THE HIGH COURT - COURT 29

COMMERCIAL

Case No. 2016/4809P

THE DATA PROTECTION COMMISSIONER PLAINTIFF

and

FACEBOOK IRELAND LTD.
AND DEFENDANTS
MAXIMILLIAN SCHREMS

HEARING HEARD BEFORE BY MS. JUSTICE COSTELLO
ON TUESDAY, 28th FEBRUARY 2017 - DAY 12

12

Gwen Malone Stenography Services certify the following to be a verbatim transcript of their stenographic notes in the above-named action.

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APPEARANCES

For the PLAINTIFF:	MR. MICHAEL COLLINS SC MR. BRIAN MURRAY SC MS. C. DONNELLY BL
Instructed by:	MR. DAMIEN YOUNG PHILIP LEE SOLICITORS 7/8 WILTON TERRACE DUBLIN 2
For the 1ST DEFENDANT:	MR. PAUL GALLAGHER SC MS. NIAMH HYLAND SC MR. FRANCIS KIERAN BL
Instructed by:	MASON HAYES & CURRAN SOUTH BANK HOUSE BARROW STREET DUBLIN 4
FOR THE 2ND DEFENDANT:	MR. EOIN McCULLOUGH SC MR. JAMES DOHERTY SC MR. SEAN O'SULLIVAN BL
Instructed by:	AHERN RUDDEN QUIGLEY 5 CLARE STREET DUBLIN 2
FOR UNITED STATES OF AMERICA:	MS. EILEEN BARRINGTON SC MS. SUZANNE KINGSTON BL
Instructed by:	McCANN FITZGERALD RIVERSIDE ONE 37-42 SIR JOHN ROGERSON'S QUAY DUBLIN 2
FOR BSA The Software Alliance:	MR. MAURICE COLLINS SC MS. KELLEY SMITH BL
Instructed by:	WILLIAM FRY SOLICITORS 2 GRAND CANAL SQUARE DUBLIN 2

FOR DIGITAL EUROPE:	**MR. MICHAEL CUSH SC** **MS. NESSA CAHILL BL**
Instructed by:	**A&L GOODBODY** **28 NORTH WALL QUAY** **NORTH WALL** **DUBLIN 1**
FOR ELECTRONIC PRIVACY INFORMATION CENTER:	**MR. COLM O'DWYER SC** **MS. GRAINNE GILMORE BL**
Instructed by:	**FREE LEGAL ADVICE CENTRE** **13 DORSET STREET LOWER** **DUBLIN 1**

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

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

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

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

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

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

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

MS. JUSTICE COSTELLO: Yes.

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

MS. JUSTICE COSTELLO: Hmm.

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

MS. JUSTICE COSTELLO: Oh, right.

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

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

MS. JUSTICE COSTELLO: You can start tomorrow.

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

MS. JUSTICE COSTELLO: Yes.

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

MS. JUSTICE COSTELLO: Hmm. 11:04

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

MS. JUSTICE COSTELLO: Yes. 11:04

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

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

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

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

MS. JUSTICE COSTELLO: Hmm.

MS. BARRINGTON: And then myself and Mr. Collins or rather Mr. Collins and myself.

MS. JUSTICE COSTELLO: I understand, yes. There may be the possibility of Mr. Maurice Collins starting tomorrow, I think we should at least alert him to that, but in the afternoon. 11:05

MS. BARRINGTON: Yes, certainly.

MR. O'DWYER: Exactly.

MS. JUSTICE COSTELLO: Particularly if we might lose a bit of today in the sense that if Prof. Vladeck finishes before four o'clock. 11:05

MR. O'DWYER: Yes.

MS. JUSTICE COSTELLO: I'd be anxious not to lose too much time tomorrow either.

MR. O'DWYER: Yes, Judge. 11:06

MS. JUSTICE COSTELLO: Thank you.

MS. HYLAND: Judge, I wonder can I call Prof. Vladeck, please.

MS. JUSTICE COSTELLO: Thank you. 11:06

PROF. VLADECK, HAVING BEEN SWORN, WAS DIRECTLY EXAMINED BY MS. HYLAND AS FOLLOWS:

MS. HYLAND: Good morning, Prof. Vladeck.

A. Good morning. 11:06

1 Q. I wonder could you just identify for the court please your qualifications and experience, but before you do that I'll just ask that some books be handed up to you. I wonder could your affidavit please with your report

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

A. Mm hmm. Great.

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

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

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

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

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

A. That's right.

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

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

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

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

A. Yes, that's right.

6 Q. Can I just remind you, we have a stenographer who is trying to take down your testimony, so you might just speak a little bit slowly for him.

A. I have the curse of being from New York, we all talk fast. 11:09

7 Q. Yes. Well hopefully some years in Texas will remediate that?

A. I think it might just exacerbate it as a reaction.

8 Q. Yes. And I think you won a prize for best team performance in moot court on two occasions; is that right? 11:10

A. Yes. So I was in law school. The three major activities I was involved in, I was in moot court where I won the prize for best oralist and for best brief. I was the executive editor, basically the No. 2 person on the law review, and I was the student director of what we eventually called the Balancing Civil Liberties With National Security after September 11th Project, we needed a better name. But those are my three principal activities. 11:10

9 Q. Yes. Can I just ask you please to identify for the court your textbook publications please, and I think you deal with this at paragraph 2 of your report. So if you can identify those for the court please?

A. Sure. So in addition to my law review and popular publications, I'm the co-editor of the two leading case books, the National Security Law and Counterterrorism Law case books in US law school. I was brought on as of the end of the last edition in 2011 and so I've been 11:10

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

11:11

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

11:11

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

11:11

11:12

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

security law on policy.

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

A. Indeed.

19 Q. Yes. 11:16

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

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

A. Hmm.

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

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

11:16

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

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

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

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

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

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

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

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

24 Q. Yes.

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

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

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

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

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

A. So I believe I received the Serwin report, the May 24th Serwin memo I should say, on October 28th, so I was pretty far along by that point. And indeed I think the report reads as if it was incorporated late because I really had finalised the report by that point. 11:21 I think I had received Ms. Gorski's affidavit perhaps ten days prior to that.

27 Q. Yes.

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

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

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

29 Q. Yes. Can I just ask you then, there is just a few points in your report I will ask to deal with and then 11:21 I may ask you, if I may, to respond to some of the Richards and the Serwin points.

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

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

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

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

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

there in an assessment of the régime.

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

A. Mm hmm. 11:23

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

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

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

suppress evidence against him, or civil suits for injunctive or declaratory relief or damages. And so, insofar as they were ancillary to this other proceeding, they were not by themselves an Article III problem. 11:24

32 Q. Yes, thank you. Now can I just turn then to a little later in your report, paragraph 57, and at this point you summarise the collection powers that the US government enjoys. And I wonder could you just identify, I suppose, each of the, I think you identify 11:24 four different types of collection powers, I wonder could you just speak to that part of your report please?

A. Sure. I mean there are more than four, but the four principal ones, and I think this is consistent through 11:25 all of the experts' discussions, are the two provided by the Stored Communications Act, so that's the 2703(d) order and a national security letter, which we have heard discussed; classic FISA warrants, which is where I just described a sort of conventional, go to the 11:25 court, demonstrate probable cause to believe that the target of the search is a foreign power or an agent of a foreign power; and then Section 702, the 2008 revision that we now know was the source of the PRISM and Upstream programmes. Those struck me as the four 11:25 most likely collection authorities that would impact an EU citizen's data as relevant to these proceedings.

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

you identify that as at paragraph 74 of your report?

A. Mm hmm.

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

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

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

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

So I know last week reference was made to the Ninth Circuit's **Mohamud** decision, I am sure I am mispronouncing that.

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

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

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

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

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

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

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

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

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

A. Mm hmm.

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

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

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

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

broader than just an individual search warrant.

