  
2 to in the Washington Post article?

3 677 Q. I think so, yeah (Same Handed). These, I think, come  
4 ultimately from the NSA, isn't that correct?

5 A. I am looking at them. I believe these were the slides 15:59  
6 that the Washington Post original PRISM article  
7 referred to.

8 678 Q. Yes. And these, I think, come from the NSA?

9 A. I think that as far as I know, that reporting is  
10 correct. 15:59

11 679 Q. All right. And you'll see that on the first page it  
12 has the two 702 programmes of which we know, Upstream  
13 and PRISM?

14 A. Yes.

15 680 Q. Upstream: "*Collection of communications on fibre cables* 15:59  
16 *and infrastructure as data flow is passed.*" And then  
17 PRISM: "*Collection directly from the servers of these*  
18 *US service providers*".

19 A. Yes.

20 681 Q. Then over the page it gives a more detailed 16:00  
21 description. There are various types of material to  
22 which access can be gained. So there's stored  
23 communications, chat, RTNEDC - which stands for  
24 realtime notification of an e-mail event such as log-in  
25 or sent message, RTNIM - realtime notification of a 16:00  
26 chat, log-in or log-out event. And then other methods,  
27 other forms of information. And some of these appear  
28 to provide for realtime communication, do you see that?

29 A. I see the slide.

1 682 Q. All right. And does that not help you in your view as  
2 to what *actually* happens here, that material comes in  
3 realtime from the providers to the NSA?  
4 A. So the Director of National Intelligence, the PCLOB  
5 report and other official statements of the US 16:00  
6 Government has said these are incorrect. That's  
7 consistent with my view under oath.

8 683 Q. Well, they may have done. But they come from the NSA,  
9 isn't that correct?  
10 A. So I'm not challenging the accuracy of these slides, 16:01  
11 I'm chall -- sorry, the accuracy of that these came  
12 from the NSA. I am saying that these slides are  
13 incorrect to my knowledge.

14 684 Q. You're saying that various government officials have  
15 said they're incorrect? 16:01  
16 A. Yes, and that my own information and belief based on  
17 the work I've done in this area is that they're  
18 incorrect.

19 685 Q. Well, is this something now that is based on your  
20 security clearance? 16:01  
21 A. The conclusion that I'm giving is the same conclusion  
22 that the PCLOB report gave, it's the same conclusion  
23 that the US Government has given to the Commission in  
24 its proceedings and it's my belief that that is the  
25 case. 16:01

26 686 Q. Sure. But I asked you is that based upon some form of  
27 classified information that you have that you're not  
28 going to tell us about?  
29 A. It is, yeah, it's based on my having been briefed and

1 I'm giving the conclusion that's been publicly  
2 released.

3 687 Q. And in fact, you can't tell us anything about  
4 classified information, isn't that correct? I can't  
5 explore that with you, because you won't give me proper 16:02  
6 answers, isn't that right?

7 A. Well, I don't know about proper answers. I'm bound by  
8 my obligations not to reveal classified information.  
9 The statement I'm giving here is the same statement  
10 that has been given by the US Government officially to 16:02  
11 Europe, it's the same statement that is made in the  
12 PCLOB report and it's the same statement that the  
13 companies have specifically stated repeatedly. And I'm  
14 stating it also.

15 688 Q. All right. Well, we'll just look at one more of the 16:02  
16 slides *from* the NSA if we may, the PRISM tasking  
17 process. Again this is referring specifically to  
18 PRISM. It's a couple of pages on.

19 A. What page please? Page four?

20 689 Q. Page four, yeah. And this seems to describe the 16:02  
21 process from tasking downwards. And we heard about  
22 tasking yesterday, isn't that right?

23 A. We did talk about it, yes.

24 690 Q. Yeah. And down the bottom of the page you'll see after  
25 the various tasking work has been carried out there's a 16:02  
26 description of the providers Google and Yahoo...

27 A. Yes.

28 691 Q. ... giving the information to an FBI data intercept  
29 technology unit. What's that?

1 A. I don't know what, if anything, has been said publicly  
2 about that.

3 692 Q. Right. And is that the means by which the information  
4 is collected by the FBI?

5 A. I'm reading the slide as you are and... This is, 16:03  
6 Judge, this is an area where I have to say what's true  
7 and I also can't say anything that's classified. And  
8 so I will try not to say anything that will be  
9 inconsistent with those obligations.

10 693 Q. Professor, I don't want to know anything that I can't 16:03  
11 explore with you. So if you can't say anything  
12 otherwise than what you know based upon information  
13 that you can't give me, well, then I'm afraid I don't  
14 want to know it.

15 A. Right, you're asking me questions. Whenever I have 16:04  
16 something that I'm confident is true and that I can say  
17 publicly, I'll say it.

18 694 Q. Yeah, if you know anything about -- well, first tell me  
19 do you know anything about this FBI collection unit?

20 A. I think I'm going to say the same thing; I don't have 16:04  
21 anything that I know is true and that I can say about  
22 it.

23 695 Q. All right. So one other thing then about this, a  
24 document you handed in yesterday.

25 A. Yes. 16:04

26 696 Q. A document from the ODNI, do you have that?

27 A. Is that the targeting procedures?

28 697 Q. It's the assessment of oversight and compliance with  
29 targeting procedures.

1 A. I've seen it. I think somebody... (Same Handed). And  
2 which date is this? Yes?

3 698 Q. This is a document to which you referred yesterday.  
4 A. It's one of the -- oh, this is targeting procedures,  
5 yes, it is. 16:05

6 699 Q. So just to put this in context, the certifications are  
7 produced by the NSA, isn't that correct?  
8 A. The certifications are given to the court by the  
9 Director of National Intelligence and the Attorney  
10 General. 16:05

11 700 Q. I'm sorry, by the Attorney General. And the  
12 certifications for 1881(a), Section 702, they don't  
13 show probable cause for individual targets, rather they  
14 describe the system?  
15 A. That's right, they show the targeting minimisation 16:05  
16 procedures that we described yesterday.

17 701 Q. And we've heard that there's a single authorisation for  
18 a very large number of targets in a single year under  
19 702, isn't that right?  
20 A. So we've agreed there's a certification once a year and 16:05  
21 the number of targets is 90,000 or whatever it is.

22 702 Q. All right. And then this document, or documents like  
23 this, are produced in the course of the year that  
24 follows, I think, is that correct?  
25 A. I believe -- well, there's oversight and compliance 16:05  
26 ones which are every six months - and three of those  
27 were recently posted. I believe this assessment of  
28 oversight and compliance with targeting was a one time  
29 study requested --

1 703 Q. A one time study. I see, all right.  
2 A. Yes.  
3 704 Q. All right. And we know that under 1881(a) that the  
4 basic rule so far as a non-US person are concerned is  
5 there must be a reasonable belief that the person is 16:06  
6 outside the US, isn't that correct?  
7 A. Yes.  
8 705 Q. And the collection must be for -- a significant purpose  
9 of the collection must be to obtain foreign  
10 intelligence? 16:06  
11 A. Yes.  
12 706 Q. And you showed this document yesterday, I think, in  
13 order to demonstrate the targeted nature of this. I  
14 just wanted to bring you to one part of it again.  
15 A. Yes. 16:06  
16 707 Q. It's on page six. It's a description of what the NSA  
17 analysts must fill in.  
18 A. Yes.  
19 708 Q. It's in the second part of the first paragraph.  
20 A. Yes. 16:06  
21 709 Q. *"Specifically, NSA analysts must include the following*  
22 *information in a relevant part in the tasking sheet:*  
23 *The specific selector being tasked; citations to the*  
24 *specific document communications that led the agency to*  
25 *determine the user of that facility is reasonably 16:07*  
26 *assessed to be located outside the US; a description of*  
27 *those cited documents or communications; a statement*  
28 *regarding the assessed non-US person's status of the*  
29 *user; and a statement identifying the foreign power or*

1           *foreign territory about which the NSA expects to*  
2           *acquire foreign intelligence information".*

3           A.    Yes.

4   710   Q.    From the point of view of a non-US person - that's an  
5           EU citizen, say residing in this country - I suppose   16:07  
6           number one is obvious, that's just a description of an  
7           e-mail or a telephone number, isn't that right?

8           A.    Yes.

9   711   Q.    Two to four aren't really of any benefit to the EU  
10           citizen, isn't that correct? They're directed to   16:07  
11           ensuring that the person *is* in fact outside the US,  
12           they're designed to protect US persons?

13          A.    Could I answer that in the following way, Judge: So my  
14           view is that EU persons, the rest of the world, and US  
15           persons benefit from the care and attention to each   16:08  
16           selector that's required here. So an analyst has to go  
17           through these hoops or jump over these obstacles for  
18           each selector that's tasked. And then they have to get  
19           their boss to sign off on them. And so the care and  
20           attention of documentation for each one means that the   16:08  
21           analyst, in practice, will want to have a good reason  
22           to go through that. And so that rather than just  
23           signing off on an extra thousand or ten thousand, for  
24           every selector they have to go through this paperwork  
25           documentation. And my view is that *is* an important   16:08  
26           limit on mass and indiscriminate surveillance, because  
27           it puts a hurdle in the way of any analyst who wants to  
28           just go fishing around.

29   712   Q.    Well, just look at the question I asked you.

1 A. Yes. So I believe it *does* provide benefit to EU  
2 citizens, because the method that has to be gone  
3 through for each selector is burdensome enough that it  
4 is done for a reason to do their job rather than to  
5 just look around among non-US persons. 16:08

6 713 Q. Prof. Swire, we can surely agree with this: Items two  
7 to four that have to be filled in in this sheet or  
8 computer form, whatever it is, they are designed to  
9 protect US persons, isn't that correct?

10 A. Well, that are located outside the United States. It 16:09  
11 has to do with different surveillance rules for inside  
12 the United States. But yes.

13 714 Q. They are not intended to be of any benefit to the EU  
14 citizen who is sitting in Dublin or Berlin?

15 A. Except in this indirect way that I've just described. 16:09

16 715 Q. Yeah, except that it makes somebody, if you like, think  
17 about the fact that he *is* there, isn't that correct?

18 A. Well, I think I've tried to answer that, that there's a  
19 system there, the system imposes bureaucratic rigour on  
20 the process to a certain extent and that is to the 16:09  
21 benefit of EU persons.

22 716 Q. All right, it's a matter for the judge ultimately. And  
23 then five is a statement identifying the foreign power  
24 or foreign territory about which the NSA expects to  
25 acquire foreign intelligence information. And that 16:09  
26 means they simply have to identify the foreign power or  
27 foreign territory, isn't that correct?

28 A. Yes, I believe so.

29 **MR. MCCULLOUGH:** All right, thank you.

1           **MR. GALLAGHER:** Sorry, Judge, I'll be very short, if  
2           that's --

3           **MS. JUSTICE COSTELLO:** Yes, yes. Well, you're happy to  
4           complete it today? I just want to know whether...

5           **MR. GALLAGHER:** I'm happy to complete it today to let           16:10  
6           --

7           **MS. JUSTICE COSTELLO:** The Professor might need a  
8           break.

9           A. I'm delighted to continue, if you'd like to.

10           **MS. JUSTICE COSTELLO:** Very good.           16:10

11           **MR. GALLAGHER:** Thank you very much for offering,  
12           Judge. I won't be long.

13

14           **RE-EXAMINATION OF PROF. SWIRE BY MR. GALLAGHER**

15           16:10

16   717   Q.   **MR. GALLAGHER:** Just in relation to those tasked  
17           selectors, if you take the first one that you're  
18           looking at there, the specific selector being -- sorry,  
19           the targeting procedures, I should say; the specific  
20           selector being tasked.           16:10

21           A. Yes.

22   718   Q.   Is that of assistance to EU citizens, that they're  
23           required to identify specific selectors and confine  
24           themselves to the selectors then so identified?

25           A. My view has been that each selector has to go through           16:10  
26           this process. So a busy analyst trying to get through  
27           their job and do a good job at it has to decide whether  
28           it's worth it to add each additional e-mail or each  
29           additional phone call or each additional Facebook

1 handle. And my view is that that is a significant  
2 deterrent to fishing expeditions.

3 719 Q. And the second one, citations to the specific documents  
4 or communications that led the agency to determine the  
5 user of that facility is reasonably assessed to be 16:11  
6 located outside the US, is that relevant?

7 A. It's relevant in the following way. If you have an  
8 e-mail address, that doesn't show your location inside  
9 or outside of the US in many cases. Sometimes it might  
10 - we could have the country code at the end. But if 16:11  
11 it's a G-mail address, you need a lot more to figure  
12 out whether it's in the EU or the US.

13 720 Q. I think the PCLOB report said that these -- the  
14 requirement that the person be a non-US person has an  
15 incidental benefit in terms of foreign citizens, isn't 16:11  
16 -- or foreign -- non-US citizens, isn't that correct?

17 A. The PCLOB report said that. And it's consistent with  
18 my view.

19 721 Q. Just, I'm going to take, if I may, the questions put by  
20 Mr. McCullough and just ask you a few questions on 16:12  
21 them, because those were the last matters that you  
22 dealt with. And in relation to the direct access issue  
23 on which you can't reveal classified information but  
24 you stated your conclusion on oath, have you read the  
25 affidavits filed on behalf of Facebook in this and the 16:12  
26 affidavit of Ms. Andrea Scheley, who deals with that  
27 matter in paragraph ten?

28 A. Is that the one that talks about the LERT, the L-E-R-T?

29 722 Q. Yes.

1 A. Yes, I read that.

2 723 Q. Yeah. Can I just ask you to look at that? That's in  
3 book four.

4 A. What tab?

5 724 Q. And it's tab 23. And if I can direct you to paragraph 16:12  
6 ten.

7 A. Paragraph ten?

8 725 Q. Yes.

9 A. Yes.

10 726 Q. Ms. Scheley says: "*Facebook does not provide direct 16:13  
11 access to its systems to any government or government  
12 agency.*" Is that consistent with your understanding of  
13 the position?

14 A. Yes, I'm reading paragraph ten. It's consistent with  
15 my understanding or what I intended to say earlier. So 16:13  
16 in particular the last sentence says: "*This  
17 information, and only this information, is sent to the  
18 requesting government entity, and subsequent requests  
19 and disclosures must follow the same process.*"

20 727 Q. I then just want you to address another point raised by 16:13  
21 Mr. McCullough and that relates to your criticisms of  
22 the Advocate General's opinion in Schrems. And I think  
23 you indicated that there were mistakes in the Advocate  
24 General's understanding of the position in relation to  
25 the surveillance, is that correct? 16:14

26 A. That's correct.

27 728 Q. And could you just identify the main errors that were  
28 included in the Advocate General's opinion?

29 A. I'd emphasise two things. One is this PRISM story that

1 we've talked about, the difference between direct  
2 access to servers or the sort of mass access - and the  
3 word "mass" was emphasised by the Advocate General -  
4 and the contrast with selectors tasked one at a time  
5 that we've been talking about. The second is that by 16:14  
6 the fall of 2015 the Review Group had done its report,  
7 the President had issued his set of reports in 2014,  
8 the US Congress had passed the USA Freedom Act, and  
9 these reforms were not reflected in the Advocate  
10 General's opinion. 16:14

11  
12 So to the extent that a dictate has been that the  
13 Commission's decision and the court's decision should  
14 be based on current actions, not old and out of date  
15 actions, there had been very substantial changes in US 16:15  
16 law and practice that were publicly available and those  
17 were not reflected in the Advocate General's report.

18 729 Q. And on the basis of your knowledge and your description  
19 to this court of how the system operates, how  
20 significant were those mistakes on the part of the 16:15  
21 Advocate General?

22 A. Well, they were significant. For instance, the entire  
23 215 programme, collection of all that phone call  
24 meta-data for vast fractions of phone calls had been  
25 cancelled by then. It's quite a material change. And 16:15  
26 secondly, for 702, PRISM, the difference between mass  
27 and undifferentiated on the one hand and targeted  
28 selectors is an entirely different kind of programme.  
29 Using the word "mass" for targeted surveillance is a

1 very fundamental mistake.

2 730 Q. I think you identified 24 reforms you said that weren't  
3 considered by the Advocate General?

4 A. That's right. In my testimony in 2015 to the Belgian  
5 authority after the Schrems case, I listed 24 - you 16:16  
6 could count them differently and say there are 20 or 26  
7 or whatever. But there were many different changes in  
8 law and practice that had not been considered.

9 731 Q. And I don't want to go through all of those reforms.  
10 But in general terms, how significant were those 16:16  
11 reforms, be they 20 or 24?

12 A. I believe they were very significant. When USA Freedom  
13 passed, I wrote an article calling it the biggest  
14 pro-privacy reform since FISA in 1978. And to not  
15 notice the biggest statute in 50 years, to me is a big 16:16  
16 deal.

17 732 Q. And how significant is PPD-28 itself?

18 A. PPD-28, to me, is significant in its, in the thrust of  
19 it to apply privacy civil liberties protections, not  
20 just to US persons but to non-US persons. It is not a 16:16  
21 statute, it could be changed in the future by a future  
22 President. But I consider it significant.

23 733 Q. **MS. JUSTICE COSTELLO:** well, how easy is that to do?

24 A. It would --

25 734 Q. **MS. JUSTICE COSTELLO:** I mean, does it literally 16:17  
26 just...

27 A. Can you just do it tomorrow?

28 735 Q. **MS. JUSTICE COSTELLO:** ... just write it in tomorrow?  
29 Does he have to go through a process or...

1 A. No -- well, if the President doesn't do a careful  
2 process and vet it then a President can get into  
3 trouble and have courts strike him down - what's  
4 happened with the immigration ban. For PPD-28, my  
5 assumption is that we would find out publicly that it 16:17  
6 was cancelled. So then the EU Commission and the  
7 courts would be on notice at that point that this thing  
8 had changed.

9 736 Q. **MS. JUSTICE COSTELLO:** But as a matter of power --  
10 A. As a matter of power, he could sign it tomorrow. 16:17

11 737 Q. **MR. GALLAGHER:** I think you indicated the concerns that  
12 US business might have if there were any change of that  
13 nature?

14 A. I know the US business would be very concerned at that  
15 point. The US business who does trans -- and also 16:17  
16 European business that does transatlantic business, if  
17 there were to be a disruption of the sort that we've  
18 discussed is possible, that would be of substantial  
19 concern to those businesses, yes.

20 738 Q. I think you've seen Prof. Meltzer's report in terms of 16:18  
21 the scale of the disruption, is that correct?

22 A. I have.

23 739 Q. Mr. McCullough put a document to you **(INDICATING)** that  
24 doesn't in any way on its face give us information with  
25 regard to whether, for example, in 2013 quarters one 16:18  
26 and two, three and four, that the users targeted are  
27 actually different, but it seeks to add up the numbers  
28 for the first and second quarter and the third and  
29 fourth quarter to give an aggregate number for the

1 year, is that correct?

2 A. On its face, the document doesn't say that. You could  
3 go back to the individual reports and see what it says  
4 and that would give you an answer.

5 740 Q. And he then aggregates the numbers for the three years 16:19  
6 total. Does it give *any* information with regard to the  
7 numbers of users that are customers of these entities,  
8 Facebook, Apple, Microsoft, Yahoo, Google?

9 A. The chart does not give those numbers. My report gives  
10 information when we talk about Google and Facebook of 16:19  
11 what the numbers are.

12 741 Q. And does it give any information as to whether the user  
13 targeted in Facebook in the first quarter of 2013 is  
14 different from the user targeted in Apple or in  
15 Microsoft or Yahoo or Google? 16:19

16 A. The document does not. And so if there's a selector  
17 and you're doing both to and from then I would think  
18 there's quite a strong chance that it might be from  
19 G-mail if it's a Google customer, but there might be a  
20 selector to Apple customers or to Facebook customers. 16:20

21 742 Q. This has been put to you as an indication of the number  
22 of users over this period, different users. Is it  
23 possible to draw *any* conclusion as to whether that  
24 represents different users or the extent of the overlap  
25 of the users encompassed or captured by those figures? 16:20

26 **MR. McCULLOUGH:** That is, of course, a leading  
27 question, Judge. I mean, all the questions on this  
28 line have been.

29 A. Would you like me to answer, Judge, or not?

1           **MR. MCCULLOUGH:** well, now it's been asked, you better.  
2           **MS. JUSTICE COSTELLO:** well, I think it's been asked,  
3           we'll get the answer. Mr. Gallagher wins that one.  
4           Yes, answer it please.  
5           A.    Ah, okay. I thought you were saying no, so I sat back   16:20  
6           and relaxed.  
7   743   Q.    **MR. GALLAGHER:** I think *I* was being told no with the  
8           question, so I'll improve it the next time. But maybe  
9           you'd answer that?  
10          A.    I received the document. I don't know the basis for   16:20  
11          deciding whether it's the same users or different  
12          users.  
13   744   Q.    Then going back perhaps, in reverse order, to some of  
14          the points raised by Mr. Murray. He referred you to  
15          Prof. Brown's report, which I think was at divide 66 -   16:21  
16          but we don't need to get it out - and the list of  
17          principles that were included in pages 16 and 17 and  
18          suggested that you didn't draw attention to *those* in  
19          your report. And can I just ask you to look at the  
20          section of your report, I think it's chapter six --   16:21  
21          A.    It is.  
22   745   Q.    -- that deals with that?  
23          A.    Yes.  
24   746   Q.    And I think you explained what you had done in chapter  
25          six, identifying the various principles and putting   16:21  
26          before the court a picture, or a full picture of the  
27          extent to which those principles were complied with, is  
28          that correct?  
29          A.    Yes, we went through the list that the Prof. Brown

1 group defined and we went step by step through them,  
2 giving quotations about them.

3 747 Q. And in fact, in paragraph three on page 6-1 you say:  
4 "*This chapter applies the 11 categories of safeguards*  
5 *derived by the Oxford team from these four sources*". 16:22

6 A. Yes.

7 748 Q. And those are the 11 safeguards that are mentioned in  
8 pages 16 and 17, isn't that correct?

9 A. I believe so. I think it's the same list of 11 that  
10 we're talking about, yes. 16:22

11 749 Q. Now, can I just then ask you, Mr. Murray referred you  
12 to the golden era of surveillance and you corrected him  
13 and said the *golden age* of surveillance. In what  
14 context were you referring to that?

15 A. I've written articles on encryption, it's an area I've 16:22  
16 spent quite a lot of time on. And the FBI in  
17 particular has said that law enforcement is going dark;  
18 the idea is there's all these encrypted communications,  
19 the FBI is being blinded by encryption, they can't see  
20 anything. In a long article on encryption and in a 16:22  
21 shorter article that was called "Golden Age of  
22 Surveillance versus" -- "Going Dark versus the Golden  
23 Age of Surveillance", I've said this is actually an era  
24 where surveillance agencies have great advantages  
25 compared to previously. It's been a concern, it's part 16:23  
26 of why we need to have good encryption. I don't know  
27 how much to go through the whole thing.

28 750 Q. No, that's --

29 A. Okay. But among other things, when Apple CEO Tim Cook

1 was talking about the big fight on encryption between  
2 Apple and the FBI, he, in his Time Magazine article,  
3 quoted "The Golden Age of Surveillance" as an example  
4 of part of why he thought it was important to have  
5 effective encryption safeguards. 16:23

6 751 Q. Can I ask you to have a look at Spokeo, on which you  
7 were examined, and divide 35? And there's just a  
8 passage on page ten that I want to draw your attention  
9 to.

10 A. Okay, I've got book three. Passage, number 35? 16:23

11 752 Q. 35, yeah.

12 A. Getting there.

13 753 Q. And page ten.

14 A. Yes, Spokeo, yes.

15 754 Q. And you see the passage, the second paragraph: "*This* 16:24  
16 *does not mean, however, the risk real harm cannot*  
17 *satisfy the requirement of correctness*"?

18 A. I'm sorry, what page are you on please?

19 755 Q. Ten. And its the first full paragraph: "*This does not*  
20 *mean, however, that the risk of real harm cannot* 16:24  
21 *satisfy the requirement of concreteness.*" Do you see  
22 that?

23 A. Yes, I see it.

24 756 Q. And Clapper -v- Amnesty. "*For example, the law has*  
25 *long permitted recovery by certain tort victims even if* 16:24  
26 *their harms may be difficult to prove or measure*",  
27 states the restatement. And: "*Just as the common law*  
28 *permitted suit in such instances, the violation of a*  
29 *procedural right granted by statute can be sufficient*

1 *in some circumstances to constitute injury-in-fact".*

2 A. Yes.

3 757 Q. *"In other words, a plaintiff in such a case need not*  
4 *allege any additional harm beyond the one Congress has*  
5 *identified".*

16:25

6 A. Can I -- so as an observation for that, I've said that  
7 a big goal of the credit report is to take care of you  
8 if you've had a mistake that hurts your credit. That's  
9 what I see as the major thrust of harm that Congress  
10 was worried about. If instead you get a bonus and have  
11 a better credit history, that has not struck me as the  
12 kind of harm that Congress was most looking at. And  
13 here, where Congress has decided that there's a kind of  
14 harm to protect - like a privacy invasion - this  
15 language is consistent with that interpretation; if  
16 it's going to hurt your credit history you should be  
17 protected, if you're getting a bonus and getting help  
18 on credit history that's not what the statute was  
19 designed to do.

16:25

16:25

20 758 Q. *And it goes on and says: "Confirming that a group of*  
21 *voters' 'inability to obtain information' that Congress*  
22 *had decided to make public is a sufficient injury in*  
23 *fact to satisfy Article III)."*

16:25

24  
25 And it goes on: *"(Holding that two advocacy*  
26 *organisations' failure to obtain information subject to*  
27 *disclosure under the Federal Advisory Committee Act*  
28 *'constitutes a sufficiently distinct injury to provide*  
29 *standing to sue')."*

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Is *that* passage relevant to the conclusions which your report contained in relation to standing and your understanding of that doctrine?

A. Well, I'd say in a holding that goes in the direction of limiting standing, at least in the view of some of the statements we've heard, this is authority pointing in the other direction, showing the relatively easier ability to establish standing and the majority is stating that, you might look at it as a limitation on the breadth of what it's saying here. 16:26

759 Q. Can I ask you then to look at the case that Mr. Murray handed in, the Facebook Biometric case?

A. Yes.

760 Q. And he referred you to Ms. Goldman's arguments on page four. 16:26

A. This was a handout separately I think.

761 Q. It looks like this (INDICATING), it was handed in to you separately.

A. Yes, I'm getting it. Got it. I have it in my hands, yes. 16:27

762 Q. And he asked you to look at page four.

A. Yes.

763 Q. And he drew your attention to Ms. Goldman's arguments, beginning on line 16. 16:27

A. Yes.

764 Q. And over the page he drew your attention to Ms. Goldman's argument on line 17, do you see that?

A. Yes.

1 765 Q. where she said: "*In the wake of Spokeo.*" He didn't  
2 draw your attention to, I think, the judge's  
3 intervention in line seven for some reason.

4 A. Well, I was guessing you were going to point me to line  
5 11: "*Spokeo impresses me for its utter lack of* 16:27  
6 *novelty*".

7 766 Q. Yes. Well, I was going to get to that, but I was just  
8 taking it in stages. I think the section begins in  
9 line seven.

10 A. Yes. And so -- 16:28

11 767 Q. And it says:  
12  
13 "*I am not sure I am prepared to say that the Ninth*  
14 *Circuit categorically said as to any statutory injury*  
15 *was enough. I think that goes too far. But leaving* 16:28  
16 *that aside, I mean, Spokeo impressed me for its utter*  
17 *lack of novelty.*"

18  
19 Does that judicial expression of the Spokeo case, how  
20 does that relate to *your* view of the Spokeo case? 16:28

21 A. Well, I've been -- I've tried to be careful to say what  
22 I know about standing and what I don't know about  
23 standing and that I haven't looked at all the different  
24 cases, especially in the lower courts. So it's the  
25 judge expressing scepticism about how big and 16:28  
26 significant Spokeo is. My own explanation of Spokeo  
27 we've gone through quite a bit, I'm not sure I have  
28 anything to add.

29 768 Q. And he didn't draw your attention, I think, to the next

1 page, beginning on line 14, and perhaps more  
2 specifically on line 18.

3  
4 *"But in any event, let me ask you this" - this is the*  
5 *court speaking - "so I denied summary judgement and* 16:29  
6 *applied Illinois law because I found that there was a*  
7 *fundamental right of privacy in Illinois and that BEPA*  
8 *was attempting to protect that. So I mean, the one*  
9 *thing the Spokeo cases all have in common, which isn't*  
10 *much because they're all very specific to the facts,* 16:29  
11 *you know, they're addressing, but the one thing they*  
12 *all have in common is that when they tried to come up*  
13 *with an illustration of an injury that passes under*  
14 *Spokeo, they all say 'invasion of privacy' and that's*  
15 *what I found in the summary judgment order".* 16:29

16 A. I'm not sure I have much to add at this point.

17 769 Q. Sorry?

18 A. I'm not sure I have much to add. Maybe I *am* getting  
19 tired, but I'm not quite seeing what --

20 770 Q. Okay. Well, we'll leave that bit then and pass from 16:29  
21 that. Earlier you were referred to -- you were asked  
22 about the Serwin report. Can you *remember* when you  
23 received the Serwin report?

24 A. Em --

25 771 Q. Or how long prior to your finalising of your own 16:30  
26 report?

27 A. I don't have a definite memory of when I received it.  
28 It was earlier than when I received the Gorski report,  
29 to my recollection, but exactly when different

1 documents arrived with me, I'm afraid I don't have a  
2 clear recollection.

3 772 Q. Well, it was furnished to Facebook's lawyers on 28th  
4 October.

5 A. You're talking about the second report or the first 16:30  
6 report?

7 773 Q. The first report.

8 A. Ah, okay.

9 774 Q. And I just want to clarify the --

10 A. Ah, well, then I'm incorrect. And that was right near 16:30  
11 the end. Because my report was filed on November 3rd.

12 775 Q. Yes. Can I ask you to -- or can I refer you to the --  
13 Mr. Murray was asking you about, and not giving you the  
14 case, the In Re Sealed decision and asking you what it  
15 held. And you couldn't recollect what it held and then 16:31  
16 you subsequently said that the date, 2002, actually  
17 assisted you and enabled you to remember.

18 A. Yes.

19 776 Q. This title, "In Re Sealed", is that a title that's  
20 commonly used for this type of case or... 16:31

21 A. That was not -- I mean, that would be a standard way  
22 the national security cases are often stated. And so  
23 it's like saying "In Re Redacted" case. "In Re Sealed"  
24 case - it provides almost no clue. As I stated before,  
25 when I saw that it was the 2002 appellate opinion, 16:31  
26 which was a very notable opinion, then I recalled it  
27 and can talk about it a great length.

28 777 Q. You indicated to the court that your practice when you  
29 publish an article is to put it -- or maybe it's

1 before, I may have got this wrong, but your practices  
2 with articles, learned articles that you author is to  
3 publicise them on the web and invite comments and  
4 corrections?

5 A. I did that in a very public way on the broadband report 16:32  
6 last year. Also, American legal practice for law  
7 review articles is to use something called SSRN, the  
8 Social Science Research Network. And it's very common  
9 at an intermediate stage to put the article up there  
10 while it's still being edited by the law review editors 16:32  
11 and it's common to receive comments at that point and  
12 corrections or add changes or whatever it is. And so  
13 for my law review articles and for the report that I  
14 referred to, I put it up there for people to see. It's  
15 known to be in process. I welcome comments and try to 16:32  
16 make it better if I get comments.

17 778 Q. And when you get the comments, I take it you consider  
18 them and see whether any changes are required?

19 A. Yes.

20 779 Q. And I think you indicated that you were desirous of 16:32  
21 doing that in this instance, but were told that that  
22 wasn't an appropriate way in which to deal with  
23 evidence, isn't that correct?

24 A. I specifically asked Gibson Dunn if I could do that  
25 here so we could have maximum accuracy and they told me 16:33  
26 that's not the appropriate thing in this case.

27 780 Q. Could you tell the court whether there is *any* analogy  
28 between *that* process and how you consider comments from  
29 third parties and corrections and what you did in

1 relation to the comments by the US Government that  
2 you've referred to?

3 A. Well, I'll make a general comment and a specific  
4 comment. So the general comment is I worked in  
5 government under what we call notice and comment 16:33  
6 rule-making. So for HIPAA - HIPAA is the medical  
7 privacy rule for the United States - in 1999 I was the  
8 White House coordinator for the HIPAA privacy rule. We  
9 put it out publicly for comment. We received 53,000  
10 comments. Our obligation was to create a record that 16:33  
11 answered those comments. And so I was the White House  
12 lead and there was a health and human services lead.  
13 We coordinated a process for 14 agencies and 70 people  
14 to respond to 54,000 comments. We put out a document  
15 of over a thousand pages into the public when we did 16:34  
16 our final rule. So that's a thorough notice - read the  
17 comments, respond to them, come up with your final  
18 draft process - that I oversaw in that setting. And  
19 that rule was upheld by the courts later.

20  
21 I think based on that experience, I'm prone to try to  
22 put out to the world 'Here's my understanding' and do  
23 it with, I don't know, some humility or understanding  
24 that I might be mistaken. And then when we do the  
25 work, sometimes we have changes. I try to have a 16:34  
26 rigorous process to minimise those changes and when  
27 I -- we had the experts' meeting and then I came to you  
28 to testify, I'm sorry, I was wrong on the Fourth  
29 Amendment, I hadn't done that part right, it was one of

1 the things I brought to you, and also on 12333.

2  
3 So now, in terms of the government, I would've welcomed  
4 public comments on my draft before we came to court.  
5 The government had an obligation to read my comments in 16:35  
6 detail with expert people before I could publish it,  
7 because of declassification review. The government  
8 sent in and had the kinds of comments we've talked  
9 about, from typographical errors to 'Here's this small  
10 exception you missed' and things like that. None of my 16:35  
11 opinions changed. But as part of my practice to try to  
12 get it as accurate as possible, I considered each one,  
13 with the people working with me, we checked each one of  
14 the proposed comments. And where I came to the view  
15 that it was better to change it than not, I made the 16:35  
16 changes. Because I took my view to be as accurate as  
17 possible this is how US law operates. So wherever I  
18 could get an accuracy improvement, that was my goal and  
19 those are the changes that I accepted.

20 781 Q. You indicated that you had given instructions, it's 16:35  
21 your practice to give instructions to your assistants  
22 and I think Mr. Murray aggregated the number of people  
23 who corrected the footnotes with the people who  
24 provided substantive help --

25 A. "Corrected" would be double-checking with the notes, 16:36  
26 yes, right.

27 782 Q. I think you said your standing order was for them not  
28 to use adjectives in what they placed before you. And  
29 I think you may have explained that, but would you just

1 clarify why you have that process or procedure so that  
2 there's no misunderstanding?

3 A. I think this also comes from my government experience.  
4 If you're writing a medical privacy rule that applies  
5 to the whole country, you want to be able to defend 16:36  
6 every sentence as accurate. So characterisations of  
7 'an insightful this' or 'a badly drafted that', just  
8 take those out. 'The rule has the following three  
9 provisions', 'it has the following two exceptions',  
10 footnote it, publicly show what the footnote is. And 16:36  
11 that way, if you have critics, people who are in the  
12 government - it might be Congress criticising what the  
13 white House says - they'll look at the sentence and  
14 they'll say 'That sentence is correct, I have nothing  
15 to shoot at'. 16:37

16  
17 And so that experience of writing in that tough setting  
18 against people who are pushing to try to find any flaws  
19 has led me to a practice of trying to be as objective  
20 in my statements as I can be. 16:37

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

22 **MS. JUSTICE COSTELLO:** Thank you very much. We're very  
23 grateful for your long time staying here.

24 A. Thank you.

25 **MS. JUSTICE COSTELLO:** So Tuesday at eleven o'clock. 16:37

26 **MR. GALLAGHER:** Thank you, Judge. Thank you for  
27 sitting late.