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

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

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

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

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

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

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

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

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

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

litigation against the federal government unless it's for damages, that damages are a different bucket because they implicate sovereign immunity in ways that prospective or declaratory relief, at least from Congress' perspective, do not. 11:35

And so the APA to me is the starting point in any discussion of a remedial framework to sue the federal government. It is, as we have seen from the testimony, it is sometimes overcome by statutes that will either 11:36 expressly or implicitly preclude it. It is sometimes ineffective, but I was struck in reading the DPC Draft Decision that it was not even mentioned because my first reaction to this entire question of suing the government is the APA. 11:36

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

A. So it would have been but for the APA, right. That is to say the federal government could have and sometimes 11:36 did claim sovereign immunity from declaratory or injunctive actions prior to the APA. The APA in 5 USC section 706 effects a complete waiver of the federal government's sovereign immunity in non-damages actions.

41 Q. Yes. 11:37

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

42 Q. And in respect of what types of decisions can one bring an action under the APA?

A. So the statute requires what's called final agency action, the theory being that we don't want agency deliberations to be subject to review, that we want the agency to actually have taken some concrete step before it can be sued. 11:37

But final agency action, I think it's worth stressing, has been interpreted rather capaciously as a functional requirement, not a formal one, right. That is to say we don't look to see if the agency has formally promulgated a rule or a decision making, we look to see if they have acted in a way that has completed the assertion of authority, the action that might give rise to the underlying claim. 11:37 11:37

43 Q. Now you heard Mr. Serwin express reservations about its use partially on the basis that it required agency action?

A. Mm hmm. 11:38

44 Q. And can I ask you to address that with particular reference to an action taken under Section 702 of FISA?

A. Yes, it's a not helpful coincidence that they are both Section 702.

45 Q. Yes. There is a Section 702 in the APA; is that right? 11:38

A. So, if it helps the court, I would like to just refer to the APA to mean Section 702 of the APA.

MS. JUSTICE COSTELLO: Okay.

A. So in the context of surveillance under 702 of FISA,

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

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

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

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

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

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

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

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

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

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

A. Mm hmm.

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

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

50 Q. Mm hmm.

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

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

available to Klayman himself were sufficient to preclude his challenge.

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

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

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

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

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

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

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

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

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

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

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

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

brief is that they be answered in the first place.

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

11:47

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

11:47

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

A. So 1810 is meant to be a damages remedy. It was part of FISA as initially enacted in 1978. It was actually, 11:47 at least in the context of *that* discussion, an important piece of the puzzle, that there would be civil remedies. It is rather specific, though. It only authorises damages, and it directs that damages will be brought for violations, for wilful or 11:47 intentional violations of FISA as defined in section 1809. Judge, you may recall 1809 is the criminal penalty in FISA. That's very narrow. That's not going to encompass of course negligent violations of FISA. It's going to be difficult to prove, but it's not 11:48 nothing.

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

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

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

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

A. Yes.

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

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

11:49

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

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

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

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

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

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

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

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

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

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

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

FISA a rather, I think, useful series of compromises between the legislature and the Executive Branch over what to do about what was then the very novel idea of stored electronic communications, obviously now not so novel. 11:52

And the idea behind ECPA was to create a framework of rules that would apply, not equally to the private sector and the government, but that would at least cross the bridge between them. So that there would be 11:53 rules that would bind private companies in what they could do with electronic communications and there would be rules that would bind the government. And so we see in ECPA two different causes of action to deal with that distinction, right. We see section 2712, which 11:53 I know has been dealt with in some detail.

59 Q. Yes.

A. Which is focussed on the government, and section 2707 which is focussed on just about every other possible defendant, the idea being that both could in theory 11:53 violate the Stored Communications Act but the rules for how you can sue them are going to differ.

60 Q. Yes. And can I just ask you please to look at the DPC's decision which is - I am sorry, I'm not sure if that was in the book that I asked you to look at, it is 11:53 in Book 1 and it's at Tab 18. I'm just going to ask you to look at how 2707 is dealt with. And if you have that book in front of you I'm going to ask you to look at Tab 18 which is the DPC decision and then paragraph

49 subsection 2?

A. Mm hmm.

61 Q. And you'll see there at paragraph 2, there's a reference to ECPA, there's a reference to 2712 and in the last three lines there's a statement: 11:54

"*There is also uncertainty as to the extent to which damages actions are available against governmental entities that breach either the Wiretap Act or the SCA.*" 11:54

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

A. Sure. I mean so this line, like many of the lines in the DPC draft, I was a bit surprised to see. As I mentioned before I didn't see Mr. Serwin's May 24th memo until shortly before I filed my report at which point I saw similar lines and understood where these discussions came from. 11:54

I don't think there is uncertainty as to the extent to which damages actions are available against governmental entities. Because 2707, which I don't believe is mentioned in paragraph 49, I think fills out 11:55 the gap. And indeed there's case law suggesting that a person under section 2707 can include a local government entity, perhaps even a federal government entity. So, you know, it strikes me that there's not

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

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

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

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

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

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

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

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

65 Q. Yes, probably the only ones.

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

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

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

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

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

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

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

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

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

A. Well, sure.

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

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

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

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

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

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

A. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12:06 12:06 12:07

give me one moment.

76 Q. Yes.

A. It's right about page, it's star 634, I believe it's page seven of the printout. The heading is "B. Analysis of the Plaintiff's Standing". 12:07

MS. JUSTICE COSTELLO: Yes, thank you.

A. So I think we see here a very, I think, thoughtful discussion - it's several pages long, so if you'll forgive me, Judge, I'm not just going to read it - but it's a sort of thoroughgoing discussion of what **Spokeo** 12:07 does and doesn't require in the context of concreteness. And what it suggests is something I had already thought to be true, which is that in this context of concreteness, the question is not whether the harm is tangible or intangible, right, the question 12:08 is whether there's some reason to believe that the violation of the statute has created some direct even potentially intangible harm to the plaintiffs - in this case a far greater risk of data theft and of breach of privacy. Contra that with **Spokeo**, where what happened 12:08 was simply an incorrect piece of information that actually redounded to the plaintiff's benefit. And even there the court didn't throw the case out, it sent it back to the Court of Appeals to determine whether the Plaintiff could still show some tangible or 12:08 intangible harm.

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

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

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

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

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

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

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

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

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

79 Q. Yes.

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

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

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

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

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

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

A. I am. 12:14

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

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

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

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

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

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

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

A. Yeah.

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

A. Mm hmm.

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

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

before the Snowden disclosures. Obviously part of the point of that litigation was to learn more. But Justice Alito, I think, had no trouble condemning as speculative allegations in that context that I think would be not easily as condemned today. 12:18

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

12:19

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

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

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

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

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

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

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

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

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

88 Q. Yes. Now, you mentioned **Wikimedia**. I think you're involved in that as a -- in what capacity are you involved in that?

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

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

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

said any citizen could bring suit, regardless of what happened to them. The statute has some role in defining the injury and necessarily in defining the injury and identifying the class of plaintiffs who are allowed to sue to enforce it. 12:23

The problem that both **Lujan** and **Spokeo** make clear is that Congress can define the injury, Congress cannot allow litigation of a nonexistent injury simply by calling it an injury, right? And so the question when 12:24
you have a statutory claim is simply whether the injury the statute recognises satisfies the usual Article III requirements. So in the context of the Fair Credit Reporting Act, we see the contrast between the **Spokeo** case where the court says 'Doesn't look like it, but 12:24
we'll send it back' and the **Horizon** case that we were discussing where the court says 'Yes, this is concrete'. The facts are going to matter in the context of the specific statute.

90 Q. Can I bring you back to the statutes that we're 12:24
interested in in this context, which is obviously national surveillance? I suppose how do you perceive the position in respect of concreteness, having regard to the statutes we're concerned with in this context?

A. Right. So I mean, again I think if the claim is that 12:24
an EU citizen believes that their data has wrongly been collected by the US Government from a firm like Facebook, that's concrete. The question is not proving that that harm was concrete, the question is proving

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

91 Q. Very good. 12:25

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

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

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

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

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

A. None with which I'm familiar.

94 Q. Okay.

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

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

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

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

That's an interesting contrast to violations of federal law by state officers. So if someone in my state of Texas breaks federal law, there actually *is* an overarching federal statute that allows for suits against the state officers, it's called Section 1983, and it dates back to right after the civil war. There's no federal analogue. And part of that is, I think, tied to the sovereign immunity tradition that Congress wants to think carefully, right, one case at a time about when it's going to subject the federal government to liability. 12:28

That's why the APA is so important. Because that was Congress' concession, frankly, that they were too - I don't know what the adjective is - that it was just, that they didn't need to do that case by case approach any more for non-damages claims, right? And so the APA is sort of now a gap filler, where previously it was not fragmented, but I think in Prof. Richards' words, sectoral. 12:29

MS. HYLAND: Very good. Prof. Vladeck, thank you for that. I wonder could you answer any questions? 12:29

A. Thank you.

PROF. VLADECK WAS CROSS-EXAMINED BY MR. MURRAY AS FOLLOWS: 12:29

MR. MURRAY: Good afternoon, Professor.

A. Hello.

96 Q. Professor, you told Ms. Hyland at the beginning of your evidence that when you were invited to give evidence on behalf of Facebook you thought that you could be useful by writing a report that "clarified what I saw were the real problems in the remedial regime". 12:29

A. Mm hmm.

97 Q. So could you perhaps, first of all, tell us what you see as the real problems in the remedial regime? 12:29

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

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

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

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

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

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

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

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

A. Indeed.

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

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

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

100 Q. Those are the real problems, Professor?

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

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

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

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

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

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

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

A. I very much doubt it. 12:34

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

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

105 Q. Okay. 12:34

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

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

A. Mm hmm.

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

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

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

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

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

109 Q. Mm hmm.

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

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

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

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

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

111 Q. So **Ashcroft -v- Iqbal** is not a real problem?

A. In the specific context of challenges to PRISM and Upstream, I don't believe it is. 12:37

112 Q. Sovereign immunity, official immunity, are they real problems?

A. Well, I mean, we've discussed this. I think that sovereign immunity is a nuisance that can be litigated around because of the points that Ms. Hyland and I 12:37 averted to on direct, that is to say sovereign immunity is, Judge, shaping much of this jurisprudence, it is producing effects in which causes of action are pursued and why. But I mean, I think as the **ACLU -v- Clapper** case quite powerfully shows, when you plead the right 12:37 claim in the right way, it is not an obstacle.

113 Q. So sovereign immunity and official immunity, something else which we see in your literature, those are not real problems either, is that right?

A. We haven't seen, Mr. Murray, so far as I *know*, we have 12:38 not seen a post-9/11 surveillance case with meaningful litigation of official immunity. So I think it would be difficult to say something that hasn't been fully litigated in this context is a problem.

114 Q. Take this statement: "*One of the most troubling* 12:38 *features of contemporary US counterterrorism policies has been the near total absence of meaningful judicial review*".

A. Sounds familiar.

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

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

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

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

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

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

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

A. No.

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

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

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

A. I did. 12:43

128 Q. Yes. How did you find out?

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

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

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

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

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

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

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

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

132 Q. Well...

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

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

A. Sure.

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

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

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

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

136 Q. Mm hmm.

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

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

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

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

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

A. I would. And I have.

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

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

140 Q. What you said was: 12:47

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

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

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

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

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

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

A. Mm hmm.

143 Q. 12333.

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

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

A. I do.

145 Q. Collection.

A. Mm hmm.

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

"*Victims of governmental overreaching in the conduct of national security policy will primarily have to turn to the political branches for redress, since retrospective judicial remedies will likely be unavailing*". 12:49
A. Um mum. 12:50
148 Q. That's your view?
A. It *is* my view. And, Judge, part of the reason for that - if I can be allowed just a brief moment? We have something in American law called the **Bivens** doctrine - B-I-V-E-N-S - this is a 1971 Supreme Court case that allows for suits directly under the Constitution for damages when a federal officer is alleged to have violated the Constitution. Judge, the Supreme Court has been very hostile to the recognition of new **Bivens** claims in the last, frankly, 30 years. The **Hernandez** case in which I'm co-counsel and which I alluded to before, one the questions raised there, Judge, is actually whether there should be a **Bivens** claim in that context. So when I talk about the difficulty of 12:50 12:50

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

149 Q. But does it not, Professor, go a little bit further? Because I had understood you to write that **Bivens** had built into it an exception which arose when there was something in the nature of special circumstances or exceptional circumstances and that -- 12:50 12:51

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

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

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

The reason why I think it's not as large a problem in the context of surveillance, Judge, is twofold. First, unlike, in all of these other national security contexts, there *are* statutes in the surveillance

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

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

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

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

A. Mm hmm.

153 Q. I want to read this:

"*Finally, Congress, through the House and Senate Intelligence and Judiciary Committees, exercises significant oversight responsibilities with respect to US foreign intelligence activities. For collection under section 702, specifically, Congress exercises oversight through statutorily required reports to the Intelligence and Judiciary Committees, and periodic briefings and hearings. These include a semiannual report by the Attorney General documenting the use of section 702 and any compliance incidents; a separate semiannual assessment by the Attorney General and the DNI documenting compliance with the targeting and minimization procedures, including compliance with the procedures designed to ensure that collection is for a valid foreign intelligence purpose; and an annual report by heads of intelligence elements which includes a certification that collection under section 702 continues to produce foreign intelligence information. Taken together, this array of oversight authorities led one commentator to describe FISA surveillance as 'the most oversight-laden foreign intelligence activity in the history of the planet'.*"

You see that?

A. I do.

154 Q. And you agree with her.

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

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

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

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

A. Idea.

156 Q. Yeah. 12:55

A. So again --

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

A. There's my Friend Mike Rogers.

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

A. I do.

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

and you proceed with some flourish, Professor, to describe -- well, to present it in, would you accept, pejorative terms: "*The behind closed doors*" --

A. Yeah.

160 Q. -- "*demands of the Congressional intelligence committees. And as those who support the government's surveillance activities are keen to point out, the intelligence agencies check each and every one of those boxes in order to, amongst other things, collect all of our telephony meta-data, spy on foreign governments, tack into the backbone of electronic communications service providers like Google/Facebook. Not only are these checks and balances portrayed as rigorous, but the current proposals for additional checks and balances involving outside, or at least disinterested actors are dismissed a simply unnecessary.*" 12:56 12:56 12:56

And you proceed to recount your experience with Mr. Rogers, who couldn't understand how somebody's privacy was violated if they didn't know about it, isn't that right? 12:56

A. Indeed.

161 Q. Yeah. Now --

A. And -- I'm sorry.

162 Q. No, no, please... You see, Professor, as we read paragraph 73 of your report where you quote Ms. Cordero with apparent approval, we see none of these qualifications which you are liberal with in your publication. Why is that? 12:56

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

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

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

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

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

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

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

165 Q. Well, Professor, someone at some stage told you what your obligations to the court were as an expert witness, didn't they? 12:58 12:58 12:59

A. Indeed.

166 Q. Yeah. Who told you that?

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

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

A. I do.

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

facts upon which you rely?

A. I do.

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

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

170 Q. Very good.

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

MR. MURRAY: Thank you, Judge.

A. Thank you.

(LUNCHEON ADJOURNMENT) 13:00

THE HEARING RESUMED AFTER THE LUNCHEON ADJOURNMENT AS FOLLOWS

MS. JUSTICE COSTELLO: Good afternoon.

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

MS. HYLAND: Yes, Prof. Vladeck, please.

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

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

A. Yeah, I'm there.

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

A. I do. 14:04

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

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

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

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

174 Q. No.

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

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

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

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

A. Indeed.

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

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

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

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

why I think these oversight mechanisms are inadequate." That does not come through in the rest of your report *at all*?