28  
29 **THE HEARING WAS THEN ADJOURNED UNTIL TUESDAY, 28TH**

**FEBRUARY AT 11:00**

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'an [1] - 202:7  
 'are [1] - 107:26  
 'Based [1] - 64:18  
 'be [1] - 103:16  
 'but [1] - 96:24  
 'Can [1] - 165:26  
 'constitutes [1] - 194:28  
 'Dear [1] - 87:5  
 'directive' [1] - 8:29  
 'Go [1] - 63:9  
 'Here [2] - 59:9, 154:10  
 'How [1] - 53:5  
 'inability [1] - 194:21  
 'invasion [1] - 197:14  
 'it [4] - 80:11, 80:26, 202:9  
 'Judge [1] - 74:23  
 'my [3] - 34:18, 113:24  
 'necessity' [1] - 8:13  
 'novel' [1] - 31:27  
 'now [1] - 23:4  
 'objectively [2] - 132:29, 136:27  
 'of [2] - 33:14, 34:2  
 'Oh' [1] - 74:28  
 'Okay [2] - 63:14, 64:20  
 'on [1] - 64:15  
 'plainly [1] - 34:1  
 'please [2] - 18:15, 18:16  
 'proportionality' [2] - 8:13, 8:19  
 'significant [1] - 31:27  
 'significant' [1] - 31:26  
 'slash' [1] - 21:2  
 'tell [1] - 87:11  
 'That [1] - 202:14  
 'the [3] - 52:29, 106:22, 202:8  
 'this [3] - 46:11, 59:2, 65:19  
 'threatened [1] - 136:28  
 'we [2] - 22:29, 23:28  
 'We're [1] - 165:28  
 'well [6] - 19:9, 24:25, 26:20, 49:23, 80:11, 119:20  
 'What [1] - 55:18  
 'Yes [3] - 50:10,

50:11, 52:11  
 'you [4] - 53:8, 115:6, 115:7, 154:10  
 'You're [2] - 151:24

**1**

1 [7] - 3:5, 3:10, 20:15, 27:4, 47:2, 160:5, 160:12  
 1-6 [2] - 132:9, 132:10  
 1-7 [1] - 92:12  
 1.1 [3] - 140:16, 140:20, 140:24  
 100 [1] - 51:23  
 100% [3] - 37:17, 170:29, 172:5  
 11 [8] - 1:18, 143:9, 143:22, 144:1, 192:4, 192:7, 192:9, 196:5  
 111 [4] - 146:20, 146:21, 146:22, 146:23  
 114 [1] - 62:4  
 1146 [1] - 132:16  
 1147 [1] - 136:10  
 1148 [1] - 137:20  
 11:00 [1] - 203:1  
 12 [1] - 140:9  
 120 [2] - 65:16, 65:28  
 121 [1] - 106:21  
 12333 [11] - 27:16, 66:10, 87:21, 151:16, 151:18, 151:23, 152:1, 152:7, 152:9, 201:1  
 13 [3] - 3:10, 7:19, 102:13  
 130,000/150,000 [1] - 169:14  
 1306 [1] - 146:4  
 1328 [1] - 145:23  
 1338 [3] - 149:29, 150:1, 150:3  
 1358 [2] - 150:3, 150:4  
 13th [2] - 160:18, 160:22  
 14 [5] - 7:21, 165:4, 165:6, 197:1, 200:13  
 146,750 [1] - 61:22  
 15 [1] - 80:19  
 152 [1] - 4:8  
 155 [3] - 31:9, 31:12, 31:17  
 156 [1] - 32:2  
 157 [1] - 32:7  
 16 [7] - 132:8,

141:27, 141:28, 163:21, 191:17, 192:8, 195:25  
 17 [6] - 7:26, 93:20, 142:7, 191:17, 192:8, 195:28  
 1790s [2] - 79:7, 79:15  
 17th [1] - 91:27  
 18 [3] - 30:26, 98:18, 197:2  
 184 [1] - 4:9  
 1881(a) [3] - 74:25, 180:12, 181:3  
 18th [1] - 84:23  
 19 [2] - 46:29, 69:28  
 1978 [1] - 188:14  
 1987 [1] - 56:29  
 1996 [1] - 16:1  
 1999 [1] - 200:7  
 1ST [1] - 2:10  
 1st [1] - 41:20

**2**

2 [14] - 2:8, 2:19, 2:25, 2:29, 2:29, 29:14, 29:17, 29:18, 46:21, 47:5, 47:6, 47:8, 105:10, 105:12  
 2-5 [1] - 153:9  
 2-7 [3] - 46:29, 47:7, 47:8  
 2.5 [1] - 153:9  
 2/27 [1] - 47:6  
 20 [11] - 9:11, 44:21, 44:22, 48:1, 58:18, 75:10, 80:18, 92:12, 154:24, 188:6, 188:11  
 20% [2] - 16:24, 16:27  
 2002 [5] - 101:3, 101:15, 102:4, 198:16, 198:25  
 2004 [5] - 16:3, 62:11, 101:8, 101:20, 145:15  
 2006 [4] - 37:22, 150:14, 150:17, 150:21  
 2006/2007 [1] - 37:1  
 2007 [7] - 33:5, 33:7, 33:28, 37:22, 150:14, 150:21, 150:22  
 2008 [2] - 36:29, 150:22  
 201 [1] - 61:27  
 2011 [1] - 154:29  
 2013 [7] - 16:19,

47:12, 143:24, 167:19, 167:23, 189:25, 190:13  
 2014 [2] - 169:8, 187:7  
 2015 [14] - 15:22, 28:16, 28:22, 29:2, 31:18, 33:6, 37:6, 62:12, 158:11, 163:11, 167:19, 169:9, 187:6, 188:4  
 2016 [2] - 28:23, 61:10  
 2016/4809P [1] - 1:5  
 2017 [3] - 1:18, 5:2, 37:6  
 207 [2] - 21:2, 21:3  
 20th [1] - 91:27  
 21 [2] - 153:11, 153:23  
 215 [11] - 14:24, 15:3, 15:18, 129:24, 147:1, 149:6, 149:8, 149:11, 149:16, 149:18, 187:23  
 22 [2] - 153:23, 154:11  
 23 [1] - 186:5  
 24 [4] - 162:3, 188:2, 188:5, 188:11  
 24th [1] - 1:18  
 24TH [1] - 5:1  
 25 [1] - 69:28  
 26 [1] - 188:6  
 265 [3] - 106:16, 106:19, 106:20  
 27 [1] - 47:2  
 271 [2] - 107:16, 108:29  
 272 [1] - 109:22  
 28 [6] - 3:4, 8:7, 145:22, 146:4, 146:19, 151:29  
 28TH [1] - 202:29  
 28th [1] - 198:3  
 29 [5] - 1:2, 26:9, 28:15, 36:1, 154:24  
 292 [1] - 128:4  
 293 [1] - 128:4  
 2ND [1] - 2:16  
 2nd [1] - 40:24

**3**

3 [5] - 26:16, 27:10, 29:21, 98:25, 105:13  
 3(a) [1] - 136:11  
 3-23.. [1] - 163:4  
 3-4 [1] - 102:13

3.4 [1] - 141:26  
 300 [1] - 47:11  
 315 [2] - 148:29, 149:2  
 33 [2] - 9:29, 31:8  
 336 [1] - 147:6  
 34 [3] - 47:5, 47:7, 47:9  
 35 [4] - 4:6, 193:7, 193:10, 193:11  
 351 [1] - 61:25  
 37-42 [1] - 2:24  
 38 [1] - 10:3  
 3rd [5] - 41:18, 41:20, 100:12, 198:11

**4**

4 [4] - 2:14, 28:8, 98:25, 117:19  
 40 [4] - 44:21, 44:22, 48:2, 62:11  
 41 [1] - 105:16  
 42 [1] - 62:4  
 46 [1] - 47:12  
 47 [2] - 67:29, 164:11  
 48 [5] - 29:16, 29:17, 41:8, 41:15, 61:29  
 49 [1] - 30:6

**5**

5 [2] - 2:19, 31:7  
 5% [1] - 16:21  
 5-33 [1] - 31:10  
 5-53 [1] - 31:12  
 50 [6] - 27:10, 27:11, 27:12, 27:14, 128:14, 188:15  
 51 [1] - 27:18  
 53 [1] - 31:12  
 53,000 [1] - 200:9  
 54,000 [1] - 200:14  
 55 [1] - 28:5  
 553 [1] - 31:17  
 57 [2] - 28:8, 54:23  
 59 [2] - 28:25, 28:27  
 5th [3] - 158:9, 160:6, 160:19

**6**

6 [1] - 123:18  
 6-0 [1] - 132:9  
 6-1 [1] - 192:3  
 61 [2] - 28:29, 29:7  
 64 [1] - 145:14  
 66 [3] - 141:1, 141:5,

191:15  
**6th** [3] - 160:15,  
160:17, 160:21

---

## 7

---

**7** [6] - 4:5, 10:3,  
123:18, 123:29,  
138:25, 138:26  
**7-38** [1] - 125:19  
**7-5** [1] - 20:20  
**7/8** [1] - 2:8  
**70** [3] - 91:25, 92:3,  
200:13  
**70%** [1] - 172:6  
**702** [25] - 7:20, 7:22,  
11:8, 15:1, 29:28,  
49:19, 76:19, 76:25,  
98:11, 126:6, 159:26,  
159:28, 163:24,  
163:29, 165:11,  
165:18, 169:10,  
172:11, 173:16,  
173:19, 174:10,  
176:12, 180:12,  
180:19, 187:26  
**72** [2] - 20:28, 21:8  
**73** [7] - 20:28, 20:29,  
21:3, 21:4, 21:8, 21:9,  
25:18  
**738** [1] - 125:23  
**74** [1] - 26:11

---

## 8

---

**8** [14] - 13:25, 14:3,  
33:19, 33:20, 138:14,  
138:16, 138:18,  
138:25, 138:26,  
138:27, 139:4, 139:5,  
139:9, 139:18  
**82** [1] - 148:28  
**87** [1] - 125:23

---

## 9

---

**90** [3] - 65:18, 169:8,  
169:9  
**90,000** [2] - 169:12,  
180:21  
**91** [3] - 4:7, 131:2,  
131:10  
**94,368** [2] - 163:10,  
163:23  
**98** [2] - 147:4, 147:6

---

## A

---

**A&L** [1] - 3:3  
**a..** [2] - 67:6, 146:26  
**ability** [4] - 57:23,  
104:19, 138:6, 195:9  
**able** [11] - 11:22,  
23:26, 25:12, 26:21,  
33:25, 59:1, 115:14,  
118:20, 157:14,  
161:10, 202:5  
**about** [1] - 165:17  
**above-named** [1] -  
1:26  
**absence** [3] - 25:11,  
130:27, 141:9  
**absent** [1] - 46:6  
**absolutely** [8] - 6:3,  
12:27, 76:15, 81:29,  
82:5, 100:29, 118:26,  
155:26  
**abstracted** [1] - 72:5  
**abuses** [1] - 151:10  
**academic** [1] - 81:12  
**aceded** [1] - 115:25  
**accept** [7] - 77:3,  
113:5, 113:6, 119:10,  
127:18, 127:19  
**acceptable** [1] - 53:7  
**accepted** [4] - 48:2,  
48:21, 143:3, 201:19  
**access** [23] - 7:22,  
11:29, 18:4, 32:13,  
32:14, 42:7, 43:8,  
49:28, 92:16, 103:23,  
159:7, 173:6, 173:7,  
173:10, 173:11,  
173:23, 173:24,  
173:27, 176:22,  
185:22, 186:11, 187:2  
**accessed** [8] - 75:18,  
76:7, 76:24, 82:16,  
88:1, 112:16, 115:6,  
168:7  
**accommodate** [2] -  
6:27, 25:8  
**accommodated** [1] -  
5:29  
**according** [1] - 166:9  
**account** [12] - 17:15,  
68:23, 68:25, 69:5,  
85:3, 145:4, 164:8,  
168:1, 168:12, 169:23  
**accounting** [1] -  
17:14  
**accounts** [7] - 84:16,  
117:1, 164:7, 164:17,  
164:20, 168:7, 168:9  
**accuracy** [5] - 160:2,

177:10, 177:11,  
199:25, 201:18  
**accurate** [23] - 48:8,  
49:7, 50:23, 50:25,  
51:6, 52:6, 56:24,  
65:13, 66:1, 66:26,  
67:1, 98:9, 103:12,  
126:29, 127:22,  
128:1, 158:17, 159:3,  
159:24, 173:26,  
201:12, 201:16, 202:6  
**accurately** [1] -  
56:28  
**acknowledging** [1] -  
54:28  
**ACLU** [5] - 14:12,  
66:29, 120:10,  
122:20, 123:2  
**acquire** [3] - 29:28,  
182:2, 183:25  
**acquired** [1] - 74:25  
**acquires** [1] - 166:12  
**acquisition** [1] -  
165:11  
**act** [3] - 38:26, 39:5,  
52:8  
**Act** [22] - 15:20,  
15:28, 16:5, 18:2,  
18:4, 19:16, 19:22,  
19:28, 19:29, 31:18,  
32:19, 37:23, 48:12,  
48:13, 49:11, 49:27,  
101:21, 116:5,  
122:12, 150:16,  
187:8, 194:27  
**acting** [1] - 52:16  
**action** [11] - 1:27,  
9:19, 9:23, 18:12,  
18:18, 77:21, 77:27,  
107:5, 113:13, 116:2,  
152:17  
**actions** [4] - 9:24,  
107:7, 187:14, 187:15  
**active** [1] - 51:21  
**activities** [9] - 8:8,  
11:15, 13:8, 18:13,  
27:14, 27:20, 29:1,  
61:5, 62:23  
**activity** [1] - 55:2  
**actor** [3] - 32:25,  
33:1, 33:13  
**actors** [3] - 13:6,  
13:26, 22:25  
**actual** [9] - 34:3,  
50:17, 87:24, 91:24,  
119:7, 119:29, 162:6,  
172:28  
**acute** [2] - 51:1, 52:4  
**add** [11] - 12:12,  
146:4, 167:21,

167:26, 169:13,  
184:28, 189:27,  
196:28, 197:16,  
197:18, 199:12  
**added** [1] - 123:24  
**addition** [2] - 50:14,  
131:3  
**additional** [5] -  
12:12, 184:28,  
184:29, 194:4  
**address** [13] - 9:15,  
86:8, 86:11, 88:16,  
89:2, 89:15, 102:1,  
112:21, 131:24,  
165:22, 185:8,  
185:11, 186:20  
**addressed** [3] -  
70:12, 131:3, 173:29  
**addresses** [1] - 8:14  
**addressing** [1] -  
197:11  
**Adequacy** [1] - 20:17  
**adequacy** [3] - 68:1,  
69:11, 152:29  
**adjectives** [4] -  
64:29, 145:9, 169:29,  
201:28  
**ADJOURNED** [1] -  
202:29  
**ADJOURNMENT** [1] -  
90:7  
**administration** [1] -  
21:28  
**administrative** [7] -  
85:11, 87:12, 87:22,  
121:22, 131:28,  
152:6, 161:29  
**Administrative** [1] -  
29:1  
**admissibility** [1] -  
125:29  
**admission** [2] -  
108:2, 137:13  
**adopt** [4] - 44:27,  
45:2, 135:6, 155:10  
**adopted** [1] - 66:21  
**adoption** [1] - 138:24  
**advance** [3] - 32:11,  
67:20, 125:9  
**advantage** [2] -  
155:24, 156:12  
**advantages** [1] -  
192:24  
**adverse** [1] - 145:6  
**ADVICE** [1] - 3:9  
**advised** [1] - 75:19  
**Advisory** [1] - 194:27  
**advocacy** [2] -  
158:28, 194:25  
**Advocate** [13] -

158:3, 158:18, 159:2,  
159:7, 160:9, 186:22,  
186:23, 186:28,  
187:3, 187:9, 187:17,  
187:21, 188:3  
**advocate** [4] -  
159:13, 159:16,  
160:2, 160:4  
**advocated** [2] -  
162:26, 162:28  
**advocating** [1] -  
159:2  
**affairs** [1] - 49:3  
**affect** [3] - 39:11,  
40:6, 40:16  
**affected** [1] - 15:15  
**affidavit** [3] - 99:4,  
125:29, 185:26  
**affidavits** [1] -  
185:25  
**afforded** [1] - 98:22  
**afraid** [3] - 33:22,  
179:13, 198:1  
**AFTER** [2] - 4:7, 91:1  
**after** [1] - 132:21  
**afternoon** [3] - 91:3,  
91:11, 91:12  
**afterwards** [1] -  
56:26  
**Age** [3] - 192:21,  
192:23, 193:3  
**age** [2] - 130:22,  
192:13  
**age** [1] - 130:24  
**agencies** [5] - 27:25,  
95:10, 131:28,  
192:24, 200:13  
**agency** [14] - 10:28,  
17:4, 17:5, 18:7,  
33:25, 40:28, 87:20,  
87:23, 151:4, 151:29,  
173:4, 181:24, 185:4,  
186:12  
**Agency** [3] - 27:25,  
30:28, 144:4  
**agency's** [1] - 33:26  
**agent** [1] - 76:14  
**aggregate** [1] -  
189:29  
**aggregated** [1] -  
201:22  
**aggregates** [1] -  
190:5  
**aggressive** [1] -  
80:27  
**agitating** [1] - 121:11  
**ago** [5] - 13:10, 24:1,  
57:23, 89:8, 148:12  
**agree** [61] - 8:7, 19:6,  
69:24, 70:14, 70:17,

70:22, 70:26, 71:12, 71:16, 71:17, 71:18, 71:26, 72:7, 72:29, 73:25, 75:15, 75:21, 75:25, 75:26, 76:1, 76:5, 77:2, 77:7, 77:13, 77:17, 77:19, 77:20, 77:28, 78:7, 78:11, 81:6, 82:20, 83:4, 83:11, 83:17, 89:4, 89:25, 92:3, 98:28, 99:2, 113:14, 113:16, 113:20, 115:1, 119:12, 119:16, 122:27, 129:6, 131:10, 151:14, 161:15, 163:28, 164:6, 164:10, 165:5, 165:6, 165:10, 171:13, 171:21, 183:6

**agreed** [9] - 20:16, 20:24, 97:8, 132:28, 166:12, 174:8, 174:21, 175:19, 180:20

**agreeing** [1] - 175:12

**agreement** [7] - 7:18, 67:16, 70:29, 97:10, 158:20, 172:23, 172:27

**ahead** [7] - 25:5, 39:14, 70:1, 70:2, 72:24, 102:18, 132:22

**AHERN** [1] - 2:18

**aim** [1] - 155:22

**air** [3] - 114:8, 124:18, 124:29

**alerted** [1] - 99:29

**Alice** [1] - 13:24

**alien** [3] - 108:1, 108:2, 108:5

**aliens** [5] - 107:8, 107:20, 109:4, 109:10, 109:25

**allege** [2] - 116:3, 194:4

**alleged** [1] - 111:1

**alleging** [3] - 77:8, 113:8, 117:22

**Alliance** [1] - 2:27

**allocation** [1] - 113:22

**allow** [3] - 13:12, 18:12, 18:23

**allowed** [4] - 38:18, 38:20, 38:23, 151:24

**allows** [2] - 13:26, 151:23

**almost** [5] - 69:26, 108:16, 142:4, 146:24, 198:24

**alone** [2] - 59:26, 74:26

**Alston** [3] - 56:1, 61:5

**alter** [2] - 20:8, 20:10

**altered** [1] - 35:3

**altogether** [1] - 60:24

**ambiguous** [1] - 111:26

**amend** [2] - 18:9, 66:15

**amended** [3] - 16:1, 16:3, 16:16

**amendment** [4] - 18:7, 71:22, 94:25, 94:27

**Amendment** [47] - 66:11, 69:20, 69:27, 70:4, 70:7, 70:10, 70:21, 71:12, 79:12, 83:6, 83:8, 92:9, 92:17, 92:24, 92:25, 93:4, 93:9, 94:7, 95:8, 96:23, 98:23, 98:25, 101:13, 101:25, 102:20, 102:21, 102:28, 102:29, 103:8, 103:11, 103:14, 103:18, 104:14, 105:3, 105:24, 106:3, 106:23, 107:3, 107:26, 109:9, 109:25, 122:26, 127:18, 131:23, 131:26, 147:11, 200:29

**Amendments** [2] - 106:24, 106:25

**amends** [1] - 70:11

**AMERICA** [1] - 2:21

**American** [15] - 10:24, 12:19, 52:28, 72:14, 82:25, 83:12, 85:20, 86:3, 115:11, 141:3, 143:15, 155:12, 155:13, 199:6

**Americans** [1] - 14:23

**amici** [6] - 29:12, 32:2, 32:4, 32:7, 32:9, 32:21

**amicus** [5] - 31:5, 31:11, 31:21, 31:28, 32:9

**Amnesty** [5] - 10:5, 10:8, 14:20, 126:5, 193:24

**amount** [6] - 10:15, 30:1, 72:19, 100:6, 171:26, 171:27

**analogue** [1] - 80:5

**analogy** [2] - 122:20, 199:27

**analysed** [1] - 126:26

**analyses** [1] - 161:17

**analysing** [1] - 116:27

**analysis** [7] - 14:3, 14:11, 19:12, 135:21, 168:24, 172:28, 173:4

**analyst** [5] - 172:16, 182:16, 182:21, 182:27, 184:26

**analysts** [2] - 181:17, 181:21

**AND** [1] - 1:13

**and..** [1] - 179:5

**Andrea** [1] - 185:26

**annex** [1] - 20:17

**Annex** [1] - 20:28

**annual** [5] - 23:27, 26:25, 30:29, 169:8, 173:16

**anomalously** [1] - 147:16

**answer** [38] - 15:15, 15:16, 21:25, 22:13, 22:19, 22:21, 23:4, 23:11, 24:1, 24:14, 25:6, 25:13, 35:19, 51:28, 52:22, 71:7, 71:15, 74:27, 74:29, 80:29, 81:14, 83:21, 89:29, 94:4, 111:5, 112:5, 122:23, 152:22, 155:26, 162:19, 165:3, 182:13, 183:18, 190:4, 190:29, 191:3, 191:4, 191:9

**answered** [3] - 51:29, 133:13, 200:11

**answering** [1] - 51:27

**answers** [5] - 23:12, 41:13, 68:13, 178:6, 178:7

**ant** [1] - 149:29

**anthology** [1] - 63:28

**anyway** [3] - 41:15, 43:23, 164:22

**apologies** [1] - 106:1

**apologise** [2] - 31:12, 108:11

**appeal** [2] - 12:10, 132:26

**Appeals** [5] - 101:17, 101:19, 101:24, 101:27, 109:26

**appeals** [1] - 13:23

**appear** [11] - 28:2, 47:8, 53:23, 110:19, 119:18, 126:25, 131:7, 156:9, 165:21, 165:24, 176:27

**APPEARANCES** [1] - 2:3

**appellant** [1] - 3:24

**appellate** [1] - 198:25

**Apple** [6] - 173:14, 190:8, 190:14, 190:20, 192:29, 193:2

**application** [3] - 32:15, 70:3, 107:27

**applications** [4] - 29:7, 31:29, 49:20, 115:25

**applied** [14] - 10:22, 10:24, 10:29, 11:2, 13:2, 103:22, 109:9, 109:25, 134:7, 134:24, 135:12, 135:23, 170:15, 197:6

**applies** [13] - 31:28, 59:6, 70:11, 78:25, 98:25, 102:20, 102:21, 103:18, 109:28, 110:21, 112:1, 192:4, 202:4

**apply** [12] - 81:2, 81:16, 81:18, 87:13, 93:10, 93:11, 94:19, 102:28, 109:28, 122:13, 171:5, 188:19

**applying** [3] - 115:22, 116:26, 141:16

**appoint** [3] - 31:21, 31:28, 32:21

**appointed** [3] - 31:6, 32:8, 32:9

**opposite** [1] - 97:19

**appreciate** [2] - 6:1, 92:2

**appreciated** [1] - 10:19

**approach** [2] - 143:19, 145:7

**approaches** [1] - 156:23

**appropriate** [7] - 26:18, 68:20, 112:10, 149:8, 149:15, 199:22, 199:26

**approved** [1] - 27:15

**approximation** [1] - 87:9

**April** [1] - 36:12

**arbitrary** [1] - 107:5

**are'** [1] - 87:2

**area** [17] - 38:24, 78:23, 94:8, 95:14, 96:10, 97:1, 98:10, 98:13, 138:4, 143:18, 151:10, 151:12, 153:7, 171:12, 177:17, 179:6, 192:15

**areas** [2] - 15:29, 58:18

**argue** [3] - 59:5, 77:24, 111:13

**argument** [12] - 117:8, 119:29, 124:25, 125:8, 125:10, 125:12, 132:28, 136:19, 137:7, 157:4, 157:18, 195:28

**arguments** [8] - 32:11, 115:10, 115:13, 119:9, 122:10, 156:7, 195:15, 195:24

**arise** [2] - 45:14, 46:5

**arose** [1] - 34:7

**arrive** [1] - 80:7

**arrived** [2] - 44:8, 198:1

**art** [1] - 12:21

**Article** [29] - 25:3, 26:9, 36:1, 67:29, 71:19, 71:22, 71:23, 71:25, 71:27, 75:28, 77:8, 85:21, 106:21, 113:7, 115:8, 117:5, 117:22, 119:19, 124:11, 125:4, 138:14, 138:16, 138:18, 138:27, 139:3, 139:5, 139:9, 139:18, 194:23

**article** [28] - 62:11, 71:24, 96:24, 101:8, 101:20, 145:19, 159:6, 159:21, 160:6, 160:11, 160:13, 160:14, 160:17, 160:19, 160:22, 160:26, 161:4, 161:17, 173:15, 173:27, 176:2, 176:6, 188:13, 192:20, 192:21, 193:2,

198:29, 199:9  
**Articles** [2] - 138:25, 138:26  
**articles** [12] - 61:29, 62:4, 64:9, 97:26, 157:27, 158:2, 158:6, 192:15, 199:2, 199:7, 199:13  
**articulated** [3] - 81:17, 130:3  
**AS** [5] - 5:1, 7:14, 35:21, 91:1, 152:25  
**ascertain** [1] - 97:16  
**aside** [2] - 98:18, 196:16  
**aspect** [1] - 104:3  
**aspects** [3] - 58:19, 142:27, 149:20  
**assert** [1] - 136:15  
**assertion** [1] - 164:21  
**assess** [1] - 26:26  
**assessed** [3] - 181:26, 181:28, 185:5  
**assessment** [7] - 10:7, 28:11, 28:12, 28:14, 134:16, 179:28, 180:27  
**assigns** [1] - 30:18  
**assist** [7] - 20:19, 31:4, 49:7, 64:1, 67:14, 70:25, 121:9  
**assistance** [8] - 20:15, 31:14, 35:16, 54:3, 54:15, 67:21, 85:26, 184:22  
**assistants** [7] - 60:14, 60:27, 64:4, 64:28, 66:23, 128:18, 201:21  
**assisted** [2] - 33:23, 198:17  
**assisting** [1] - 98:8  
**associated** [2] - 43:9, 54:17  
**associates** [1] - 63:21  
**assume** [3] - 134:26, 167:29, 168:8  
**assumed** [3] - 109:9, 109:24, 162:10  
**assuming** [2] - 7:1, 167:29  
**assumption** [4] - 69:18, 70:19, 71:10, 189:5  
**assurance** [1] - 21:25  
**AT** [1] - 203:1  
**at** [1] - 202:15

**attach** [3] - 128:21, 128:24, 137:23  
**attached** [1] - 172:6  
**attaches** [1] - 103:14  
**attack** [6] - 130:3, 130:9, 130:11, 130:13, 130:16, 130:19  
**attacks** [1] - 130:17  
**attempting** [1] - 197:8  
**attended** [1] - 153:25  
**attending** [1] - 62:18  
**attention** [19] - 33:20, 66:13, 96:12, 96:15, 96:17, 104:5, 108:14, 127:27, 144:23, 152:6, 182:15, 182:20, 191:18, 193:8, 195:24, 195:27, 196:2, 196:29  
**attested** [1] - 99:3  
**attitude** [1] - 155:11  
**Attorney** [4] - 9:24, 27:15, 180:9, 180:11  
**attorney** [10] - 50:26, 55:12, 56:13, 56:14, 56:18, 56:27, 58:4, 58:5, 59:20, 62:20  
**attorneys** [11] - 42:2, 42:3, 53:20, 56:4, 56:7, 60:18, 60:21, 60:29, 61:1, 63:11, 63:19  
**attorneys'** [1] - 18:18  
**audience** [2] - 86:23, 87:6  
**August** [1] - 62:24  
**author** [2] - 65:27, 199:2  
**authorisation** [1] - 180:17  
**authorisations** [1] - 32:1  
**authorise** [1] - 165:11  
**authorised** [2] - 43:13, 150:16  
**authoritative** [4] - 96:4, 101:23, 101:26, 141:21  
**authorities** [11] - 25:21, 25:23, 29:8, 36:4, 97:26, 105:10, 141:3, 144:5, 151:20, 151:22, 160:28  
**Authority** [1] - 35:29  
**authority** [28] - 9:4, 20:2, 25:27, 26:7, 32:20, 34:21, 43:9, 50:14, 66:10, 89:8, 93:13, 94:10, 98:15, 101:28, 103:26, 103:27, 104:18, 105:6, 108:1, 127:20, 141:22, 153:26, 153:27, 154:5, 154:7, 165:18, 188:5, 195:7  
**automobile** [1] - 131:11  
**avail** [2] - 108:7, 109:6  
**availability** [1] - 27:23  
**available** [12] - 5:27, 6:16, 28:26, 30:4, 42:26, 65:6, 65:8, 87:29, 98:4, 107:2, 171:14, 187:16  
**aware** [17] - 16:8, 32:24, 50:18, 63:6, 85:1, 95:21, 96:4, 96:5, 100:19, 103:27, 116:1, 117:2, 117:7, 118:12, 126:17, 152:13, 164:29

---

**B**

---

**back** [1] - 24:1  
**backbone** [1] - 173:23  
**background** [5] - 16:5, 51:17, 64:16, 68:9, 89:13  
**bad** [2] - 13:11, 108:12  
**badly** [2] - 121:27, 202:7  
**ban** [5] - 128:5, 129:12, 129:15, 155:14, 189:4  
**BANK** [1] - 2:13  
**bank** [2] - 17:12, 17:14  
**bankruptcy** [2] - 37:7, 37:13  
**Bar** [1] - 80:23  
**bare** [3] - 77:8, 123:7, 124:11  
**barred** [1] - 122:8  
**BARRINGTON** [1] - 2:21  
**BARROW** [1] - 2:14  
**bars** [1] - 115:23  
**Based** [1] - 158:11  
**based** [25] - 19:8, 19:12, 49:17, 62:9, 63:17, 66:1, 67:9, 94:25, 94:27, 123:3, 142:20, 143:8, 158:16, 159:10, 159:24, 160:1, 162:18, 167:9, 177:16, 177:19, 177:26, 177:29, 179:12, 187:14, 200:21  
**baseline** [5] - 140:13, 140:22, 141:10, 155:9, 157:10  
**baseline"** [1] - 140:12  
**basic** [2] - 88:10, 181:4  
**basis** [12] - 31:6, 53:7, 101:25, 115:23, 122:29, 133:7, 135:3, 158:26, 159:18, 164:21, 187:18, 191:10  
**BE** [1] - 7:13  
**be..** [2] - 92:1, 145:25  
**bear** [1] - 7:8  
**became** [4] - 40:25, 64:24, 95:21, 100:19  
**become** [2] - 105:25, 106:4  
**becomes** [2] - 108:3, 120:7  
**bedrock** [1] - 94:7  
**BEFORE** [1] - 1:17  
**began** [1] - 66:5  
**begin** [1] - 97:21  
**beginning** [3] - 160:26, 195:25, 197:1  
**begins** [4] - 20:29, 21:12, 125:18, 196:8  
**behalf** [3] - 34:11, 56:4, 185:25  
**behaviour** [1] - 119:14  
**behind** [2] - 156:10, 157:20  
**Belgian** [8] - 35:28, 35:29, 89:8, 153:25, 153:27, 154:5, 162:3, 188:4  
**Belgium** [1] - 153:19  
**belief** [8] - 43:9, 63:17, 75:2, 156:3, 156:14, 177:16, 177:24, 181:5  
**beliefs** [2] - 156:1, 156:7  
**believes** [1] - 100:25  
**below** [5] - 18:27, 139:8, 139:18, 165:24, 166:1  
**benchmark** [1] - 140:11  
**benefit** [8] - 21:18, 89:12, 182:9, 182:15, 183:1, 183:13, 183:21, 185:15  
**benefits** [1] - 157:25  
**BEPA** [1] - 197:7  
**Berlin** [1] - 183:14  
**best** [22] - 6:26, 33:8, 44:19, 45:6, 74:5, 74:17, 83:24, 87:10, 88:2, 88:9, 88:17, 93:27, 101:28, 102:2, 102:4, 105:6, 111:7, 127:6, 144:8, 156:22, 165:29, 174:15  
**better** [9] - 11:1, 17:11, 157:5, 161:18, 165:26, 191:1, 194:11, 199:16, 201:15  
**between** [19] - 44:2, 44:22, 45:19, 61:20, 62:6, 79:4, 79:25, 100:8, 101:6, 124:15, 153:4, 158:20, 159:18, 162:13, 174:24, 187:1, 187:26, 193:1, 199:28  
**beyond** [6] - 8:16, 11:26, 52:7, 52:10, 87:17, 194:4  
**big** [22] - 16:3, 23:1, 23:2, 50:18, 65:16, 124:2, 159:28, 171:18, 171:23, 171:25, 172:1, 172:4, 172:9, 172:14, 172:16, 172:24, 173:2, 188:15, 193:1, 194:7, 196:25  
**bigger** [1] - 169:19  
**biggest** [2] - 188:13, 188:15  
**Bill** [1] - 108:1  
**bill** [1] - 61:4  
**billed** [1] - 61:3  
**billing** [1] - 61:4  
**binder** [1] - 132:6  
**binding** [1] - 97:19  
**biographical** [2] - 46:21, 46:25  
**biography** [1] - 47:4  
**Biometric** [2] - 116:4, 195:13  
**biometric** [8] - 116:9, 116:13, 116:21, 118:12, 118:25,

120:2, 121:13, 123:23  
**biometrics** [3] -  
 118:3, 118:17, 118:23  
**BIPA** [1] - 124:11  
**Bird** [3] - 56:1, 61:5,  
 61:6  
**bit** [11] - 5:13, 7:1,  
 11:18, 58:10, 79:4,  
 79:25, 82:7, 114:25,  
 115:15, 196:27,  
 197:20  
**bits** [1] - 145:4  
**BL** [7] - 2:6, 2:11,  
 2:17, 2:22, 2:27, 3:2,  
 3:8  
**blinded** [1] - 192:19  
**block** [2] - 144:3  
**Bob** [1] - 13:25  
**bodies** [1] - 68:24  
**body** [5] - 25:28,  
 25:29, 26:3, 55:5  
**bonus** [2] - 194:10,  
 194:17  
**Book** [10] - 20:15,  
 27:10, 28:8, 29:14,  
 29:17, 29:18, 29:21,  
 105:10, 105:12,  
 105:13  
**book** [12] - 27:9,  
 38:7, 38:11, 58:15,  
 139:13, 141:1, 142:4,  
 143:12, 145:14,  
 154:9, 186:3, 193:10  
**booklet** [1] - 146:6  
**books** [2] - 27:7,  
 167:6  
**boss** [1] - 182:19  
**bottom** [3] - 145:25,  
 161:24, 178:24  
**bound** [1] - 178:7  
**box** [4] - 40:22,  
 48:16, 48:18, 48:26  
**Branch** [1] - 9:6  
**breach** [14] - 77:21,  
 85:20, 116:3, 117:17,  
 117:28, 118:19,  
 119:10, 119:14,  
 119:17, 120:6, 120:8,  
 120:12, 120:14,  
 120:25  
**breach** [1] - 77:24  
**breached** [2] -  
 118:19, 120:4  
**breaches** [2] - 111:1,  
 120:26  
**breadth** [1] - 195:11  
**break** [3] - 91:18,  
 121:23, 184:8  
**BRIAN** [1] - 2:5  
**briefed** [1] - 177:29

**briefly** [5] - 6:8, 9:15,  
 102:21, 118:9, 171:18  
**bring** [6] - 12:4, 68:7,  
 71:9, 113:25, 113:28,  
 181:14  
**bringing** [2] -  
 130:18, 130:25  
**brings** [1] - 173:28  
**broad** [5] - 8:21,  
 15:18, 65:1, 66:12,  
 166:4  
**broadband** [2] -  
 65:15, 199:5  
**broader** [2] - 65:29,  
 68:22  
**broke** [1] - 9:21  
**brought** [5] - 32:18,  
 37:7, 66:13, 126:6,  
 201:1  
**Brown** [4] - 141:22,  
 142:21, 143:6, 191:29  
**Brown's** [6] - 140:5,  
 140:27, 142:27,  
 144:10, 144:17,  
 191:15  
**Brussels** [1] - 58:15  
**BSA** [1] - 2:27  
**build** [1] - 47:14  
**built** [1] - 151:29  
**burdensome** [1] -  
 183:3  
**bureaucratic** [1] -  
 183:19  
**business** [8] - 55:2,  
 155:10, 156:12,  
 189:12, 189:14,  
 189:15, 189:16  
**businesses** [5] -  
 155:8, 155:13, 156:4,  
 157:24, 189:19  
**busy** [2] - 100:5,  
 184:26  
**BY** [10] - 1:17, 4:5,  
 4:6, 4:8, 4:9, 7:13,  
 35:21, 91:7, 152:25,  
 184:14

## C

**cabin** [1] - 149:19  
**cabinet** [1] - 120:22  
**cables** [1] - 176:15  
**CAHILL** [1] - 3:2  
**California** [1] - 116:3  
**CANAL** [1] - 2:29  
**cancelled** [2] -  
 187:25, 189:6  
**cannot** [7] - 73:14,  
 77:7, 109:26, 117:25,

122:27, 193:16,  
 193:20  
**capital** [1] - 109:14  
**capture** [1] - 145:11  
**captured** [1] - 190:25  
**car** [2] - 80:1, 131:12  
**card** [1] - 148:14  
**care** [4] - 155:11,  
 182:15, 182:19, 194:7  
**careful** [3] - 163:1,  
 189:1, 196:21  
**carefully** [12] - 19:13,  
 56:22, 73:13, 73:17,  
 83:18, 83:21, 84:9,  
 84:11, 87:27, 126:26,  
 127:3, 162:18  
**carried** [1] - 178:25  
**Carte** [1] - 124:10  
**case** [181] - 6:10,  
 6:11, 10:10, 10:16,  
 10:18, 11:9, 11:20,  
 12:8, 14:9, 14:17,  
 14:20, 15:3, 15:12,  
 15:16, 15:17, 15:23,  
 15:24, 17:17, 18:11,  
 19:21, 20:8, 20:10,  
 24:18, 32:9, 32:10,  
 36:2, 36:28, 37:5,  
 37:6, 37:13, 37:16,  
 40:2, 49:9, 50:7, 51:2,  
 51:14, 53:1, 53:22,  
 57:11, 57:12, 59:13,  
 60:15, 60:16, 63:9,  
 63:10, 63:11, 63:12,  
 63:26, 66:4, 73:16,  
 73:19, 74:20, 76:21,  
 77:11, 77:20, 79:10,  
 79:12, 79:27, 81:13,  
 85:9, 85:19, 87:18,  
 91:28, 93:15, 93:20,  
 93:21, 93:24, 93:26,  
 93:28, 94:2, 94:5,  
 94:12, 94:13, 95:5,  
 95:26, 95:27, 95:29,  
 96:4, 96:11, 96:21,  
 97:2, 97:4, 97:10,  
 97:11, 98:7, 98:8,  
 98:10, 98:16, 101:2,  
 101:3, 101:4, 101:5,  
 101:10, 101:15,  
 101:16, 102:4, 102:7,  
 103:3, 103:5, 103:13,  
 103:15, 103:16,  
 103:28, 104:7,  
 104:19, 105:19,  
 106:3, 106:9, 108:17,  
 108:23, 109:24,  
 109:27, 110:1, 110:4,  
 110:11, 110:19,  
 111:9, 111:12,

111:16, 112:9, 113:4,  
 114:29, 115:2, 115:5,  
 115:29, 116:25,  
 116:27, 116:29,  
 117:1, 117:4, 117:9,  
 117:13, 118:22,  
 118:25, 120:2,  
 122:12, 124:25,  
 126:4, 126:29, 127:3,  
 127:7, 127:28, 128:4,  
 128:21, 128:24,  
 129:11, 129:15,  
 129:19, 129:28,  
 132:12, 133:28,  
 134:25, 137:13,  
 139:17, 145:5,  
 146:28, 147:2, 148:3,  
 148:4, 148:17,  
 158:18, 164:26,  
 167:26, 169:23,  
 177:25, 188:5, 194:3,  
 195:12, 195:13,  
 196:19, 196:20,  
 198:14, 198:20,  
 198:23, 198:24,  
 199:26  
**Case** [1] - 1:5  
**cases** [60] - 19:12,  
 19:20, 20:3, 29:13,  
 37:18, 57:8, 57:10,  
 57:17, 57:18, 57:27,  
 59:5, 59:21, 59:22,  
 61:27, 62:26, 62:28,  
 63:1, 71:3, 72:17,  
 72:19, 72:21, 72:26,  
 72:27, 84:26, 85:7,  
 85:13, 98:4, 98:22,  
 107:18, 107:20,  
 108:7, 110:27,  
 110:29, 111:6, 112:1,  
 113:4, 114:26, 115:5,  
 115:21, 115:24,  
 115:28, 115:29,  
 117:17, 120:29,  
 121:5, 123:12,  
 123:16, 124:6, 124:9,  
 124:23, 128:3, 128:8,  
 129:12, 129:16,  
 131:1, 147:23, 185:9,  
 196:24, 197:9, 198:22  
**catches** [1] - 87:8  
**categorically** [2] -  
 99:6, 196:14  
**categories** [1] -  
 192:4  
**category** [1] - 170:26  
**CD** [2] - 175:4,  
 175:10  
**CENTER** [1] - 3:8  
**Central** [1] - 30:14

**central** [4] - 95:25,  
 97:29, 126:19, 171:2  
**centralised** [2] -  
 25:28  
**CENTRE** [1] - 3:9  
**CEO** [1] - 192:29  
**certain** [14] - 9:6,  
 58:21, 59:17, 77:25,  
 83:2, 83:15, 86:17,  
 86:18, 114:22,  
 116:15, 116:20,  
 145:11, 183:20,  
 193:25  
**certainly** [21] - 6:21,  
 6:27, 7:3, 45:20, 46:8,  
 73:9, 78:3, 86:15,  
 97:20, 102:8, 111:26,  
 125:8, 128:9, 128:11,  
 136:23, 136:29,  
 146:14, 147:2,  
 161:18, 162:24,  
 164:25  
**certification** [4] -  
 32:16, 76:20, 173:17,  
 180:20  
**certifications** [4] -  
 49:20, 180:6, 180:8,  
 180:12  
**certified** [1] - 58:16  
**certify** [2] - 1:22,  
 24:18  
**certifying** [1] - 24:17  
**chain** [1] - 56:20  
**chall** [1] - 177:11  
**challenge** [13] -  
 10:21, 10:26, 10:27,  
 10:29, 11:3, 14:8,  
 17:14, 126:6, 126:13,  
 129:24, 129:26,  
 134:29  
**challenging** [2] -  
 10:25, 177:10  
**chance** [5] - 5:17,  
 5:18, 18:26, 24:10,  
 190:18  
**change** [17] - 16:23,  
 47:27, 48:13, 49:26,  
 50:17, 50:19, 100:21,  
 100:22, 100:23,  
 124:2, 138:10, 148:5,  
 148:21, 148:24,  
 187:25, 189:12,  
 201:15  
**changed** [13] - 34:8,  
 34:19, 34:28, 35:7,  
 41:14, 49:17, 50:29,  
 65:26, 65:27, 148:12,  
 188:21, 189:8, 201:11  
**changes** [35] - 32:18,  
 43:28, 44:5, 44:9,

44:10, 44:14, 44:22, 44:23, 44:26, 44:28, 45:1, 45:3, 48:20, 50:6, 50:19, 52:2, 53:16, 91:19, 91:23, 91:24, 92:3, 92:5, 150:12, 151:12, 151:15, 161:28, 187:15, 188:7, 199:12, 199:18, 200:25, 200:26, 201:16, 201:19

**changing** [2] - 33:5, 147:19

**Chapter** [2] - 13:25, 46:21

**chapter** [22] - 10:3, 13:5, 14:3, 31:7, 31:10, 33:19, 33:20, 46:21, 47:3, 47:4, 47:5, 47:6, 142:4, 142:5, 143:2, 143:11, 143:13, 154:9, 191:20, 191:24, 192:4

**chapters** [1] - 98:25

**characterisations** [1] - 202:6

**characterise** [1] - 65:5

**charge** [4] - 64:1, 86:12, 86:16, 87:4

**charged** [1] - 86:17

**chart** [1] - 190:9

**Charter** [7] - 67:29, 82:13, 138:17, 138:19, 138:25, 138:27, 142:24

**chat** [3] - 13:28, 176:23, 176:26

**check** [4] - 57:1, 60:22, 65:7, 65:9

**checked** [6] - 56:8, 56:9, 59:1, 93:25, 201:13

**checking** [7] - 12:28, 56:26, 60:19, 63:18, 63:23, 96:29, 201:25

**checks** [1] - 56:27

**chequebook** [1] - 80:28

**Chief** [1] - 9:3

**chilling** [1] - 83:9

**CIA** [3] - 27:14, 152:2, 152:5

**circuit** [2] - 101:5, 123:16

**Circuit** [13] - 15:3, 72:18, 72:27, 85:9, 117:21, 122:20, 132:27, 133:8, 134:7, 134:19, 134:24, 135:8, 196:14

**Circuit's** [2] - 133:26, 136:26

**circuits** [2] - 97:24, 121:8

**circumstances** [9] - 6:9, 32:23, 59:11, 70:11, 83:2, 83:16, 112:17, 149:16, 194:1

**citation** [5] - 42:21, 63:23, 63:24, 137:6, 139:19

**citations** [4] - 60:23, 139:1, 181:23, 185:3

**cite** [9] - 63:7, 63:14, 93:20, 98:14, 103:3, 103:12, 104:19, 111:16, 129:18

**cited** [9] - 61:27, 61:29, 94:10, 96:1, 103:5, 128:4, 145:12, 181:27

**citing** [4] - 101:28, 104:6, 107:17, 139:22

**citizen** [12] - 76:7, 76:9, 95:26, 96:15, 104:28, 122:1, 153:14, 154:12, 159:1, 182:5, 182:10, 183:14

**citizens** [13] - 69:18, 70:5, 70:19, 71:10, 87:29, 88:12, 102:24, 104:25, 122:27, 183:2, 184:22, 185:15, 185:16

**citizens'** [1] - 76:23

**City** [1] - 95:13

**civil** [7] - 32:6, 32:12, 37:25, 38:8, 38:12, 149:4, 188:19

**civilian** [1] - 9:4

**claim** [15] - 11:24, 12:5, 18:21, 18:23, 58:17, 59:28, 59:29, 103:25, 112:23, 112:29, 113:25, 113:28, 123:3, 140:3

**claiming** [1] - 112:18

**claims** [4] - 111:15, 112:13, 115:22, 123:7

**Clapper** [27] - 10:6, 10:8, 11:9, 13:9, 14:1, 14:12, 19:20, 72:3, 72:4, 73:4, 74:19, 74:20, 120:10, 122:20, 122:21, 123:2, 125:21, 126:4, 126:5, 126:25, 128:3, 128:7, 129:6, 131:3, 132:4, 134:23, 193:24

**CLARE** [1] - 2:19

**clarifications** [1] - 49:19

**clarify** [4] - 12:23, 81:21, 198:9, 202:1

**clarifying** [1] - 100:25

**clarity** [3] - 71:9, 91:14, 115:1

**class** [6] - 18:12, 18:17, 105:25, 106:4, 106:26, 116:2

**classified** [15] - 11:29, 30:3, 32:13, 43:8, 43:11, 47:17, 47:25, 61:18, 147:13, 148:10, 177:27, 178:4, 178:8, 179:7, 185:23

**Classified** [2] - 48:12, 49:10

**clauses** [1] - 160:29

**clear** [13] - 12:26, 32:17, 40:5, 59:17, 71:2, 82:5, 100:21, 135:6, 141:9, 146:5, 153:3, 164:21, 198:2

**clearance** [3] - 42:6, 43:18, 177:20

**cleared** [1] - 32:13

**clearly** [10] - 15:16, 41:24, 63:13, 81:18, 82:10, 92:22, 120:4, 137:20, 144:21, 145:7

**client** [3] - 45:19, 80:27, 81:7

**close** [4] - 33:18, 87:8, 105:2, 140:12

**closely** [1] - 122:11

**closer** [1] - 122:19

**closing** [1] - 139:13

**clue** [1] - 198:24

**code** [2] - 112:15, 185:10

**coagent** [1] - 125:9

**colleagues** [1] - 152:22

**collect** [1] - 168:23

**collected** [5] - 87:14, 102:26, 168:22, 172:14, 179:4

**collection** [10] - 118:23, 170:28, 172:19, 172:23, 176:15, 176:17, 179:19, 181:8, 181:9, 187:23

**collects** [1] - 116:17

**COLLINS** [2] - 2:5, 2:27

**COLM** [1] - 3:8

**colourable** [4] - 115:12, 115:13, 125:10, 125:12

**combination** [1] - 174:28

**combined** [1] - 136:21

**comfortable** [3] - 58:29, 64:25, 126:29

**coming** [4] - 87:26, 101:6, 139:19, 171:24

**comma** [2] - 103:10, 103:21

**Commander** [1] - 9:3

**comment** [11] - 16:7, 80:24, 82:24, 118:9, 131:9, 163:23, 200:3, 200:4, 200:5, 200:9

**commentaries** [3] - 98:5, 139:7, 139:16

**commentary** [2] - 66:6

**commented** [1] - 32:25

**commenting** [1] - 158:2

**comments** [29] - 34:17, 35:10, 35:12, 35:14, 41:17, 42:11, 42:13, 43:25, 48:2, 50:7, 65:24, 66:1, 163:18, 163:25, 199:3, 199:11, 199:15, 199:16, 199:17, 199:28, 200:1, 200:10, 200:11, 200:14, 200:17, 201:4, 201:5, 201:8, 201:14

**comments'** [1] - 65:21

**Commerce** [2] - 36:10, 157:2

**commerce** [2] - 157:3, 157:5

**COMMERCIAL** [1] - 1:3

**commission** [1] - 26:10

**Commission** [21] - 9:22, 16:18, 16:21, 23:27, 24:3, 24:6, 24:20, 26:26, 26:29, 27:1, 27:3, 32:25, 32:27, 32:29, 33:2, 33:6, 36:5, 36:6, 36:11, 177:23, 189:6

**Commission's** [1] - 187:13

**COMMISSIONER** [1] - 1:7

**Commissioner** [5] - 5:6, 24:13, 91:5, 125:28, 127:26

**commit** [1] - 130:26

**committed** [1] - 5:19

**Committee** [4] - 36:10, 144:3, 157:2, 194:27

**committee** [1] - 26:9

**Committees** [1] - 62:19

**committees** [1] - 35:28

**common** [12] - 42:28, 45:18, 46:6, 79:19, 79:24, 80:5, 128:22, 193:27, 197:9, 197:12, 199:8, 199:11

**commonly** [1] - 198:20

**communicate** [6] - 164:1, 164:8, 165:7, 168:9, 168:13, 168:16

**communicated** [1] - 169:24

**communication** [6] - 45:17, 74:12, 165:25, 169:18, 170:19, 176:28

**communications** [28] - 7:22, 11:12, 46:5, 72:1, 73:24, 74:4, 74:24, 75:3, 75:7, 75:9, 133:1, 133:15, 135:10, 136:18, 165:11, 165:21, 166:12, 166:19, 170:12, 172:10, 173:7, 174:12, 176:15, 176:23, 181:24, 181:27, 185:4, 192:18

**Communications** [2] - 36:5, 36:11

**community** [6] - 105:26, 105:27, 106:5, 106:7, 106:27, 106:29

**companies** [7] - 11:21, 51:23, 130:26, 167:12, 173:13, 173:25, 178:13

**companies'** [1] - 159:7

**company** [8] - 9:17,

16:29, 18:3, 18:15,  
18:18, 102:27,  
164:14, 173:17  
**comparative** [2] -  
58:28, 59:29  
**compare** [1] - 143:26  
**compare"** [1] -  
161:26  
**compared** [2] -  
144:25, 192:25  
**comparing** [3] -  
59:15, 144:6, 144:24  
**comparison** [7] -  
130:16, 153:4, 162:7,  
162:12, 162:17,  
162:18, 162:22  
**compelled** [1] -  
174:11  
**competent** [1] -  
25:21  
**competition** [1] -  
157:25  
**competitive** [2] -  
156:5, 157:17  
**competitors** [3] -  
155:15, 155:23,  
157:26  
**complain** [1] -  
122:25  
**complaint** [7] -  
17:17, 17:19, 25:29,  
26:3, 33:26, 80:22,  
116:25  
**complete** [6] - 47:17,  
47:26, 63:22, 91:23,  
184:4, 184:5  
**completed** [3] -  
26:14, 26:16, 47:11  
**complexity** [2] -  
72:20, 99:18  
**compliance** [5] -  
8:26, 119:26, 179:28,  
180:25, 180:28  
**Compliance** [1] -  
30:11  
**complicated** [2] -  
23:2, 86:26  
**complied** [1] -  
191:27  
**comply** [2] - 55:10,  
55:11  
**comprehensive** [5] -  
9:14, 15:7, 15:9,  
150:18, 150:23  
**comprehensively** [1]  
- 144:22  
**compromised** [1] -  
118:21  
**computer** [3] -  
130:13, 172:17, 183:8  
**concern** [12] - 21:23,  
22:3, 43:19, 119:15,  
120:25, 120:26,  
130:2, 148:1, 148:22,  
159:5, 189:19, 192:25  
**concerned** [13] -  
24:8, 39:25, 75:18,  
85:19, 98:1, 113:5,  
117:16, 118:6,  
119:13, 121:15,  
159:29, 181:4, 189:14  
**concerning** [1] -  
158:22  
**concerns** [6] - 8:15,  
60:3, 118:13, 130:21,  
151:11, 189:11  
**concession** [1] -  
129:9  
**concluded** [1] -  
147:13  
**concludes** [1] -  
147:26  
**conclusion** [10] -  
68:17, 158:25,  
162:29, 172:22,  
177:21, 177:22,  
178:1, 185:24, 190:23  
**conclusions** [2] -  
144:23, 195:2  
**conclusive** [1] -  
106:22  
**concrete** [11] - 77:5,  
77:16, 77:29, 78:8,  
78:28, 81:4, 111:8,  
112:6, 112:11,  
113:18, 115:10  
**concreteness** [1] -  
193:21  
**concurrence** [1] -  
79:21  
**conduct** [2] - 27:19,  
102:10  
**conducted** [2] -  
30:20, 94:19  
**confer** [1] - 112:2  
**conference** [1] - 5:22  
**conferring** [1] -  
111:2  
**confers** [2] - 77:21,  
113:22  
**confidence** [1] - 65:9  
**confident** [4] - 93:14,  
93:19, 95:14, 179:16  
**Confidential** [2] -  
48:11, 49:11  
**confine** [1] - 184:23  
**confirm** [4] - 13:7,  
16:19, 22:26, 93:22  
**confirmed** [3] -  
49:15, 61:6, 92:5  
**confirming** [1] -  
194:20  
**confusing** [1] - 86:24  
**confusion** [3] -  
98:21, 102:19, 126:10  
**congested** [2] -  
170:10, 170:11  
**congestion** [1] -  
171:4  
**Congress** [15] -  
15:22, 16:4, 149:12,  
150:14, 150:17,  
154:17, 155:27,  
157:2, 187:8, 194:4,  
194:9, 194:12,  
194:13, 194:21,  
202:12  
**Congress'** [1] -  
15:26  
**Congressional** [3] -  
35:28, 62:18, 68:26  
**connect** [1] - 15:4  
**connected** [5] - 9:27,  
54:16, 55:1, 55:6,  
58:18  
**connection** [13] -  
39:1, 65:18, 70:20,  
93:1, 96:8, 105:2,  
105:26, 106:6,  
106:28, 108:6, 109:5,  
131:11, 175:21  
**connections** [5] -  
15:4, 69:19, 70:6,  
71:11, 107:23  
**conscious** [1] -  
38:29  
**consensus** [1] - 70:8  
**consequence** [1] -  
8:27  
**consequences** [1] -  
9:10  
**consider** [6] - 45:21,  
62:22, 125:17,  
188:22, 199:17,  
199:28  
**Consider** [1] - 147:9  
**consideration** [7] -  
15:26, 125:18,  
125:25, 127:17,  
131:23, 132:1, 147:19  
**considered** [18] -  
14:12, 15:23, 50:24,  
53:7, 67:7, 83:19,  
83:22, 83:28, 84:7,  
84:11, 105:27, 106:6,  
106:28, 162:4,  
165:24, 188:3, 188:8,  
201:12  
**considering** [2] -  
19:25, 117:29  
**consistent** [13] -  
14:2, 58:27, 64:24,  
118:1, 135:4, 159:22,  
175:23, 175:25,  
177:7, 185:17,  
186:12, 186:14,  
194:15  
**constitute** [2] -  
136:29, 194:1  
**Constitution** [5] -  
79:7, 81:10, 82:29,  
83:2, 92:17  
**constitutional** [11] -  
20:2, 20:4, 30:21,  
87:12, 87:18, 94:7,  
94:18, 97:17, 107:21,  
126:6, 166:24  
**constitutionality** [5]  
- 11:23, 12:8, 12:10,  
12:20, 12:29  
**constrained** [2] -  
58:21, 59:8  
**constraint** [1] -  
126:2  
**contact** [5] - 35:11,  
51:9, 53:8, 53:12,  
53:23  
**contacts** [1] - 41:29  
**contain** [1] - 54:28  
**contained** [2] - 52:2,  
195:3  
**contains** [2] - 20:16,  
147:6  
**content** [1] - 165:24  
**contents** [1] - 35:3  
**contested** [1] -  
143:18  
**context** [23] - 12:11,  
19:2, 19:23, 19:25,  
20:2, 58:11, 59:25,  
60:5, 68:10, 68:19,  
69:9, 72:10, 75:17,  
89:23, 101:27,  
107:13, 114:12,  
118:5, 140:3, 170:7,  
180:6, 192:14  
**CONTINUATION** [1]  
- 91:7  
**continue** [5] - 5:28,  
147:28, 156:16,  
162:8, 184:9  
**continued** [3] - 44:2,  
151:11, 167:24  
**CONTINUED** [3] -  
4:7, 7:13, 91:1  
**continues** [1] -  
102:28  
**continuing** [3] -  
44:7, 151:4, 167:21  
**contract** [1] - 160:29  
**contrast** [1] - 187:4  
**contrasted** [1] - 13:1  
**contribute** [1] -  
154:4  
**contribution** [1] -  
55:4  
**control** [4] - 47:18,  
47:26, 56:1, 152:9  
**controls** [1] - 121:23  
**controversy** [2] -  
20:3, 65:22  
**Convention** [10] -  
138:12, 138:17,  
138:18, 138:19,  
138:28, 139:24,  
141:12, 142:2,  
142:23, 144:19  
**convey** [1] - 86:19  
**Cook** [1] - 192:29  
**coordinated** [1] -  
200:13  
**coordinator** [1] -  
200:8  
**copies** [2] - 33:12,  
59:21  
**copy** [4] - 18:5,  
85:24, 88:23, 104:1  
**COPYRIGHT** [1] -  
3:23  
**cornered** [1] -  
123:24  
**corners** [1] - 6:11  
**correct** [112] - 14:13,  
15:20, 18:15, 18:16,  
25:26, 26:5, 27:26,  
28:2, 28:6, 28:17,  
30:4, 30:5, 30:24,  
32:3, 32:19, 32:20,  
33:29, 34:17, 34:28,  
35:17, 38:16, 38:22,  
39:3, 40:27, 41:1,  
41:17, 48:12, 49:1,  
50:11, 53:21, 57:4,  
58:7, 58:8, 60:23,  
63:17, 63:25, 65:10,  
66:8, 73:7, 78:20,  
79:28, 81:15, 81:26,  
82:9, 88:29, 89:2,  
89:16, 91:16, 92:22,  
93:12, 97:12, 103:9,  
105:22, 110:12,  
110:18, 112:11,  
113:9, 114:1, 116:19,  
125:3, 127:16,  
127:21, 134:26,  
137:26, 148:25,  
148:27, 151:16,  
153:17, 153:28,  
154:4, 154:14,  
154:15, 154:18,

154:28, 157:29,  
158:4, 160:8, 160:13,  
160:20, 163:8, 164:4,  
165:8, 166:13, 167:2,  
167:3, 168:3, 169:5,  
169:21, 169:25,  
170:10, 170:17,  
170:25, 176:4,  
176:10, 177:9, 178:4,  
180:7, 180:24, 181:6,  
182:10, 183:9,  
183:17, 183:27,  
185:16, 186:25,  
186:26, 189:21,  
190:1, 191:28, 192:8,  
199:23, 202:14  
**correct'** [1] - 24:2  
**corrected** [6] -  
17:27, 23:24, 146:10,  
192:12, 201:23,  
201:25  
**correcting** [2] -  
42:25, 54:2  
**correction** [1] -  
34:27  
**corrections** [7] -  
49:9, 49:10, 54:6,  
54:9, 199:4, 199:12,  
199:29  
**correctly** [1] - 73:27  
**correctness** [1] -  
193:17  
**COSTELLO** [62] -  
1:17, 5:4, 5:8, 6:1,  
6:10, 6:15, 6:19, 6:23,  
6:29, 7:7, 7:10, 10:23,  
11:6, 12:16, 12:21,  
12:25, 12:27, 16:13,  
21:6, 23:20, 23:23,  
24:5, 25:15, 29:21,  
34:23, 71:21, 79:8,  
80:20, 90:2, 91:3,  
100:9, 102:9, 105:14,  
109:11, 109:17,  
109:23, 111:22,  
128:13, 132:8,  
132:10, 140:19,  
141:2, 141:5, 143:12,  
143:14, 146:3,  
149:24, 150:1, 150:6,  
161:13, 166:25,  
172:3, 184:3, 184:7,  
184:10, 188:23,  
188:25, 188:28,  
189:9, 191:2, 202:22,  
202:25  
**Council** [3] - 30:16,  
33:3, 80:23  
**counsel** [14] - 33:7,  
33:22, 39:24, 40:2,

40:4, 41:29, 42:1,  
52:17, 117:20, 119:3,  
121:11, 124:24,  
125:9, 171:21  
**counsel's** [1] - 33:20  
**count** [3] - 143:7,  
172:15, 188:6  
**counted** [2] - 61:24,  
140:9  
**counterterrorism** [3]  
- 129:13, 129:17,  
129:25  
**counting** [3] -  
167:28, 169:26,  
169:27  
**countries** [7] - 57:28,  
59:18, 141:10,  
142:19, 143:5,  
155:13, 155:18  
**country** [11] - 12:22,  
24:8, 24:9, 55:14,  
93:7, 106:28, 107:23,  
123:6, 182:5, 185:10,  
202:5  
**country's** [2] - 59:3,  
59:10  
**counts** [1] - 104:9  
**couple** [5] - 58:25,  
121:18, 148:11,  
153:13, 178:18  
**course** [28] - 7:9,  
14:7, 20:2, 33:14,  
36:8, 36:23, 37:12,  
39:25, 45:9, 50:21,  
53:19, 53:28, 58:20,  
85:28, 87:14, 95:20,  
99:16, 102:9, 106:2,  
118:11, 126:9,  
127:27, 131:24,  
137:5, 162:23,  
169:28, 180:23,  
190:26  
**course'** [1] - 34:2  
**court** [123] - 5:23,  
6:16, 6:18, 6:22, 8:3,  
9:16, 10:2, 10:6,  
11:18, 11:24, 11:28,  
12:8, 12:18, 13:10,  
13:13, 13:15, 13:23,  
13:27, 14:1, 14:15,  
18:11, 18:22, 19:4,  
25:3, 29:2, 29:4,  
29:25, 31:5, 32:22,  
32:26, 34:14, 34:15,  
35:1, 36:15, 37:20,  
37:21, 37:22, 38:26,  
39:4, 39:9, 40:14,  
40:23, 47:24, 48:5,  
48:18, 49:7, 49:20,  
50:24, 50:27, 50:28,

51:15, 52:1, 52:2,  
53:3, 54:23, 56:19,  
58:7, 59:5, 59:24,  
60:2, 64:2, 66:27,  
70:25, 71:28, 72:22,  
73:23, 74:2, 74:23,  
74:28, 78:16, 79:5,  
82:1, 82:6, 84:4,  
85:26, 89:12, 89:22,  
89:27, 94:10, 96:29,  
97:29, 98:1, 98:16,  
99:3, 107:18, 108:18,  
109:25, 111:10,  
111:18, 111:24,  
113:3, 113:5, 113:19,  
113:20, 113:24,  
114:23, 119:5,  
121:10, 121:21,  
121:23, 123:12,  
123:16, 125:10,  
126:23, 129:9,  
129:25, 130:10,  
132:25, 135:13,  
137:16, 137:20,  
137:27, 145:3, 146:6,  
161:28, 172:26,  
180:8, 187:19,  
191:26, 197:5,  
198:28, 199:27, 201:4  
**Court** [46] - 11:27,  
12:11, 13:3, 14:17,  
15:1, 54:27, 70:12,  
71:2, 71:3, 72:18,  
72:27, 78:3, 78:12,  
78:15, 79:4, 79:12,  
81:8, 84:23, 84:25,  
85:7, 85:9, 85:13,  
85:25, 96:11, 97:9,  
97:18, 98:21, 101:17,  
101:19, 101:24,  
101:27, 104:24,  
109:26, 110:24,  
126:4, 126:13,  
127:14, 127:25,  
130:2, 132:4, 134:6,  
142:6, 159:15,  
160:21, 162:5  
**COURT** [3] - 1:2,  
117:10  
**court's** [5] - 31:22,  
67:21, 114:11,  
134:27, 187:13  
**courts** [17] - 20:4,  
20:5, 29:1, 93:4,  
93:18, 95:10, 105:23,  
115:24, 123:6, 126:1,  
128:6, 129:22, 131:4,  
189:3, 189:7, 196:24,  
200:19  
**cover** [3] - 62:12,

85:5, 85:6  
**covered** [4] - 50:1,  
50:3, 50:12, 112:29  
**create** [5] - 25:7,  
129:11, 152:17,  
155:23, 200:10  
**created** [4] - 13:22,  
31:18, 147:21, 167:6  
**creates** [1] - 155:11  
**creation** [2] - 33:2,  
138:26  
**credit** [26] - 16:18,  
16:21, 16:23, 16:24,  
16:25, 17:4, 17:5,  
17:20, 18:3, 18:4,  
18:7, 18:14, 18:15,  
18:17, 36:28, 37:2,  
114:13, 114:14,  
121:4, 121:5, 148:14,  
194:7, 194:8, 194:11,  
194:16, 194:18  
**Credit** [9] - 15:28,  
16:4, 18:1, 19:16,  
19:21, 19:27, 19:29,  
37:23, 122:11  
**criminal** [6] - 9:21,  
68:23, 101:7, 103:16,  
142:12, 147:23  
**criteria** [3] - 32:4,  
143:9, 143:22  
**criterion** [3] - 32:5,  
143:11, 144:1  
**critical** [2] - 150:15,  
150:20  
**criticise** [1] - 67:1  
**criticising** [2] -  
160:12, 202:12  
**criticism** [1] - 160:9  
**criticisms** [3] -  
139:15, 143:16,  
186:21  
**critics** [1] - 202:11  
**CROSS** [5] - 4:6, 4:8,  
35:21, 91:7, 152:25  
**cross** [5] - 48:17,  
48:23, 48:27, 66:14,  
102:10  
**CROSS-**  
**EXAMINATION** [1] -  
91:7  
**cross-examination**  
[2] - 66:14, 102:10  
**cross-examine** [2] -  
48:17, 48:27  
**CROSS-EXAMINED**  
[4] - 4:6, 4:8, 35:21,  
152:25  
**cross-examined** [1]  
- 48:23  
**curiae** [1] - 31:5

**curing** [1] - 151:10  
**CURRAN** [1] - 2:13  
**current** [3] - 84:19,  
162:6, 187:14  
**curstory** [2] - 127:26,  
128:1  
**CUSH** [1] - 3:2  
**customer** [2] - 168:6,  
190:19  
**customers** [3] -  
190:7, 190:20  
**cutting** [1] - 6:10  
**CV** [1] - 51:22  
**cyber** [2] - 130:12,  
130:16  
**cycle** [1] - 88:14

---

## D

---

**daily** [1] - 85:7  
**damages** [2] - 18:19,  
130:28  
**DAMIEN** [1] - 2:7  
**Dark** [1] - 192:22  
**dark** [1] - 192:17  
**Data** [4] - 5:5, 91:4,  
125:28, 127:25  
**data** [66] - 25:23,  
26:4, 26:6, 26:8, 30:2,  
49:28, 50:3, 58:13,  
58:16, 68:8, 75:18,  
76:6, 82:13, 82:14,  
82:16, 82:28, 83:3,  
83:9, 83:15, 84:26,  
85:20, 85:22, 87:25,  
87:27, 87:29, 88:11,  
88:14, 92:17, 94:20,  
95:26, 96:2, 96:16,  
98:2, 98:26, 102:23,  
102:26, 103:6,  
103:23, 104:9, 107:2,  
111:2, 112:3, 112:13,  
112:15, 113:22,  
115:9, 115:21,  
116:17, 117:17,  
117:29, 120:13,  
121:12, 142:6, 153:1,  
155:15, 156:11,  
157:21, 160:28,  
169:4, 171:3, 174:15,  
176:16, 178:28,  
187:24  
**DATA** [1] - 1:7  
**data"** [2] - 49:29,  
50:12  
**data'** [2] - 115:6,  
115:7  
**database** [6] - 15:3,  
118:18, 120:24,

122:22, 123:20, 168:25  
**databases** [1] - 118:14  
**date** [7] - 61:12, 84:24, 91:27, 161:23, 180:2, 187:14, 198:16  
**DAY** [1] - 1:18  
**days** [1] - 6:5  
**DC** [1] - 101:5  
**de** [1] - 113:11  
**deadline** [3] - 41:8, 41:16, 44:8  
**deal** [5] - 5:21, 30:29, 175:29, 188:16, 199:22  
**dealing** [1] - 15:24  
**deals** [4] - 7:21, 10:1, 185:26, 191:22  
**dealt** [3] - 7:19, 7:23, 185:22  
**debate** [5] - 79:4, 79:25, 95:22, 96:24, 172:13  
**debates** [1] - 171:19  
**decent** [1] - 64:22  
**deceptive** [2] - 9:23, 9:25  
**decide** [5] - 68:4, 82:1, 140:1, 155:13, 184:27  
**decided** [8] - 18:22, 47:15, 80:4, 132:12, 133:8, 154:2, 194:13, 194:22  
**decides** [1] - 106:3  
**deciding** [5] - 77:28, 78:7, 78:28, 81:3, 191:11  
**Decision** [2] - 20:17, 126:4  
**decision** [40] - 16:9, 18:29, 27:4, 50:9, 50:10, 79:13, 84:14, 84:22, 85:24, 88:23, 89:20, 93:17, 97:18, 101:1, 104:24, 108:9, 109:21, 110:4, 110:29, 126:18, 126:20, 127:13, 127:15, 127:24, 132:3, 132:5, 149:17, 154:27, 157:28, 159:15, 160:5, 160:7, 160:12, 160:21, 161:2, 161:9, 162:4, 187:13, 198:14  
**decision'** [1] - 79:20  
**decisions** [7] - 59:26, 93:19, 97:24, 158:16, 159:23, 160:1  
**declassification** [14] - 35:6, 35:8, 42:16, 42:18, 42:23, 42:29, 46:23, 46:24, 49:12, 61:16, 147:14, 147:22, 148:23, 201:7  
**declassified** [1] - 101:4  
**declassify** [1] - 148:10  
**deduced** [1] - 73:2  
**deeper** [2] - 64:16, 64:22  
**Defence** [1] - 27:19  
**defence** [2] - 117:13, 124:24  
**defend** [1] - 202:5  
**DEFENDANT** [2] - 2:10, 2:16  
**defendant** [1] - 119:4  
**DEFENDANTS** [1] - 1:13  
**defendants** [3] - 115:21, 119:18, 123:19  
**define** [1] - 67:15  
**defined** [1] - 192:1  
**defining** [1] - 98:22  
**definite** [1] - 197:27  
**delighted** [2] - 51:4, 184:9  
**delivered** [2] - 54:26, 85:15  
**delivery** [1] - 62:7  
**democracy** [1] - 33:4  
**democratic** [1] - 139:6  
**demonstrate** [2] - 163:15, 181:13  
**denied** [1] - 197:5  
**deny** [2] - 13:7, 22:26  
**department** [4] - 22:1, 22:5, 25:3, 25:4  
**Department** [4] - 27:18, 41:2, 150:18, 150:22  
**dependents'** [2] - 80:11, 80:26  
**derived** [3] - 83:5, 83:8, 192:5  
**describe** [8] - 36:3, 130:18, 131:19, 159:13, 171:20, 171:21, 178:20, 180:14  
**described** [10] - 19:11, 26:16, 34:20, 69:8, 82:28, 111:20, 112:14, 173:15, 180:16, 183:15  
**describes** [1] - 20:17  
**describing** [2] - 49:26, 173:19  
**description** [9] - 49:7, 126:29, 171:16, 176:21, 178:26, 181:16, 181:26, 182:6, 187:18  
**designed** [4] - 33:4, 182:12, 183:8, 194:19  
**desirous** [1] - 199:20  
**desk** [1] - 41:6  
**destroyed** [1] - 120:14  
**detail** [15] - 13:11, 15:24, 16:25, 21:14, 51:5, 70:25, 72:4, 72:20, 76:19, 85:27, 86:3, 98:24, 101:20, 165:18, 201:6  
**detailed** [9] - 10:18, 16:26, 49:18, 50:20, 65:16, 72:16, 72:25, 151:1, 176:20  
**details** [6] - 10:14, 12:29, 13:2, 14:8, 37:2, 175:26  
**detain** [1] - 46:7  
**determination** [1] - 22:10  
**determine** [6] - 40:19, 129:28, 149:9, 149:15, 181:25, 185:4  
**deterrent** [1] - 185:2  
**developed** [5] - 105:26, 106:5, 106:27, 107:22, 109:5  
**dictate** [1] - 187:12  
**differ** [1] - 29:16  
**difference** [6] - 39:26, 124:15, 157:7, 159:28, 187:1, 187:26  
**different** [63] - 9:12, 14:18, 15:14, 18:1, 22:27, 23:6, 29:8, 39:18, 39:22, 42:19, 56:26, 57:22, 58:19, 59:10, 59:18, 63:19, 63:23, 65:14, 66:9, 76:11, 78:4, 79:4, 79:8, 79:9, 79:10, 79:17, 82:25, 83:14, 87:1, 87:22, 88:15, 89:9, 91:19, 96:2, 96:25, 98:9, 114:22, 122:15, 122:18, 122:29, 127:2, 130:13, 134:4, 144:26, 145:26, 154:25, 159:10, 166:26, 167:22, 183:11, 187:28, 188:7, 189:27, 190:14, 190:22, 190:24, 191:11, 196:23, 197:29  
**differently** [2] - 162:8, 188:6  
**difficult** [4] - 86:24, 97:7, 106:13, 193:26  
**difficulty** [6] - 45:11, 46:12, 46:14, 75:27, 76:1, 76:3  
**DIGITAL** [1] - 3:2  
**dimension** [1] - 20:4  
**direct** [20] - 9:9, 10:2, 41:29, 63:18, 96:15, 96:17, 108:14, 159:6, 173:6, 173:7, 173:10, 173:11, 173:22, 173:24, 173:27, 185:22, 186:5, 186:10, 187:1  
**directed** [5] - 96:11, 96:12, 105:24, 106:4, 182:10  
**direction** [7] - 54:27, 61:6, 128:25, 148:5, 171:19, 195:5, 195:8  
**directions** [1] - 145:8  
**Directive** [5] - 8:7, 30:8, 30:15, 68:1, 151:28  
**directive** [5] - 8:29, 76:21, 173:17, 174:26, 174:27  
**directives** [3] - 49:20, 152:20, 174:10  
**directly** [5] - 41:5, 53:27, 97:4, 138:27, 176:17  
**DIRECTLY** [2] - 4:5, 7:13  
**Director** [7] - 28:29, 40:26, 42:4, 42:9, 42:27, 177:4, 180:9  
**disagree** [15] - 7:29, 67:19, 69:25, 70:15, 70:17, 70:22, 70:24, 70:26, 71:13, 72:7, 73:25, 75:15, 81:6, 113:17, 139:2  
**disagreement** [2] - 67:16, 70:29  
**disagreements** [1] - 7:18  
**disappointed** [1] - 10:11  
**disclose** [10] - 39:28, 40:3, 40:5, 53:3, 53:15, 54:29, 80:14, 80:17, 86:7, 139:21  
**disclosed** [8] - 39:10, 43:1, 46:17, 48:5, 49:4, 52:11, 52:12, 82:17  
**discloses** [1] - 35:26  
**disclosure** [11] - 40:21, 46:27, 47:20, 47:28, 48:27, 51:3, 51:25, 87:13, 114:3, 114:4, 194:27  
**disclosures** [3] - 52:9, 52:15, 186:19  
**discover** [1] - 99:9  
**discovered** [1] - 23:8  
**discuss** [4] - 20:20, 47:12, 68:15, 161:28  
**discussed** [6] - 11:23, 12:1, 57:9, 72:3, 98:24, 189:18  
**discussion** [13] - 22:25, 22:26, 24:28, 29:11, 57:22, 68:9, 108:18, 126:3, 148:29, 153:26, 153:27, 154:14, 174:22  
**discussions** [4] - 21:22, 29:7, 108:26, 153:16  
**dismissed** [1] - 126:13  
**dismissing** [1] - 123:7  
**dispute** [3] - 76:26, 82:5, 139:27  
**disruption** [2] - 189:17, 189:21  
**dissemination** [1] - 27:23  
**distinct** [2] - 111:14, 194:28  
**District** [3] - 72:18, 72:27, 124:10  
**district** [4] - 116:2, 117:3, 123:12, 132:25  
**disturbing** [1] - 149:19  
**divide** [13] - 27:10, 27:22, 28:5, 28:8, 28:25, 28:27, 28:29, 29:15, 29:16, 29:19, 30:6, 191:15, 193:7  
**divorced** [1] - 80:24  
**doctrinal** [3] - 134:18, 134:26, 136:22

**doctrine** [4] - 10:1, 59:2, 131:3, 195:4  
**doctrines** [1] - 59:17  
**document** [30] - 27:8, 28:7, 29:6, 30:27, 31:1, 44:1, 44:10, 44:20, 53:9, 53:11, 54:21, 57:5, 65:16, 65:28, 66:4, 70:13, 100:5, 167:5, 167:9, 179:24, 179:26, 180:3, 180:22, 181:12, 181:24, 189:23, 190:2, 190:16, 191:10, 200:14  
**documentation** [3] - 15:6, 182:20, 182:25  
**documented** [2] - 14:26, 41:25  
**documents** [10] - 27:9, 28:3, 36:25, 87:19, 152:4, 175:27, 180:22, 181:27, 185:3, 198:1  
**DOD** [1] - 27:19  
**DOHERTY** [1] - 2:17  
**domestic** [1] - 147:11  
**don't..** [2] - 37:28, 45:6  
**done** [50] - 6:21, 10:16, 20:1, 22:14, 23:11, 23:12, 23:14, 24:12, 26:3, 33:15, 36:29, 51:11, 52:20, 52:27, 56:7, 58:28, 59:11, 59:16, 59:19, 61:4, 61:18, 66:27, 67:7, 93:8, 96:6, 96:13, 96:20, 96:22, 96:25, 97:27, 104:22, 119:25, 127:3, 135:18, 150:19, 150:24, 150:29, 151:9, 162:13, 162:18, 166:20, 171:25, 175:27, 177:8, 177:17, 183:4, 187:6, 191:24, 200:29  
**DONNELLY** [1] - 2:6  
**DORSET** [1] - 3:10  
**dots** [1] - 15:4  
**double** [6] - 59:1, 60:19, 167:27, 169:26, 169:27, 201:25  
**double-checked** [1] - 59:1  
**double-checking** [2]

- 60:19, 201:25  
**doubt** [1] - 39:29  
**down** [11] - 21:7, 84:23, 84:26, 101:6, 107:16, 114:16, 123:5, 139:12, 155:4, 178:24, 189:3  
**Down** [1] - 158:11  
**downwards** [1] - 178:21  
**DPC** [8] - 88:23, 88:28, 89:19, 125:21, 126:18, 126:20, 126:24, 129:7  
**DPC's** [3] - 89:4, 89:28, 126:4  
**draft** [20] - 40:24, 42:4, 43:26, 44:3, 53:29, 56:9, 56:21, 56:25, 59:21, 64:3, 64:19, 64:20, 64:22, 65:19, 89:28, 128:22, 128:24, 129:3, 200:18, 201:4  
**Draft** [1] - 126:4  
**drafted** [1] - 202:7  
**draw** [6] - 104:5, 190:23, 191:18, 193:8, 196:2, 196:29  
**drawn** [1] - 34:13  
**drew** [4] - 33:20, 144:23, 195:24, 195:27  
**drive** [1] - 175:10  
**dropped** [2] - 37:5, 37:16  
**dropping** [1] - 37:18  
**DUBLIN** [7] - 2:8, 2:14, 2:19, 2:25, 2:29, 3:5, 3:10  
**Dublin** [2] - 6:7, 183:14  
**due** [4] - 42:6, 102:9, 132:29, 135:9  
**Dunn** [17] - 35:10, 41:22, 42:2, 42:10, 43:23, 43:25, 44:24, 45:28, 53:5, 53:11, 53:15, 53:19, 53:28, 55:21, 87:5, 199:24  
**during** [5] - 12:1, 73:4, 84:1, 91:18, 115:12  
**duty** [3] - 31:28, 32:7, 50:24  
**duty..** [1] - 54:28

## E

**e-mail** [12] - 13:28, 114:5, 114:6, 165:22, 165:25, 168:2, 174:28, 175:4, 176:24, 182:7, 184:28, 185:8  
**e-mails** [1] - 166:17  
**early** [5] - 61:11, 61:14, 61:15, 61:21, 66:26  
**ease** [1] - 7:19  
**easier** [1] - 195:8  
**easy** [2] - 99:1, 188:23  
**ECJ** [1] - 161:8  
**economic** [2] - 54:29, 55:2  
**ECPA** [2] - 63:5, 63:8  
**edge** [3] - 155:20, 156:5, 157:17  
**edit** [1] - 49:29  
**edited** [1] - 199:10  
**editing** [1] - 63:28  
**editorial** [2] - 47:18, 47:26  
**editors** [1] - 199:10  
**edits** [1] - 56:12  
**effect** [9] - 7:20, 77:9, 77:12, 78:4, 83:10, 98:21, 139:7, 155:1, 167:24  
**effective** [4] - 142:14, 143:7, 157:25, 193:5  
**effects** [3] - 92:19, 154:27, 155:8  
**effectuate** [1] - 21:19  
**effort** [2] - 74:5, 173:2  
**eight** [2] - 56:16, 60:26  
**EILEEN** [1] - 2:21  
**either** [9] - 22:15, 22:19, 62:9, 70:16, 76:27, 80:11, 80:27, 94:15, 98:29  
**elaborate** [1] - 24:28  
**ELECTRONIC** [1] - 3:7  
**element** [1] - 9:13  
**eleven** [1] - 202:25  
**elsewhere** [1] - 48:3  
**em** [2] - 72:2, 197:24  
**embarrass** [1] - 119:4  
**embarrassing** [2] - 120:17, 123:21