A. I would dispute the characterisation *"at all"*, Judge. I think that there are seven or eight different places in the report where I refer to my own reservations about the existing scheme. I think Mr. Murray is correct that I do not in the report expressly flag my concerns about the intelligence committees. 14:07

179 Q. And where do you impliedly flag your concerns about the intelligence committees? 14:07

A. Well I think I refer in numerous places, Mr. Murray, to being critical of the overall holistic régime.

180 Q. Yes. You see the problem, Prof. Vladeck. You're here as an independent expert witness, we're all, the court in particular, are relying upon you and relying upon you to make *full* disclosure of your position and of the evidence that you are relying on; isn't that right, you know that? 14:08

A. Yes. 14:08

181 Q. You understand that?

A. I do.

182 Q. And you include a gushing account in your report of the oversight achieved through, inter alia, the intelligence committees; you have a quotation without *apparent* approval about the most oversight laden foreign intelligence activity in the history of the *planet*, no less; this is what we're told when we see your report, you the independent expert, but it turns 14:08

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

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

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

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

184 Q. But excuse me, Professor, that is not the way these are introduced, look at paragraph 78 of your report please: "*The collection authorities described above are subject to a series of <u>significant</u> constraints*"?

A. Mm hmm.

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

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

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

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

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

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

187 Q. Yes.

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

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

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

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

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

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

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

A. I do.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. That sounds right to me.

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

A. That sounds correct. 14:16

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

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

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

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

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

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

A. Indeed.

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

A. Certainly.

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

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

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

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

A. Quite.

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

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

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

judicial remedial system?

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

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

A. Mm hmm. 14:21

209 Q. And there you express the view, you are talking about the **Bivens** claim, I think you are referring to the national security exception that we discussed this morning, and you say in the second sentence:

14:22

"*Because EU citizens lacking substantial voluntary connections to the United Stases are not protected by the Fourth Amendment - see* ***Verdugo-Urquidez*** *- they, unlike US citizens, are non-citizens lawfully present in the US could not pursue such claims."* 14:22

Do you see that?

A. I do.

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

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

A. Mm hmm.

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

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

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

A. Mm hmm.

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

Do you see that?

A. I do. 14:23

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

"Although the Supreme Court has never addressed whether the Fourth Amendment might apply to searchs of those individuals' data if the data is located within the United States, the prevailing assumption is the answer is 'no'." 14:24

A. Mm hmm.

215 Q. And that remains your position?

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

MS. JUSTICE COSTELLO: I am sorry, which report? 14:24

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

MS. JUSTICE COSTELLO: Oh, Yes.

A. Pardon me for shorthand. I believe that it clarified that there was some daylight between me and Prof. Swire 14:24 on this matter. I do believe, Mr. Murray, that the answer is likely to be 'no', but I also agree with the statement in the expert document that the Supreme Court has not decided the question.

216 Q. **MR. MURRAY:** Which it clearly has not done? 14:24

A. Quite.

217 Q. And you refer in your articles or in your paper in one of the footnotes to an argument that is floated in some of the academic journals to the contrary based on Justice Kennedy's separate opinion in **Verdugo-Urquidez**? 14:24

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

Fourth Amendment.

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

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

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

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

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

phone calls based on which tower you are pinging. Those raise messy questions about expectations of privacy, very much of a piece with these that I think will eventually get to the Supreme Court, whether in the **Hernandez** case or otherwise. 14:26

220 Q. Yes, because, and it is interesting you raise that, because in fact there is an argument being strongly presented and accepted in some of the lower courts that you have no expectation of privacy in information of that kind, that even though the government, without 14:26 warrant, can access from telecommunications companies information that will tell law enforcement where you have been at particular points in time, that you have no constitutional or statutory vested right in that because of the fact that you have shared it with the 14:26 telephone company in the first instance?

A. And this, Judge, is the fight over what we call the third party doctrine. I believe Mr. Murray referred to the **Jones** case last week. This was the case where there was a GPS tracker installed on the suspect's car 14:27 and there was the separate plurality opinion by Justice Alito that suggested that it is not the trespass, it's the totality of the circumstances. There is clearly going to have to be a reckoning by the Supreme Court with the substantive Fourth Amendment questions that 14:27 these kinds of cases raise. I don't have a good feel yet for which way that's going to come out.

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

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

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

222 Q. Yes.

A. What do you mean by bare constitutional violation?

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

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

224 Q. Yes.

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

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

cause of action on a non-US citizen?

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

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

A. Well any plaintiff does. 14:29

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

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

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

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

229 Q. Yes. 14:29

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

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

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

A. Mm hmm.

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

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

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

A. Mm hmm.

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

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

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

Do you agree with that? 14:31

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

233 Q. Okay. 14:32

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

234 Q. You agree with that?

A. Yes.

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

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

A. No.

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

A. Thank you. 14:32

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

A. Mm hmm.

238 Q. I think you observe there:

14:33

"*As of May 2012 not a single damages judgment is awarded in any of the dozens of lawsuits arising out of post September '11 US counterterrorism policies.*"

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

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

239 Q. And I think if you turn to page 1313?
A. Mm hmm.
240 Q. You explain there the fact that a number of different circuit courts have recognise a new obstacle to **Bivens** claims in national security cases, that is the special exemption, and that effectively operates to cut out any freestanding claim for constitutional damages in a national security context? 14:34
A. Or at least it has so far. I am optimistic, Mr. Murray, that at some point the Supreme Court will right the ship on this front. But I mean, Judge, the notion of a freestanding constitutional damages remedy has been quite elusive so far in the national security space, indeed I should say in general. I mean the Supreme Court has been hostile to **Bivens** claims, as I think I mentioned this morning, in ways that are frankly unfortunate. 14:34
241 Q. And then if you go to page 1329, just to confirm this, I quoted this to you earlier, in the last sentence on that page: "*In the short-term this jurisprudential pattern.*" 14:35

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

A. Mm hmm.

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

A. Indeed.

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

A. I do.

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

A. Mm hmm.

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

A. Mm hmm. 14:35

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

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

247 Q. No, that's from 2014?

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

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

A. Mm hmm. 14:36

249 Q. *"At the time"*, midway through that paragraph:

"*The upshot of Justice Alito's analysis seemed obvious. Given that the actual implementation of such*

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

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

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

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

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

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

And if you then go to page 567, please.

A. Can I just interject there?

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

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

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

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

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

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

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

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

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

255 Q. Yes.

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

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

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

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

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

A. Yes.

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

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

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

MS. JUSTICE COSTELLO: 6-7?

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

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

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

great volitional transparency on the part of the government."

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

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

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

A. Quite.

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

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

A. Just very briefly, Judge.

MR. MURRAY: Oh, I am sorry.

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

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

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

A. Mm hmm. 14:43

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

A. Mm hmm.

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

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

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

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

A. They certainly do.

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

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

Which of course is, since your article was written,

Mohamud:

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

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

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

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

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

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

267 Q. No, that's not suggested.

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

MR. MURRAY: Adequate is the word --

A. Indeed.

268 Q. -- that you use?

A. Quite.

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

A. We are the same person.

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

A. Indeed.

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

A. I do.

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

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

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

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

A. Mm hmm.

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

A. Mm hmm.

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

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

276 Q. Excuse me?

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

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

right.

A. I don't mean to be pedantic.

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

"*Congress could authorise suit by any person who can demonstrate a reasonable basis to believe that their communications would be acquired under FISA and that they have taken objectively reasonable steps to avoid such surveillance. Congress <u>could</u> do the same for other challenges to secret government programmes.*" 14:49

So that can be done without doing violence to Article III of the constitution in *your* view, and, although you corrected me, I had understood from the tenor of your writing and your evidence that you believe it should be done? 14:49 14:50

A. Yes, although if we listed, Mr. Murray, all the things I wished the United States Congress would and should do we would be here very long.