**embassies** [3] - 34:24, 34:25, 50:16  
**embassy** [1] - 44:13  
**emphasise** [1] - 186:29  
**emphasised** [3] - 79:14, 115:3, 187:3  
**emphasises** [1] - 160:27  
**employed** [1] - 17:20  
**employee** [1] - 9:8  
**employees** [1] - 9:4  
**enabled** [1] - 198:17  
**encompassed** [1] - 190:25  
**encrypted** [1] - 192:18  
**encryption** [6] - 192:15, 192:19, 192:20, 192:26, 193:1, 193:5  
**end** [11] - 6:26, 22:16, 22:18, 23:3, 34:14, 65:26, 97:3, 141:7, 171:26, 185:10, 198:11  
**endangering** [1] - 142:12  
**ended** [1] - 79:12  
**energy** [1] - 123:13  
**Energy** [1] - 157:1  
**enforcement** [4] - 9:26, 50:15, 156:13, 192:17  
**engage** [2] - 128:29, 156:21  
**engaged** [1] - 39:21  
**engineering** [3] - 131:13, 131:16, 131:19  
**English** [3] - 8:16, 8:23, 79:24  
**enormous** [1] - 10:15  
**ensure** [3] - 30:19, 47:16, 47:25  
**ensuring** [1] - 182:11  
**entered** [1] - 126:7  
**enters** [1] - 108:3  
**entire** [2] - 170:24, 187:22  
**entirely** [2] - 126:28, 187:28  
**entities** [2] - 54:15, 190:7  
**entitled** [5] - 38:26, 40:14, 102:6, 102:10, 122:25  
**entity** [2] - 41:4, 186:18

**envelope** [1] - 165:23  
**envisaged** [1] - 122:9  
**EOIN** [1] - 2:16  
**equally** [1] - 175:16  
**equivalence** [3] - 68:2, 162:16  
**equivocally** [1] - 99:5  
**era** [3] - 130:19, 192:12, 192:23  
**errant** [1] - 33:22  
**error** [4] - 17:9, 17:13, 95:5, 99:29  
**errors** [7] - 16:17, 42:25, 43:2, 43:4, 54:2, 186:27, 201:9  
**especially** [2] - 147:23, 196:24  
**espousal** [1] - 156:11  
**espouse** [1] - 156:28  
**essential** [1] - 162:16  
**essentially** [3] - 17:19, 21:27, 60:10  
**establish** [17] - 71:29, 73:23, 74:2, 74:10, 74:11, 75:2, 75:6, 77:4, 83:27, 105:4, 107:20, 129:8, 133:14, 135:17, 135:19, 136:15, 195:9  
**established** [3] - 74:14, 92:29, 96:7  
**establishes** [4] - 94:13, 103:15, 104:25, 104:27  
**establishing** [3] - 75:27, 76:3, 93:15  
**etc** [3] - 64:14, 134:3, 172:29  
**EU** [49] - 21:24, 21:28, 24:9, 24:11, 24:12, 24:20, 25:28, 49:27, 58:13, 58:17, 60:1, 68:7, 68:17, 76:7, 76:9, 76:23, 86:25, 87:29, 88:12, 95:26, 96:15, 98:2, 98:27, 102:27, 103:7, 122:1, 138:22, 139:25, 144:2, 144:24, 156:28, 158:20, 158:21, 161:10, 161:17, 161:25, 162:13, 182:5, 182:9, 182:14, 183:1, 183:13,

183:21, 184:22,  
185:12, 189:6  
**EU**<sup>[1]</sup> - 161:13  
**Europe**<sup>[9]</sup> - 33:3,  
112:14, 142:19,  
153:29, 154:13,  
155:29, 159:19,  
159:23, 178:11  
**EUROPE**<sup>[1]</sup> - 3:2  
**European**<sup>[39]</sup> - 8:19,  
20:16, 22:2, 22:18,  
49:29, 58:15, 58:19,  
58:22, 59:15, 59:18,  
68:3, 68:11, 82:7,  
82:12, 82:15, 86:23,  
87:6, 98:20, 122:26,  
138:12, 139:14,  
139:28, 141:2,  
141:12, 142:6,  
143:16, 143:26,  
144:5, 144:18, 153:1,  
155:22, 156:4,  
156:10, 156:13,  
157:21, 157:24,  
161:7, 162:5, 189:16  
**Europeans**<sup>[1]</sup> -  
144:27  
**evening**<sup>[1]</sup> - 6:29  
**event**<sup>[4]</sup> - 84:29,  
176:24, 176:26, 197:4  
**eventually**<sup>[3]</sup> -  
33:12, 65:17, 133:13  
**evidence**<sup>[28]</sup> - 5:18,  
5:21, 5:25, 27:29,  
34:7, 38:18, 38:21,  
38:23, 38:27, 39:5,  
50:27, 54:23, 55:14,  
73:2, 74:22, 78:6,  
82:7, 92:4, 92:29,  
93:2, 93:9, 110:18,  
127:4, 134:23, 135:7,  
154:26, 164:28,  
199:23  
**evolved**<sup>[1]</sup> - 44:3  
**ex**<sup>[1]</sup> - 142:14  
**exact**<sup>[4]</sup> - 33:18,  
40:8, 54:12, 133:10  
**exactly**<sup>[24]</sup> - 13:24,  
21:10, 29:23, 33:13,  
67:16, 69:26, 80:22,  
81:23, 89:26, 89:27,  
100:16, 113:27,  
116:15, 116:25,  
120:1, 134:9, 137:12,  
137:23, 137:28,  
138:7, 151:7, 152:18,  
170:6, 197:29  
**examination**<sup>[2]</sup> -  
66:14, 102:10  
**EXAMINATION**<sup>[3]</sup> -  
4:9, 91:7, 184:14  
**examine**<sup>[3]</sup> - 48:17,  
48:27, 70:24  
**EXAMINED**<sup>[6]</sup> - 4:5,  
4:6, 4:8, 7:13, 35:21,  
152:25  
**examined**<sup>[2]</sup> -  
48:23, 193:7  
**example**<sup>[13]</sup> - 8:14,  
9:25, 13:16, 28:13,  
30:14, 49:26, 63:4,  
121:15, 131:11,  
168:5, 189:25, 193:3,  
193:24  
**examples**<sup>[4]</sup> -  
13:25, 91:25, 119:3,  
131:27  
**except**<sup>[5]</sup> - 34:29,  
95:27, 133:27,  
183:15, 183:16  
**exception**<sup>[2]</sup> -  
34:21, 201:10  
**exceptionally**<sup>[1]</sup> -  
38:20  
**exceptions**<sup>[3]</sup> -  
65:4, 65:5, 65:10  
**exceptions'**<sup>[1]</sup> -  
202:9  
**excluding**<sup>[1]</sup> -  
111:22  
**excuse**<sup>[10]</sup> - 20:14,  
26:15, 31:12, 77:3,  
97:5, 97:8, 104:12,  
104:26, 106:11,  
155:16  
**Executive**<sup>[7]</sup> - 9:6,  
27:15, 151:16,  
151:17, 151:19,  
151:26, 152:16  
**exegesis**<sup>[1]</sup> - 106:21  
**exercise**<sup>[2]</sup> -  
130:10, 142:13  
**Exhibit**<sup>[1]</sup> - 29:22  
**exist**<sup>[2]</sup> - 60:4, 80:15  
**existed**<sup>[1]</sup> - 11:20  
**existence**<sup>[1]</sup> - 59:17  
**existing**<sup>[1]</sup> - 21:19  
**exists**<sup>[3]</sup> - 59:3,  
149:6, 150:11  
**expect**<sup>[1]</sup> - 46:26  
**expected**<sup>[1]</sup> - 52:25  
**expects**<sup>[3]</sup> - 161:11,  
182:1, 183:24  
**expeditions**<sup>[1]</sup> -  
185:2  
**experience**<sup>[30]</sup> -  
8:18, 8:24, 16:15,  
18:21, 37:19, 40:16,  
42:6, 43:18, 55:17,  
58:13, 59:29, 64:5,  
64:27, 65:13, 66:3,  
66:22, 68:7, 86:23,  
87:24, 95:14, 102:14,  
102:19, 111:6,  
123:10, 144:27,  
157:24, 159:11,  
200:21, 202:3, 202:17  
**expert**<sup>[46]</sup> - 7:17,  
15:29, 20:25, 36:15,  
36:22, 36:23, 37:13,  
37:25, 38:18, 38:24,  
38:27, 39:22, 42:18,  
49:23, 52:21, 54:22,  
54:26, 55:1, 55:3,  
55:4, 55:6, 55:13,  
57:7, 58:7, 58:9,  
59:12, 59:27, 59:28,  
63:19, 63:27, 63:29,  
68:5, 74:22, 78:6,  
78:18, 78:19, 78:27,  
86:11, 100:20,  
111:29, 138:21,  
145:3, 201:6  
**expertise**<sup>[6]</sup> - 26:6,  
32:2, 32:6, 72:23,  
78:23, 97:1  
**experts**<sup>[13]</sup> - 7:29,  
31:19, 66:8, 66:16,  
99:10, 99:14, 100:18,  
100:19, 100:24,  
114:28, 165:6,  
165:10, 166:11  
**experts'**<sup>[10]</sup> - 66:5,  
67:17, 69:28, 69:29,  
70:28, 163:19, 165:4,  
174:6, 174:16, 200:27  
**explain**<sup>[20]</sup> - 10:6,  
13:14, 29:4, 29:25,  
32:28, 67:27, 79:3,  
86:1, 86:22, 87:2,  
87:5, 95:4, 105:18,  
129:19, 129:20,  
156:24, 157:14,  
166:15, 167:8, 173:2  
**explained**<sup>[11]</sup> - 7:25,  
86:21, 88:9, 88:10,  
88:11, 104:6, 104:8,  
125:14, 165:18,  
191:24, 201:29  
**explaining**<sup>[3]</sup> -  
37:14, 89:8, 163:1  
**explains**<sup>[1]</sup> - 19:10  
**explanation**<sup>[5]</sup> -  
66:20, 110:13,  
110:14, 111:28,  
196:26  
**explore**<sup>[3]</sup> - 163:4,  
178:5, 179:11  
**exports**<sup>[1]</sup> - 155:12  
**exposed**<sup>[2]</sup> - 119:6,  
119:27  
**express**<sup>[6]</sup> - 67:28,  
68:5, 69:9, 83:1,  
87:28, 138:29  
**expressed**<sup>[6]</sup> - 20:9,  
22:2, 130:21, 148:22,  
152:29, 153:3  
**expressing**<sup>[4]</sup> -  
68:15, 68:17, 159:1,  
196:25  
**expression**<sup>[1]</sup> -  
196:19  
**expressly**<sup>[1]</sup> - 88:16  
**extensively**<sup>[1]</sup> -  
62:14  
**extent**<sup>[8]</sup> - 26:27,  
67:25, 70:9, 112:9,  
183:20, 187:12,  
190:24, 191:27  
**extra**<sup>[4]</sup> - 16:11,  
17:15, 17:16, 182:23  
**extract**<sup>[1]</sup> - 154:20  
**extracts**<sup>[1]</sup> - 59:22  
**extraordinarily**<sup>[1]</sup> -  
8:21  
**extremely**<sup>[5]</sup> -  
87:24, 87:26, 97:6,  
146:12, 166:4  
**eye**<sup>[1]</sup> - 116:14  
**eyesight**<sup>[2]</sup> - 26:15,  
150:3

**F**

**fabric**<sup>[1]</sup> - 131:8  
**face**<sup>[3]</sup> - 9:26,  
189:24, 190:2  
**Facebook**<sup>[47]</sup> - 5:6,  
9:18, 9:26, 42:5,  
42:12, 44:24, 44:25,  
45:29, 46:8, 46:11,  
51:9, 51:23, 54:14,  
61:3, 86:8, 86:10,  
91:5, 92:3, 116:1,  
116:26, 117:3,  
117:13, 117:20,  
121:11, 123:24,  
168:5, 168:12,  
168:13, 173:14,  
173:18, 173:25,  
174:24, 174:27,  
175:3, 175:7, 175:8,  
175:20, 184:29,  
185:25, 186:10,  
190:8, 190:10,  
190:13, 190:20,  
195:13  
**FACEBOOK**<sup>[1]</sup> -  
1:12  
**Facebook's**<sup>[7]</sup> -  
42:2, 42:3, 52:28,  
53:19, 174:27, 175:1,  
198:3  
**facial**<sup>[9]</sup> - 10:20,  
10:21, 10:26, 10:27,  
11:3, 116:26, 118:2,  
118:15, 134:28  
**facility**<sup>[2]</sup> - 181:25,  
185:5  
**fact**<sup>[48]</sup> - 12:9,  
14:26, 14:27, 18:13,  
19:8, 19:12, 19:28,  
25:12, 28:12, 36:7,  
38:29, 46:16, 48:1,  
53:16, 63:4, 63:14,  
63:24, 73:2, 75:14,  
75:19, 75:24, 77:14,  
78:16, 79:6, 88:13,  
105:21, 112:8,  
121:19, 122:28,  
127:7, 130:8, 131:14,  
131:17, 133:24,  
135:20, 136:9,  
136:16, 136:21,  
140:9, 148:28,  
152:16, 168:26,  
169:3, 178:3, 182:11,  
183:17, 192:3, 194:23  
**Fact**<sup>[1]</sup> - 147:10  
**fact'**<sup>[1]</sup> - 194:1  
**fact'**<sup>[1]</sup> - 137:1  
**facto**<sup>[1]</sup> - 142:14  
**factor**<sup>[1]</sup> - 79:19  
**facts**<sup>[21]</sup> - 5:13,  
11:1, 14:17, 15:10,  
17:11, 65:23, 96:2,  
105:19, 110:24,  
110:25, 120:3, 128:6,  
129:28, 134:4,  
134:28, 143:19,  
158:17, 158:25,  
159:3, 159:10, 197:10  
**factual**<sup>[12]</sup> - 12:29,  
104:22, 111:7,  
122:15, 135:19,  
135:21, 149:9,  
158:26, 159:9,  
159:25, 159:28,  
160:10  
**factually**<sup>[2]</sup> - 15:14,  
162:18  
**failed**<sup>[1]</sup> - 17:2  
**fails**<sup>[2]</sup> - 17:7,  
136:19  
**failure**<sup>[1]</sup> - 194:26  
**Fair**<sup>[9]</sup> - 15:28, 16:4,  
18:1, 19:16, 19:21,  
19:27, 19:29, 37:23,  
122:11

**fair** [22] - 36:28,  
 38:14, 41:21, 42:14,  
 44:27, 69:2, 77:13,  
 82:17, 94:15, 121:2,  
 121:3, 121:4, 121:5,  
 131:8, 133:28,  
 134:10, 134:16,  
 140:14, 152:28,  
 159:13, 171:16,  
 173:24  
**fairly** [5] - 10:29,  
 67:26, 87:8, 88:19,  
 136:16  
**fairness** [5] - 45:26,  
 46:26, 68:18, 69:22,  
 104:3  
**faith** [3] - 49:21,  
 52:8, 171:19  
**fall** [4] - 139:8,  
 139:17, 170:26, 187:6  
**familiar** [7] - 6:23,  
 86:16, 104:4, 105:19,  
 116:9, 146:12, 175:14  
**familiarity** [1] - 116:7  
**famous** [1] - 30:27  
**far** [5] - 53:25,  
 106:12, 176:9, 181:4,  
 196:15  
**fault** [1] - 109:26  
**favour** [4] - 17:13,  
 145:5, 153:6, 159:14  
**fax** [2] - 174:28,  
 175:10  
**FBI** [10] - 119:24,  
 148:14, 150:21,  
 175:18, 178:28,  
 179:4, 179:19,  
 192:16, 192:19, 193:2  
**FCC** [4] - 36:4,  
 36:14, 65:17, 68:25  
**FCRA** [2] - 15:26,  
 15:27  
**fears** [1] - 137:8  
**feasibility** [1] - 7:29  
**feasible** [3] - 8:9,  
 8:15, 8:23  
**feature** [3] - 110:6,  
 110:8, 110:9  
**featured** [2] - 89:19,  
 108:17  
**features** [4] - 18:4,  
 88:27, 142:4, 171:1  
**February** [2] - 91:27  
**FEBRUARY** [3] -  
 1:18, 5:1, 203:1  
**Federal** [9] - 9:22,  
 16:18, 16:20, 23:26,  
 36:5, 36:10, 107:7,  
 194:27  
**federal** [21] - 11:28,  
 12:10, 12:28, 23:13,  
 37:20, 37:21, 37:22,  
 37:24, 38:6, 38:7,  
 38:11, 71:28, 73:23,  
 74:2, 80:9, 85:20,  
 93:17, 97:16, 119:5,  
 126:1, 131:4  
**feed** [1] - 175:19  
**fees** [1] - 18:18  
**fell** [1] - 139:12  
**felt** [4] - 14:6, 58:29,  
 66:7, 85:26  
**few** [3] - 13:10,  
 163:3, 185:20  
**fibre** [1] - 176:15  
**field** [4] - 10:10,  
 38:24, 64:9, 141:22  
**fight** [2] - 120:27,  
 193:1  
**figure** [6] - 70:28,  
 128:29, 163:10,  
 166:9, 170:3, 185:11  
**figures** [1] - 190:25  
**file** [2] - 30:2, 128:21  
**filed** [4] - 41:18,  
 125:28, 185:25,  
 198:11  
**filing** [1] - 120:22  
**fill** [1] - 181:17  
**filled** [2] - 62:15,  
 183:7  
**filter** [1] - 171:5  
**filter's** [1] - 172:6  
**filtering** [2] - 171:10,  
 172:25  
**filtering's** [1] - 172:8  
**filters** [2] - 171:8,  
 171:11  
**final** [5] - 34:6,  
 61:14, 146:9, 200:16,  
 200:17  
**finalising** [1] -  
 197:25  
**financial** [3] - 51:10,  
 54:15, 54:29  
**fine** [2] - 99:27,  
 102:18  
**fine'** [1] - 46:11  
**finger** [1] - 133:11  
**fingerprint** [4] -  
 118:14, 118:15,  
 120:3, 120:24  
**fingerprints** [2] -  
 116:14, 118:20  
**finish** [6] - 5:17,  
 5:18, 100:5, 100:12,  
 100:13, 102:15  
**finished** [2] - 5:21,  
 6:12  
**firm** [7] - 35:10,  
 60:29, 61:1, 61:2,  
 61:4, 62:23, 64:4  
**first** [52] - 7:5, 10:5,  
 10:20, 11:7, 16:15,  
 17:7, 22:28, 23:5,  
 27:8, 27:9, 28:8, 32:5,  
 34:19, 36:17, 36:18,  
 36:21, 41:17, 47:3,  
 59:13, 60:12, 64:3,  
 67:26, 73:26, 80:9,  
 83:19, 83:28, 98:15,  
 99:26, 100:2, 101:4,  
 101:16, 101:18,  
 101:23, 108:2,  
 108:16, 132:15,  
 145:22, 158:9, 159:4,  
 160:19, 167:23,  
 171:15, 172:2,  
 176:11, 179:18,  
 181:19, 184:17,  
 189:28, 190:13,  
 193:19, 198:5, 198:7  
**First** [2] - 83:8,  
 106:23  
**FISA** [19] - 11:24,  
 62:11, 76:6, 76:12,  
 76:16, 86:26, 101:6,  
 101:16, 101:19,  
 101:24, 101:27,  
 119:26, 121:21,  
 146:19, 146:24,  
 147:9, 147:16,  
 147:20, 188:14  
**FISC** [9] - 11:26,  
 12:18, 13:1, 28:25,  
 29:2, 31:5, 31:21,  
 31:28, 32:21  
**fishing** [2] - 182:28,  
 185:2  
**fit** [2] - 51:28, 134:16  
**fits** [1] - 22:25  
**fitted** [1] - 149:10  
**FITZGERALD** [1] -  
 2:23  
**five** [14] - 5:19,  
 10:11, 13:19, 13:21,  
 47:13, 79:13, 79:20,  
 133:29, 135:3, 141:1,  
 147:7, 147:25,  
 161:23, 183:23  
**fix** [2] - 18:14, 22:9  
**fixed** [6] - 22:9,  
 22:15, 23:4, 37:3,  
 139:8  
**flag** [1] - 24:18  
**flaws** [1] - 202:18  
**flexible** [1] - 8:22  
**flight** [2] - 6:29, 7:5  
**flip** [1] - 60:22  
**flow** [2] - 9:14,  
 176:16  
**flowing** [1] - 124:16  
**fly** [1] - 5:24  
**focus** [4] - 30:29,  
 115:26, 115:27, 155:5  
**focussed** [9] - 10:15,  
 13:6, 17:24, 95:8,  
 95:17, 95:22, 95:25,  
 98:10, 123:12  
**folders** [1] - 93:29  
**follow** [5] - 37:27,  
 38:1, 40:10, 186:19  
**followed** [6] - 7:24,  
 31:1, 53:18, 55:19,  
 116:16, 150:26  
**following** [14] - 1:23,  
 34:9, 38:5, 50:29,  
 76:10, 87:11, 150:29,  
 160:15, 175:17,  
 181:21, 182:13,  
 185:7, 202:8, 202:9  
**FOLLOWS** [5] - 5:1,  
 7:14, 35:22, 91:1,  
 152:26  
**follows** [1] - 180:24  
**foot** [1] - 161:4  
**footnote** [24] - 46:29,  
 47:1, 47:21, 47:22,  
 63:4, 65:6, 91:26,  
 93:20, 94:14, 98:18,  
 102:13, 102:16,  
 128:4, 144:21,  
 146:20, 146:22,  
 147:6, 149:2, 164:11,  
 202:10  
**footnoteable** [1] -  
 65:3  
**footnoted** [1] - 62:14  
**footnotes** [8] -  
 56:23, 56:27, 65:7,  
 147:5, 149:25,  
 149:28, 163:1, 201:23  
**FOR** [4] - 2:21, 2:27,  
 3:2, 3:7  
**forbidden** [1] - 166:7  
**force** [2] - 115:15,  
 126:7  
**Foreign** [3] - 11:26,  
 101:20, 145:28  
**foreign** [26] - 76:14,  
 92:22, 101:6, 101:10,  
 102:25, 103:17,  
 129:12, 129:16,  
 129:23, 140:22,  
 141:11, 155:15,  
 158:23, 172:17,  
 172:28, 181:9,  
 181:29, 182:1, 182:2,  
 183:23, 183:24,  
 183:25, 183:26,  
 183:27, 185:15,  
 185:16  
**forget** [2] - 46:8  
**forgetting** [1] - 46:10  
**forgive** [1] - 121:27  
**form** [9] - 9:22,  
 17:21, 61:14, 67:10,  
 149:17, 155:23,  
 158:28, 177:26, 183:8  
**format** [1] - 55:25  
**forms** [3] - 126:2,  
 161:17, 176:27  
**formula** [1] - 70:15  
**formulation** [2] -  
 121:10, 133:26  
**forth** [3] - 82:18,  
 143:9, 151:19  
**Forum** [3] - 51:20,  
 51:22, 51:24  
**forward** [6] - 11:20,  
 18:24, 31:21, 102:12,  
 141:26, 161:1  
**forwarded** [1] -  
 166:18  
**foster** [1] - 33:4  
**four** [21] - 10:11,  
 10:12, 40:22, 41:7,  
 44:9, 53:29, 60:17,  
 60:25, 79:15, 79:20,  
 143:6, 143:9, 178:19,  
 178:20, 182:9, 183:7,  
 186:3, 189:26, 192:5,  
 195:16, 195:22  
**Fourteenth** [1] -  
 107:26  
**Fourth** [45] - 66:11,  
 69:20, 69:27, 70:4,  
 70:7, 70:10, 70:21,  
 71:12, 79:12, 83:6,  
 92:8, 92:17, 92:24,  
 92:25, 93:4, 93:9,  
 94:6, 95:7, 96:23,  
 98:23, 98:25, 101:12,  
 101:25, 102:20,  
 102:21, 102:27,  
 102:29, 103:8,  
 103:11, 103:14,  
 103:18, 104:14,  
 105:3, 105:24, 106:3,  
 106:23, 107:3, 109:9,  
 109:25, 122:26,  
 127:17, 131:23,  
 131:26, 147:11,  
 200:28  
**fourth** [3] - 150:2,  
 150:5, 189:29  
**fraction** [1] - 62:12  
**fractions** [1] - 187:24  
**fragmented** [1] -  
 83:13

**framed** [1] - 121:27  
**framework** [1] - 62:15  
**France** [1] - 58:26  
**FRANCIS** [1] - 2:11  
**FREE** [1] - 3:9  
**free** [2] - 18:5, 131:28  
**FREEDOM** [2] - 31:18, 32:19  
**Freedom** [3] - 15:20, 187:8, 188:12  
**French** [1] - 60:5  
**FRIDAY** [2] - 1:18, 5:1  
**friends** [1] - 168:13  
**front** [8] - 11:3, 33:8, 36:9, 45:4, 72:11, 111:19, 111:24, 160:13  
**FRY** [1] - 2:28  
**FTC** [1] - 68:24  
**full** [9] - 11:27, 56:1, 62:28, 64:6, 84:17, 112:22, 112:25, 191:26, 193:19  
**fully** [4] - 6:3, 126:17, 126:18, 144:12  
**fulminate** [1] - 161:8  
**fun** [1] - 16:10  
**function** [2] - 81:11, 81:12  
**functions** [1] - 30:19  
**Fundamental** [1] - 144:4  
**fundamental** [5] - 12:6, 69:7, 156:2, 188:1, 197:7  
**funny** [1] - 86:5  
**furnish** [1] - 105:11  
**furnished** [3] - 54:3, 84:15, 198:3  
**furthermore** [1] - 137:7  
**futile** [1] - 108:1  
**future** [5] - 75:10, 133:22, 135:11, 188:21  
**Future** [3] - 51:19, 51:21, 51:24

## G

**G-mail** [2] - 185:11, 190:19  
**gained** [1] - 176:22  
**Gallagher** [11] - 45:18, 46:1, 46:2,

46:3, 46:9, 46:15, 47:1, 73:3, 87:19, 152:4, 191:3  
**GALLAGHER** [32] - 2:10, 4:5, 4:9, 5:7, 5:15, 6:20, 7:4, 7:11, 7:14, 21:9, 25:16, 29:23, 35:1, 35:18, 45:13, 80:12, 80:22, 91:10, 102:6, 111:26, 145:19, 149:29, 150:2, 184:1, 184:5, 184:11, 184:14, 184:16, 189:11, 191:7, 202:21, 202:26  
**Gallagher's** [1] - 80:18  
**games** [1] - 83:26  
**gather** [1] - 76:6  
**gathered** [1] - 57:25  
**gathering** [1] - 115:9  
**General** [12] - 9:24, 27:15, 30:16, 150:17, 150:24, 151:3, 158:3, 180:10, 180:11, 187:3, 187:21, 188:3  
**general** [15] - 16:17, 20:1, 59:9, 72:18, 72:26, 75:20, 75:22, 110:23, 116:18, 116:19, 141:14, 148:24, 188:10, 200:3, 200:4  
**General's** [9] - 158:19, 159:2, 159:8, 160:9, 186:22, 186:24, 186:28, 187:10, 187:17  
**generally** [4] - 38:21, 42:26, 147:11, 152:16  
**Georgia** [1] - 64:7  
**Germany** [1] - 58:26  
**Gibson** [17] - 35:10, 41:22, 42:2, 42:10, 43:23, 43:25, 44:24, 45:28, 53:5, 53:11, 53:15, 53:19, 53:28, 55:21, 87:4, 199:24  
**GILMORE** [1] - 3:8  
**given** [24] - 9:6, 17:14, 18:21, 20:18, 43:8, 52:27, 56:18, 56:21, 64:1, 72:16, 72:22, 72:25, 81:12, 88:23, 104:4, 127:26, 128:25, 147:19, 154:16, 169:7, 177:23, 178:10, 180:8, 201:20  
**given..** [1] - 167:13

**glad** [8] - 48:7, 48:15, 51:11, 51:25, 54:12, 72:22, 106:10, 156:4  
**global** [1] - 143:28  
**goal** [2] - 194:7, 201:18  
**golden** [5] - 130:19, 130:22, 130:24, 192:12, 192:13  
**Golden** [3] - 192:21, 192:22, 193:3  
**Goldman** [3] - 117:19, 123:5, 124:5  
**Goldman's** [2] - 195:15, 195:24  
**goldman's** [1] - 195:28  
**GOODBODY** [1] - 3:3  
**Google** [8] - 168:5, 168:16, 173:14, 178:26, 190:8, 190:10, 190:15, 190:19  
**Gorski** [3] - 8:21, 99:15, 197:28  
**Gorski's** [4] - 100:3, 100:10, 163:25, 174:22  
**governing** [3] - 27:19, 54:22, 55:13  
**government** [67] - 9:21, 13:6, 19:2, 23:25, 24:2, 24:16, 25:4, 34:9, 35:11, 37:11, 40:29, 41:10, 41:27, 43:16, 44:23, 45:17, 45:20, 45:25, 45:27, 47:16, 47:25, 49:5, 49:6, 49:17, 50:1, 53:9, 53:16, 61:18, 62:4, 75:19, 88:1, 92:16, 103:22, 107:5, 114:5, 163:12, 164:6, 164:12, 165:10, 165:20, 166:11, 166:12, 168:19, 168:22, 169:7, 169:12, 174:2, 174:10, 174:13, 174:14, 174:15, 174:20, 174:25, 174:26, 175:1, 175:7, 175:8, 177:14, 186:11, 186:18, 200:5, 201:3, 201:5, 201:7, 202:3, 202:12  
**Government** [15] - 48:1, 48:19, 48:28,

51:1, 52:3, 52:29, 53:10, 54:4, 76:8, 107:7, 177:6, 177:23, 178:10, 200:1  
**Government'** [1] - 53:12  
**Government's** [1] - 141:15  
**government's** [2] - 35:5, 174:29  
**graduate** [1] - 58:14  
**GRAINNE** [1] - 3:8  
**GRAND** [1] - 2:29  
**granted** [5] - 14:17, 29:9, 76:25, 126:15, 193:29  
**grateful** [1] - 202:23  
**great** [11] - 30:29, 76:19, 86:3, 137:12, 137:28, 138:7, 142:28, 171:23, 171:25, 192:24, 198:27  
**greater** [1] - 115:1  
**grew** [1] - 159:17  
**ground** [1] - 74:26  
**grounds** [1] - 117:4  
**Group** [5] - 62:10, 144:7, 148:6, 151:12, 187:6  
**group** [7] - 15:21, 46:22, 47:23, 70:28, 143:9, 192:1, 194:20  
**groups** [1] - 65:25  
**guess** [1] - 28:22  
**guessing** [1] - 196:4  
**guidance** [4] - 39:23, 40:2, 40:4, 71:2  
**guided** [1] - 38:3  
**guidelines** [3] - 150:23, 151:2, 152:5

## H

**half** [6] - 167:19, 167:22, 167:23, 167:24, 167:28, 168:27  
**hand** [14] - 21:12, 36:26, 54:21, 55:26, 70:8, 84:26, 132:18, 136:11, 161:20, 162:13, 162:14, 163:25, 165:6, 187:27  
**HANDED** [3] - 105:12, 117:10  
**handed** [5] - 80:15, 84:23, 179:24, 195:13, 195:18

**Handed** [1] - 158:7  
**Handed)** [5] - 54:22, 154:21, 167:8, 176:3, 180:1  
**handle** [1] - 185:1  
**handled** [3] - 87:25, 87:27, 118:1  
**handling** [1] - 25:29  
**handout** [1] - 195:17  
**hands** [1] - 195:20  
**happy** [2] - 184:3, 184:5  
**Harbour** [11] - 21:23, 36:2, 154:27, 155:1, 155:2, 157:28, 158:11, 158:19, 159:14, 159:15, 159:17  
**hard** [2] - 98:9, 110:14  
**hardly** [1] - 129:9  
**harm** [40] - 18:26, 78:5, 79:24, 112:20, 112:21, 112:24, 112:27, 113:16, 113:29, 114:4, 114:6, 115:8, 117:26, 117:28, 118:5, 118:6, 118:22, 119:7, 119:26, 119:29, 120:4, 120:9, 120:12, 120:13, 120:15, 120:16, 120:23, 121:10, 121:12, 122:7, 122:9, 122:21, 123:1, 123:2, 193:16, 193:20, 194:4, 194:9, 194:12, 194:14  
**harmed** [3] - 114:10, 124:19, 125:1  
**harms** [2] - 79:17, 193:26  
**Harvey** [1] - 63:21  
**HAYES** [1] - 2:13  
**head** [2] - 60:17, 93:15  
**header** [1] - 165:22  
**heading** [2] - 136:10, 149:25  
**headings** [1] - 145:27  
**headline** [1] - 159:4  
**health** [1] - 200:12  
**hear** [4] - 38:26, 39:8, 105:29, 137:29  
**HEARD** [1] - 1:17  
**heard** [9] - 12:18, 24:1, 69:23, 116:5, 116:28, 175:29, 178:21, 180:17, 195:7

**hearing** [3] - 5:5,  
 36:1, 69:16  
**HEARING** [5] - 1:17,  
 4:7, 5:1, 91:1, 202:29  
**heavily** [1] - 115:3  
**held** [9] - 96:5,  
 119:21, 120:18,  
 121:7, 132:25,  
 133:27, 162:11,  
 198:15  
**help** [15] - 37:24,  
 45:7, 49:2, 52:10,  
 67:18, 88:7, 97:14,  
 111:16, 118:26,  
 146:22, 157:3, 157:5,  
 177:1, 194:17, 201:24  
**helped** [2] - 53:2,  
 159:16  
**helpful** [4] - 19:19,  
 42:24, 54:1, 66:19  
**helpfully** [1] - 68:27  
**helping** [1] - 149:26  
**hesitancy** [1] - 38:5  
**hide** [1] - 51:14  
**high** [1] - 136:4  
**HIGH** [1] - 1:2  
**higher** [1] - 141:14  
**highly** [4] - 15:16,  
 16:25, 49:18, 137:8  
**himself** [2] - 5:27,  
 80:12  
**hint** [2] - 101:15,  
 101:16  
**HIPAA** [3] - 200:6,  
 200:8  
**hired** [3] - 55:18,  
 55:20, 61:2  
**historical** [1] - 107:2  
**history** [7] - 18:3,  
 78:5, 138:24, 138:26,  
 194:11, 194:16,  
 194:18  
**hmm** [32] - 21:16,  
 37:4, 37:9, 37:21,  
 38:9, 40:8, 41:9,  
 42:20, 44:5, 45:3,  
 56:3, 56:5, 76:18,  
 93:14, 96:19, 99:20,  
 101:3, 104:19, 109:3,  
 112:4, 114:15,  
 114:20, 115:18,  
 122:5, 125:20,  
 127:22, 133:10,  
 135:13, 136:12,  
 160:8, 164:13, 169:16  
**hold** [5] - 78:13,  
 93:19, 119:20, 124:6,  
 162:26  
**holding** [5] - 110:25,  
 123:7, 128:2, 194:25,

195:5  
**holds** [4] - 93:18,  
 93:21, 113:14, 117:24  
**Honour** [1] - 91:18  
**hook** [1] - 79:18  
**hoops** [1] - 182:17  
**hope** [3] - 111:22,  
 145:24, 171:21  
**hopefully** [3] - 92:3,  
 92:5, 105:11  
**hopes** [1] - 43:4  
**hoping** [1] - 55:24  
**Hopkins** [1] - 109:2  
**hosted** [1] - 153:27  
**hostile** [6] - 13:6,  
 13:26, 22:25, 32:25,  
 33:1, 33:13  
**hotel** [1] - 95:12  
**hours** [3] - 5:19,  
 41:8, 41:15  
**HOUSE** [1] - 2:13  
**House** [3] - 200:8,  
 200:11, 202:13  
**houses** [1] - 92:18  
**Human** [3] - 138:12,  
 141:12, 142:6  
**human** [4] - 93:23,  
 141:16, 172:16,  
 200:12  
**humiliated** [2] -  
 119:7, 119:28  
**humility** [1] - 200:23  
**hundreds** [1] - 14:22  
**hurdle** [1] - 182:27  
**hurt** [2] - 114:14,  
 194:16  
**hurts** [1] - 194:8  
**HYLAND** [1] - 2:11  
**Hyland** [1] - 105:16

## I

**I..** [2] - 63:2, 105:8  
**idea** [5] - 13:11,  
 22:21, 23:15, 88:10,  
 192:18  
**ideal** [1] - 5:28  
**ideally** [1] - 5:24  
**identification** [2] -  
 7:17, 67:22  
**identified** [9] - 27:6,  
 30:2, 68:27, 123:21,  
 163:29, 170:21,  
 174:12, 184:24, 188:2  
**identified"** [1] -  
 194:5  
**identify** [8] - 27:18,  
 170:16, 170:19,  
 170:25, 171:15,

183:26, 184:23,  
 186:27  
**identifying** [5] -  
 70:26, 142:22,  
 181:29, 183:23,  
 191:25  
**identity** [2] - 121:2,  
 121:8  
**Ill** [17] - 25:3, 71:19,  
 71:22, 71:23, 71:24,  
 71:25, 71:27, 75:28,  
 77:8, 85:21, 113:7,  
 115:8, 117:5, 117:22,  
 119:19, 124:12, 125:4  
**Ill** [1] - 194:23  
**illegal** [2] - 109:10,  
 109:25  
**Illinois** [5] - 116:4,  
 116:9, 124:10, 197:6,  
 197:7  
**illustration** [1] -  
 197:13  
**imagine** [2] - 22:27,  
 74:10  
**immediately** [2] -  
 157:29, 160:11  
**immigration** [1] -  
 189:4  
**imminent** [2] - 75:11,  
 133:22  
**impacts** [1] - 131:5  
**impending** [1] -  
 136:29  
**imperfections** [1] -  
 42:19  
**implemented** [1] -  
 28:15  
**implied** [1] - 83:1  
**implies** [2] - 162:17,  
 170:28  
**import** [1] - 34:28  
**importance** [1] -  
 156:2  
**important** [28] - 11:2,  
 14:18, 19:23, 19:24,  
 39:1, 39:9, 85:2,  
 87:24, 87:26, 88:19,  
 89:1, 89:4, 89:22,  
 92:19, 95:5, 101:18,  
 101:28, 120:7,  
 145:11, 155:19,  
 156:8, 158:16, 159:9,  
 159:11, 159:17,  
 159:23, 182:25, 193:4  
**imposes** [2] -  
 116:20, 183:19  
**imprecise** [1] - 8:22  
**impressed** [1] -  
 196:16  
**impresses** [1] -

196:5  
**impression** [1] - 73:7  
**improper** [2] - 53:12,  
 118:23  
**improve** [1] - 191:8  
**improvement** [2] -  
 21:19, 201:18  
**inaccuracies** [2] -  
 66:18, 158:22  
**Inaccurate** [1] -  
 158:12  
**inadequacy** [1] -  
 158:3  
**Inaudible** [1] - 65:18  
**inbox** [1] - 84:19  
**incidental** [1] -  
 185:15  
**include** [3] - 98:6,  
 120:16, 181:21  
**included** [3] - 60:6,  
 186:28, 191:17  
**includes** [4] - 58:14,  
 58:15, 88:12, 88:13  
**including** [9] - 31:29,  
 53:26, 55:3, 55:27,  
 85:10, 94:20, 98:26,  
 144:29, 147:1  
**inconsistent** [3] -  
 136:28, 137:2, 179:9  
**incorrect** [19] -  
 43:13, 45:8, 81:9,  
 91:21, 93:6, 94:25,  
 94:27, 95:2, 95:3,  
 106:9, 127:18,  
 137:24, 158:24,  
 159:29, 177:6,  
 177:13, 177:15,  
 177:18, 198:10  
**incorrectly** [2] -  
 91:15, 91:28  
**incorrectness** [1] -  
 160:5  
**incredible** [1] - 138:5  
**indeed** [6] - 42:24,  
 45:16, 85:1, 128:6,  
 138:29, 167:1  
**independence** [8] -  
 39:11, 39:16, 39:23,  
 39:26, 39:29, 40:7,  
 40:17, 40:19  
**independent** [15] -  
 12:7, 12:9, 31:19,  
 35:13, 39:2, 39:5,  
 39:27, 41:4, 41:24,  
 50:9, 50:10, 65:25,  
 151:3, 153:16, 160:28  
**indeterminate** [1] -  
 19:8  
**INDEX** [1] - 4:1  
**indicate** [1] - 68:13

**indicated** [7] - 5:8,  
 51:4, 186:23, 189:11,  
 198:28, 199:20,  
 201:20  
**INDICATING** [2] -  
 189:23, 195:18  
**indicating** [1] - 39:7  
**indication** [1] -  
 190:21  
**indirect** [2] - 157:22,  
 183:15  
**indiscriminate** [1] -  
 182:26  
**individual** [26] - 12:4,  
 13:29, 15:2, 15:15,  
 17:29, 18:26, 21:24,  
 22:2, 25:29, 26:4,  
 32:11, 33:16, 43:21,  
 76:2, 76:21, 95:19,  
 96:7, 129:26, 129:28,  
 129:29, 139:24,  
 139:29, 140:3,  
 180:13, 190:3  
**individuals** [6] -  
 129:23, 130:25,  
 164:1, 164:9, 165:7  
**inference** [1] - 43:11  
**inform** [1] - 68:8  
**Information** [4] -  
 48:11, 48:13, 49:11,  
 116:4  
**information** [59] -  
 11:29, 23:5, 27:24,  
 29:28, 29:29, 32:13,  
 37:12, 40:18, 43:8,  
 47:17, 47:25, 50:23,  
 51:18, 76:24, 86:2,  
 86:28, 87:14, 116:13,  
 116:21, 116:22,  
 119:6, 119:21,  
 119:27, 120:8,  
 120:17, 120:18,  
 120:21, 121:15,  
 121:25, 122:2,  
 123:23, 131:15,  
 144:28, 147:13,  
 147:14, 155:17,  
 164:12, 164:14,  
 174:3, 174:19,  
 175:20, 176:27,  
 177:16, 177:27,  
 178:4, 178:8, 178:28,  
 179:3, 179:12,  
 181:22, 183:25,  
 185:23, 186:17,  
 189:24, 190:6,  
 190:10, 190:12,  
 194:26  
**INFORMATION** [1] -  
 3:8

**information**" [1] - 182:2  
**information'** [1] - 194:21  
**informed** [2] - 64:6, 142:11  
**infrastructure** [1] - 176:16  
**infringement** [1] - 23:23  
**inherent** [1] - 32:20  
**initial** [4] - 56:9, 63:19, 136:26, 171:10  
**injury** [38] - 14:26, 14:27, 17:21, 18:28, 19:28, 25:12, 75:14, 77:4, 77:16, 77:29, 78:2, 78:8, 78:10, 78:28, 79:1, 79:6, 79:14, 79:19, 81:4, 81:6, 112:8, 115:10, 123:25, 124:16, 126:14, 133:24, 135:20, 136:9, 136:15, 136:23, 136:29, 194:1, 194:22, 194:28, 196:14, 197:13  
**injury-in-fact** [8] - 14:26, 14:27, 19:28, 75:14, 112:8, 133:24, 135:20, 136:9  
**injury-in-fact"** [1] - 194:1  
**input** [1] - 48:28  
**INS** [2] - 109:8, 109:21  
**inside** [3] - 104:22, 183:11, 185:8  
**insightful** [1] - 202:7  
**insist** [2] - 155:17, 161:10  
**insisted** [1] - 24:29  
**insofar** [3] - 83:6, 83:8, 152:9  
**inspected** [1] - 169:5  
**Inspector** [3] - 150:17, 150:24, 151:3  
**instance** [21] - 29:6, 48:9, 51:8, 64:8, 64:29, 89:6, 95:7, 95:18, 95:22, 95:23, 121:2, 129:22, 147:22, 152:2, 153:9, 160:24, 161:23, 171:15, 174:24, 187:22, 199:21  
**instances** [3] - 37:19, 165:23, 193:28  
**instead** [4] - 18:16, 50:12, 132:20, 194:10  
**institution** [1] - 55:5  
**instructed** [8] - 2:18, 2:23, 2:28, 3:9, 52:18, 55:25, 61:8, 86:18  
**Instructed** [3] - 2:7, 2:12, 3:3  
**instruction** [4] - 8:11, 53:24, 61:21, 62:7  
**instructions** [4] - 6:13, 52:17, 201:20, 201:21  
**Intelligence** [12] - 11:27, 30:8, 30:15, 40:26, 42:5, 42:10, 42:27, 101:20, 145:28, 158:12, 177:4, 180:9  
**intelligence** [22] - 8:2, 8:8, 27:14, 27:20, 27:24, 33:25, 87:21, 92:22, 101:11, 102:26, 103:17, 120:8, 129:12, 129:16, 129:23, 140:22, 158:23, 172:18, 172:29, 181:10, 182:2, 183:25  
**intended** [6] - 86:19, 107:6, 115:20, 174:21, 183:13, 186:15  
**interaction** [2] - 26:2, 34:9  
**intercept** [1] - 178:28  
**intercepted** [5] - 133:1, 133:17, 133:19, 135:10, 136:18  
**interest** [9] - 45:12, 45:19, 46:6, 48:20, 51:1, 52:4, 54:29, 67:10, 117:14  
**interested** [3] - 106:11, 111:29, 170:27  
**interesting** [3] - 23:8, 45:16, 131:2  
**interfered** [11] - 35:2, 72:1, 73:25, 74:4, 74:12, 75:3, 75:8, 75:9, 133:16, 133:18, 133:19  
**interference** [2] - 35:15, 80:5  
**intermediate** [1] - 199:9  
**internal** [1] - 152:9  
**International** [1] - 126:5  
**international** [2] - 58:28, 141:16  
**internet** [7] - 65:15, 65:21, 170:9, 173:9, 173:13, 173:23, 173:25  
**interpretation** [4] - 31:23, 31:27, 141:15, 194:15  
**interpreted** [1] - 135:27  
**interprets** [1] - 165:10  
**interrupt** [2] - 51:26, 68:12  
**intervention** [1] - 196:3  
**intricacy** [1] - 138:5  
**introduce** [1] - 114:29  
**introduces** [1] - 115:2  
**intrusive** [1] - 156:23  
**invariably** [1] - 164:1  
**invasion** [5] - 114:8, 115:9, 124:17, 124:29, 194:14  
**invasions** [2] - 83:9, 124:6  
**invested** [1] - 108:3  
**investigated** [1] - 34:11  
**investigation** [6] - 22:7, 23:2, 23:3, 34:12, 101:7, 161:25  
**investigation'** [1] - 22:14  
**investigations** [2] - 86:29, 142:13  
**investigations'** [1] - 87:15  
**invite** [2] - 72:7, 199:3  
**invited** [1] - 154:5  
**invoke** [1] - 93:3  
**involved** [5] - 28:4, 53:1, 61:17, 129:15, 134:13  
**involvement** [2] - 15:25, 53:22  
**involves** [2] - 19:27, 170:23  
**involving** [4] - 112:2, 127:19, 129:12, 129:16  
**IRELAND** [1] - 1:12  
**Ireland** [8] - 5:6, 39:18, 40:9, 52:21, 55:17, 57:28, 58:27, 91:5  
**Irish** [21] - 11:4, 52:16, 52:29, 55:22, 55:27, 55:28, 56:7, 56:13, 56:14, 56:17, 56:29, 57:17, 58:1, 58:3, 58:4, 58:6, 58:9, 59:28, 60:6, 89:26  
**ironically** [1] - 141:10  
**irrelevant** [1] - 57:16  
**is'** [5] - 34:18, 80:9, 154:10, 162:6  
**issue** [17] - 6:15, 25:2, 34:6, 37:10, 46:9, 57:16, 67:23, 73:29, 80:9, 85:2, 95:25, 102:1, 107:10, 110:20, 149:22, 173:6, 185:22  
**issue"** [1] - 70:12  
**issued** [5] - 37:13, 148:11, 150:22, 151:2, 187:7  
**issues** [16] - 5:9, 5:10, 7:23, 15:27, 16:8, 45:14, 46:4, 65:22, 84:26, 85:10, 85:11, 89:27, 89:28, 97:29, 163:3, 173:29  
**it'** [6] - 8:17, 23:1, 23:4, 52:12, 65:7, 154:10  
**it'/'No** [1] - 52:11  
**it's..** [1] - 149:29  
**item** [3] - 26:12, 69:28, 165:6  
**items** [3] - 66:7, 84:20, 183:6  
**itself** [5] - 77:15, 151:19, 151:21, 151:23, 188:17

---

**J**

---

**JAMES** [1] - 2:17  
**January** [3] - 28:15, 65:14, 154:13  
**jet** [1] - 5:26  
**Jim** [1] - 63:20  
**job** [10] - 9:9, 32:10, 62:19, 62:20, 86:22, 108:12, 123:22, 183:4, 184:27  
**jobs** [4] - 155:6, 155:8, 155:12, 155:28  
**JOHN** [1] - 2:24  
**joint** [5] - 7:17, 69:29, 163:18, 165:4, 174:5  
**Jones** [2] - 79:11, 79:27  
**journal** [1] - 154:3  
**Judge** [33] - 5:11, 5:14, 5:15, 6:3, 6:8, 6:13, 7:3, 7:9, 7:11, 8:5, 20:16, 21:9, 27:8, 45:15, 71:25, 90:1, 90:4, 101:5, 105:16, 111:25, 111:26, 141:4, 149:29, 150:4, 150:7, 155:25, 179:6, 182:13, 184:1, 184:12, 190:27, 190:29, 202:26  
**judge** [32] - 12:7, 12:20, 24:21, 24:23, 26:20, 40:13, 40:14, 40:18, 67:14, 68:4, 76:13, 79:3, 111:8, 111:9, 117:3, 117:16, 124:1, 124:3, 124:12, 135:29, 136:1, 136:5, 136:6, 140:1, 144:29, 157:1, 162:23, 166:15, 166:21, 166:23, 183:22, 196:25  
**judge's** [1] - 196:2  
**judgement** [1] - 197:5  
**judges** [4] - 12:10, 12:28, 71:24, 79:9  
**judgment** [9] - 31:22, 35:13, 108:19, 109:11, 109:12, 128:20, 132:25, 134:5, 197:15  
**judgments** [1] - 78:17  
**Judicial** [2] - 12:19, 49:27  
**judicial** [16] - 11:19, 11:27, 12:12, 12:13, 12:16, 12:17, 24:25, 24:26, 25:1, 68:21, 131:5, 131:7, 149:5, 150:10, 151:5, 196:19  
**jump** [1] - 182:17  
**June** [8] - 36:8, 36:9, 61:10, 61:11, 61:21, 61:22  
**junior** [1] - 56:4  
**jurisdiction** [5] - 55:13, 58:17, 141:14, 156:20, 157:3  
**jurisdiction'** [1] - 107:28  
**jurisdictions** [1] -

60:7  
**jurisprudence** [1] - 68:3  
**just..** [1] - 188:26  
**Justice** [6] - 41:2, 109:12, 150:18, 150:22, 159:15, 160:21  
**JUSTICE** [62] - 1:17, 5:4, 5:8, 6:1, 6:10, 6:15, 6:19, 6:23, 6:29, 7:7, 7:10, 10:23, 11:6, 12:16, 12:21, 12:25, 12:27, 16:13, 21:6, 23:20, 23:23, 24:5, 25:15, 29:21, 34:23, 71:21, 79:8, 80:20, 90:2, 91:3, 100:9, 102:9, 105:14, 109:11, 109:17, 109:23, 111:22, 128:13, 132:8, 132:10, 140:19, 141:2, 141:5, 143:12, 143:14, 146:3, 149:24, 150:1, 150:6, 161:13, 166:25, 172:3, 184:3, 184:7, 184:10, 188:23, 188:25, 188:28, 189:9, 191:2, 202:22, 202:25  
**justices** [12] - 10:12, 78:4, 78:11, 78:15, 79:10, 79:13, 79:15, 79:26, 109:9, 109:24, 133:29, 135:4  
**justiciable** [3] - 152:10, 152:11, 152:14  
**justified** [1] - 139:3

## K

**keep** [4] - 138:6, 148:10, 149:17, 171:16  
**KELLEY** [1] - 2:27  
**kept** [1] - 121:20  
**key** [7] - 23:17, 72:17, 72:26, 79:19, 105:21, 140:15, 159:25  
**KIERAN** [1] - 2:11  
**kind** [28] - 11:23, 13:25, 13:28, 13:29, 17:9, 17:17, 18:23, 26:11, 31:7, 66:25, 79:6, 95:5, 112:20, 112:24, 112:27,

113:12, 113:23, 115:15, 115:19, 116:14, 119:14, 121:25, 123:1, 123:2, 148:26, 187:28, 194:12, 194:13  
**kinds** [9] - 9:10, 9:18, 57:22, 77:25, 79:17, 148:23, 169:15, 201:8  
**KINGSTON** [1] - 2:22  
**know** [1] - 80:26  
**knowledge** [8] - 13:2, 16:17, 44:25, 48:9, 159:11, 174:16, 177:13, 187:18  
**knowledgeable** [2] - 35:9, 35:16  
**known** [9] - 14:19, 14:21, 40:1, 51:12, 52:5, 54:19, 95:9, 99:18, 199:15  
**knows** [1] - 39:9

## L

**lack** [7] - 13:1, 25:6, 115:1, 149:5, 155:16, 196:5, 196:17  
**lacking** [4] - 69:18, 70:5, 70:19, 71:10  
**lag** [1] - 5:26  
**language** [12] - 8:12, 8:23, 63:8, 70:8, 77:9, 77:11, 77:23, 79:23, 95:24, 139:5, 152:19, 194:15  
**large** [12] - 35:26, 62:12, 62:14, 64:3, 67:25, 80:28, 115:24, 168:17, 169:4, 169:6, 169:29, 180:18  
**larger** [4] - 44:11, 169:20, 170:3, 170:5  
**last** [17] - 12:15, 13:5, 16:2, 23:6, 36:9, 65:13, 80:18, 86:12, 107:1, 108:18, 108:21, 132:18, 132:23, 156:16, 185:21, 186:16, 199:6  
**late** [6] - 47:11, 60:21, 61:11, 61:22, 100:4, 202:27  
**latest** [1] - 28:18  
**latter** [1] - 15:16  
**laughs** [1] - 16:14  
**law** [135] - 8:19, 9:21, 11:4, 12:19, 15:29, 24:11, 24:12, 31:24, 33:5, 35:10, 36:16, 38:5, 42:16, 43:14, 49:7, 50:15, 50:27, 51:16, 55:27, 55:28, 56:7, 56:17, 58:5, 58:6, 58:9, 58:14, 58:16, 58:19, 58:20, 58:22, 58:28, 59:3, 59:13, 59:28, 59:29, 60:1, 60:4, 60:5, 60:6, 61:4, 61:29, 62:23, 63:29, 64:2, 64:9, 65:4, 67:15, 68:4, 68:8, 68:9, 68:16, 68:17, 69:13, 72:5, 72:14, 74:22, 75:16, 76:16, 77:17, 78:1, 78:7, 78:9, 78:19, 78:20, 78:22, 78:29, 79:19, 79:25, 80:5, 80:8, 80:9, 81:5, 81:20, 81:24, 81:29, 82:7, 82:12, 82:15, 82:25, 83:12, 85:9, 85:22, 86:22, 87:6, 89:26, 93:14, 96:10, 96:24, 96:29, 97:17, 97:26, 98:20, 99:5, 103:26, 103:27, 105:5, 113:9, 121:26, 124:2, 124:21, 125:3, 129:28, 135:27, 136:21, 138:22, 139:8, 139:14, 139:24, 141:16, 143:16, 143:23, 144:7, 156:11, 158:17, 158:22, 158:23, 159:3, 161:7, 161:9, 161:29, 162:6, 162:13, 168:22, 187:16, 188:8, 192:17, 193:24, 193:27, 197:6, 199:6, 199:10, 199:13, 201:17  
**Law** [1] - 145:29  
**Law** [1] - 158:12  
**law** [4] - 31:27, 59:10, 60:6, 138:8  
**lawful** [2] - 11:15, 159:18  
**lawfully** [1] - 108:3  
**lawlessly** [1] - 150:29  
**laws** [4] - 117:29, 153:1, 153:2, 153:6  
**lawsuit** [1] - 119:5  
**lawsuits** [1] - 130:26

**lawyer** [12] - 19:18, 56:13, 56:14, 58:1, 58:3, 58:16, 60:12, 60:19, 64:7, 68:29, 80:15, 136:5  
**lawyers** [24] - 35:8, 41:28, 42:17, 42:18, 42:26, 49:12, 52:29, 54:1, 63:24, 66:24, 97:15, 110:26, 111:12, 111:15, 122:6, 122:14, 122:19, 174:27, 175:1, 175:6, 175:9, 175:13, 175:20, 198:3  
**lead** [7] - 9:9, 65:27, 113:13, 131:18, 132:22, 200:12  
**leader** [1] - 9:5  
**leading** [1] - 190:26  
**leak** [1] - 47:17  
**leaked** [1] - 47:26  
**leaks** [1] - 146:29  
**learn** [2] - 26:10, 146:24  
**learned** [5] - 41:17, 43:10, 100:20, 146:29, 199:2  
**least** [18] - 16:26, 36:7, 61:13, 61:20, 68:10, 85:18, 108:25, 111:18, 112:21, 120:26, 142:14, 147:20, 151:10, 157:20, 162:10, 169:18, 172:25, 195:6  
**leave** [3] - 5:12, 39:29, 197:20  
**leaving** [1] - 196:15  
**led** [5] - 16:23, 126:22, 181:24, 185:4, 202:19  
**LEE** [1] - 2:7  
**left** [6] - 21:12, 24:5, 24:6, 34:20, 132:18, 163:25  
**left-hand** [3] - 21:12, 132:18, 163:25  
**LEGAL** [1] - 3:9  
**Legal** [1] - 30:11  
**legal** [27] - 9:26, 10:24, 25:8, 32:10, 32:15, 50:17, 59:25, 64:7, 67:14, 68:17, 85:10, 85:20, 86:23, 87:6, 87:18, 93:13, 94:10, 98:1, 103:14, 104:18, 122:28, 123:3, 139:15, 143:26, 158:16,

175:13, 199:6  
**legally** [1] - 147:2  
**legislation** [8] - 110:20, 110:22, 110:26, 111:2, 121:14, 121:17, 156:20, 157:10  
**legitimate** [1] - 33:24  
**length** [6] - 121:19, 131:24, 142:28, 144:17, 168:28, 198:27  
**lengthy** [2] - 50:20, 132:1  
**LERT** [2] - 185:28  
**less** [3] - 7:20, 44:21, 157:25  
**letter** [6] - 64:1, 86:12, 87:4, 87:10, 88:22, 150:15  
**letter"** [1] - 86:16  
**letters** [7] - 109:14, 148:8, 148:13, 148:20, 150:8, 150:13, 150:19  
**level** [7] - 34:26, 54:3, 58:25, 72:23, 96:13, 101:24, 172:14  
**liability** [1] - 17:3  
**liable** [1] - 17:5  
**LIBE** [1] - 144:3  
**liberties** [4] - 32:6, 32:12, 149:4, 188:19  
**library** [1] - 149:22  
**lies** [2] - 156:10, 157:20  
**life** [1] - 41:11  
**light** [1] - 16:7  
**likelihood** [19] - 71:29, 73:24, 74:3, 74:12, 74:24, 75:4, 75:5, 75:7, 133:15, 134:1, 134:12, 134:17, 134:21, 135:5, 135:9, 135:17, 136:2, 136:17, 137:25  
**likelihood'** [2] - 132:29, 136:27  
**likely** [7] - 71:7, 71:14, 82:1, 136:8, 164:6, 164:23, 164:25  
**limit** [2] - 159:26, 182:26  
**limitation** [1] - 195:10  
**limitations** [1] - 93:23  
**limited** [1] - 163:7  
**limiting** [1] - 195:6  
**line** [15] - 9:4, 12:11,

123:18, 150:3, 150:5,  
165:24, 166:1,  
190:28, 195:25,  
195:28, 196:3, 196:4,  
196:9, 197:1, 197:2  
**lines** [4] - 13:14,  
19:9, 87:11, 175:17  
**link** [1] - 91:26  
**list** [12] - 32:5, 34:20,  
44:16, 44:18, 48:7,  
91:23, 129:27,  
141:27, 142:2,  
191:16, 191:29, 192:9  
**listed** [2] - 91:19,  
188:5  
**listen** [1] - 108:12  
**listener** [1] - 43:17  
**listing** [1] - 60:16  
**lists** [2] - 142:5,  
143:7  
**literally** [1] - 188:25  
**litigate** [1] - 32:15  
**litigation** [4] - 9:19,  
36:24, 36:25, 89:11  
**litigator** [2] - 37:27,  
137:11  
**live** [1] - 175:21  
**loan** [1] - 17:26  
**loaned** [1] - 3:24  
**located** [3] - 181:26,  
183:10, 185:6  
**location** [2] - 47:28,  
185:8  
**log** [3] - 176:24,  
176:26  
**log-in** [2] - 176:24,  
176:26  
**log-out** [1] - 176:26  
**logical** [1] - 23:20  
**look** [68] - 17:21,  
18:5, 19:20, 25:17,  
40:12, 47:2, 54:24,  
56:22, 57:24, 64:20,  
66:16, 67:14, 67:20,  
68:20, 68:21, 69:29,  
73:21, 91:19, 92:9,  
93:20, 93:22, 94:1,  
97:13, 97:23, 97:25,  
98:18, 102:13, 105:9,  
106:16, 107:17,  
110:26, 111:12,  
111:15, 112:10,  
114:5, 117:9, 118:29,  
132:3, 132:12,  
132:18, 139:23,  
140:2, 140:16,  
140:25, 140:27,  
143:10, 143:21,  
152:5, 153:9, 155:4,  
160:24, 161:3, 162:5,

163:21, 165:4, 166:1,  
168:19, 174:5,  
178:15, 182:29,  
183:5, 186:2, 191:19,  
193:6, 195:10,  
195:12, 195:22,  
202:13  
**looked** [15] - 16:19,  
16:25, 19:13, 34:16,  
35:12, 35:14, 50:8,  
63:11, 63:12, 73:10,  
100:12, 143:6, 168:4,  
168:24, 196:23  
**looking** [16] - 29:20,  
31:9, 31:10, 31:15,  
57:26, 68:19, 97:17,  
99:15, 99:16, 114:6,  
140:18, 143:3,  
167:19, 176:5,  
184:18, 194:12  
**looks** [6] - 109:18,  
109:20, 111:8,  
137:23, 154:24,  
195:18  
**loophole'** [1] - 65:2  
**loophole/'It's** [1] -  
65:1  
**Lopez** [2] - 109:8,  
109:21  
**Lopez-Mendoza** [2] -  
109:8, 109:21  
**lose** [1] - 119:3  
**loses** [1] - 124:26  
**lost** [1] - 123:22  
**lovely** [1] - 6:7  
**lower** [2] - 129:22,  
196:24  
**LOWER** [1] - 3:10  
**LTD** [1] - 1:12  
**Ltd** [2] - 5:6, 91:5  
**LUNCH** [2] - 4:7,  
91:1  
**LUNCHEON** [1] -  
90:7

---

## M

---

**Magazine** [1] - 193:2  
**magnum** [1] - 62:7  
**mail** [14] - 13:28,  
114:5, 114:6, 165:22,  
165:25, 168:2,  
174:28, 175:4,  
176:24, 182:7,  
184:28, 185:8,  
185:11, 190:19  
**mailbox** [2] - 168:16  
**mails** [1] - 166:17  
**main** [7] - 18:3,

18:14, 49:6, 77:24,  
160:26, 165:19,  
186:27  
**maintained** [2] -  
134:6, 134:9  
**major** [3] - 151:8,  
155:12, 194:9  
**majority** [16] - 10:14,  
10:18, 14:1, 14:9,  
79:20, 80:4, 109:8,  
109:16, 109:24,  
133:29, 134:11,  
135:4, 135:22,  
137:19, 137:25, 195:9  
**making..** [1] - 139:4  
**Malone** [3] - 1:21,  
3:23, 3:25  
**MALONE** [1] - 1:31  
**manner** [3] - 3:24,  
26:18, 30:20  
**manual** [1] - 27:19  
**map** [1] - 13:27  
**marked** [1] - 147:4  
**market** [1] - 123:24  
**MASON** [1] - 2:13  
**mass** [6] - 159:25,  
182:26, 187:2, 187:3,  
187:26, 187:29  
**match** [1] - 171:29  
**matches** [3] - 16:27,  
16:28, 172:11  
**material** [11] - 16:22,  
57:23, 65:20, 67:9,  
89:7, 118:8, 145:6,  
168:20, 176:21,  
177:2, 187:25  
**materials** [14] -  
20:16, 20:26, 27:6,  
27:8, 32:14, 56:9,  
59:1, 60:13, 61:7,  
61:18, 65:17, 85:27,  
85:29  
**matter** [24] - 5:5,  
5:21, 5:28, 10:5, 19:3,  
20:13, 22:17, 31:22,  
34:6, 34:13, 51:10,  
76:26, 91:4, 97:16,  
110:23, 136:26,  
140:1, 140:2, 144:10,  
162:23, 183:22,  
185:27, 189:9, 189:10  
**matters** [11] - 27:28,  
32:24, 68:3, 68:27,  
69:4, 82:6, 141:24,  
142:7, 154:17,  
154:19, 185:21  
**MAURICE** [1] - 2:27  
**MAXIMILLIAN** [1] -  
1:14  
**maximum** [1] -

199:25  
**McCANN** [1] - 2:23  
**McCullough** [1] -  
124:10  
**McCullough** [16] -  
2:16, 4:8, 6:14,  
152:25, 152:28,  
161:14, 161:16,  
166:28, 167:1, 173:5,  
183:29, 185:20,  
186:21, 189:23,  
190:26, 191:1  
**MCTs** [6] - 7:25,  
166:19, 166:28,  
166:29, 167:3, 170:21  
**mean** [29] - 5:27, 6:3,  
7:1, 7:7, 12:17, 26:9,  
46:25, 71:21, 77:15,  
79:9, 83:21, 100:9,  
104:29, 106:12,  
128:16, 135:28,  
145:23, 160:2,  
170:11, 172:3,  
172:28, 174:18,  
188:25, 190:27,  
193:16, 193:20,  
196:16, 197:8, 198:21  
**meaning** [6] - 67:29,  
68:1, 68:2, 68:5, 69:1,  
84:19  
**means** [9] - 8:23,  
93:24, 103:14,  
106:22, 174:2,  
174:13, 179:3,  
182:20, 183:26  
**measure** [2] - 143:4,  
193:26  
**measured** [1] - 143:4  
**measures** [3] - 17:1,  
17:2, 17:6  
**mechanism** [8] -  
13:23, 23:17, 23:18,  
24:14, 34:3, 174:24,  
175:5, 175:11  
**mediated** [3] - 41:21,  
44:23, 45:28  
**mediates** [1] - 53:11  
**medical** [2] - 200:6,  
202:4  
**meet** [6] - 64:11,  
92:25, 102:29,  
103:11, 104:7, 136:8  
**meeting** [14] - 67:17,  
99:10, 99:15, 99:20,  
99:22, 99:23, 99:27,  
99:28, 100:18,  
100:20, 153:19,  
153:21, 153:25,  
200:27  
**Meltzer's** [1] -

189:20  
**Member** [5] - 25:21,  
139:29, 140:3,  
144:26, 162:14  
**members** [2] - 47:13,  
157:2  
**memorandum** [3] -  
26:17, 43:27, 128:28  
**memorising** [1] -  
83:23  
**memory** [6] - 33:9,  
33:10, 33:11, 83:25,  
140:17, 197:27  
**Mendoza** [2] - 109:8,  
109:21  
**mental** [1] - 88:10  
**mention** [2] - 32:29,  
51:21  
**mentioned** [4] -  
10:21, 51:19, 72:21,  
192:7  
**mentioning** [1] -  
170:8  
**mere** [4] - 77:14,  
92:5, 115:8, 115:9  
**merely** [1] - 93:2  
**merits** [2] - 57:13,  
57:15  
**message** [2] - 42:22,  
176:25  
**met** [1] - 47:12  
**meta** [1] - 187:24  
**meta-data** [1] -  
187:24  
**metadata** [3] - 14:23,  
15:19, 129:24  
**method** [1] - 183:2  
**methodology** [3] -  
66:21, 66:24, 143:5  
**methods** [1] - 176:26  
**Mexico** [1] - 105:21  
**MICHAEL** [2] - 2:5,  
3:2  
**Microsoft** [3] -  
173:13, 190:8, 190:15  
**middle** [1] - 109:22  
**midway** [1] - 107:16  
**might** [44] - 14:15,  
16:22, 20:15, 20:19,  
24:12, 24:29, 29:18,  
29:25, 35:19, 39:10,  
39:29, 40:6, 40:16,  
43:15, 43:16, 55:15,  
57:14, 77:25, 83:9,  
113:11, 113:20,  
118:18, 128:15,  
134:13, 134:29,  
143:17, 146:15,  
147:24, 154:24,  
165:21, 165:23,

167:24, 172:5, 172:7, 184:7, 185:9, 189:12, 190:18, 190:19, 195:10, 200:24, 202:12  
**might've** [4] - 52:27, 52:28, 61:21, 61:22  
**military** [2] - 9:1, 9:3  
**million** [4] - 14:22, 167:20, 167:22, 167:28  
**millions** [4] - 14:26, 15:8  
**mind** [6] - 7:8, 12:3, 14:18, 33:10, 67:12, 139:19  
**mine** [2] - 29:18, 29:21  
**minimis** [1] - 113:11  
**Minimisation** [2] - 29:22, 30:11  
**minimisation** [2] - 29:27, 180:15  
**minimise** [2] - 29:29, 200:26  
**minimum** [1] - 149:10  
**minute** [1] - 65:12  
**misconceived** [1] - 43:17  
**misinterpretation** [1] - 108:9  
**misreading** [1] - 103:6  
**missed** [1] - 56:19  
**missed'** [1] - 201:10  
**mission** [1] - 158:21  
**missions** [1] - 30:19  
**misstatement** [2] - 43:12, 43:13  
**mistake** [19] - 16:24, 16:26, 17:5, 17:10, 17:22, 17:25, 18:6, 18:9, 42:21, 43:22, 49:13, 103:20, 104:9, 104:11, 109:13, 129:4, 160:10, 188:1, 194:8  
**mistaken** [2] - 154:29, 200:24  
**mistakes** [5] - 16:22, 48:10, 186:23, 187:20  
**misunderstanding** [2] - 78:14, 202:2  
**misunderstood** [1] - 44:12  
**model** [1] - 160:29  
**modified** [1] - 29:9  
**moment** [4] - 46:9, 70:1, 107:12, 152:8

**money** [2] - 17:15, 119:4  
**months** [3] - 24:1, 57:23, 180:26  
**morning** [16] - 5:4, 5:22, 7:5, 8:5, 35:24, 35:25, 72:3, 73:3, 91:14, 91:20, 92:1, 104:12, 110:18, 111:5, 125:17, 133:5  
**mortgage** [1] - 17:26  
**most** [8] - 50:16, 71:14, 75:29, 127:26, 131:5, 143:25, 149:19, 194:12  
**motivation** [1] - 156:29  
**motive** [1] - 157:22  
**mouth** [1] - 113:26  
**move** [8] - 7:26, 20:13, 27:5, 91:13, 92:8, 94:18, 97:23, 110:1  
**moved** [4] - 44:7, 55:29, 132:25, 148:18  
**MR** [94] - 2:5, 2:5, 2:7, 2:10, 2:11, 2:12, 2:16, 2:17, 2:17, 2:27, 3:2, 3:8, 4:5, 4:6, 4:8, 4:9, 5:7, 5:11, 5:15, 6:3, 6:8, 6:12, 6:18, 6:20, 6:21, 6:25, 7:3, 7:4, 7:9, 7:11, 7:14, 21:9, 25:16, 29:23, 35:1, 35:18, 35:21, 35:24, 45:13, 45:16, 71:23, 71:25, 79:27, 80:12, 80:14, 80:17, 80:22, 80:24, 90:1, 90:4, 91:8, 91:10, 91:11, 102:6, 102:8, 102:11, 105:16, 109:13, 109:29, 111:24, 111:26, 111:27, 128:18, 132:12, 140:20, 141:4, 141:6, 144:12, 145:19, 145:21, 146:11, 149:29, 150:2, 150:7, 152:21, 152:25, 152:28, 161:14, 161:16, 166:28, 167:1, 173:5, 183:29, 184:1, 184:5, 184:11, 184:14, 184:16, 189:11, 190:26, 191:1, 191:7, 202:21, 202:26  
**MS** [69] - 1:17, 2:6, 2:11, 2:21, 2:22, 2:27,

3:2, 3:8, 5:4, 5:8, 6:1, 6:10, 6:15, 6:19, 6:23, 6:29, 7:7, 7:10, 10:23, 11:6, 12:16, 12:21, 12:25, 12:27, 16:13, 21:6, 23:20, 23:23, 24:5, 25:15, 29:21, 34:23, 71:21, 79:8, 80:20, 90:2, 91:3, 100:9, 102:9, 105:14, 109:11, 109:17, 109:23, 111:22, 128:13, 132:8, 132:10, 140:19, 141:2, 141:5, 143:12, 143:14, 146:3, 149:24, 150:1, 150:6, 161:13, 166:25, 172:3, 184:3, 184:7, 184:10, 188:23, 188:25, 188:28, 189:9, 191:2, 202:22, 202:25  
**multi** [3] - 166:12, 166:18, 170:19  
**multiple** [7] - 9:18, 9:26, 114:28, 131:27, 159:27, 161:28, 164:19  
**multiplies** [1] - 169:3  
**multiply** [1] - 169:22  
**MURRAY** [41] - 2:5, 4:6, 5:11, 6:3, 6:8, 6:12, 6:18, 6:21, 6:25, 7:3, 7:9, 35:21, 35:24, 45:16, 71:23, 71:25, 79:27, 80:14, 80:17, 80:24, 90:1, 90:4, 91:8, 91:11, 102:8, 102:11, 105:16, 109:13, 109:29, 111:24, 111:27, 128:18, 140:20, 141:4, 141:6, 144:12, 145:21, 146:11, 150:7, 152:21  
**Murray** [11] - 5:8, 35:19, 80:12, 105:15, 111:23, 149:24, 191:14, 192:11, 195:12, 198:13, 201:22  
**must** [21] - 3:23, 31:21, 32:14, 68:25, 68:29, 75:19, 77:4, 92:25, 102:28, 103:11, 104:7, 116:16, 136:23, 136:29, 161:7, 181:5, 181:8, 181:9, 181:17,

181:21, 186:19  
**mysteries** [1] - 86:6  


---

**N**  


---

**name** [6] - 57:20, 91:28, 93:15, 109:14, 166:26  
**named** [4] - 1:26, 29:12, 63:20, 173:12  
**names** [2] - 57:27, 60:17  
**narrow** [1] - 65:2  
**National** [8] - 27:24, 30:28, 40:26, 42:5, 42:9, 42:27, 177:4, 180:9  
**national** [35] - 19:17, 19:19, 21:26, 23:7, 23:16, 23:19, 25:22, 25:27, 33:16, 50:15, 60:4, 75:17, 86:29, 87:15, 105:25, 106:5, 106:26, 117:29, 118:28, 119:10, 119:11, 122:14, 142:12, 147:13, 148:8, 148:13, 148:19, 150:13, 150:15, 150:19, 153:7, 156:19, 156:20, 173:4, 198:22  
**natural** [1] - 111:11  
**nature** [9] - 14:29, 15:7, 19:11, 20:6, 34:2, 147:20, 159:28, 181:13, 189:13  
**near** [3] - 61:14, 161:24, 198:10  
**necessarily** [3] - 168:9, 169:5, 170:23  
**necessary** [3] - 139:1, 139:6, 149:16  
**necessity** [1] - 168:19  
**need** [15] - 7:24, 14:7, 20:24, 32:14, 40:19, 56:23, 79:28, 93:22, 128:26, 184:7, 185:11, 191:16, 192:26, 194:3  
**needn't** [1] - 27:6  
**needs** [3] - 39:4, 41:13, 112:6  
**negative** [3] - 74:1, 97:6, 114:14  
**negotiate** [1] - 159:16  
**negotiating** [2] -

24:8  
**NESSA** [1] - 3:2  
**Network** [2] - 146:8, 199:8  
**neutral** [1] - 143:25  
**never** [6] - 22:20, 52:20, 75:23, 107:5, 116:28, 146:24  
**new** [5] - 85:2, 115:2, 118:8, 150:23, 167:4  
**New** [1] - 95:12  
**newly** [3] - 29:5, 168:26, 168:28  
**news** [1] - 84:20  
**newspaper** [1] - 62:4  
**newspapers** [1] - 116:28  
**next** [19] - 22:28, 27:22, 29:11, 30:6, 69:16, 107:1, 109:7, 111:11, 112:9, 112:23, 118:27, 118:29, 123:18, 129:4, 129:5, 137:4, 137:6, 191:8, 196:29  
**NIAMH** [1] - 2:11  
**night** [1] - 62:20  
**nine** [4] - 22:28, 23:6, 62:2, 79:13  
**Ninth** [3] - 106:25, 117:21, 196:13  
**nobody** [2] - 38:20, 44:25  
**non** [29] - 8:26, 11:9, 11:12, 58:3, 63:8, 63:15, 64:12, 69:18, 70:5, 70:19, 71:10, 92:23, 92:29, 93:3, 101:12, 102:20, 104:25, 156:23, 171:6, 171:9, 172:20, 181:4, 181:28, 182:4, 183:5, 185:14, 185:16, 188:20  
**non-citizens** [4] - 69:18, 70:5, 70:19, 71:10  
**non-compliance** [1] - 8:26  
**non-intrusive** [1] - 156:23  
**non-qualified** [1] - 58:3  
**non-target** [1] - 11:12  
**non-targets** [2] - 171:6, 171:9  
**non-US** [18] - 11:9, 63:8, 63:15, 64:12, 92:23, 92:29, 93:3,