279 Q. Okay. Well, we don't have to be here for very long because that's the one we are concerned with and you agree? 14:50

A. And let me say, so the point, Judge, is my concern is the next, as I said previously, my concern is the next programme. We now know I think the basics about PRISM and Upstream, we now know about the telephone metadata programme which the Second Circuit invalidated and Congress then largely scrapped. And so my concern is ensuring that there are meaningful remedies the next 14:50

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

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

A. Mm hmm. Although that's usually in the next context in which I - I do refer to the **Al-Haramain** decision and sovereign immunity in the context of FISA. The official immunity context, Judge, is much more of an issue in the context of **Bivens** claims, which Mr. Murray and I have already been discussing, where there actually is a viable claim and where the courts have been unwilling to impose liability if the officer did not violate what's called a clearly established right and not just somehow transgressed the law. And that's been an obstacle in some of these other cases, especially the prisoner treatment cases. 14:50 14:51 14:51 14:51

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

A. Mm hmm.

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

A. Quite.

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

A. Mm hmm.

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

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

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

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

A. Mm hmm.

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

> "*Should an optimal remedial regime favour prospective or retrospective relief, injunction or damages. To be sure there are compelling reasons why in appropriate circumstances both forms of relief might be necessary. Damages lack the coercive power of injunctions and will do little to stop ongoing unlawful government conduct and injunctive relief, as Part 2 demonstrated, can often be side-stepped through government actions to moot the dispute, whether by deceasing the complained of context, releasing the petitioning detainee, removing for the plaintiff those or otherwise."* 14:53

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

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

MS. JUSTICE COSTELLO: Hmm.

A. So the USA FREEDOM Act, Section 215 was due to expire I believe on June 1, 2015 and so Congress, when it passed the USA FREEDOM Act, created this temporary transitional period during which it actually authorised the very programme it was scrapping, right, to allow the government this move. And there is litigation in 14:54

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

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

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

A. That's right.

288 Q. Not Section 702?

A. That's right. 14:55

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

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

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

A. Mm hmm.

291 Q. Can you get damages under the APA?

A. No.

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

A. Quite. 14:55

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

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

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

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

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

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

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

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

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

297 Q. You talk about injunctions?

A. What's that?

298 Q. You talk about injunctions?

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

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

A. Mm hmm.

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

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

Do you see that?

A. Mm hmm, I do.

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

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

A. Mm hmm. 14:58

302 Q. Is that right?

A. Yeah.

303 Q. It is too broad?

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

ought not to have been.

304 Q. Well why does it need to be repealed?

A. Well so I think the State Secrets Protection Act, which was the proposal that I have endorsed, I think it was a bill drafted by then Senator Kennedy, would have abrogated the privilege in particular context and would have left it intact in others but would have created more robust procedural checks to ensure that it was invoked in a case that actually justified its invocation. 14:59

305 Q. And does your report which addresses - your report to the court - which addresses state secrets, does it record your advocacy of its repeal?

A. I don't believe I did it as such. If you just give me one moment please. 14:59

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

A. Mm hmm. No, but I do in paragraph 102 and in footnote 32, Judge, refer to the argument we discussed this morning about how FISA itself might be ripe to abrogate the state secrets privilege, which in this context I think would mean we would not need a new statute from Congress in the specific context of FISA. Now FISA is unique in that regard. I am hard pressed to think of other examples of statutory causes of action that one could argue meaningfully were enacted against in understanding that state secrets wouldn't be available. 14:59 15:00

307 Q. I am sorry, in your article you advocate the abrogation of state secrets because you have some problem with it, right?

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

308 Q. Changing it?

A. Yes. 15:00

309 Q. Yes.

A. Quite.

310 Q. Because you believe it's overbroad?

A. I do.

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

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

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

15:01

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

there would be at least *some* adversarial litigation in the context of national security secrets.

312 Q. There is a stenographer change.

So having advocated here the abrogation of state secrets privilege, you were going to show us where you say in your report to the court that you believe it should be abrogated. 15:01

A. No, that's not what I -- I don't believe that's what I said. I referred the court to paragraph 102 and footnote 32. 15:02

313 Q. Yeah?

A. I'm sorry, I meant footnote 31, forgive me, where I talk about, Judge, the argument that in the unique context of FISA, we don't need -- that's simply not an issue, because FISA itself overrides the state secrets privilege. And so once again the broader concerns I have are, at least to some degree, mitigated by the exemplar of a specific statute in the context. 15:02

314 Q. But only insofar as FISA is concerned. 15:02

A. That's right.

315 Q. Yeah.

A. That's right.

316 Q. But other -- we're not solely concerned in this case with FISA, are we? 15:02

A. No. Although I do think that FISA is obviously the very important heart of the matter.

317 Q. Yeah. You see, you take Ms. Gorski to task over her view that state secrets privilege is an obstacle

preventing US federal courts from entertaining challenges to secret surveillance programmes. You don't disclose the fact that you argued yourself that it should be abolished. Maybe you have and I've missed it in your report? 15:03

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

318 Q. No. Why not?

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

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

The question in this context for me, Judge, was whether I thought that was going to be an obstacle in the 15:03 context of a claim by an EU citizen that his or her data was being wrongfully collected in violation of FISA. It's my own view - frankly, it is my *hope* - that in that context the state secrets privilege would be held not to apply because FISA would not make sense in 15:03 its provision of all these remedies if a state secrets defence remained available.

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

collection and PRISM?

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

320 Q. No. Because --

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

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

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

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

A. Mm hmm.

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

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

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

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

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

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

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

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

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

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

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

A. Quite. No dispute. 15:08

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

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

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

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

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

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

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

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

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

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

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

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

A. That's right.

332 Q. **MR. MURRAY:** But hold on. What happened in the case was that the plaintiffs, who were activists, believed that they were precluded by state -- by federal law from publishing certain advertisements because there was legislation which limited the ability of citizens to express certain views during an election campaign. 15:11

A. I think the constraint was from state law. But I don't think that's material.

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

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

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

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

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

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

A. Yes, that is the statutory definition.

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

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

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

15:14 15:14 15:14

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

15:15 15:15

337 Q. Well, just to work backwards from that.

A. Please.

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

A. That's right. Although --

339 Q. On the **Clapper** test?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. So there's no merit --

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

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

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

texting. So how would that play into your scenario?

A. Judge, I think if anything, right, that would be part of the factual allegations in the complaint that might very well give rise to, at least if -- remember, at the motion to dismiss stage, we assume all the facts as 15:21
alleged and all the plausible well pled effects as alleged in the complaint are true. And so if the allegation in my complaint is in my completely innocuous conversation with my Friends in Paris and Brussels and Munich and Frankfurt the US Government has 15:21
nevertheless been collecting at least some of my communications under Section 702 and if I could point to reasons why that was plausible, which, frankly, the PCLOB report would be a good starting point, right, that would survive motion to dismiss. 15:21

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

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

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

A. Your anxiety by itself would not be sufficient.

348 Q. Okay. Why is that?

A. Because of **Clapper**. 15:23

349 Q. Yeah. Just **Clapper**?

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

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

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

A. By itself, no. 15:24

351 Q. No. Okay.

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

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

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

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

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

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

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

355 Q. Okay. Well --

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

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

A. No, it's fine.

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

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

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

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

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

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

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

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

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

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

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

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

A. Mm hmm.

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

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

A. I was not.

362 Q. Did you read it?

A. I reviewed the transcript.

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

A. I think "plausible" is to some degree, Judge, in the eye of the beholder. But I don think, I mean "plausible", I think, in this case is dramatically enhanced by the volume of public information we now have about how PRISM and Upstream operate. 15:28

364 Q. Okay.

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

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

A. Mm hmm.

366 Q. Why do you refer to that?

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

MS. JUSTICE COSTELLO: Thank you.

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

you, in a footnote - just to sort of reinforce the point that I believe I made earlier that part of what I was trying do in my report was show the avenues that were found to be open even after **Clapper**.