101:12, 102:20,  
104:25, 172:20,  
181:4, 181:28, 182:4,  
183:5, 185:14,  
185:16, 188:20  
**noncompliance** [1] -  
155:14  
**none** [6] - 11:10,  
34:17, 34:18, 34:28,  
97:23, 201:10  
**NORTH** [2] - 3:4, 3:4  
**northern** [2] - 116:2,  
117:3  
**Northern** [1] - 124:9  
**notable** [1] - 198:26  
**notably** [1] - 158:23  
**note** [3] - 43:27,  
72:11, 125:21  
**noted** [2] - 11:21,  
158:21  
**notes** [4] - 1:25,  
45:3, 60:22, 201:25  
**nothing** [8] - 35:7,  
42:5, 42:11, 42:23,  
44:24, 45:29, 79:13,  
202:14  
**Notice** [1] - 147:9  
**notice** [17] - 11:16,  
24:3, 27:1, 48:17,  
48:24, 48:27, 66:28,  
75:20, 75:22, 116:23,  
147:12, 148:24,  
188:15, 189:7, 200:5,  
200:16  
**noticed** [4] - 11:18,  
12:15, 13:9, 23:28  
**notification** [2] -  
176:24, 176:25  
**notifies** [1] - 25:29  
**notion** [2] - 59:25,  
59:26  
**nots** [1] - 74:16  
**novel** [1] - 31:23  
**novelty** [1] - 196:17  
**novelty**" [1] - 196:6  
**November** [8] -  
40:24, 41:18, 41:20,  
44:2, 100:12, 198:11  
**NSA** [30] - 9:2, 29:27,  
30:14, 31:29, 41:2,  
119:24, 120:18,  
120:19, 120:21,  
163:29, 165:26,  
165:28, 166:22,  
169:5, 170:26,  
171:12, 172:24,  
173:10, 175:18,  
176:4, 176:8, 177:3,  
177:8, 177:12,  
178:16, 180:7,

181:16, 181:21,  
182:1, 183:24  
**NSLs** [10] - 148:12,  
148:29, 149:4, 149:8,  
149:11, 149:16,  
149:17, 150:5,  
150:13, 150:24  
**number** [49] - 10:14,  
21:2, 34:26, 35:26,  
44:11, 44:18, 44:21,  
50:19, 57:4, 60:7,  
85:12, 91:19, 91:21,  
91:24, 91:29, 107:18,  
113:3, 115:24, 116:8,  
132:6, 163:7, 163:16,  
164:17, 164:24,  
164:28, 164:29,  
165:5, 168:2, 168:6,  
168:9, 168:17, 169:3,  
169:4, 169:6, 169:8,  
169:19, 169:20,  
169:22, 169:24,  
170:3, 170:5, 180:18,  
180:21, 182:6, 182:7,  
189:29, 190:21,  
193:10, 201:22  
**numbered** [1] -  
44:18  
**numbers** [13] - 62:1,  
167:12, 168:26,  
168:27, 169:11,  
169:14, 169:15,  
169:29, 189:27,  
190:5, 190:7, 190:9,  
190:11  
**numerical** [1] - 13:16

---

**O**

---

**o'clock** [3] - 90:1,  
90:3, 202:25  
**O'DWYER** [1] - 3:8  
**O'SULLIVAN** [1] -  
2:17  
**oath** [5] - 36:13,  
85:4, 99:4, 177:7,  
185:24  
**Obama** [2] - 47:12,  
148:11  
**objective** [5] - 65:3,  
143:3, 143:25, 145:9,  
202:19  
**objectively** [2] -  
71:29, 73:23, 74:3,  
74:11, 74:23, 75:2,  
75:4, 75:7, 133:14,  
134:1, 134:11,  
134:17, 134:20,  
135:5, 135:9, 135:16,  
136:1, 136:17,

137:16, 137:17,  
137:25  
**obligation** [5] - 27:3,  
116:20, 145:3,  
200:10, 201:5  
**obligations** [4] -  
57:8, 141:16, 178:8,  
179:9  
**observation** [3] -  
17:29, 146:26, 194:6  
**observations** [4] -  
16:2, 16:11, 62:8,  
121:18  
**observe** [2] - 8:12,  
13:5  
**observed** [2] - 30:25,  
50:21  
**observes** [1] -  
144:18  
**obstacles** [1] -  
182:17  
**obtain** [4] - 116:21,  
181:9, 194:21, 194:26  
**obtained** [2] - 76:9,  
119:25  
**obvious** [5] - 48:19,  
69:11, 76:25, 82:4,  
182:6  
**obviously** [8] - 26:4,  
39:27, 44:8, 53:28,  
55:10, 67:17, 83:18,  
117:12  
**occasion** [2] -  
138:11, 154:21  
**occasions** [2] -  
35:27, 153:13  
**occur** [2] - 48:6,  
55:12  
**occurred** [2] - 51:20,  
52:14  
**occurs** [1] - 171:17  
**October** [1] - 44:1,  
44:2, 61:14, 61:15,  
158:9, 160:6, 160:15,  
160:17, 160:18,  
162:4, 198:4  
**odd** [3] - 17:16,  
18:28, 19:21  
**ODNI** [1] - 179:26  
**OF** [5] - 2:21, 4:9,  
91:7, 184:14  
**offered** [1] - 35:9  
**offering** [1] - 184:11  
**Office** [4] - 29:1,  
30:15, 40:25, 42:27  
**office** [4] - 41:5,  
56:18, 59:20, 80:7  
**official** [3] - 26:3,  
148:16, 177:5  
**officially** [2] - 24:17,

178:10  
**officials** [1] - 177:14  
**often** [8] - 19:8,  
29:12, 29:13, 114:26,  
124:25, 150:28,  
165:7, 198:22  
**old** [1] - 187:14  
**Ombudsman** [1] -  
20:14  
**Ombudsperson** [8] -  
20:14, 20:18, 21:18,  
21:21, 22:14, 25:26,  
26:1, 26:17  
**ON** [2] - 1:18, 5:1  
**once** [12] - 26:14,  
26:15, 30:3, 35:14,  
51:18, 51:24, 83:24,  
108:2, 118:18, 175:9,  
175:19, 180:20  
**one** [133] - 5:15,  
6:19, 6:20, 9:14, 9:24,  
11:16, 12:5, 15:28,  
17:22, 17:23, 18:3,  
19:7, 21:6, 23:1, 23:6,  
24:23, 28:13, 28:18,  
29:5, 32:24, 34:16,  
34:19, 34:21, 34:23,  
34:25, 36:7, 36:28,  
37:21, 42:15, 43:7,  
43:19, 44:13, 45:10,  
46:4, 48:9, 50:14,  
51:23, 52:19, 52:26,  
53:3, 56:7, 56:29,  
57:20, 60:12, 60:18,  
60:25, 61:4, 62:8,  
63:10, 64:27, 65:28,  
66:9, 66:11, 68:29,  
69:4, 74:19, 80:15,  
81:16, 82:24, 84:20,  
86:6, 90:1, 91:14,  
100:7, 102:11,  
105:12, 113:19,  
115:5, 120:24,  
120:26, 121:15,  
121:18, 121:25,  
122:17, 129:6, 130:5,  
130:6, 130:12,  
130:20, 137:11,  
138:29, 142:7,  
143:22, 144:1,  
146:11, 148:5, 148:8,  
152:4, 152:8, 153:19,  
158:5, 158:7, 160:14,  
160:24, 162:13,  
163:12, 163:24,  
164:26, 166:18,  
166:25, 169:6,  
169:18, 170:6,  
170:12, 171:19,  
171:23, 173:5,  
173:29, 178:15,  
179:23, 180:4,  
180:28, 181:1,  
181:14, 182:6,  
182:20, 184:17,  
185:3, 185:28,  
186:29, 187:4,  
187:27, 189:25,  
191:3, 194:4, 197:8,  
197:11, 200:29,  
201:12, 201:13  
**ONE** [1] - 2:23  
**one-paragraph** [1] -  
84:20  
**ones** [8] - 6:20,  
45:16, 166:2, 166:20,  
171:10, 171:15,  
176:1, 180:26  
**open** [1] - 39:29  
**operate** [2] - 112:17,  
126:1  
**operates** [8] - 95:8,  
101:24, 101:25,  
111:27, 175:17,  
175:25, 187:19,  
201:17  
**operating** [1] - 171:8  
**operation** [2] -  
26:25, 171:25  
**operators** [1] -  
175:17  
**opinion** [43] - 10:14,  
19:4, 34:18, 38:18,  
38:21, 38:23, 39:5,  
49:16, 68:19, 69:4,  
69:6, 71:5, 78:19,  
78:26, 78:27, 80:7,  
80:29, 81:19, 82:2,  
89:4, 89:28, 101:17,  
101:18, 107:18,  
109:16, 110:24,  
111:29, 124:22,  
125:5, 125:6, 128:14,  
134:28, 158:19,  
158:21, 159:2, 159:8,  
160:9, 160:16,  
186:22, 186:28,  
187:10, 198:25,  
198:26  
**opinion'** [1] - 81:2  
**opinions** [4] - 34:8,  
34:18, 80:18, 201:11  
**opportunity** [4] -  
34:10, 66:29, 67:3,  
67:4  
**opposed** [1] - 15:11  
**opus** [1] - 62:7  
**or..** [2] - 188:29,  
198:20  
**orally** [1] - 36:21

**Order** [5] - 27:16,  
151:16, 151:17,  
151:19, 151:26  
**order** [26] - 9:3, 9:6,  
9:9, 14:22, 15:7, 35:9,  
40:19, 54:27, 69:6,  
76:17, 86:1, 119:26,  
121:9, 129:8, 148:11,  
163:15, 166:1, 166:9,  
168:28, 170:16,  
170:19, 170:25,  
171:15, 181:13,  
191:13, 201:27  
**order"** [2] - 149:6,  
197:15  
**ordered** [1] - 150:17  
**orders** [5] - 29:9,  
49:20, 149:9, 149:16  
**Orders** [1] - 152:16  
**ordinary** [2] - 8:16,  
9:3  
**organisation** [1] -  
33:4  
**organisation"** [1] -  
161:12  
**organisations'** [1] -  
194:26  
**original** [4] - 56:6,  
66:7, 173:12, 176:6  
**originally** [1] - 14:6  
**otherwise** [3] -  
106:27, 117:14,  
179:12  
**ought** [1] - 52:9  
**ourselves** [1] - 78:17  
**out-of-pocket** [1] -  
130:27  
**outcome** [2] - 51:2,  
112:26  
**outline** [3] - 38:17,  
64:14, 64:18  
**outlines** [1] - 59:9  
**output** [1] - 172:10  
**outside** [18] - 11:14,  
11:15, 13:12, 13:26,  
102:25, 103:24,  
104:10, 107:8,  
110:21, 115:20,  
151:22, 151:25,  
181:6, 181:26,  
182:11, 183:10,  
185:6, 185:9  
**overall** [4] - 92:25,  
102:29, 103:11,  
158:26  
**overhaul** [1] - 16:3  
**overlap** [1] - 190:24  
**overlaps** [1] - 62:22  
**overlying** [1] -  
159:27

**overnight** [4] -  
34:10, 44:15, 48:10,  
49:16  
**overreading** [1] -  
125:14  
**overruled** [1] -  
134:25  
**oversaw** [1] - 200:18  
**overseen** [1] -  
121:23  
**oversight** [11] -  
25:22, 68:26, 121:20,  
149:8, 150:10,  
150:12, 151:4, 151:6,  
179:28, 180:25,  
180:28  
**overstates** [1] -  
164:23  
**overwhelmed** [1] -  
138:5  
**own** [19] - 16:27,  
19:15, 20:5, 20:21,  
68:18, 69:10, 69:11,  
99:16, 100:5, 107:5,  
125:7, 135:14,  
135:16, 161:12,  
173:22, 175:24,  
177:16, 196:26,  
197:25  
**Oxford** [1] - 192:5

## P

**PAGE** [1] - 4:2  
**page** [82] - 7:19,  
7:21, 7:26, 9:11, 9:29,  
10:3, 20:20, 20:27,  
20:28, 25:18, 26:11,  
29:6, 29:11, 31:8,  
31:17, 46:29, 47:7,  
47:8, 57:4, 65:28,  
69:28, 92:12, 102:13,  
106:16, 106:17,  
106:20, 107:1,  
107:16, 108:29,  
109:7, 117:19,  
118:27, 118:29,  
123:5, 123:18,  
123:29, 124:3,  
125:19, 125:23,  
128:14, 132:15,  
132:19, 136:10,  
136:11, 137:20,  
141:6, 141:7, 141:27,  
141:28, 142:7,  
145:22, 146:3, 146:6,  
146:19, 147:4, 147:6,  
148:28, 154:24,  
161:4, 161:23,  
163:21, 165:4, 174:5,

176:11, 176:20,  
178:19, 178:20,  
178:24, 181:16,  
192:3, 193:8, 193:13,  
193:18, 195:15,  
195:22, 195:27, 197:1  
**pages** [12] - 47:11,  
61:25, 62:11, 65:16,  
72:14, 85:28, 125:26,  
146:7, 178:18,  
191:17, 192:8, 200:15  
**pagination** [1] -  
145:25  
**paid** [1] - 81:13  
**panel** [6] - 31:19,  
132:27, 132:28,  
153:22, 153:26,  
154:13  
**paper** [4] - 128:19,  
154:2, 154:3, 174:23  
**papers** [1] - 92:19  
**paperwork** [1] -  
182:24  
**paragraph** [36] -  
31:9, 31:17, 47:5,  
47:7, 47:8, 84:20,  
92:12, 92:14, 100:27,  
100:28, 125:23,  
129:2, 129:5, 131:2,  
131:10, 132:18,  
132:23, 140:16,  
140:20, 141:26,  
147:7, 150:2, 150:4,  
153:11, 153:23,  
154:11, 156:16,  
181:19, 185:27,  
186:5, 186:7, 186:14,  
192:3, 193:15, 193:19  
**paragraphs** [1] -  
58:25  
**paraphrase** [1] -  
87:8  
**parliament** [1] -  
35:28  
**part** [61] - 9:5, 10:9,  
25:4, 40:24, 41:2,  
55:28, 57:14, 57:15,  
57:21, 58:22, 58:24,  
61:13, 63:1, 63:17,  
63:18, 63:20, 63:23,  
64:15, 64:16, 64:21,  
69:27, 73:15, 88:2,  
88:4, 88:5, 88:6,  
88:20, 89:1, 89:14,  
93:23, 98:15, 105:25,  
105:27, 106:4, 106:6,  
106:26, 106:28,  
111:19, 111:24,  
127:4, 131:8, 136:22,  
145:2, 155:22,

156:10, 157:20,  
159:9, 160:24,  
165:22, 165:25,  
170:21, 173:10,  
181:14, 181:19,  
181:22, 187:20,  
192:25, 193:4,  
200:29, 201:11  
**participated** [2] -  
153:14, 154:13  
**participation** [1] -  
26:8  
**particular** [41] - 6:11,  
12:22, 18:25, 21:18,  
22:2, 31:1, 34:21,  
38:3, 38:24, 52:18,  
57:11, 64:12, 73:29,  
77:5, 77:29, 78:8,  
78:28, 79:24, 81:4,  
95:21, 96:10, 96:20,  
104:3, 110:25, 111:7,  
111:10, 112:16,  
116:17, 122:28,  
123:3, 135:19,  
149:22, 153:8,  
158:22, 159:5,  
160:10, 166:5, 166:6,  
186:16, 192:17  
**particularised** [5] -  
77:6, 77:16, 112:7,  
112:11, 113:18  
**particularity** [1] -  
88:8  
**particularly** [3] -  
92:19, 114:12, 123:17  
**parties** [4] - 6:2,  
111:12, 132:23,  
199:29  
**partner** [1] - 63:20  
**parts** [10] - 44:3,  
57:13, 57:17, 62:8,  
64:3, 64:14, 79:5,  
79:8, 108:19, 128:20  
**party** [9] - 3:24, 36:1,  
45:17, 46:5, 48:19,  
51:1, 52:4, 55:2,  
141:14  
**pass** [5] - 42:13,  
171:11, 173:7, 173:8,  
197:20  
**passage** [5] -  
108:28, 193:8,  
193:10, 193:15, 195:2  
**passed** [8] - 10:27,  
42:22, 54:6, 54:9,  
119:24, 176:16,  
187:8, 188:13  
**passes** [2] - 171:3,  
197:13  
**past** [1] - 6:24

**path** [1] - 12:13  
**PATRIOT** [1] -  
150:16  
**PAUL** [1] - 2:10  
**Pause** [1] - 161:20  
**pay** [1] - 61:3  
**PCLOB** [14] - 28:11,  
131:27, 165:19,  
165:25, 166:8, 166:9,  
171:28, 175:23,  
175:26, 177:4,  
177:22, 178:12,  
185:13, 185:17  
**peculiar** [2] - 18:21,  
18:23  
**penalties** [1] - 9:8  
**people** [50] - 7:8, 9:1,  
9:2, 9:20, 13:7, 13:12,  
13:26, 14:27, 15:10,  
23:6, 25:8, 34:15,  
35:17, 44:15, 49:8,  
55:18, 55:20, 71:15,  
75:23, 75:26, 76:23,  
86:21, 86:24, 98:7,  
106:15, 107:4,  
111:18, 114:13,  
130:10, 145:8,  
146:29, 156:1,  
156:12, 156:14,  
157:17, 168:10,  
168:17, 169:4,  
169:17, 169:24,  
172:14, 172:16,  
199:14, 200:13,  
201:6, 201:13,  
201:22, 201:23,  
202:11, 202:18  
**people'** [1] - 106:22  
**people's** [3] - 16:21,  
96:1, 122:22  
**per** [4] - 128:5,  
129:11, 129:15,  
164:23  
**perform** [1] - 152:7  
**performed** [1] -  
98:26  
**perhaps** [16] - 9:29,  
10:2, 21:13, 24:11,  
46:27, 59:21, 67:18,  
69:12, 72:4, 105:18,  
113:2, 118:29,  
120:17, 160:24,  
191:13, 197:1  
**period** [5] - 23:3,  
93:1, 149:27, 150:28,  
190:22  
**periods** [1] - 167:27  
**permanent** [3] -  
102:24, 104:28,  
147:20

**permanently** [1] - 147:17  
**permission** [1] - 3:25  
**permit** [1] - 119:23  
**permits** [1] - 174:14  
**permitted** [2] - 193:25, 193:28  
**perpetuity** [1] - 148:18  
**person** [49] - 17:10, 17:20, 18:13, 18:17, 18:26, 21:29, 22:5, 22:19, 22:22, 23:9, 32:10, 43:2, 45:12, 55:1, 63:8, 64:11, 64:12, 76:13, 92:18, 92:23, 92:29, 93:3, 96:26, 101:11, 101:12, 104:27, 105:2, 112:13, 114:12, 114:18, 116:21, 122:17, 122:18, 135:8, 153:16, 164:23, 166:5, 166:6, 166:18, 167:25, 168:1, 181:4, 181:5, 182:4, 182:11, 185:14  
**person's** [3] - 15:5, 25:13, 181:28  
**personal** [9] - 37:11, 49:29, 82:14, 86:2, 86:28, 92:16, 102:26, 119:6, 119:27  
**personally** [5] - 46:10, 46:12, 46:14, 57:17, 57:18  
**persons** [22] - 11:9, 11:10, 30:21, 49:27, 63:15, 75:18, 98:2, 102:20, 102:24, 105:25, 106:4, 106:26, 107:27, 142:10, 182:12, 182:14, 182:15, 183:5, 183:9, 183:21, 188:20  
**Persons** [1] - 30:11  
**persons'** [1] - 30:1  
**perspective** [1] - 149:5  
**perspectives** [1] - 66:9  
**pertains** [1] - 131:4  
**Peter** [2] - 145:29, 166:6  
**PETER** [3] - 4:3, 7:13, 35:21  
**phenomenon** [2] - 32:26, 33:1  
**PHILIP** [1] - 2:7  
**phone** [9] - 15:4, 15:5, 15:6, 120:11, 122:22, 148:13, 184:29, 187:23, 187:24  
**photo** [1] - 123:19  
**photocopied** [1] - 3:23  
**photographs** [1] - 146:6  
**photos** [1] - 116:27  
**phrase** [8] - 74:18, 86:15, 104:29, 115:11, 118:5, 130:4, 130:5, 133:4  
**phrases** [3] - 130:6, 130:9, 130:20  
**physically** [2] - 96:26, 104:16  
**picture** [2] - 191:26  
**piece** [2] - 113:22, 158:28  
**pieces** [2] - 158:5, 168:24  
**ping** [1] - 13:27  
**pinned** [1] - 43:15  
**pipe** [13] - 171:24, 171:25, 172:1, 172:4, 172:8, 172:9, 172:14, 172:16, 172:24, 172:25, 173:2, 173:7  
**pipes** [1] - 172:7  
**place** [7] - 37:14, 102:22, 102:25, 120:27, 155:2, 170:11, 170:12  
**placed** [1] - 201:28  
**placement** [1] - 129:27  
**places** [1] - 98:10  
**placing** [1] - 109:26  
**plain** [1] - 63:8  
**plainly** [1] - 33:24  
**plaintiff** [19] - 37:5, 37:16, 71:20, 71:28, 73:22, 74:1, 75:2, 75:6, 112:29, 113:7, 113:15, 113:23, 117:21, 117:25, 118:17, 119:17, 129:7, 133:14, 194:3  
**PLAINTIFF** [2] - 1:7, 2:5  
**plaintiff's** [1] - 74:20  
**plaintiffs** [9] - 11:9, 13:19, 37:17, 116:3, 117:5, 122:25, 126:5, 126:14, 133:8  
**play** [2] - 7:2, 83:26  
**plays** [1] - 92:19  
**pleased** [1] - 54:12  
**plus** [2] - 60:25  
**Plyler** [1] - 107:25  
**pocket** [1] - 130:27  
**point** [55] - 12:4, 12:6, 13:5, 13:17, 15:3, 17:7, 17:9, 20:27, 23:17, 24:16, 33:13, 33:18, 43:2, 46:28, 47:28, 51:9, 53:23, 58:23, 77:24, 84:1, 95:11, 97:2, 98:14, 99:7, 99:8, 100:22, 103:20, 104:16, 106:10, 108:22, 120:6, 120:11, 123:1, 131:18, 135:29, 137:24, 142:21, 155:8, 158:5, 159:12, 159:21, 160:26, 163:14, 170:15, 170:24, 171:2, 171:4, 173:5, 182:4, 186:20, 189:7, 189:15, 196:4, 197:16, 199:11  
**point'** [1] - 100:26  
**pointing** [3] - 12:9, 73:29, 195:7  
**points** [9] - 62:13, 62:15, 67:16, 67:19, 119:19, 139:1, 145:11, 170:10, 191:14  
**policies** [1] - 30:18  
**Policy** [2] - 8:6, 151:28  
**policy** [2] - 87:20, 155:10  
**port** [1] - 130:14  
**portion** [1] - 156:27  
**position** [14] - 21:20, 26:23, 38:17, 45:10, 69:17, 96:15, 97:16, 110:25, 135:6, 142:18, 147:29, 174:8, 186:13, 186:24  
**positive** [1] - 114:12  
**possibility** [3] - 23:21, 55:14, 156:6  
**possible** [15] - 67:2, 68:24, 85:14, 99:12, 99:13, 142:11, 145:10, 147:5, 149:14, 157:10, 165:27, 189:18, 190:23, 201:12, 201:17  
**possible"** [1] - 8:2  
**possibly** [2] - 61:17, 167:26  
**Post** [6] - 159:6, 173:12, 173:26, 176:1, 176:2, 176:6  
**post** [3] - 66:25, 128:7, 142:14  
**posted** [2] - 65:25, 180:27  
**potential** [1] - 14:25  
**power** [7] - 76:14, 130:22, 181:29, 183:23, 183:26, 189:9, 189:10  
**powers** [2] - 11:28, 106:24  
**PPD** [1] - 7:28  
**PPD's** [1] - 8:1  
**PPD-28** [10] - 8:4, 8:26, 151:18, 151:21, 151:28, 152:8, 152:18, 188:17, 188:18, 189:4  
**practical** [2] - 87:12, 117:16  
**practice** [25] - 9:23, 10:28, 42:28, 55:16, 59:15, 93:14, 95:9, 121:22, 142:19, 143:26, 144:24, 144:25, 148:9, 158:23, 161:7, 162:6, 182:21, 187:16, 188:8, 198:28, 199:6, 201:11, 201:21, 202:19  
**practices** [10] - 9:25, 143:4, 143:5, 144:26, 150:21, 161:11, 161:17, 161:18, 161:26, 199:1  
**practicing** [2] - 50:26, 55:12  
**pre** [2] - 21:19, 41:9  
**pre-existing** [1] - 21:19  
**pre-publication** [1] - 41:9  
**precedent** [5] - 32:15, 59:6, 110:27, 122:13  
**precise** [5] - 34:29, 50:2, 174:1, 174:13, 175:5  
**precisely** [4] - 34:28, 67:13, 70:27, 174:19  
**predicate** [1] - 159:9  
**predict** [2] - 81:13, 81:29  
**predicting** [2] - 81:7, 135:13  
**prediction** [1] - 136:5  
**predictive** [2] - 81:11, 81:22  
**prefer** [1] - 5:25  
**prejudice** [1] - 169:29  
**premise** [1] - 82:16  
**preparation** [3] - 10:9, 84:2, 108:22  
**prepare** [1] - 36:23  
**prepared** [8] - 36:22, 38:2, 56:17, 60:8, 83:29, 99:3, 108:24, 196:13  
**preparing** [3] - 63:27, 126:26, 127:4  
**prescribes** [1] - 30:18  
**present** [3] - 32:10, 58:6, 145:3  
**presented** [2] - 37:26, 154:3  
**presents** [1] - 31:23  
**President** [12] - 8:11, 9:1, 9:5, 41:5, 47:12, 148:11, 151:14, 151:26, 187:7, 188:22, 189:1, 189:2  
**President's** [1] - 28:6  
**presidential** [1] - 152:19  
**Presidential** [2] - 8:6, 151:28  
**press** [4] - 68:26, 84:16, 84:19, 131:28  
**presumably** [4] - 60:8, 84:25, 97:17, 154:12  
**presume** [2] - 37:24, 126:18  
**presumption** [6] - 11:1, 147:24, 147:28, 148:12, 148:15, 148:18  
**presumptions** [1] - 147:15  
**pretty** [2] - 59:16, 155:28  
**prevailing** [6] - 69:18, 70:16, 70:19, 71:4, 71:8, 71:10  
**prevailing..** [1] - 71:6  
**prevent** [1] - 112:17  
**prevented** [1] - 130:25  
**previews** [6] - 15:12, 67:2, 89:10, 108:6, 109:20, 148:9

**previously** [4] - 36:11, 62:10, 71:5, 192:25  
**primarily** [1] - 17:24  
**primary** [1] - 60:18  
**principle** [2] - 82:23, 156:23  
**principles** [4] - 155:9, 191:17, 191:25, 191:27  
**prioritised** [1] - 61:16  
**PRISM** [16] - 158:24, 158:25, 173:15, 173:16, 173:25, 173:27, 174:6, 174:20, 175:12, 176:6, 176:13, 176:17, 178:16, 178:18, 186:29, 187:26  
**Privacy** [11] - 20:26, 21:22, 23:27, 24:7, 26:17, 26:25, 35:29, 51:20, 51:21, 51:24, 116:5  
**privacy** [53] - 9:11, 15:29, 32:6, 32:12, 37:7, 37:15, 65:15, 69:7, 82:14, 82:28, 83:3, 83:9, 83:15, 84:19, 84:26, 111:2, 112:2, 112:23, 113:23, 113:24, 114:2, 114:8, 114:9, 115:5, 119:16, 124:6, 124:17, 124:18, 124:29, 125:1, 130:26, 131:15, 153:25, 153:27, 154:5, 155:9, 155:16, 156:2, 156:8, 156:23, 156:28, 157:5, 157:22, 188:14, 188:19, 194:14, 197:7, 200:7, 200:8, 202:4  
**PRIVACY** [1] - 3:7  
**privacy** [2] - 155:11, 197:14  
**private** [6] - 9:19, 76:6, 77:26, 153:14, 154:12, 159:1  
**privilege** [3] - 45:14, 46:4, 80:20  
**pro** [1] - 188:14  
**pro-privacy** [1] - 188:14  
**probability** [1] - 136:4  
**probable** [4] - 76:10, 76:13, 83:7, 180:13  
**probing** [1] - 149:14  
**problem** [11] - 6:24, 18:2, 22:10, 22:11, 22:15, 22:20, 23:2, 24:4, 24:12, 26:8, 115:4  
**problems** [2] - 24:29, 87:2  
**procedural** [2] - 77:8, 193:29  
**Procedure** [2] - 48:13, 49:11  
**procedure** [14] - 21:27, 25:1, 25:18, 28:25, 31:5, 38:6, 38:8, 38:12, 52:16, 53:10, 53:13, 53:18, 87:23, 202:1  
**Procedures** [3] - 30:12, 48:12, 147:21  
**procedures** [24] - 7:24, 24:11, 27:14, 27:18, 27:19, 27:22, 29:27, 30:3, 30:18, 30:23, 37:2, 37:25, 116:15, 147:15, 147:22, 152:1, 152:3, 166:23, 167:4, 179:27, 179:29, 180:4, 180:16, 184:19  
**Procedures** [1] - 29:22  
**proceed** [5] - 40:3, 45:6, 45:10, 53:5, 55:18  
**proceeding** [3] - 13:3, 24:27, 46:24  
**proceeding** [1] - 24:25  
**proceedings** [13] - 12:22, 18:27, 19:4, 31:29, 34:14, 48:20, 52:4, 89:23, 121:20, 126:19, 130:18, 172:27, 177:24  
**proceeds** [1] - 129:21  
**process** [24] - 24:7, 56:25, 60:19, 60:22, 63:3, 63:22, 64:6, 111:19, 111:27, 161:29, 170:21, 172:1, 178:17, 178:21, 183:20, 184:26, 188:29, 189:2, 199:15, 199:28, 200:13, 200:18, 200:26, 202:1  
**process** [1] - 186:19  
**processed** [1] - 119:22  
**processing** [3] - 25:23, 82:17, 155:18  
**produce** [1] - 175:10  
**produced** [4] - 145:13, 175:27, 180:7, 180:23  
**production** [3] - 56:20, 175:13, 175:15  
**Prof** [49] - 5:7, 5:10, 5:16, 6:4, 6:27, 7:16, 18:29, 19:7, 24:24, 46:7, 46:10, 47:29, 48:15, 48:22, 49:2, 50:26, 51:19, 51:26, 66:19, 67:13, 69:15, 70:9, 86:5, 87:5, 91:10, 95:20, 96:5, 97:3, 99:15, 100:2, 100:17, 121:1, 140:5, 140:20, 140:27, 141:22, 142:21, 142:27, 143:6, 144:10, 144:17, 152:21, 152:28, 173:6, 175:16, 183:6, 189:20, 191:15, 191:29  
**PROF** [7] - 4:3, 4:9, 7:13, 35:21, 91:7, 152:25, 184:14  
**professional** [4] - 40:16, 41:12, 81:2, 111:29  
**Professor** [50] - 8:28, 20:13, 34:6, 35:18, 35:24, 40:13, 59:19, 62:6, 63:27, 67:27, 68:12, 70:13, 72:15, 74:18, 78:13, 81:20, 91:11, 92:2, 94:3, 95:24, 96:14, 97:8, 98:29, 101:10, 102:12, 103:28, 105:20, 107:17, 108:15, 108:28, 109:29, 110:17, 111:20, 117:12, 121:9, 122:26, 125:22, 127:12, 132:13, 135:7, 136:24, 142:3, 143:15, 144:13, 145:2, 163:4, 179:10, 184:7, 202:21  
**professor** [12] - 16:1, 35:1, 35:26, 59:7, 62:20, 62:23, 92:8, 95:14, 100:3, 105:11, 110:3, 137:14  
**proffer** [1] - 78:19  
**programme** [16] - 14:24, 14:29, 129:25, 135:1, 158:24, 166:21, 170:8, 172:17, 173:14, 173:16, 173:19, 173:20, 173:27, 187:23, 187:28  
**programme** [1] - 173:15  
**programmes** [6] - 129:13, 129:17, 134:14, 163:24, 163:29, 176:12  
**prohibits** [1] - 92:18  
**projects** [1] - 54:17  
**prominently** [2] - 88:28, 89:19  
**promise** [1] - 9:27  
**promising** [1] - 161:1  
**prompt** [1] - 147:12  
**prone** [1] - 200:21  
**prongs** [4] - 73:27, 73:28, 74:10, 135:20  
**pronounced** [1] - 30:26  
**proof** [1] - 76:10  
**propagated** [1] - 43:5  
**proper** [4] - 112:6, 162:12, 178:5, 178:7  
**properly** [3] - 55:24, 67:27, 150:24  
**property** [2] - 80:5, 80:6  
**propose** [2] - 5:11, 51:26  
**proposed** [2] - 91:23, 201:14  
**proposing** [1] - 67:5  
**proposition** [12] - 57:5, 63:25, 67:20, 72:5, 77:14, 94:14, 97:28, 98:6, 98:15, 103:6, 105:6, 127:20  
**propositions** [2] - 67:26, 113:3  
**prosecution** [2] - 9:21, 147:24  
**prosecutions** [1] - 68:23  
**protect** [13] - 107:4, 112:24, 112:28, 114:17, 114:21, 115:16, 131:12, 131:15, 156:8, 182:12, 183:9, 194:14, 197:8  
**protected** [13] - 21:26, 22:23, 23:14, 25:14, 69:20, 70:7, 70:21, 71:12, 106:23, 114:18, 118:14, 156:15, 194:17  
**protecting** [1] - 23:19  
**protection** [30] - 9:14, 12:6, 26:6, 26:8, 32:11, 58:14, 58:16, 68:8, 69:12, 82:14, 83:3, 83:15, 92:16, 94:8, 98:22, 104:15, 112:3, 115:15, 115:19, 141:13, 142:7, 143:8, 153:1, 153:2, 153:6, 156:2, 156:11, 157:6, 160:28  
**PROTECTION** [1] - 1:7  
**Protection** [4] - 5:5, 91:4, 125:28, 127:25  
**protectionism** [4] - 155:17, 156:25, 156:29, 157:11  
**protectionist** [2] - 155:24, 156:6  
**protections** [13] - 22:8, 26:28, 37:14, 69:6, 86:28, 87:23, 88:15, 94:19, 107:21, 119:16, 143:21, 155:16, 188:19  
**protects** [1] - 114:24  
**prove** [5] - 77:4, 113:29, 115:7, 122:7, 193:26  
**provide** [11] - 23:5, 26:18, 83:2, 83:15, 92:4, 116:20, 161:1, 176:28, 183:1, 186:10, 194:28  
**provided** [11] - 15:18, 51:17, 54:15, 56:8, 62:14, 78:1, 78:9, 79:1, 81:5, 85:27, 201:24  
**providers** [8] - 11:22, 174:11, 174:14, 174:15, 174:20, 177:3, 178:26  
**providers** [1] - 176:18  
**provides** [3] - 78:7, 116:15, 198:24  
**providing** [5] - 17:24,

33:15, 48:9, 63:29, 85:26  
**Providing** [1] - 147:9  
**provision** [7] - 37:25, 50:18, 75:16, 77:22, 107:6, 109:6, 159:14  
**provisions** [5] - 19:24, 76:11, 83:14, 107:25, 122:3  
**provisions'** [1] - 202:9  
**public** [18] - 24:17, 25:23, 28:2, 47:15, 65:21, 66:28, 79:11, 87:13, 119:6, 119:28, 147:25, 150:20, 151:1, 194:22, 199:5, 200:15, 201:4  
**public"** [1] - 174:16  
**publically** [1] - 23:13  
**publication** [1] - 41:9  
**publicise** [1] - 199:3  
**publicly** [9] - 65:20, 66:25, 178:1, 179:1, 179:17, 187:16, 189:5, 200:9, 202:10  
**publish** [3] - 67:5, 198:29, 201:6  
**published** [4] - 65:14, 101:18, 146:7, 165:1  
**publishing** [1] - 67:7  
**pull** [1] - 60:12  
**purge** [2] - 121:21, 121:24  
**purporting** [1] - 67:28  
**purpose** [4] - 107:3, 154:3, 172:29, 181:8  
**purposes** [5] - 82:23, 168:24, 169:11, 172:18, 172:25  
**pursuant** [3] - 27:15, 52:17, 54:26  
**pushing** [1] - 202:18  
**put** [30] - 17:16, 23:12, 34:22, 45:9, 50:3, 50:11, 59:24, 60:5, 65:20, 68:10, 69:26, 79:5, 80:1, 86:27, 89:7, 109:14, 118:19, 133:11, 154:7, 154:9, 180:6, 185:19, 189:23, 190:21, 198:29, 199:9, 199:14, 200:9, 200:14, 200:22  
**puts** [1] - 182:27  
**putting** [5] - 69:13, 82:22, 108:28,

113:26, 191:25

## Q

**qualifications** [1] - 113:10  
**qualified** [5] - 56:13, 58:1, 58:3, 58:4, 58:5  
**qualify** [1] - 72:23  
**quarter** [3] - 189:28, 189:29, 190:13  
**quarters** [1] - 189:25  
**QUAY** [2] - 2:24, 3:4  
**quarrying** [1] - 23:7  
**questions** [11] - 13:8, 51:27, 67:15, 78:26, 81:19, 149:14, 152:22, 179:15, 185:19, 185:20, 190:27  
**quickly** [3] - 26:10, 100:4, 145:17  
**QUIGLEY** [1] - 2:18  
**quite** [28] - 8:5, 8:18, 11:18, 14:2, 14:18, 15:14, 16:17, 17:10, 49:23, 50:20, 79:3, 79:25, 85:14, 99:1, 115:15, 122:15, 136:4, 136:8, 144:13, 152:3, 162:8, 162:27, 167:26, 187:25, 190:18, 192:16, 196:27, 197:19  
**quotation** [4] - 8:6, 129:6, 140:8, 140:10  
**quotations** [1] - 192:2  
**quote** [9] - 33:7, 33:18, 33:23, 70:5, 72:9, 72:11, 129:18, 140:14, 163:10  
**quoted** [5] - 70:4, 107:25, 108:29, 142:27, 193:3  
**quotes** [4] - 8:7, 124:9, 144:3, 144:4  
**quoting** [1] - 106:20

## R

**raise** [1] - 91:14  
**raised** [2] - 186:20, 191:14  
**raises** [1] - 12:3  
**raising** [2] - 119:19, 156:6  
**range** [4] - 37:1, 68:26, 83:13, 83:14

**rather** [8] - 23:11, 41:29, 120:29, 143:28, 145:19, 180:13, 182:22, 183:4  
**rating** [1] - 16:23  
**rationale** [2] - 112:1, 112:5  
**raw** [1] - 27:23  
**re** [9] - 10:8, 10:13, 14:5, 14:16, 16:10, 100:16, 150:16, 161:20, 161:21  
**RE** [2] - 4:9, 184:14  
**Re** [10] - 93:21, 94:5, 101:1, 101:14, 103:3, 103:13, 198:14, 198:19, 198:23  
**re-authorised** [1] - 150:16  
**RE-EXAMINATION** [2] - 4:9, 184:14  
**re-read** [4] - 10:8, 10:13, 14:16, 16:10  
**re-reading** [4] - 14:5, 100:16, 161:20, 161:21  
**reach** [1] - 158:25  
**reached** [3] - 39:21, 137:17, 164:17  
**Read** [1] - 161:21  
**read** [107] - 10:8, 10:13, 13:9, 14:6, 14:16, 16:10, 42:1, 55:11, 56:22, 56:23, 57:8, 57:10, 57:14, 57:15, 57:17, 57:23, 62:26, 62:28, 63:1, 69:21, 70:15, 70:16, 72:8, 72:20, 73:3, 73:6, 73:8, 73:9, 73:11, 73:13, 73:14, 73:17, 74:21, 78:17, 80:18, 83:18, 83:20, 83:24, 84:5, 84:9, 84:11, 84:14, 84:16, 84:17, 84:20, 85:3, 85:4, 85:12, 85:14, 85:17, 85:18, 85:24, 88:6, 88:25, 92:14, 95:29, 100:4, 101:1, 101:3, 102:17, 108:11, 108:20, 108:21, 108:24, 108:25, 108:26, 110:4, 110:7, 110:11, 110:15, 115:28, 115:29, 124:23, 126:20, 126:25, 126:28, 127:2, 127:7, 127:15, 128:8, 128:9,

128:11, 128:15, 128:16, 129:5, 129:11, 134:5, 136:13, 136:24, 137:4, 138:24, 139:16, 142:3, 146:15, 164:11, 185:24, 186:1, 200:16, 201:5  
**reader** [1] - 144:29  
**reading** [38] - 14:5, 16:11, 19:15, 19:26, 19:27, 20:5, 24:24, 56:6, 57:12, 72:11, 72:17, 72:25, 86:4, 95:20, 100:16, 100:17, 102:15, 103:9, 105:29, 108:11, 108:16, 110:24, 117:1, 118:7, 123:11, 123:16, 125:7, 133:28, 134:10, 134:16, 134:28, 137:26, 161:20, 161:21, 173:24, 173:26, 179:5, 186:14  
**readings** [1] - 56:10  
**reads** [1] - 67:13  
**real** [12] - 19:1, 113:16, 113:19, 113:29, 117:26, 117:28, 118:5, 118:6, 119:26, 123:25, 193:16, 193:20  
**realised** [1] - 14:10  
**really** [7] - 19:27, 21:12, 24:14, 58:23, 79:16, 113:11, 182:9  
**realm** [2] - 59:7, 129:24  
**realtime** [4] - 176:24, 176:25, 176:28, 177:3  
**reason** [22] - 6:25, 10:20, 35:7, 42:4, 42:9, 43:7, 45:24, 45:27, 45:28, 50:14, 104:6, 119:15, 120:9, 137:11, 142:26, 156:13, 163:14, 166:8, 182:21, 183:4, 196:3  
**reasonable** [31] - 5:17, 17:1, 17:2, 17:6, 39:29, 71:29, 73:24, 74:3, 74:11, 74:24, 75:2, 75:4, 75:7, 92:26, 103:1, 132:29, 133:14, 134:1, 134:12, 134:17,

134:21, 135:5, 135:9, 135:16, 136:1, 136:17, 136:27, 137:17, 137:25, 181:5  
**reasonable"** [1] - 103:12  
**reasonable'** [1] - 103:16  
**reasonableness** [1] - 104:8  
**reasonably** [5] - 39:10, 40:6, 143:3, 181:25, 185:5  
**reasoning** [2] - 88:28, 105:23  
**reasons** [4] - 14:5, 64:27, 69:11, 163:1  
**recalled** [1] - 198:26  
**receive** [5] - 38:26, 53:9, 107:21, 132:1, 199:11  
**received** [8] - 50:7, 66:1, 84:1, 191:10, 197:23, 197:27, 197:28, 200:9  
**receives** [1] - 40:14  
**recent** [4] - 37:21, 115:2, 127:14, 158:19  
**recently** [2] - 110:5, 180:27  
**recognition** [3] - 116:26, 118:2, 118:16  
**recollect** [3] - 28:18, 99:20, 198:15  
**recollection** [15] - 16:20, 34:17, 43:28, 61:12, 87:10, 88:2, 88:9, 88:17, 101:14, 102:2, 102:4, 105:8, 127:6, 197:29, 198:2  
**recommend** [1] - 148:26  
**recommendation** [1] - 147:7  
**recommendations** [5] - 28:5, 28:10, 28:14, 47:13, 47:14  
**recommended** [3] - 15:21, 144:7, 148:6  
**record** [9] - 15:5, 15:6, 32:28, 37:17, 91:21, 152:2, 165:1, 200:10  
**recorded** [1] - 74:20  
**recording** [1] - 144:17  
**records** [14] - 9:20, 9:28, 22:29, 37:7, 37:13, 50:2, 50:12, 120:11, 121:21,

122:22, 148:13,  
148:14, 148:15,  
149:23  
**records**<sup>[1]</sup> - 50:4  
**recovery**<sup>[1]</sup> - 193:25  
**rectified**<sup>[1]</sup> - 22:21  
**Redacted**<sup>[1]</sup> -  
198:23  
**Redress**<sup>[1]</sup> - 49:27  
**redress**<sup>[2]</sup> - 112:25,  
112:27  
**redressability**<sup>[2]</sup> -  
74:7, 74:8  
**reduce**<sup>[1]</sup> - 30:1  
**refer**<sup>[17]</sup> - 27:9,  
30:23, 33:23, 101:2,  
102:7, 125:21, 130:2,  
130:24, 131:1,  
138:11, 140:5,  
142:26, 144:20,  
145:13, 146:11,  
152:9, 198:12  
**reference**<sup>[14]</sup> - 7:19,  
7:28, 19:17, 21:13,  
25:17, 31:3, 31:8,  
35:5, 47:29, 67:25,  
130:9, 132:6, 139:29,  
156:27  
**referral**<sup>[1]</sup> - 126:22  
**referred**<sup>[23]</sup> - 27:28,  
28:10, 28:24, 30:27,  
62:27, 62:28, 94:14,  
125:22, 126:24,  
127:13, 130:15,  
142:28, 144:16,  
167:10, 176:1, 176:7,  
180:3, 191:14,  
192:11, 195:15,  
197:21, 199:14, 200:2  
**referring**<sup>[3]</sup> -  
174:25, 178:17,  
192:14  
**refers**<sup>[4]</sup> - 56:6,  
106:25, 115:28, 126:3  
**refine**<sup>[1]</sup> - 67:18  
**reflect**<sup>[2]</sup> - 124:21,  
124:23  
**reflected**<sup>[3]</sup> - 128:2,  
187:9, 187:17  
**reform**<sup>[1]</sup> - 188:14  
**reforms**<sup>[10]</sup> -  
143:23, 143:24,  
144:8, 149:14,  
149:19, 162:3, 187:9,  
188:2, 188:9, 188:11  
**refreshed**<sup>[1]</sup> -  
101:14  
**regard**<sup>[6]</sup> - 9:12,  
82:26, 140:5, 141:21,  
189:25, 190:6  
**regarding**<sup>[1]</sup> -  
181:28  
**regime**<sup>[3]</sup> - 139:3,  
139:15, 150:15  
**register**<sup>[1]</sup> - 23:13  
**Register**<sup>[1]</sup> - 23:26  
**REGISTRAR**<sup>[2]</sup> -  
5:5, 91:4  
**regularisation**<sup>[1]</sup> -  
151:8  
**regularised**<sup>[1]</sup> -  
32:21  
**regularly**<sup>[1]</sup> - 27:4  
**regulations**<sup>[1]</sup> -  
121:17  
**Regulatory**<sup>[1]</sup> -  
62:19  
**regulatory**<sup>[3]</sup> - 36:3,  
68:24, 156:22  
**relate**<sup>[1]</sup> - 196:20  
**related**<sup>[3]</sup> - 30:28,  
58:20, 84:26  
**relates**<sup>[4]</sup> - 112:12,  
113:4, 165:15, 186:21  
**relating**<sup>[3]</sup> - 15:27,  
110:19, 168:20  
**relation**<sup>[20]</sup> - 5:9,  
8:3, 9:11, 15:26, 19:1,  
24:4, 26:2, 31:4,  
40:21, 45:15, 147:28,  
147:29, 148:21,  
151:17, 153:19,  
184:16, 185:22,  
186:24, 195:3, 200:1  
**relationship**<sup>[2]</sup> -  
45:25, 45:26  
**relative**<sup>[1]</sup> - 13:1  
**relatively**<sup>[5]</sup> - 59:2,  
131:7, 163:7, 163:16,  
195:8  
**relaxed**<sup>[1]</sup> - 191:6  
**relayed**<sup>[1]</sup> - 35:12  
**release**<sup>[3]</sup> - 147:24,  
147:29, 148:17  
**release..**<sup>[1]</sup> - 147:15  
**released**<sup>[4]</sup> - 23:15,  
37:12, 148:15, 178:2  
**relevance**<sup>[3]</sup> -  
138:17, 138:19,  
138:20  
**relevant**<sup>[20]</sup> - 57:12,  
64:1, 69:8, 78:2, 78:5,  
78:10, 78:11, 79:1,  
81:6, 81:9, 85:5,  
111:13, 121:17,  
128:15, 142:23,  
162:22, 181:22,  
185:6, 185:7, 195:2  
**reliance**<sup>[1]</sup> - 109:27  
**relied**<sup>[4]</sup> - 126:24,  
127:25, 144:10, 159:8  
**relief**<sup>[5]</sup> - 71:28,  
73:23, 74:2, 126:2,  
129:8  
**relies**<sup>[1]</sup> - 158:24  
**rely**<sup>[1]</sup> - 105:3  
**remains**<sup>[5]</sup> - 69:16,  
92:24, 146:28, 147:2,  
147:16  
**remand**<sup>[1]</sup> - 18:24  
**remarkable**<sup>[1]</sup> -  
129:9  
**remedied**<sup>[1]</sup> - 26:22  
**remedies**<sup>[20]</sup> - 20:6,  
33:16, 64:13, 68:19,  
68:21, 68:22, 85:19,  
85:22, 87:28, 88:13,  
88:16, 88:17, 88:19,  
88:20, 89:14, 98:2,  
131:5, 131:7, 131:14,  
131:17  
**remedy**<sup>[10]</sup> - 12:4,  
12:5, 18:1, 22:22,  
78:1, 78:10, 79:1,  
81:5, 112:22, 142:14  
**remember**<sup>[21]</sup> -  
28:19, 38:10, 45:1,  
50:14, 54:8, 54:12,  
57:27, 87:17, 88:21,  
93:24, 99:11, 99:14,  
108:26, 113:18,  
117:1, 127:9, 133:4,  
133:10, 139:22,  
197:22, 198:17  
**remembered**<sup>[2]</sup> -  
14:2, 63:6  
**remembering**<sup>[7]</sup> -  
54:7, 54:9, 54:11,  
137:12, 137:28, 138:7  
**removing**<sup>[1]</sup> -  
158:25  
**repealed**<sup>[3]</sup> - 15:19,  
15:21, 15:22  
**repeatedly**<sup>[1]</sup> -  
178:13  
**reflectingly**<sup>[1]</sup> -  
150:25  
**reply**<sup>[1]</sup> - 26:20  
**report**<sup>[218]</sup> - 7:17,  
7:18, 10:2, 10:3,  
16:19, 16:20, 17:11,  
18:4, 18:6, 18:14,  
20:9, 20:21, 20:25,  
22:27, 28:4, 28:5,  
28:12, 28:29, 30:26,  
31:7, 32:17, 33:6,  
33:28, 35:3, 35:4,  
35:26, 37:14, 40:15,  
40:16, 40:23, 40:25,  
42:19, 44:6, 45:24,  
46:16, 46:18, 46:29,  
47:11, 47:14, 47:15,  
47:16, 47:20, 47:23,  
48:3, 48:4, 48:14,  
48:21, 48:29, 49:4,  
49:16, 50:19, 50:21,  
50:28, 51:6, 51:7,  
51:16, 51:19, 52:2,  
52:6, 52:21, 53:2,  
53:14, 53:29, 54:26,  
55:24, 55:26, 56:2,  
56:16, 56:17, 56:19,  
57:24, 57:26, 58:6,  
58:7, 59:24, 60:8,  
60:15, 61:7, 61:9,  
61:17, 61:22, 62:9,  
62:10, 62:13, 62:27,  
62:29, 63:1, 63:27,  
63:29, 65:14, 65:15,  
65:26, 65:27, 66:5,  
66:21, 67:5, 67:9,  
67:10, 67:28, 68:28,  
69:15, 69:17, 69:28,  
69:29, 70:29, 71:6,  
72:14, 73:8, 73:15,  
74:20, 83:19, 83:28,  
83:29, 84:2, 84:4,  
84:12, 84:15, 85:2,  
85:15, 85:22, 86:6,  
86:11, 86:18, 87:3,  
89:11, 89:15, 92:10,  
94:9, 95:6, 96:28,  
98:6, 98:12, 99:2,  
100:7, 100:9, 100:17,  
100:24, 108:24,  
110:6, 110:8, 110:9,  
114:13, 121:5,  
125:18, 126:26,  
127:5, 127:15,  
127:17, 127:28,  
131:25, 132:1,  
138:11, 139:21,  
140:6, 140:9, 140:19,  
140:21, 140:26,  
140:27, 142:4, 142:5,  
142:27, 142:29,  
143:13, 143:14,  
143:20, 144:5,  
144:11, 144:17,  
144:20, 144:22,  
145:13, 145:15,  
145:20, 146:12,  
148:6, 153:9, 163:3,  
163:6, 163:19,  
164:12, 165:4,  
165:19, 166:8, 166:9,  
171:28, 173:29,  
174:6, 175:24,  
175:26, 177:5,  
177:22, 178:12,  
185:13, 185:17,  
187:6, 187:17,  
189:20, 190:9,  
191:15, 191:19,  
191:20, 194:7, 195:3,  
197:22, 197:23,  
197:26, 197:28,  
198:5, 198:6, 198:7,  
198:11, 199:5, 199:13  
**report'**<sup>[2]</sup> - 18:16,  
18:17  
**Reporting**<sup>[9]</sup> -  
15:28, 16:4, 18:2,  
19:16, 19:21, 19:28,  
19:29, 37:23, 122:11  
**reporting**<sup>[7]</sup> - 17:4,  
17:5, 18:7, 36:28,  
109:18, 149:11, 176:9  
**Reports**<sup>[1]</sup> - 56:29  
**reports**<sup>[24]</sup> - 16:18,  
16:22, 16:24, 16:25,  
28:11, 29:5, 36:22,  
36:23, 37:2, 37:18,  
38:3, 41:5, 62:4, 64:5,  
66:23, 85:7, 114:14,  
163:13, 164:15,  
167:9, 168:4, 168:5,  
187:7, 190:3  
**represents**<sup>[1]</sup> -  
190:24  
**reproduced**<sup>[2]</sup> -  
3:24, 56:19  
**request**<sup>[111]</sup> - 21:29,  
22:1, 25:18, 25:20,  
25:25, 26:14, 26:15,  
66:28, 174:29, 175:6,  
175:15  
**requested**<sup>[1]</sup> -  
180:29  
**requesting**<sup>[1]</sup> -  
186:18  
**requests**<sup>[7]</sup> - 21:7,  
21:9, 22:28, 24:4,  
175:7, 175:9, 186:18  
**require**<sup>[2]</sup> - 21:14,  
78:16  
**required**<sup>[8]</sup> - 29:5,  
42:16, 49:5, 142:2,  
142:22, 182:16,  
184:23, 199:18  
**requirement**<sup>[9]</sup> -  
8:1, 75:20, 75:22,  
116:24, 126:1,  
136:28, 185:14,  
193:17, 193:21  
**requirements**<sup>[2]</sup> -  
77:7, 144:18  
**requires**<sup>[5]</sup> - 83:6,  
141:12, 142:6,  
147:12, 174:3  
**re-read**<sup>[1]</sup> - 108:20

**research** [28] - 35:15, 55:4, 55:23, 55:27, 55:28, 56:4, 56:22, 57:29, 58:3, 58:5, 58:28, 59:20, 60:18, 62:22, 63:20, 64:17, 96:20, 98:4, 98:7, 98:8, 98:12, 98:14, 99:6, 127:19, 128:19, 128:28, 131:22, 142:20  
**Research** [2] - 146:8, 199:8  
**researcher** [1] - 64:7  
**researches** [2] - 127:27, 127:28  
**researching** [2] - 49:8, 97:6  
**reserved** [1] - 106:25  
**residence** [1] - 93:1  
**resident** [1] - 104:28  
**residents** [1] - 102:24  
**resides** [1] - 108:3  
**residing** [1] - 182:5  
**respect** [2] - 74:21, 76:9  
**respects** [1] - 14:19  
**respond** [4] - 74:5, 118:10, 200:14, 200:17  
**respondent** [1] - 3:24  
**Respondent** [1] - 108:5  
**respondent's** [1] - 132:28  
**respondents** [2] - 132:26, 136:15  
**respondents'** [1] - 137:7  
**response** [4] - 22:13, 26:18, 58:10, 73:3  
**response'** [1] - 26:23  
**responsibilities** [1] - 30:19  
**responsibility** [2] - 60:12, 151:5  
**responsive** [1] - 157:9  
**rest** [8] - 5:28, 32:16, 86:26, 134:14, 156:24, 157:14, 161:16, 182:14  
**restatement** [1] - 193:27  
**restrain** [1] - 107:7  
**restricted** [1] - 164:25  
**rests** [1] - 137:7

**result** [4] - 49:12, 123:21, 150:21, 160:12  
**resulted** [1] - 147:23  
**results** [1] - 34:11  
**RESUMED** [1] - 5:1  
**retain** [1] - 47:26  
**retained** [4] - 76:7, 82:17, 121:16, 122:3  
**retaining** [1] - 55:3  
**retention** [1] - 115:9  
**returning** [1] - 9:28  
**returns** [1] - 175:8  
**reveal** [5] - 33:16, 34:3, 145:6, 178:8, 185:23  
**revealed** [2] - 9:20, 120:20  
**revelations** [2] - 14:21, 162:1  
**reverse** [1] - 191:13  
**reversed** [1] - 132:27  
**Review** [5] - 62:10, 144:7, 148:6, 151:11, 187:6  
**review** [38] - 11:19, 11:28, 12:7, 12:9, 12:12, 12:13, 12:16, 12:19, 15:21, 23:27, 26:25, 27:3, 28:6, 35:6, 35:8, 41:9, 41:12, 41:28, 42:16, 42:18, 42:29, 46:22, 46:23, 46:24, 46:25, 47:23, 49:12, 60:13, 61:16, 61:19, 61:29, 64:9, 96:24, 97:26, 199:7, 199:10, 199:13, 201:7  
**reviewed** [5] - 33:5, 47:16, 47:24, 48:10, 86:12  
**reviewing** [3] - 12:20, 100:1, 160:14  
**revisit** [2] - 5:11, 5:14  
**rewrite** [2] - 53:2, 64:23  
**RICHARD** [1] - 2:12  
**Richards** [5] - 18:29, 19:7, 24:24, 51:19, 121:1  
**right'** [1] - 49:24  
**right-hand** [3] - 70:8, 136:11, 165:6  
**Rights** [5] - 108:1, 138:12, 141:12, 142:6, 144:4  
**rights** [19] - 12:6, 21:25, 22:3, 30:21,

69:7, 83:1, 83:5, 106:24, 111:2, 112:2, 112:13, 112:14, 113:23, 117:23, 124:14, 141:13, 141:16, 156:3, 156:28  
**rigorous** [1] - 200:26  
**rigour** [1] - 183:19  
**risk** [13] - 45:8, 118:19, 119:14, 120:6, 120:7, 120:12, 120:25, 120:27, 121:1, 121:8, 193:16, 193:20  
**risks** [2] - 9:26, 155:12  
**ROGERSIDE** [1] - 2:23  
**ROGERSON'S** [1] - 2:24  
**role** [6] - 35:5, 68:24, 71:24, 92:20, 110:29, 160:27  
**Rom** [2] - 175:4, 175:10  
**room** [1] - 104:14  
**roughly** [6] - 100:13, 112:8, 150:14, 165:28, 169:12, 172:13  
**round** [1] - 89:10  
**RTNEDC** [1] - 176:25  
**RTNIM** [1] - 176:25  
**RUDDEN** [1] - 2:18  
**Rule** [1] - 65:18  
**rule** [13] - 33:4, 55:11, 64:28, 113:6, 117:20, 181:4, 200:6, 200:7, 200:8, 200:16, 200:19, 202:4, 202:8  
**rule-making** [1] - 200:6  
**Rules** [1] - 54:27  
**rules** [32] - 18:8, 28:25, 37:25, 37:27, 38:1, 38:4, 38:6, 38:7, 38:11, 38:12, 38:14, 38:15, 39:16, 39:23, 39:26, 40:10, 52:16, 54:22, 55:13, 55:15, 55:17, 55:22, 64:12, 71:19, 71:26, 121:24, 141:9, 150:29, 156:14, 166:7, 183:11  
**ruling** [1] - 10:11  
**run** [1] - 45:8  
**running** [1] - 60:20  
**runs** [1] - 125:25  
**rushing** [1] - 100:11  
**régime** [2] - 9:11,

21:18

## S

**Safe** [11] - 21:23, 36:2, 154:27, 155:1, 155:2, 157:28, 158:11, 158:19, 159:14, 159:15, 159:16  
**safeguarded** [1] - 88:12  
**safeguards** [13] - 8:14, 30:20, 86:1, 87:1, 87:13, 87:25, 151:17, 151:29, 152:3, 159:27, 192:4, 192:7, 193:5  
**safer** [1] - 29:19  
**safety** [1] - 131:12  
**SAME** [3] - 105:12, 117:9, 117:10  
**sat** [1] - 191:5  
**satisfactory** [1] - 5:23  
**satisfied** [1] - 134:8  
**satisfy** [8] - 73:28, 77:7, 113:7, 117:21, 124:11, 193:17, 193:21, 194:23  
**save** [1] - 39:26  
**saved** [1] - 171:11  
**saw** [13] - 33:19, 33:21, 42:18, 44:4, 44:25, 48:10, 51:18, 51:20, 51:24, 54:6, 100:1, 121:1, 198:25  
**SC** [10] - 2:5, 2:5, 2:10, 2:11, 2:16, 2:17, 2:21, 2:27, 3:2, 3:8  
**scale** [1] - 189:21  
**scanned** [2] - 123:19, 170:9  
**scanning** [1] - 170:23  
**scans** [1] - 116:14  
**scenarios** [1] - 75:29  
**sceptical** [2] - 124:1, 124:3  
**scepticism** [1] - 196:25  
**Scheley** [2] - 185:26, 186:10  
**school** [1] - 38:6  
**SCHREMS** [1] - 1:14  
**Schrems** [9] - 27:4, 153:21, 154:14, 160:5, 160:6, 160:12, 161:9, 186:22, 188:5

**Science** [2] - 146:8, 199:8  
**scope** [5] - 70:3, 86:18, 98:22, 110:21, 115:20  
**scrutiny** [1] - 66:26  
**se** [3] - 128:5, 129:12, 129:15  
**sealed** [3] - 103:5, 103:13, 103:28  
**Sealed** [8] - 93:21, 94:5, 101:1, 101:15, 103:3, 198:14, 198:19, 198:23  
**SEAN** [1] - 2:17  
**search** [20] - 83:6, 93:8, 95:12, 95:13, 95:18, 96:2, 96:22, 96:25, 103:13, 103:15, 103:16, 103:17, 103:22, 104:9, 104:11, 104:22, 105:21, 167:16, 172:15  
**searched** [5] - 171:4, 171:14, 172:1, 173:8, 173:9  
**searches** [13] - 92:18, 92:23, 92:25, 94:19, 96:6, 98:26, 101:11, 102:21, 102:23, 102:28, 103:11, 104:7  
**Second** [11] - 15:2, 106:24, 122:20, 132:27, 133:8, 133:26, 134:6, 134:19, 134:24, 135:8, 136:26  
**second** [19] - 17:9, 42:17, 47:4, 142:8, 143:2, 150:2, 150:4, 156:16, 160:13, 160:14, 160:22, 161:4, 167:24, 181:19, 185:3, 187:5, 189:28, 193:15, 198:5  
**secondary** [1] - 97:26  
**secondly** [2] - 39:28, 187:26  
**secrecy** [2] - 147:20, 148:18  
**secret** [4] - 23:16, 23:19, 147:14, 147:16  
**secretarial** [1] - 60:28  
**secrets** [9] - 33:17, 43:1, 56:6, 57:21, 57:22, 58:22, 58:24,

59:14, 60:3  
**Section** [22] - 7:20, 7:22, 11:8, 14:24, 15:18, 29:28, 49:19, 74:25, 76:19, 76:25, 98:11, 126:6, 129:24, 149:6, 149:8, 149:11, 163:24, 165:10, 165:18, 169:10, 174:10, 180:12  
**section** [14] - 20:27, 26:16, 56:16, 57:12, 85:23, 89:17, 128:14, 128:15, 145:27, 149:16, 149:18, 191:20, 196:8  
**sections** [2] - 61:17, 128:16  
**sectoral** [1] - 9:13  
**secures** [1] - 174:2  
**Security** [3] - 27:24, 30:14, 30:28  
**security** [32] - 19:17, 19:19, 21:26, 23:7, 23:16, 23:19, 25:22, 32:12, 33:17, 33:25, 37:15, 50:15, 60:4, 75:17, 86:29, 87:15, 118:28, 119:11, 122:14, 130:12, 130:17, 142:12, 148:8, 148:13, 148:19, 150:13, 150:15, 150:19, 153:7, 173:4, 177:20, 198:22  
**see** [110] - 7:28, 8:4, 21:2, 21:3, 21:21, 22:6, 22:7, 23:14, 26:14, 27:13, 27:14, 34:11, 36:20, 37:17, 37:18, 37:20, 37:29, 38:17, 41:19, 42:24, 43:3, 43:6, 43:20, 44:22, 45:11, 47:29, 52:26, 53:19, 54:11, 54:21, 55:8, 55:9, 55:27, 56:11, 63:9, 67:15, 73:21, 74:18, 81:11, 97:13, 97:18, 97:23, 98:4, 98:5, 98:29, 101:8, 103:28, 104:21, 105:7, 106:16, 112:10, 113:2, 121:11, 123:27, 124:27, 125:8, 127:12, 127:24, 128:27, 131:20, 133:12, 134:2, 134:5, 134:22, 135:2, 135:3, 135:24, 136:7, 138:2, 138:10, 139:20, 140:21, 140:24, 141:6, 141:19, 142:7, 142:16, 144:21, 145:13, 148:28, 151:19, 153:13, 154:2, 154:8, 154:11, 154:26, 155:4, 155:7, 155:22, 160:4, 167:18, 171:13, 172:5, 172:6, 174:8, 176:11, 176:28, 176:29, 178:24, 181:1, 190:3, 192:19, 193:15, 193:21, 193:23, 194:9, 195:28, 199:14, 199:18  
**seeing** [3] - 21:8, 132:20, 197:19  
**seek** [1] - 18:7  
**seeking** [1] - 108:2  
**seeks** [4] - 71:28, 73:22, 74:2, 189:27  
**seem** [2] - 115:23, 149:25  
**sees** [2] - 49:23, 172:18  
**seized** [3] - 76:7, 96:16, 122:2  
**seizure** [2] - 83:6, 122:24  
**seizures** [1] - 102:22  
**selecting** [1] - 32:4  
**selector** [11] - 171:29, 181:23, 182:16, 182:18, 182:24, 183:3, 184:18, 184:20, 184:25, 190:16, 190:20  
**selectors** [14] - 164:7, 164:20, 164:29, 170:15, 171:27, 173:18, 174:12, 174:14, 175:19, 184:17, 184:23, 184:24, 187:4, 187:28  
**self** [1] - 156:22  
**self-regulatory** [1] - 156:22  
**sell** [1] - 123:22  
**Senate** [1] - 36:10  
**send** [4] - 43:26, 65:24, 174:15, 174:29  
**sending** [1] - 175:11  
**sends** [2] - 174:26, 175:3  
**senior** [2] - 60:18, 148:16  
**sense** [7] - 12:17, 19:16, 19:20, 118:7, 129:6, 129:7, 162:28  
**sensitive** [1] - 119:14  
**sent** [14] - 33:6, 43:25, 44:1, 44:6, 45:24, 45:27, 100:4, 169:11, 174:12, 174:23, 175:6, 176:25, 186:17, 201:8  
**sentence** [18] - 65:10, 65:28, 65:29, 66:11, 95:3, 103:9, 103:22, 107:2, 129:4, 137:4, 137:6, 159:5, 164:11, 174:22, 186:16, 202:6, 202:13, 202:14  
**sentences** [3] - 49:18, 66:15, 66:17  
**separate** [4] - 20:13, 43:27, 109:11, 168:23  
**separately** [2] - 195:17, 195:19  
**series** [6] - 67:26, 91:29, 137:9, 151:28, 151:29, 166:17  
**Serious** [1] - 147:19  
**seriously** [2] - 141:24, 161:7  
**served** [3] - 48:17, 48:24, 48:26  
**server** [1] - 120:21  
**servers** [3] - 159:7, 176:17, 187:2  
**serves** [3] - 140:22, 141:10, 174:10  
**service** [5] - 11:22, 42:26, 54:4, 60:2, 176:18  
**services** [1] - 200:12  
**Services** [4] - 1:22, 3:23, 3:25, 30:15  
**SERVICES** [1] - 1:32  
**Serwin** [5] - 83:19, 84:29, 127:13, 197:22, 197:23  
**Serwin's** [2] - 83:28, 110:9  
**set** [5] - 18:8, 69:7, 143:9, 166:22, 187:7  
**sets** [4] - 32:2, 32:4, 141:14, 151:19  
**setting** [9] - 43:11, 111:7, 118:16, 122:14, 129:26, 135:19, 157:4, 200:18, 202:17  
**settings** [8] - 51:10, 58:29, 59:16, 77:10, 95:9, 122:15, 149:9, 175:14  
**seven** [4] - 161:5, 174:5, 196:3, 196:9  
**several** [2] - 164:7, 164:23  
**shall** [4] - 8:8, 32:22, 54:27, 69:29  
**share** [1] - 54:14  
**sharing** [1] - 46:12  
**sheet** [2] - 181:22, 183:7  
**sheets** [1] - 128:19  
**Shield** [6] - 20:26, 21:23, 23:27, 24:7, 26:17, 26:25  
**shoot** [1] - 202:15  
**short** [5] - 59:16, 67:22, 100:6, 167:19, 184:1  
**shorter** [1] - 192:21  
**should've** [3] - 52:5, 52:11, 52:12  
**show** [19] - 107:2, 113:16, 114:9, 117:26, 123:20, 123:25, 124:18, 124:28, 124:29, 126:14, 143:21, 144:28, 154:20, 167:5, 175:28, 180:13, 180:15, 185:8, 202:10  
**showed** [1] - 181:12  
**showing** [4] - 18:25, 25:12, 76:12, 195:8  
**shy** [1] - 119:19  
**sic** [1] - 137:19  
**side** [10] - 10:12, 21:12, 70:8, 85:11, 115:14, 118:16, 132:19, 136:11, 163:26, 165:6  
**sign** [4] - 51:7, 74:6, 182:19, 189:10  
**signal** [1] - 24:18  
**Signals** [2] - 30:8, 30:15  
**signals** [4] - 8:1, 8:7, 27:23, 87:21  
**signed** [1] - 54:1  
**significance** [11] - 8:1, 8:4, 8:26, 9:13, 10:7, 16:8, 19:1, 21:17, 26:26, 46:27  
**significant** [15] - 31:23, 50:17, 84:29, 108:6, 120:28, 181:8, 185:1, 187:20, 187:22, 188:10, 188:12, 188:17, 188:18, 188:22, 196:26  
**Significantly** [1] - 147:10  
**significantly** [1] - 30:1  
**signing** [1] - 182:23  
**Silverman** [1] - 101:5  
**similar** [15] - 8:18, 11:4, 44:4, 49:28, 66:3, 77:23, 79:14, 89:6, 89:7, 111:13, 112:26, 119:9, 120:24, 147:22, 148:7  
**similarities** [1] - 58:26  
**similarly** [3] - 42:11, 120:7, 175:3  
**simply** [7] - 8:5, 45:28, 99:1, 105:23, 134:7, 175:18, 183:26  
**sincere** [3] - 156:1, 156:7, 156:14  
**single** [3] - 34:16, 180:17, 180:18  
**SIR** [1] - 2:24  
**site** [1] - 56:26  
**sitting** [5] - 41:6, 115:4, 165:3, 183:14, 202:27  
**situation** [9] - 15:11, 93:3, 95:27, 104:22, 111:8, 111:14, 114:17, 121:13, 123:22  
**situations** [1] - 54:14  
**six** [7] - 142:5, 143:11, 143:13, 180:26, 181:16, 191:20, 191:25  
**slash** [2] - 21:3, 47:2  
**slide** [2] - 176:29, 179:5  
**slides** [5] - 175:28, 176:5, 177:10, 177:12, 178:16  
**slightly** [4] - 29:16, 127:2, 137:2, 154:25  
**sloppy** [1] - 17:14  
**small** [6] - 42:21, 91:29, 105:13, 131:8, 163:16, 201:9  
**smaller** [4] - 91:29, 171:26, 173:3  
**Smarte** [1] - 124:10

**SMITH** [1] - 2:27  
**smoothly** [1] - 60:21  
**Snowden** [3] - 14:21, 146:29, 162:1  
**so..** [3] - 131:21, 140:29, 146:10  
**Social** [2] - 146:8, 199:8  
**society** [1] - 139:6  
**software** [1] - 116:26  
**Software** [1] - 2:27  
**sole** [1] - 45:12  
**solemnly** [1] - 99:3  
**solicit** [1] - 65:21  
**SOLICITORS** [2] - 2:7, 2:28  
**solve** [1] - 160:27  
**somebody'** [1] - 166:2  
**somebody..** [1] - 180:1  
**someone** [8] - 10:10, 43:17, 93:6, 105:11, 116:16, 120:13, 143:21, 154:8  
**sometimes** [6] - 49:22, 57:11, 84:21, 165:29, 185:9, 200:25  
**something** [2] - 116:9, 148:6  
**somewhere** [1] - 36:29  
**soon** [1] - 142:11  
**Sorry** [1] - 47:1  
**sorry** [57] - 10:24, 16:12, 20:26, 21:28, 26:15, 29:14, 31:22, 44:12, 47:1, 47:22, 56:1, 58:4, 60:15, 70:13, 71:21, 74:16, 86:15, 86:17, 88:4, 91:10, 94:6, 94:28, 100:9, 104:12, 104:26, 105:7, 105:29, 106:11, 106:12, 108:15, 125:22, 127:28, 128:12, 129:5, 138:18, 139:12, 140:13, 140:16, 140:18, 148:29, 149:24, 150:3, 150:4, 150:7, 160:16, 163:6, 172:3, 173:8, 174:4, 175:6, 177:11, 180:11, 184:1, 184:18, 193:18, 197:17, 200:28  
**sort** [18] - 8:15, 12:5, 19:21, 21:24, 34:2, 43:13, 49:16, 50:17, 56:29, 63:18, 79:24, 87:18, 100:6, 114:16, 124:21, 173:4, 187:2, 189:17  
**sort'** [1] - 49:13  
**sorts** [1] - 50:6  
**sought** [3] - 39:23, 40:2, 40:4  
**sound** [1] - 123:10  
**sounds** [4] - 75:13, 84:24, 133:23, 137:2  
**source** [2] - 9:15, 146:11  
**sources** [4] - 97:26, 143:6, 143:9, 145:4  
**sources"** [1] - 192:5  
**SOUTH** [1] - 2:13  
**SP0018** [1] - 30:9  
**speaking** [5] - 7:16, 163:16, 165:28, 169:13, 197:5  
**specific** [20] - 25:16, 38:10, 50:8, 58:23, 79:18, 95:17, 98:10, 129:2, 141:9, 148:17, 159:21, 173:18, 181:23, 181:24, 184:18, 184:19, 184:23, 185:3, 197:10, 200:3  
**specifically** [9] - 11:21, 96:5, 173:13, 174:26, 178:13, 178:17, 181:21, 197:2, 199:24  
**specified** [1] - 32:22  
**speculation** [3] - 11:11, 15:1, 134:29  
**speculations** [1] - 137:9  
**speculative** [10] - 11:13, 14:25, 15:11, 15:17, 134:3, 137:8, 137:19, 137:21, 137:26, 137:27  
**speech** [1] - 83:10  
**spelled** [2] - 31:22, 91:28  
**spend** [2] - 27:6, 42:25  
**spending** [1] - 55:23  
**spent** [4] - 11:7, 11:18, 66:16, 192:16  
**split** [1] - 81:11  
**Spokeo** [52] - 15:23, 15:24, 16:7, 16:10, 16:29, 18:3, 19:15, 19:26, 20:8, 20:10, 77:9, 77:11, 77:23, 84:14, 110:4, 110:19, 111:16, 112:1, 112:17, 112:19, 113:6, 113:14, 113:26, 114:11, 114:29, 115:5, 115:23, 117:2, 117:6, 117:17, 117:20, 117:24, 122:6, 122:8, 123:6, 124:1, 124:7, 124:22, 125:7, 125:15, 127:14, 193:6, 193:14, 196:1, 196:5, 196:16, 196:19, 196:20, 196:26, 197:9, 197:14  
**Spokeo's** [1] - 18:12  
**sponsorship** [1] - 55:3  
**SQUARE** [1] - 2:29  
**SSRN** [2] - 146:7, 199:7  
**staffed** [2] - 34:15, 44:15  
**stage** [4] - 56:20, 60:17, 146:7, 199:9  
**stages** [2] - 171:28, 196:8  
**stamina** [1] - 7:8  
**stand** [1] - 129:20  
**standard** [15] - 8:22, 16:28, 22:16, 22:17, 23:11, 40:9, 80:25, 110:27, 136:27, 139:8, 139:17, 141:15, 152:19, 155:28, 198:21  
**standard"** [1] - 140:23  
**standards** [1] - 141:11  
**standing** [95] - 10:1, 10:7, 10:13, 10:19, 13:12, 13:20, 13:22, 14:7, 14:16, 15:10, 16:9, 19:2, 19:7, 19:25, 20:9, 24:26, 24:28, 24:29, 25:2, 25:5, 25:6, 57:13, 57:14, 57:15, 57:16, 71:19, 71:25, 71:27, 72:13, 72:14, 72:15, 72:19, 72:27, 74:13, 74:15, 74:26, 75:28, 76:4, 77:4, 85:21, 85:23, 85:28, 88:19, 88:21, 88:27, 89:1, 89:14, 89:17, 89:19, 111:6, 113:4, 113:7, 114:26, 115:8, 117:5, 117:22, 117:24, 119:19, 122:23, 122:24, 123:1, 123:3, 123:17, 125:4, 125:18, 125:25, 125:29, 126:15, 126:27, 128:7, 129:8, 129:23, 129:26, 129:29, 131:3, 132:26, 132:29, 133:9, 133:26, 133:27, 134:23, 135:9, 135:17, 135:18, 135:21, 138:3, 138:4, 194:29, 195:3, 195:6, 195:9, 196:22, 196:23, 201:27  
**standing'** [1] - 19:10  
**stands** [4] - 56:28, 57:5, 129:19, 176:23  
**start** [5] - 86:13, 97:17, 97:20, 144:27, 154:24  
**starting** [1] - 109:2  
**starts** [2] - 82:15, 146:3  
**State** [4] - 21:29, 22:5, 25:2, 25:3  
**state** [13] - 9:24, 49:3, 56:6, 57:21, 58:22, 58:24, 59:14, 60:3, 93:5, 103:8, 109:4, 116:3, 143:1  
**stateable** [1] - 115:11  
**statement** [59] - 22:16, 22:17, 22:18, 23:29, 43:13, 46:23, 49:15, 54:28, 56:24, 65:3, 66:7, 69:24, 71:1, 77:17, 81:22, 81:24, 94:9, 94:11, 97:2, 97:8, 97:10, 98:3, 98:28, 99:2, 99:5, 100:21, 100:22, 100:23, 100:27, 100:28, 101:23, 101:29, 112:8, 113:9, 113:14, 113:17, 114:7, 124:28, 125:3, 125:6, 126:3, 126:28, 127:22, 128:1, 134:26, 134:27, 136:21, 137:16, 143:25, 143:28, 151:25, 164:19, 178:9, 178:11, 178:12, 181:27, 181:29, 183:23  
**statements** [18] - 58:21, 59:2, 59:9, 59:17, 60:2, 78:3, 89:10, 96:28, 99:16, 100:19, 124:21, 126:27, 144:6, 145:11, 165:5, 177:5, 195:7, 202:20  
**States** [80] - 5:16, 8:12, 8:25, 9:1, 10:25, 23:25, 24:9, 25:1, 25:21, 30:8, 37:8, 39:19, 40:9, 40:28, 45:19, 46:17, 48:28, 51:1, 52:3, 60:4, 69:20, 70:6, 70:20, 71:11, 78:20, 78:23, 82:1, 82:29, 83:1, 84:22, 84:25, 85:24, 86:25, 88:1, 93:4, 93:7, 93:9, 95:11, 95:18, 95:19, 96:3, 96:7, 96:8, 96:16, 96:23, 96:26, 97:9, 97:15, 98:23, 103:23, 103:24, 104:10, 104:14, 104:17, 104:23, 105:27, 106:6, 107:4, 107:22, 108:7, 109:10, 115:22, 124:21, 125:4, 127:14, 127:25, 132:4, 134:6, 140:1, 140:3, 142:18, 144:26, 154:1, 156:5, 157:15, 159:19, 162:14, 183:10, 183:12, 200:7  
**STATES** [1] - 2:21  
**states** [6] - 93:13, 116:8, 125:29, 139:24, 141:13, 193:27  
**States'** [2] - 59:14, 96:27  
**stating** [2] - 178:14, 195:10  
**statistical** [1] - 29:5  
**status** [2] - 26:4, 181:28  
**statute** [44] - 10:25, 11:10, 11:15, 16:6, 16:16, 16:29, 17:3, 17:4, 17:23, 17:24, 18:1, 18:22, 18:28, 19:27, 31:18, 32:4, 50:8, 77:14, 77:21, 111:10, 112:7, 112:20, 112:22, 112:23, 112:28,