367 Q. **MR. MURRAY:** The **Neiman Marcus** case was one where there had been a significant data breach at a department store -- 15:29

A. That sounds familiar.

368 Q. -- which resulted in customers' credit card details being hacked, isn't that right? 15:29

A. That sounds familiar.

369 Q. Well --

A. Yes. I'm sorry, I didn't mean to be coy. Yes.

370 Q. Well, sorry, do you remember the facts of the case or not? 15:29

A. I do. I do, yes. There was a breach, the details were hacked and the plaintiffs sued, claiming that Neiman Marcus was liable because they did not take adequate procedures to protect their data. Forgive me for being coy. 15:30

371 Q. But you just omitted perhaps one detail, which is that the plaintiffs had had transactions, fraudulent transactions on their credit card accounts following the hacking. Not an insignificant detail perhaps?

A. I didn't mean to omit it. I apologise. 15:30

372 Q. Yeah, okay. So it would've been surprising if your credit card bill increased as a result of a data breach if you didn't have standing to complain about it, wouldn't it?

A. Yes. I mean, Judge, I wasn't -- again, I don't mean to overstate why this case is here. The case is there not because I thought that the holding was somehow an important development of the standing doctrine, but just because I at least found the discussion in the quoted passage in footnote 26 helpful to me in understanding what was left, frankly, of the substantial risk standard. And so I wasn't, Mr. Murray, I wasn't trying to make any broader claim about the import of that case other than just that I found that particular passage illuminating. 15:30 15:30

373 Q. It doesn't introduce any change in the law, isn't that right?

A. Oh, no. To the contrary, I think it was just simply summarising what was true after **Clapper**. 15:31

374 Q. Now, you referred to another case, the **Horizon** case. And I mean, Professor, various views have been expressed about the effect or non-effect of the decision in **Spokeo**.

A. Mm hmm. 15:31

375 Q. And I want to see can we perhaps just narrow our range of disagreement about that.

A. Sure.

376 Q. So **Spokeo** was decided in May of last year and some people seem to think it is of relevance to cases involving breach of what we would describe in Europe as data protection or data privacy rights, isn't that right? 15:31

A. Yes. And just to be clear, Mr. Murray, I agree that

especially in the context of statutes like the Fair Credit Reporting Act and private defendants, like the defendants in **Spokeo** and in the **Horizon** case, I wouldn't dispute for a moment that **Spokeo** is *relevant*. The reaction I had to **Spokeo**, Judge, was to the suggestion by Mr. Serwin in his supplemental memorandum and Prof. Richards in his report that **Spokeo** had somehow narrowed, I believe, or tightened -- 15:32

377 Q. All right.

A. -- the doctrine. 15:32

378 Q. So let's then, as I said try, to see what we can agree. It's relevant?

A. Quite.

379 Q. It's relevant to standing?

A. It's relevant to the concrete or particular -- sorry concrete *and* particularised injury prong of the injury-in-fact requirement, which is, as I mentioned this morning, Judge, I think especially relevant in the context of statutory claims against private defendants. 15:32

380 Q. Yeah. Well, let's, as I said, let's see what we can agree on first, Professor. It's especially -- it's a case that's relevant to standing, it's a case that's relevant to standing in the context of what we call data breach or data privacy... 15:32

A. Mm hmm. 15:32

381 Q. ... rights. Yes?

A. Yes.

382 Q. Okay. And it is a case which is of relevance to such data privacy rights arising from particular statutes

providing particular protections?

A. I agree.

383 Q. Okay. And whether it's as a consequence of **Spokeo** or as a consequence of the pre-existing law articulated in **Spokeo**, it certainly casts a shadow over the issue or raises a doubt as to whether you can get damages just for unlawful retention of your information. Now, I know you say private persons versus the state and we'll have a conversation about that in a moment, but would you agree with the manner in which I've just formulated that proposition; it creates a doubt or an issue about whether you have standing to challenge the simple retention, unlawful retention of your information? 15:33 15:33

A. The only word in that statement I disagree with, Mr. Murray, is "creates". I would have argued, Judge, that that issue existed -- 15:33

384 Q. No, I thought I had made it clear --

A. I'm sorry.

385 Q. -- that I'm going to park that dispute. It either created it or it confirmed a pre-existing issue? 15:34

A. Yes, fair enough. Then I wholeheartedly agree.

386 Q. All right. So there's this issue there about whether data retention generates or presents a concrete injury. Right?

A. Mm hmm. 15:34

387 Q. Okay. And the reason that's an issue is because either the pre-existing law or **Spokeo** emphasises the need for concreteness and there is this perhaps slightly confusing statement in the judgment that something can

be intangible but concrete, but it's equally clear from the judgment that the mere fact that there is a breach of a statute does not in and of itself create Article III standing in the sense of creating a concrete injury for the purpose of injury-in-fact? 15:34

A. Not in all cases, I agree.

388 Q. Yeah, not in all cases. All right. So would you also agree that there is a *view* - and I understand you disagree with the *view* - but that there is a view that **Spokeo** *did* introduce a change? 15:35

A. I was not aware of that view before I read Mr. Serwin's November memo and Prof. Richards' report. But I can't dispute that that view clearly exists.

389 Q. Okay. You mentioned a case, the **Horizon** case.

A. Mm hmm. 15:35

390 Q. Do you still have your copy of it?

A. I do.

391 Q. And I've lost my own copy, so forgive me while I try to find where I was, but I think it's maybe footnote 17. In fact, if you go, Professor, to the bottom of page nine. 15:35

A. Yeah.

392 Q. "*Although it is possible to read the Supreme Court decision in Spokeo as creating a requirement that a plaintiff show a statutory violation has caused a material risk of harm before he can bring suit, we do not believe the court so intended to change the traditional standard for the establishment of standing.*" 15:36

And then there's a discussion about the **Nickelodeon** case, which we had the pleasure of debating at some point in the distant past in this case. And footnote 17 then says: "*Some other courts have interpreted Spokeo in such a manner*". 15:36

A. So I referred to both of those cases this morning, Judge. These are the Seventh and Eighth Circuit cases --

393 Q. Well, I wonder could we just stay with the quotation for one moment? 15:36

A. Sure.

394 Q. "*Some other courts have interpreted Spokeo in such a manner, most notably the Eighth Circuit in Breitberg, concluding that in the light of Spokeo the improper retention of information under the Cable Communications Policy Act did not provide an injury-in-fact absent proof of material risk of harm from the retention.*" 15:36

And then **Gubala**, which I think is one of the Cable Communications Act cases, "*finding that as a result of Spokeo, the unlawful retention of the individuals*" -- sorry, "*under the Cable Communications Policy Act did not constitute recognisable injury.*" 15:36 15:37

So there seems to be a view somewhere in the courts that - in some circuits - that it did introduce a change?

A. So if I just may? I mean, Judge, first of all, those

are both recent decisions, **Breitberg** and the **Gubala** Seventh Circuit case. Second, as I said this morning, Judge, I actually think that those are faithful applications of the **Lujan** principle, which is to say that concreteness in this context requires more than the bare assertion of a procedural injury and that in the unique context of Section 551 of the Cable Communications Policy Act - the same claim in both cases, it was the same lawyer - that it made sense under **Lujan** and not just **Spokeo** that there would not be standing simply by a violation of the text of the statute, you had to show something more. 15:37 15:37

So, you know, I don't take those cases as suggesting that **Spokeo** changed or narrowed the law in this regard as opposed to maybe perhaps clarified what **Lujan** meant, but we end up in the same place I think. 15:37

395 Q. Well, I just want to -- I mean, you seem to be disputing -- like, I understand your view is that it didn't change the law. Fine. But I'm just trying to clarify whether you accept that there is a view -- 15:38

A. I think I said that. I do.

396 Q. -- in the courts that it did change the law?

A. I mean, I don't know that it makes -- surely there's some judge somewhere who has suggested that **Spokeo** changed the -- every time the Supreme Court interprets one of its prior cases, right, it is, at least marginally, changing the law. 15:38

397 Q. Okay.

A. The dispute, if anything, Judge, is just over the vol -- the degree of the change.

398 Q. All right. So the application of the requirement for concrete injury - and we agree bare statutory violation is not enough, procedural violation is not enough and I think we also agree that to establish "harm" you have to bring yourself within an established category of a common law type remedy or a statutory harm, is that a fair... 15:38

A. I think that's right. 15:39

399 Q. Yeah, okay. But it's not just retention cases to which the concreteness requirement applied in **Spokeo** has been applied, it's also been applied to disclosure cases, isn't that right?