113:1, 113:12, 114:2,  
114:13, 114:17,  
114:21, 114:23,  
115:16, 115:19,  
116:4, 116:10,  
116:15, 119:23,  
120:14, 136:16,  
188:15, 188:21,  
193:29, 194:18  
**statute**<sup>[1]</sup> - 50:11  
**statutes**<sup>[5]</sup> - 112:2,  
116:7, 118:13,  
119:11, 119:18  
**statutory**<sup>[25]</sup> -  
19:23, 19:24, 20:1,  
20:6, 29:8, 31:26,  
50:2, 63:7, 83:14,  
87:12, 98:11, 111:11,  
111:14, 112:9,  
112:15, 113:8,  
116:20, 117:22,  
117:23, 123:7,  
124:14, 124:15,  
196:14  
**staying**<sup>[1]</sup> - 202:23  
**stenographer**<sup>[2]</sup> -  
47:27, 138:10  
**stenographic**<sup>[1]</sup> -  
1:25  
**Stenography**<sup>[3]</sup> -  
1:21, 3:23, 3:25  
**STENOGRAPHY**<sup>[1]</sup>  
- 1:31  
**step**<sup>[3]</sup> - 63:22,  
192:1  
**Stevens**<sup>[1]</sup> - 109:12  
**still**<sup>[6]</sup> - 110:11,  
135:11, 150:8, 167:1,  
167:3, 199:10  
**stop**<sup>[8]</sup> - 92:28,  
94:22, 103:10,  
114:13, 124:24,  
126:17, 127:12,  
156:24  
**stored**<sup>[2]</sup> - 116:22,  
176:22  
**stores**<sup>[1]</sup> - 116:17  
**story**<sup>[5]</sup> - 24:11,  
51:15, 51:16, 173:12,  
186:29  
**straight**<sup>[3]</sup> - 65:23,  
138:6, 175:21  
**straightforward**<sup>[1]</sup> -  
46:2  
**STREET**<sup>[3]</sup> - 2:14,  
2:19, 3:10  
**strict**<sup>[4]</sup> - 7:20, 7:21,  
17:3, 18:8  
**stricter**<sup>[1]</sup> - 161:11  
**strictly**<sup>[1]</sup> - 166:20

**Strike**<sup>[1]</sup> - 158:11  
**strike**<sup>[3]</sup> - 115:22,  
117:4, 189:3  
**striking**<sup>[1]</sup> - 58:26  
**strikingly**<sup>[1]</sup> -  
144:25  
**strong**<sup>[7]</sup> - 11:1,  
112:29, 144:25,  
152:29, 153:4,  
156:13, 190:18  
**stronger**<sup>[1]</sup> - 14:9  
**strongly**<sup>[3]</sup> - 162:11,  
162:26  
**struck**<sup>[6]</sup> - 10:13,  
14:8, 33:12, 34:1,  
50:3, 194:11  
**structure**<sup>[5]</sup> - 20:7,  
21:21, 21:28, 82:26,  
87:25  
**stuck**<sup>[1]</sup> - 156:19  
**students**<sup>[2]</sup> - 19:10,  
72:16  
**studied**<sup>[1]</sup> - 38:6  
**studies**<sup>[4]</sup> - 58:14,  
65:25, 150:18, 150:19  
**study**<sup>[9]</sup> - 72:18,  
72:26, 85:8, 97:27,  
115:26, 115:27,  
137:14, 180:29, 181:1  
**stuff**<sup>[3]</sup> - 24:26,  
51:6, 66:9  
**style**<sup>[2]</sup> - 60:10,  
109:18  
**subject**<sup>[18]</sup> - 9:7,  
9:18, 19:3, 26:5,  
30:28, 38:13, 46:22,  
46:24, 53:13, 80:20,  
82:5, 92:24, 101:12,  
103:7, 143:16,  
146:25, 173:3, 194:26  
**subjected**<sup>[1]</sup> -  
142:10  
**submission**<sup>[2]</sup> -  
47:24, 49:17  
**submissions**<sup>[1]</sup> -  
117:15  
**submit**<sup>[1]</sup> - 49:5  
**submitted**<sup>[13]</sup> -  
23:29, 25:20, 25:25,  
35:6, 40:23, 40:24,  
46:16, 49:4, 65:17,  
84:4, 100:1, 100:11,  
154:7  
**submitting**<sup>[3]</sup> -  
21:7, 21:9, 25:17  
**subsequent**<sup>[4]</sup> -  
18:27, 37:15, 128:3,  
186:18  
**subsequently**<sup>[1]</sup> -  
198:16

**subset**<sup>[4]</sup> - 172:10,  
172:19, 172:29, 173:3  
**substance**<sup>[3]</sup> - 7:23,  
44:4, 57:2  
**substantial**<sup>[11]</sup> -  
61:13, 69:19, 70:6,  
70:20, 71:11, 85:12,  
107:23, 109:5,  
150:12, 187:15,  
189:18  
**substantive**<sup>[2]</sup> -  
62:13, 201:24  
**subtract**<sup>[2]</sup> - 169:26,  
169:27  
**succeeded**<sup>[1]</sup> -  
146:9  
**sue**<sup>[8]</sup> - 11:22, 63:8,  
81:1, 119:17, 122:6,  
126:15, 129:8, 129:29  
**sue'**<sup>[1]</sup> - 194:29  
**sued**<sup>[2]</sup> - 17:15,  
116:1  
**sues**<sup>[1]</sup> - 17:6  
**suffered**<sup>[1]</sup> - 122:8  
**suffers**<sup>[1]</sup> - 158:22  
**efficiency**<sup>[1]</sup> -  
69:12  
**sufficient**<sup>[13]</sup> -  
71:19, 71:27, 73:22,  
74:1, 74:9, 105:26,  
106:5, 106:27, 121:7,  
124:6, 135:20,  
193:29, 194:22  
**sufficiently**<sup>[3]</sup> -  
85:2, 125:9, 194:28  
**suggest**<sup>[2]</sup> - 105:22,  
139:2  
**suggested**<sup>[13]</sup> -  
44:22, 44:28, 48:20,  
49:29, 52:3, 53:16,  
53:17, 106:14, 107:6,  
109:4, 149:12,  
151:14, 191:18  
**suggesting**<sup>[2]</sup> -  
117:13, 139:16  
**suggestion**<sup>[1]</sup> -  
52:13  
**suggestions**<sup>[3]</sup> -  
50:29, 53:18, 126:9  
**suggests**<sup>[3]</sup> -  
106:22, 115:5, 160:29  
**suit**<sup>[3]</sup> - 116:2,  
116:5, 193:28  
**suits**<sup>[1]</sup> - 6:28  
**summaries**<sup>[1]</sup> -  
108:25  
**summarise**<sup>[1]</sup> -  
172:13  
**summary**<sup>[12]</sup> -  
58:21, 58:25, 59:2,  
59:16, 63:13, 84:21,  
85:17, 94:15, 100:29,  
132:25, 197:5, 197:15  
**summer**<sup>[1]</sup> - 36:8  
**supervision**<sup>[2]</sup> -  
149:5, 150:10  
**supervisor**<sup>[1]</sup> - 26:9  
**supervisory**<sup>[4]</sup> -  
25:21, 25:27, 26:3,  
26:7  
**supplement**<sup>[1]</sup> -  
51:25  
**supplemented**<sup>[1]</sup> -  
83:12  
**supplied**<sup>[2]</sup> - 3:24,  
100:3  
**support**<sup>[9]</sup> - 60:28,  
63:9, 63:10, 94:11,  
111:17, 119:5, 155:9,  
156:13, 157:21  
**supported**<sup>[1]</sup> -  
63:25  
**supporting**<sup>[1]</sup> -  
157:22  
**supports**<sup>[2]</sup> - 51:24,  
98:5  
**suppose**<sup>[4]</sup> -  
153:26, 171:2,  
173:28, 182:5  
**supposed**<sup>[11]</sup> -  
8:17, 38:1, 38:4,  
40:11, 52:20, 55:19,  
99:21, 112:20,  
112:24, 114:5, 151:24  
**Supreme**<sup>[32]</sup> -  
12:11, 13:2, 14:17,  
15:1, 70:12, 71:2,  
71:3, 78:3, 78:12,  
78:15, 79:4, 79:12,  
81:8, 84:23, 84:25,  
85:7, 85:9, 85:13,  
85:25, 96:11, 97:9,  
97:18, 98:21, 104:24,  
110:24, 126:3,  
126:13, 127:14,  
127:25, 130:2, 132:4,  
134:6  
**surely**<sup>[1]</sup> - 183:6  
**surprise**<sup>[1]</sup> - 139:20  
**surprised**<sup>[1]</sup> - 39:8  
**surveil**<sup>[1]</sup> - 164:23  
**surveillance**<sup>[53]</sup> -  
11:11, 12:17, 13:8,  
13:13, 13:20, 13:21,  
13:24, 14:29, 15:15,  
15:19, 19:3, 19:17,  
21:26, 32:1, 34:4,  
34:5, 34:21, 68:9,  
68:20, 75:16, 79:11,  
86:22, 87:6, 101:7,  
117:29, 119:11,  
120:19, 121:14,  
130:20, 130:22,  
139:3, 139:8, 141:11,  
142:10, 143:8,  
146:24, 147:16,  
147:21, 147:26,  
151:20, 151:21,  
152:7, 153:7, 159:25,  
161:25, 170:8,  
182:26, 183:11,  
186:25, 187:29,  
192:12, 192:13,  
192:24  
**Surveillance**<sup>[7]</sup> -  
11:27, 101:21,  
145:29, 147:9,  
192:22, 192:23, 193:3  
**surveillance'**<sup>[1]</sup> -  
33:17  
**surveilled**<sup>[4]</sup> -  
13:28, 75:23, 75:27,  
76:3  
**surveys**<sup>[1]</sup> - 164:6  
**suspect**<sup>[1]</sup> - 80:21  
**suspected**<sup>[1]</sup> -  
129:27  
**sustained**<sup>[1]</sup> - 17:11  
**SUZANNE**<sup>[1]</sup> - 2:22  
**Suzlon**<sup>[2]</sup> - 63:5,  
63:14  
**SUZLON**<sup>[1]</sup> - 63:5  
**Swire**<sup>[28]</sup> - 5:7, 5:10,  
5:16, 6:4, 6:27, 7:16,  
46:7, 46:10, 47:29,  
48:15, 48:22, 49:2,  
50:26, 51:26, 66:19,  
67:13, 86:5, 87:5,  
91:10, 100:25,  
143:29, 145:29,  
152:21, 152:28,  
166:7, 173:6, 175:16,  
183:6  
**SWIRE**<sup>[7]</sup> - 4:3, 4:9,  
7:13, 35:21, 91:7,  
152:25, 184:14  
**Swire's**<sup>[1]</sup> - 140:20  
**syllabus**<sup>[1]</sup> - 63:12  
**sympathy**<sup>[1]</sup> -  
118:22  
**System**<sup>[1]</sup> - 145:28  
**system**<sup>[20]</sup> - 13:27,  
22:23, 22:27, 23:7,  
25:13, 33:26, 85:20,  
86:3, 86:26, 89:9,  
89:10, 130:13,  
143:10, 144:8,  
157:15, 157:16,  
180:14, 183:19,  
187:19

**systematic** [1] -  
86:27  
**systems** [3] - 25:8,  
131:15, 186:11

## T

**Tab** [3] - 29:7,  
105:16, 132:8  
**tab** [6] - 105:14,  
141:1, 142:8, 145:14,  
186:4, 186:5  
**tailor** [1] - 8:17  
**tailored** [3] - 8:2, 8:8,  
8:15  
**talks** [6] - 29:28,  
31:10, 31:17, 97:4,  
128:2, 185:28  
**tap** [1] - 146:25  
**tape** [1] - 175:10  
**target** [8] - 11:8,  
11:12, 147:12,  
147:25, 164:20,  
164:28, 165:15,  
169:23  
**targeted** [11] - 11:14,  
159:27, 164:2, 165:7,  
169:15, 181:13,  
187:27, 187:29,  
189:26, 190:13,  
190:14  
**targeting** [9] - 7:24,  
11:8, 15:2, 179:27,  
179:29, 180:4,  
180:15, 180:28,  
184:19  
**targets** [28] - 11:11,  
14:19, 14:20, 14:23,  
15:8, 15:11, 33:24,  
34:4, 134:13, 146:19,  
146:24, 163:7,  
163:10, 163:23,  
163:28, 164:7,  
164:12, 165:8,  
167:15, 169:12,  
170:5, 171:5, 171:6,  
171:9, 180:13,  
180:18, 180:21  
**targets"** [1] - 165:12  
**task** [2] - 49:6,  
128:15  
**tasked** [8] - 22:5,  
150:25, 168:26,  
181:23, 182:18,  
184:16, 184:20, 187:4  
**tasking** [5] - 178:16,  
178:21, 178:22,  
178:25, 181:22  
**taught** [3] - 39:18,

72:15, 138:3  
**teach** [3] - 118:12,  
130:12, 138:3  
**teaching** [1] - 5:19  
**team** [3] - 49:8, 50:7,  
192:5  
**Tech** [1] - 64:7  
**technical** [4] - 34:27,  
49:21, 92:5, 170:29  
**technicalities** [1] -  
6:16  
**technological** [3] -  
155:20, 174:2, 174:13  
**technologically** [1] -  
165:23  
**technology** [3] -  
79:18, 85:10, 178:29  
**telephone** [4] -  
14:23, 129:24, 168:2,  
182:7  
**template** [2] - 80:25,  
123:20  
**temporarily** [1] -  
93:2  
**ten** [12] - 6:5, 13:19,  
22:28, 24:1, 182:23,  
185:27, 186:6, 186:7,  
186:14, 193:8,  
193:13, 193:19  
**tens** [1] - 14:22  
**Tenth** [1] - 106:25  
**tenth** [2] - 23:1, 23:8  
**term** [11] - 8:19,  
12:21, 17:12, 31:26,  
48:12, 49:29, 50:2,  
50:11, 103:14,  
130:12, 173:11  
**terma** [1] - 71:3  
**termination** [1] - 9:9  
**terms** [22] - 7:23,  
10:7, 16:9, 19:16,  
49:19, 49:21, 54:2,  
82:23, 83:26, 105:24,  
106:3, 106:15,  
116:18, 117:16,  
148:6, 149:14,  
152:16, 173:22,  
185:15, 188:10,  
189:20, 201:3  
**TERRACE** [1] - 2:8  
**terribly** [4] - 108:15,  
125:22, 146:2, 148:29  
**territorial** [1] -  
107:27  
**territory** [7] - 107:8,  
107:22, 109:5,  
141:17, 182:1,  
183:24, 183:27  
**terrorist** [1] - 129:27  
**test** [19] - 13:12,

81:3, 81:16, 81:18,  
83:25, 92:26, 102:29,  
103:11, 104:8, 113:2,  
134:6, 134:23, 135:8,  
135:11, 137:3,  
139:28, 139:29,  
140:17  
**testified** [8] - 16:4,  
35:27, 36:4, 36:7,  
36:9, 36:15, 36:21,  
150:13  
**testify** [4] - 37:1,  
114:28, 154:6, 200:28  
**testifying** [4] - 10:9,  
38:10, 155:25, 155:26  
**testimony** [24] -  
12:1, 37:5, 37:26,  
62:11, 66:6, 70:10,  
70:11, 89:7, 100:1,  
100:2, 100:3, 121:19,  
129:1, 154:16,  
154:23, 154:29,  
155:4, 156:17, 157:1,  
159:22, 159:26,  
162:3, 174:22, 188:4  
**tests** [2] - 137:12,  
138:7  
**tests'** [1] - 137:28  
**text** [2] - 57:6, 84:17  
**textbook** [1] - 67:5  
**textbooks** [1] - 62:2  
**textual** [2] - 106:18,  
106:21  
**than..** [1] - 162:8  
**that'** [5] - 63:10,  
64:17, 64:22, 114:19,  
202:7  
**that..** [2] - 57:24,  
83:10  
**THE** [12] - 1:2, 1:7,  
2:16, 4:7, 5:1, 6:7,  
35:25, 91:1, 105:12,  
117:10, 202:29  
**the..** [1] - 158:7  
**theft** [2] - 121:2,  
121:8  
**theme** [1] - 161:3  
**themselves** [2] -  
53:28, 184:24  
**THEN** [1] - 202:29  
**there'** [1] - 17:16  
**there's..** [1] - 164:10  
**therefore** [6] - 26:2,  
89:22, 107:3, 117:2,  
117:24, 134:22  
**they've** [1] - 175:19  
**think..** [2] - 153:14,  
154:23  
**thinking** [3] - 17:12,  
17:22, 151:16

**thinks** [1] - 143:29  
**third** [11] - 17:29,  
21:7, 29:6, 45:17,  
46:5, 50:14, 71:21,  
106:17, 106:20,  
189:28, 199:29  
**this'** [3] - 151:24,  
151:25, 202:7  
**thorough** [2] - 100:7,  
200:16  
**though'** [1] - 34:1  
**thousand** [5] - 169:9,  
182:23, 200:15  
**threatened** [1] -  
136:23  
**three** [27] - 16:11,  
19:12, 23:29, 24:4,  
40:22, 41:7, 44:9,  
53:29, 56:29, 60:21,  
60:25, 64:14, 65:4,  
65:5, 65:9, 72:17,  
72:25, 73:26, 141:6,  
144:1, 148:16,  
180:26, 189:26,  
190:5, 192:3, 193:10,  
202:8  
**throughout** [4] -  
138:11, 140:8,  
142:28, 144:22  
**thrust** [2] - 188:18,  
194:9  
**Thursday** [1] - 5:27  
**tick** [1] - 143:7  
**tick-lists** [1] - 143:7  
**tightened** [1] -  
166:23  
**Tim** [1] - 192:29  
**timely** [1] - 26:18  
**tips** [1] - 54:2  
**tired** [1] - 197:19  
**title** [4] - 29:26, 94:4,  
198:19  
**TO** [4] - 7:13, 105:12,  
117:10  
**to..** [1] - 157:12  
**today** [12] - 5:16,  
6:27, 79:18, 81:19,  
87:20, 94:26, 94:29,  
112:19, 148:1, 155:5,  
184:4, 184:5  
**together** [5] - 76:6,  
77:2, 82:6, 149:9,  
169:14  
**tomorrow** [5] - 7:4,  
7:6, 188:27, 188:28,  
189:10  
**tone** [1] - 64:24  
**took** [5] - 62:24,  
100:24, 143:11,  
201:16

**tool** [1] - 149:10  
**top** [1] - 147:14  
**top-secret** [1] -  
147:14  
**topic** [5] - 64:12,  
65:14, 70:27, 85:25,  
129:1  
**topics** [3] - 58:22,  
60:1, 86:4  
**tort** [1] - 193:25  
**total** [4] - 125:26,  
163:12, 167:18, 190:6  
**touched** [1] - 11:13  
**touches** [1] - 172:24  
**tough** [1] - 202:17  
**towards** [2] - 21:5,  
151:9  
**traceable** [1] -  
136:16  
**track** [2] - 43:26,  
43:28  
**tracked** [2] - 44:5,  
44:10  
**tracker** [1] - 80:1  
**Trade** [4] - 9:22,  
16:18, 16:20, 36:5  
**trade** [4] - 9:23,  
121:2, 157:22, 157:23  
**traditional** [3] -  
17:21, 76:12, 79:19  
**traditionally** [4] -  
78:1, 78:9, 78:29,  
81:5  
**traffic** [2] - 170:9,  
170:24  
**training** [1] - 30:29  
**trans** [1] - 189:15  
**transactions** [3] -  
166:13, 166:19,  
170:20  
**transatlantic** [1] -  
189:16  
**transcript** [3] - 1:24,  
54:13, 117:8  
**Transcripts** [1] -  
3:23  
**transferred** [5] -  
94:20, 98:27, 102:23,  
102:27, 103:7  
**transfers** [2] -  
155:14, 159:18  
**transit** [1] - 66:10  
**transmitted** [1] -  
174:19  
**transparency** [4] -  
148:19, 163:13,  
164:15, 167:9  
**treatise** [1] - 97:25  
**tremendous** [1] -  
72:19

**trespass** [2] - 79:14, 80:6  
**tricky** [1] - 65:20  
**tried** [11] - 48:6, 52:6, 68:7, 86:26, 87:2, 98:9, 123:22, 162:29, 183:18, 196:21, 197:12  
**trigger** [1] - 77:26  
**triggered** [1] - 96:23  
**trouble** [1] - 189:3  
**true** [6] - 46:20, 73:1, 77:10, 179:6, 179:16, 179:21  
**trust** [1] - 47:14  
**try** [34] - 13:7, 13:27, 33:8, 33:10, 34:27, 35:17, 37:11, 37:27, 41:23, 44:20, 49:21, 52:12, 52:18, 59:5, 64:17, 67:14, 70:25, 72:22, 74:29, 76:5, 87:9, 97:15, 114:17, 128:29, 137:14, 155:28, 171:20, 173:2, 179:8, 199:15, 200:21, 200:25, 201:11, 202:18  
**trying** [43] - 25:7, 40:10, 48:8, 50:22, 51:5, 51:6, 51:14, 52:8, 52:15, 52:19, 54:5, 57:25, 58:23, 65:23, 70:28, 74:17, 74:29, 75:1, 78:13, 88:11, 99:13, 100:5, 108:11, 112:4, 112:28, 114:13, 114:21, 118:4, 118:7, 118:24, 124:24, 129:19, 131:12, 131:15, 140:17, 143:17, 143:21, 144:28, 157:9, 157:12, 165:20, 184:26, 202:19  
**Tuesday** [3] - 5:19, 5:22, 202:25  
**TUESDAY** [1] - 202:29  
**turn** [8] - 9:29, 13:19, 13:21, 122:13, 129:1, 132:15, 136:10, 146:22  
**turning** [1] - 106:19  
**turns** [3] - 13:8, 95:17, 95:24  
**twenty** [1] - 133:22  
**twice** [1] - 36:21  
**two** [38] - 25:8,

28:20, 32:24, 37:19, 42:15, 44:13, 56:29, 57:22, 62:8, 64:15, 64:16, 65:25, 66:7, 66:17, 72:13, 76:11, 83:29, 85:28, 90:3, 111:12, 112:19, 125:26, 129:22, 135:28, 138:29, 144:1, 153:4, 158:6, 161:4, 171:28, 172:7, 176:12, 182:9, 183:6, 186:29, 189:26, 194:25, 202:9  
**type** [5] - 12:22, 18:27, 122:8, 148:8, 198:20  
**types** [3] - 68:21, 122:9, 176:21  
**typical** [3] - 64:10, 112:21, 164:28  
**typically** [2] - 100:8, 128:21  
**typographical** [1] - 201:9

## U

**UK** [3] - 53:26, 58:27, 60:6  
**ultimately** [3] - 40:25, 176:4, 183:22  
**unable** [3] - 31:4, 98:16, 123:23  
**unanimous** [1] - 47:13  
**unclear** [4] - 5:13, 114:25, 114:26, 143:19  
**unconstitutional** [2] - 10:26, 166:22  
**under** [75] - 7:22, 8:19, 11:3, 13:13, 13:20, 13:21, 13:24, 14:23, 14:29, 18:1, 18:8, 18:28, 19:21, 19:29, 22:23, 24:11, 24:12, 27:4, 29:8, 29:28, 33:17, 34:4, 36:13, 59:3, 59:9, 61:6, 63:4, 63:7, 63:8, 66:10, 71:18, 71:26, 74:25, 75:28, 75:29, 76:6, 76:19, 76:25, 76:27, 79:17, 82:12, 83:1, 85:4, 96:21, 97:16, 112:7, 112:14, 112:22, 120:19, 121:17, 121:26, 122:2, 122:26,

138:17, 139:3, 142:2, 142:22, 149:24, 163:24, 163:29, 165:18, 166:7, 167:3, 168:22, 173:19, 173:23, 173:24, 174:10, 174:20, 177:7, 180:18, 181:3, 194:27, 197:13, 200:5  
**undermines** [1] - 26:27  
**underneath** [1] - 136:14  
**understandable** [2] - 68:10, 144:13  
**understanding** [1] - 200:22  
**understood** [5] - 79:15, 110:17, 111:7, 126:18, 144:12  
**undifferentiated** [1] - 187:27  
**unfair** [3] - 46:2, 46:7, 160:1  
**unfortunately** [1] - 158:18  
**unidentified** [1] - 56:17  
**uniform** [1] - 9:2  
**Union** [8] - 58:16, 59:15, 82:13, 82:15, 86:23, 139:14, 156:4, 157:21  
**unique** [1] - 116:13  
**unit** [2] - 178:29, 179:19  
**United** [76] - 8:11, 8:25, 9:1, 10:25, 23:25, 24:9, 25:1, 30:8, 37:8, 39:19, 40:9, 40:28, 45:19, 46:17, 48:28, 50:29, 52:3, 59:14, 60:4, 69:19, 70:6, 70:20, 71:11, 78:20, 78:23, 82:1, 82:29, 83:1, 84:22, 84:25, 85:24, 86:25, 88:1, 93:4, 93:7, 93:8, 95:11, 95:18, 95:19, 96:3, 96:6, 96:8, 96:16, 96:22, 96:25, 96:26, 97:9, 97:15, 98:23, 103:23, 103:24, 104:10, 104:14, 104:16, 104:23, 105:27, 106:6, 107:4, 107:22, 108:7, 109:10, 115:22, 124:21, 125:4,

127:14, 127:24, 132:4, 134:5, 142:18, 154:1, 156:5, 157:15, 159:18, 183:10, 183:12, 200:7  
**UNITED** [1] - 2:21  
**universal** [1] - 107:26  
**University** [1] - 55:5  
**unlawful** [1] - 158:20  
**unless** [3] - 5:25, 65:8, 148:16  
**unreasonable** [3] - 7:10, 69:5, 92:18  
**unsolvable** [1] - 160:27  
**unsupported** [1] - 127:20  
**UNTIL** [1] - 202:29  
**unusual** [1] - 17:10  
**unvarnished** [2] - 145:4, 145:7  
**up** [26] - 11:3, 21:27, 24:19, 26:24, 41:23, 54:21, 65:20, 79:12, 86:28, 90:2, 99:14, 106:17, 106:20, 128:18, 146:5, 146:9, 165:26, 166:23, 167:21, 167:26, 169:13, 189:27, 197:12, 199:9, 199:14, 200:17  
**updated** [1] - 152:3  
**updating** [1] - 152:6  
**upheld** [1] - 200:19  
**upholding** [1] - 23:18  
**upside** [1] - 114:16  
**Upstream** [10] - 166:21, 166:27, 167:1, 167:3, 170:8, 172:11, 173:20, 173:23, 176:12, 176:15  
**upstream** [1] - 166:29  
**Urquidez** [1] - 98:24  
**US** [169] - 9:11, 11:9, 11:10, 22:23, 24:2, 24:16, 25:4, 27:7, 29:1, 30:1, 30:11, 30:20, 30:21, 34:9, 35:5, 36:9, 45:17, 47:24, 48:1, 48:19, 49:7, 51:15, 51:16, 52:29, 53:8, 53:9, 53:12, 53:19, 54:4, 58:20, 58:24, 59:13, 61:18, 63:8, 63:15,

63:29, 64:2, 64:12, 67:15, 68:9, 69:13, 74:22, 75:16, 76:8, 76:16, 77:17, 78:7, 78:18, 81:20, 85:22, 86:22, 87:6, 87:29, 89:10, 92:17, 92:23, 92:24, 92:29, 93:1, 93:3, 94:19, 94:20, 95:27, 98:1, 98:2, 98:20, 98:21, 98:26, 101:11, 101:12, 102:20, 102:22, 102:23, 102:24, 102:25, 102:26, 103:7, 104:25, 104:27, 104:28, 105:5, 126:1, 126:2, 126:3, 129:9, 129:12, 131:4, 139:3, 139:7, 139:15, 139:17, 140:21, 141:4, 141:5, 141:10, 141:15, 143:4, 143:23, 144:1, 144:7, 144:24, 144:25, 153:1, 153:6, 154:16, 155:8, 155:10, 155:14, 155:15, 155:16, 155:19, 155:23, 155:25, 155:27, 155:28, 156:22, 157:3, 157:5, 157:23, 157:26, 158:12, 158:20, 158:21, 158:23, 159:23, 159:24, 161:7, 161:10, 161:11, 161:18, 161:25, 161:28, 162:13, 169:12, 171:28, 172:20, 174:11, 176:18, 177:5, 177:23, 178:10, 181:4, 181:6, 181:26, 181:28, 182:4, 182:11, 182:12, 182:14, 183:5, 183:9, 185:6, 185:9, 185:12, 185:14, 185:16, 187:8, 187:15, 188:20, 189:12, 189:14, 189:15, 200:1, 201:17  
**USA** [4] - 31:18, 32:18, 187:8, 188:12  
**useful** [1] - 89:11  
**usefulness** [1] - 43:21  
**user** [5] - 181:25, 181:29, 185:5,

190:12, 190:14  
**users** [8] - 189:26,  
190:7, 190:22,  
190:24, 190:25,  
191:11, 191:12  
**uses** [1] - 116:17  
**USSID** [2] - 30:9,  
30:26  
**usual** [1] - 114:16  
**utter** [2] - 196:5,  
196:16

---

## V

---

**vaguer** [1] - 50:12  
**value** [1] - 123:24  
**variety** [1] - 95:9  
**various** [12] - 9:10,  
25:7, 54:14, 64:4,  
108:19, 149:18,  
153:16, 154:19,  
176:21, 177:14,  
178:25, 191:25  
**vast** [1] - 187:24  
**vector** [5] - 130:3,  
130:9, 130:11,  
130:16, 130:19  
**Venice** [5] - 32:25,  
32:27, 32:28, 33:2,  
33:6  
**verbatim** [1] - 1:24  
**Verdugo** [10] - 95:29,  
98:24, 104:21,  
104:25, 104:26,  
104:27, 105:3, 105:9,  
110:1  
**Verdugo-Urquidez**  
[1] - 98:24  
**Verizon** [2] - 14:22,  
15:6  
**version** [10] - 33:28,  
44:6, 145:24, 145:26,  
146:5, 146:9, 146:19,  
154:25, 160:16  
**versions** [2] - 28:2,  
33:6  
**versus** [5] - 12:5,  
49:10, 135:14, 192:22  
**vet** [1] - 189:2  
**vetting** [2] - 46:17,  
100:7  
**via** [1] - 175:21  
**victims** [1] - 193:25  
**video** [2] - 5:22,  
153:29  
**videolink** [3] - 6:14,  
6:17, 6:26  
**view** [80] - 8:3, 8:15,  
8:18, 9:12, 9:16,

10:18, 21:17, 25:9,  
34:18, 41:12, 50:16,  
50:20, 52:5, 52:24,  
52:26, 64:24, 67:28,  
68:5, 68:16, 68:22,  
68:25, 71:4, 78:22,  
79:3, 81:9, 87:26,  
87:28, 89:26, 95:3,  
96:22, 99:17, 103:20,  
111:9, 111:10, 114:4,  
115:5, 120:2, 120:3,  
124:25, 131:7,  
134:19, 134:20,  
134:27, 135:14,  
135:16, 135:22,  
135:27, 136:5, 136:6,  
138:29, 143:18,  
144:9, 144:27,  
144:29, 150:28,  
151:9, 155:29,  
159:10, 159:17,  
159:24, 161:17,  
162:11, 162:24,  
171:20, 172:26,  
173:22, 173:24,  
177:1, 177:7, 182:4,  
182:14, 182:25,  
184:25, 185:1,  
185:18, 195:6,  
196:20, 201:14,  
201:16  
**views** [12] - 14:15,  
20:8, 69:10, 69:11,  
78:4, 134:4, 152:29,  
153:3, 153:4, 157:20,  
158:3, 159:1  
**Views** [1] - 158:12  
**violate** [2] - 9:7, 9:27  
**violated** [8] - 9:8,  
42:23, 77:15, 113:12,  
114:9, 117:23,  
124:19, 125:1  
**violated'** [1] - 113:24  
**violating** [1] - 151:22  
**violation** [10] - 22:8,  
26:21, 26:22, 77:8,  
113:8, 117:22, 123:7,  
124:11, 124:16,  
193:28  
**violations** [3] -  
77:25, 113:12, 130:27  
**viz** [1] - 98:1  
**Vladeck** [5] - 69:15,  
70:9, 96:5, 97:3,  
99:15  
**Vladeck's** [4] - 70:9,  
95:20, 100:2, 100:17  
**voluntary** [5] - 69:19,  
70:6, 70:20, 71:11,  
108:6

**voters'** [1] - 194:21  
**votes** [1] - 81:8

---

## W

---

**wait** [2] - 22:9, 70:1  
**wake** [4] - 123:5,  
161:1, 161:29, 196:1  
**WALL** [2] - 3:4, 3:4  
**wall** [1] - 101:6  
**wants** [1] - 182:27  
**warrant** [9] - 76:9,  
76:16, 76:22, 76:23,  
76:25, 76:27, 79:29,  
80:1, 103:16  
**WAS** [3] - 35:21,  
152:25, 202:29  
**Washington** [6] -  
159:6, 173:12,  
173:26, 176:1, 176:2,  
176:6  
**watch** [1] - 129:27  
**watchdog** [1] - 151:3  
**way'** [2] - 80:11,  
80:27  
**ways** [7] - 14:8, 25:7,  
53:6, 55:25, 116:17,  
130:13, 131:27  
**we'll..** [1] - 140:28  
**web** [3] - 65:6, 65:8,  
199:3  
**website** [1] - 154:8  
**Wednesday** [2] -  
5:24, 5:25  
**week** [15] - 5:20,  
10:9, 10:13, 16:10,  
16:12, 19:13, 69:16,  
73:4, 74:21, 84:27,  
86:12, 108:18,  
108:20, 115:12  
**weeks** [3] - 40:22,  
41:7, 53:29  
**weight** [2] - 79:5,  
79:26  
**welcome** [1] -  
199:15  
**welcomed** [1] -  
201:3  
**well'** [1] - 59:3  
**well..** [2] - 39:15,  
122:16  
**whatsoever** [1] -  
103:26  
**whereby** [1] - 75:18  
**whether..** [1] - 184:4  
**White** [3] - 200:8,  
200:11, 202:13  
**whole** [10] - 13:5,  
15:3, 47:15, 64:23,

73:9, 91:28, 108:27,  
131:8, 192:27, 202:5  
**widely** [1] - 150:8  
**wilfully** [2] - 17:1,  
17:7  
**WILLIAM** [1] - 2:28  
**willing** [1] - 167:27  
**WILTON** [1] - 2:8  
**win** [1] - 114:19  
**wins** [2] - 124:26,  
191:3  
**wire** [1] - 146:25  
**wiretap** [1] - 147:12  
**wiretaps** [1] - 147:11  
**wish** [2] - 98:13,  
104:20  
**wished** [1] - 42:13  
**Witness** [5] - 71:26,  
80:25, 140:21,  
145:21, 150:7  
**witness** [10] - 20:18,  
36:15, 40:21, 45:14,  
45:23, 48:16, 48:18,  
48:25, 102:6, 115:12  
**WITNESS** [7] - 4:2,  
6:7, 7:5, 35:25, 91:12,  
105:12, 117:10  
**witnesses** [2] -  
53:24, 53:26  
**witnesses'** [1] -  
51:18  
**Wo** [1] - 109:2  
**wonderful** [2] - 28:7,  
104:20  
**wondering** [2] -  
118:8, 144:16  
**wonders** [1] - 46:4  
**word** [29] - 8:13,  
8:29, 43:28, 50:3,  
50:12, 54:13, 62:1,  
68:1, 68:2, 68:29,  
69:10, 73:11, 75:8,  
77:24, 83:13, 88:17,  
88:21, 103:22,  
128:10, 133:15,  
133:18, 134:1,  
140:11, 140:15,  
187:3, 187:29  
**words** [25] - 8:22,  
13:14, 13:15, 17:3,  
33:14, 34:27, 40:8,  
50:8, 61:23, 64:23,  
87:10, 112:4, 113:18,  
113:19, 113:26,  
114:1, 115:2, 133:10,  
134:3, 134:18,  
135:28, 137:23,  
138:5, 144:2, 194:3  
**works** [4] - 58:24,  
59:14, 89:9, 128:20

**workshop** [1] - 36:13  
**world** [13] - 23:13,  
33:5, 117:26, 117:28,  
118:5, 118:6, 123:25,  
151:1, 156:19,  
156:24, 157:15,  
182:14, 200:22  
**worldwide** [1] - 65:8  
**worried** [1] - 194:10  
**worrisome** [1] -  
149:4  
**worrisome"** [1] -  
150:5  
**worry** [2] - 22:29,  
24:20  
**orse** [1] - 161:18  
**worst** [1] - 151:10  
**worth** [2] - 130:23,  
184:28  
**would've** [5] - 51:11,  
53:3, 53:17, 54:18,  
201:3  
**WOULFE** [1] - 2:12  
**write** [11] - 49:22,  
61:8, 64:12, 100:27,  
100:28, 101:1,  
101:19, 128:18,  
128:24, 145:7, 188:28  
**writing** [17] - 43:2,  
43:24, 51:8, 51:15,  
51:16, 52:15, 58:15,  
65:1, 66:22, 69:27,  
83:28, 85:22, 98:20,  
100:13, 114:11,  
202:4, 202:17  
**written** [10] - 3:25,  
43:25, 59:8, 62:10,  
64:3, 64:6, 91:26,  
101:8, 118:13, 192:15  
**wrote** [13] - 16:1,  
33:19, 51:3, 51:7,  
53:14, 66:29, 72:13,  
73:8, 103:21, 110:14,  
157:27, 160:11,  
188:13

---

## Y

---

**Yahoo** [3] - 11:21,  
190:8, 190:15  
**Yahoo..** [1] - 178:26  
**year** [22] - 7:2, 18:5,  
36:9, 36:11, 65:13,  
76:20, 85:13, 89:8,  
119:21, 120:22,  
121:16, 163:12,  
163:24, 167:16,  
168:27, 169:11,  
169:13, 180:18,

180:20, 180:23,  
190:1, 199:6  
**years** [14] - 13:10,  
58:18, 64:10, 68:8,  
75:10, 80:19, 133:22,  
147:25, 148:11,  
148:16, 167:18,  
188:15, 190:5  
**yesterday** [27] - 9:17,  
10:27, 12:1, 27:29,  
28:10, 28:24, 31:3,  
31:26, 34:7, 34:14,  
35:7, 40:22, 46:15,  
48:16, 48:26, 49:15,  
58:13, 66:5, 70:14,  
104:13, 126:10,  
131:10, 178:22,  
179:24, 180:3,  
180:16, 181:12  
**Yick** [1] - 109:2  
**York** [1] - 95:13  
**YOUNG** [1] - 2:7  
**yourself** [2] - 28:4,  
154:2

---

## Z

---

**zone** [2] - 11:14,  
155:14

## €

**€100** [1] - 17:16