A. As in **Spokeo** itself. I mean, right, in **Spokeo** itself we had the disclosure of information that turned out to be to the benefit of the plaintiff, right -- 15:39

400 Q. Well, that wasn't necessarily without dispute. And you've seen the dissent which, or the separate opinion of Justice Ginsburg, which disputes that. 15:39

A. Fair enough.

401 Q. But take a look -- I'm just going to hand up a collection of the cases (Same Handed). Prof. Richards was berated by Mr. Gallagher for not being familiar with all of these cases. You, I presume, read them all as they come out, do you? 15:39

A. So by my research, Judge, there have been somewhere over 500 cases in the federal courts in the eight/nine months since **Spokeo** citing **Spokeo**. I hope you'll

forgive me in saying I have not read all of them.

402 Q. Okay. Well, that's entirely understandable, Professor. But it does sound like it is - and you will have heard the debate last week with Prof. Swire about Facebook's *own* case in the Northern District of California - that it *is* being used to strike out cases on the grounds of Article III standing in a wide range of circumstances? 15:40

A. Or at least being invoked. I mean, I think, you know, again that decision hasn't been handed down yet, to my understanding. 15:40

403 Q. Okay. But you will be familiar with the fact that there *are* very similar cases in which claims *have* been struck out, in fact under the Illinois biometric statute, isn't that right?

A. Indeed. I would just point out, so far as I understand, that all of the cases invoked by Prof. Richards involve claims against -- well, or I should say claims not against the federal government. 15:40

404 Q. You are correct about that, yeah. And we'll come back to that in a moment. 15:41

A. Fair enough.

405 Q. But just to try and understand the principles first.

A. Please.

406 Q. Because the federal government, I presume, is bound by the same principles of law as apply to everybody else and it doesn't seem to be shy about bringing applications to strike out proceedings. 15:41

A. No. The only thing would I suggest, Mr. Murray, is that I do believe, as I said this morning, that there

would be a little more sympathy on the part of courts to a retention based injury to a violation of privacy where it was the government wrongfully holding the data as opposed to a private company. Again I'm speculating into a vacuum, because we haven't seen cases to that effect.

407 Q. And there is no legal authority that you can cite to support that proposition?

A. I wouldn't say there's no legal authority. I mean, again, right, the third party doctrine, Judge, presupposes that we surrender our expectation of privacy in data that we voluntarily share with a private company, with our phone provider, with our cable company. As Judge Leon, I think, quite rightly points out in the **Klayman** case, it's not obvious that that maps on to the government's ability to take all of those disparate data streams and abrogate them. And so I do think that there is support in those cases at the very least, Judge - and it's only analogous support - for the notion that the privacy concern may very well differ when it's the government abrogating private data versus data held by private companies. That's the only point I was trying to make.

408 Q. And **Clapper** itself, as we know, was a seizure -- sorry, **ACLU -v- Clapper** itself was a seizure in breach of the Fourth Amendment?

A. Although that's not the claim, Judge, that obviously won the day in the Second Circuit. The Second Circuit didn't reach the Fourth Amendment question, it simply

held that the phone records programme was not authorised by the USA PATRIOT Act, by Section 215.

409 Q. But the harm suffered by the plaintiffs was the harm, if they were right in their case - and this is obviously the assumption in standing - that there was a seizure in breach of the Fourth Amendment? 15:43

A. Indeed. Which I think goes back to my point from the this morning about how the harm doesn't have to be the same as the claim.

410 Q. Yeah. And does the Fourth Amendment operate vis-a-vis private actors? 15:43

A. No.

411 Q. No. So that vis-a-vis state actors, there is a basis for asserting a harm which is not available vis-a-vis private actors? 15:43

A. I agree. And I think, Judge, that's further to the point about why retention by the government might differ from retention by a private firm.

412 Q. And not available to EU citizens?

A. Well, again, I mean, not to muddy the water, but -- 15:43

413 Q. If our point of agreement of this afternoon - and I fully understand that you think the law might change and so forth, we had a similar debate with Prof. Swire - but in terms of your best ability of predicting the legal position at this point in time, the EU citizen doesn't have that? 15:43

A. And just -- Judge, I agree with Mr. Murray. I just want to put the sort of cherry on top, which is to say because of the absence of a claim on the merits, not

because of a lack of standing.

414 Q. Yes. But they can't invoke the Fourth Amendment *at all* for the purposes of identifying an injury?

A. I think they could. That is to say I think they could allege that their privacy was violated, even if they don't have an ultimate Fourth Amendment claim on the merits. And that's why I introduced the **Hernandez** case this morning where you have a Mexican national who very well may not be protected by the Fourth Amendment, but who still has an interest in not being wrongly seized by having, you know, by having himself be killed. So, right, I think an EU citizen could allege privacy harm for the purposes of the actual -- or, I'm sorry, for purposes of the concreteness and particularised prong of standing, even if the court is ultimately unsympathetic to that claim on the merits. 15:44 15:44 15:44

415 Q. Yeah. But the seizure in that situation would have to be a seizure that was unlawful because of noncompliance with the legislation rather than because of noncompliance with the Fourth Amendment? 15:45

A. Based on current Fourth Amendment law, I agree.

416 Q. Yeah. So, for example, **Beck -v- McDonald** is a Fourth Circuit decision from --

A. I'm sorry, which tab?

417 Q. Sorry, excuse me, tab seven. 15:45

A. Thank you.

418 Q. So this is a case in which there were data breaches involving the loss of personal information of a large number of patients at, I think, a veterans' hospital.

A. Mm hmm.

419 Q. And they sought to establish Article III standing based on harm from an increased risk of future identity theft. But there had been unlawful disclosure and the action was brought under the Privacy Act, isn't that right, the 1974 Act? 15:45

A. Yes.

420 Q. Yeah. So this isn't a case brought under some obscure credit reporting act or a statute about cable TV, this is the Privacy Act itself, yeah? 15:46

A. That's right.

421 Q. And you've looked at this case, have you?

A. I actually, this case is about two weeks old, so this is the first time I'm seeing it, forgive me.

422 Q. All right. Well, I fully understand that. So if you go to page seven. And there does appear, Professor, to be circumstances in which the **Clapper**, you know, immanence test, a test of time, or timing and the **Spokeo** or non-**Spokeo** test of concreteness converge in these types of cases. Because here, if you look at page seven, it says in the paragraphs on the right-hand side, the top paragraph: 15:46 15:46

"*Clapper's discussion of where a threatened injury constitutes Article III injury-in-fact is controlling... Clapper's iteration of the well established tenet that a threatened injury must be 'certainly impending' to constitute injury-in-fact is hardly novel.*" 15:46

Referring to authority in that regard. And then they say:

"*We also reject the plaintiffs' claim that emotional upset and fear of identity theft and financial fraud resulting from the data breaches are adverse effects sufficient to confer Article III standing.*" 15:47

So just to be clear, this is a situation in which there's been an unauthorised disclosure of these people's private information and they have no cause of action so far, their apprehension of identity theft's a bit remote and the emotional upset they have is not cognisable in law as a concrete injury, is that right... 15:47

A. Right. And so, I mean, my, just reacting to this case for the first time, my reaction to this, Judge, is that this is very similar to the Seventh and Eighth Circuit cases in **Breitberg** and **Gubala** where the concern the plaintiffs alleged was that the data would be used against them, it would be used in some way to their detriment through data theft, right through someone's abuse of their credit cards etc. and that they could not show that that had happened. So we're back to the actual or imminent problem of **Clapper**, not the concreteness problem with **Spokeo**. 15:47 15:48

423 Q. Exactly. But what they *can* show is that their private information has, they say, as a result of a breach of

the law, been disclosed to somebody who shouldn't have seen it, is that right?

A. I mean, so under -- yes. The problem in this case, as I understand it, Mr. Murray, is that the court read the Privacy Act read to not allow that kind of claim. 15:48

424 Q. Exactly. The fact that your privacy has been violated, not just now through unlawful retention, but through disclosure, is not sufficient in itself to create a concrete injury under the legislation?

A. Because the Privacy Act, as opposed to, say, FISA is not worried necessarily in the same degree about the government's retention and -- they're different statutes, but yes, I agree. 15:48

425 Q. And how does that then relate to the JRA?

A. Well, I mean, obviously, I think as we've discussed previously, I mean, the JRA, I imagine - we don't have case law yet - will be interpreted consistently with the Privacy Act. 15:48

426 Q. Yes, exactly.

A. And just briefly, I mean, Judge, this is part of why in my report I focus more on the other remedies, because I share what I take to be the DPC's concerns about some of the inadequacies of the Privacy Act regime. 15:49

427 Q. And let's just specify for the judge what those inadequacies are. 15:49

A. Well, I think my report is quite clear on this, Mr. Murray.

428 Q. Yeah.

A. I refer, Judge, to the ability of particular agencies

to effectively exempt themselves from the Privacy Act regime, which the NSA, to my knowledge, has done, right, that that's why my focus when thinking about the most effective opportunities to hold the government to account for the kinds of claims we're talking about, Mr. Murray, are not usually going to be focused on the Privacy Act so much as the APA, FISA etc. 15:49

429 Q. And if you look at just tab one of that booklet, simply because it brings into focus the discussion that we had with Prof. Swire last week, **Vigil -v- Take-Two Interactive Software** is a case brought under the same statute as the legislation that Facebook is being sued for in the Northern District of California and here a claim *was* struck out on Article III grounds under that statute where, similarly, it was contended that the defendants had taken and retained unlawfully biometric, private biometric information of the plaintiffs or information captured by the legislation. 15:50 15:50

But just in terms of the legal analysis, if you go to page seven of 19, the legal test articulated there on the left-hand side, the first paragraph, referring to the **Driehaus** case: 15:50

"*The Supreme Court in Spokeo recently clarified that for an injury to be particularised it had must affect the plaintiff in a personal individual way*" - quoting **Lujan** - "*'for an injury to be concrete it must be real and not abstract'.*" 15:51

If you go over then to page 18, at the very bottom of that page they refer to a case which is actually quoted in the transcript we looked at last week, **McCollough -v- Smarte Carte**, and that's cited in the top right-hand page:

"*Plaintiff is denied standing for alleged violations of the BIPA. In that case the defendant provided for rent a fingerprint coded locker*" -- 15:51

A. I'm sorry it's at page 18?

430 Q. Sorry, page eight, excuse me. I'm sorry, that's my mistake excuse me.

MS. JUSTICE COSTELLO: On which column?

431 Q. **MR. MURRAY:** And we're at the top right-hand column, Judge, referring to this **Smarte Carte** case: 15:52

"*Denied standing to a plaintiff for alleged violations of the BIPA. In that case the defendant provided for rent a fingerprint coded locker that used the plaintiff's fingerprint as the key to lock and unlock the locker. The plaintiff claimed the defendant had violated multiple provisions of the BIPA. Specifically the plaintiff alleged that the defendant had collected and indefinitely retained fingerprint data without publishing any destruction guidelines. The plaintiff also alleged that the defendant had failed to give any notice or receive any written consent acknowledging that the defendant was collecting or using biometric* 15:52 15:52

identifiers.

The court dismissed the plaintiff's claim of bare procedural and technical violations of BIPA for want of Article III standing, reasoning the plaintiff undoubtedly understood that when she first used the system her fingerprint data would have to be retained until she retrieved her belongings from the locker. As the court held, even without prior written consent, if the defendant did indeed retain the fingerprint data beyond the rental period, the court finds it difficult to imagine without more how this retention could work a concrete harm." 15:52 15:52

(To Witness) And that, I think, is a feature of these cases across a whole range of statutes. And I think you would agree, Professor, that there would be a reasonable basis for contending that the same principles applied vis-a-vis the federal government retaining information under statutes such as FISA? 15:53 15:53

A. I certainly agree, Mr. Murray, that the government will likely make that argument.

432 Q. Yes.

A. I remain of the view that because of the different expectation of privacy we have vis-a-vis private actors and vis-a-vis the government that a court will be less skeptical of the concreteness of the harm from wrongful retention in the context of surveillance data than they have been in these claims. But again, I happily 15:53

concede, as I have many times, that we don't yet have a case on that point.

433 Q. Yeah. Well, it's not just that we don't have a case, it's a credible argument being advanced based upon what **Spokeo** has decided? 15:53

A. So I mean, credible insofar -- credible if the government is willing to argue that we have - that *anyone* has; this wouldn't be about EU citizens versus Americans, this would be that *anyone* would have no expectation of privacy even in the government's 15:54 retention in a database of information about them. Nothing would surprise me from the perspective of arguments the government might make. Judge, I *would* be surprised if the court accepted that argument.

434 Q. But what's the provision of the legislation that you 15:54 would point to that would allow you to say that retention of information which has *never* been acknowledged as the basis for a claim at common law, American law, English law, what's the basis on which you could say that retention of the information is a 15:54 concrete harm?

A. So the best basis I have, Judge, is the one I referred to earlier, which is Judge Leon's decision in the **Klayman** case, which talks about the different privacy harms that can accrue when the government is holding 15:54 onto data from different data streams, as opposed to those data streams simply residing in the servers of private firms. That's the best argument I'm aware of.

435 Q. And what relief do you get in that situation if -- you

don't get damages?

A. No. I mean, so the claims had been structured so far, Judge, to seek some kind of prospective relief where the government is required to purge the data or destroy the data, basically to end the harm, which is the wrongful retention thereof. 15:55

436 Q. You can't get damages for what's happened in the past in that situation.

A. Not unless - just to tie things back together, Judge - not unless we were talking about, for example, a violation of 1810, right, where you had some reason to believe that the data was collected or retained in a manner that was willful and intentionally in violation of FISA. 15:55

437 Q. And **FAA -v- Cooper** would prevent you from claiming damages under the Privacy Act, isn't that right, unless you could prove -- 15:55

A. Unless you could show actual harm.

438 Q. Yeah. So your range of remedial options is fairly limited, isn't that right? 15:55

A. It is limited. I don't think I've ever suggested otherwise.

439 Q. No. And it's hard to see even that you could get declaratory relief, isn't it?

A. I don't know that that's true. I mean, declaratory relief requires, depending upon the context, Judge, some kind of showing that this harm is still occurring, right, or that it's likely to occur again in the future. In the context of a claim, right, that the 15:56

government is holding onto not just my data incorrectly, but many individuals' data, I'm not sure it would be such an uphill battle to get a declaration.

440 Q. But in the situation where the breach has occurred and it's stopped, you can't get damages for the reasons we have discussed -- 15:56

A. Unless you sue under 1810.

441 Q. Yeah. You can't get an injunction, because it's not happening any more. And you can't get a declaration for the same reason? 15:56

A. Unless you can show some basis for believing that it might recur.

442 Q. Well --

A. And so this is why, Judge, 18 -- I mean, in a sense this is actually how the pieces fit together. 1810 is meant to provide a recourse for the malevolent government actor, who's much more likely, in Mr. Murray's example, to be the one who did one or a handful of bad things in the past and is no longer acting. I think the assumption that pervades the scheme is that where the challenge is programmatic, where the challenge is that the government as a whole is continuing to engage in this programme, that's where the prospective remedies - injunctive relief, declarations - are going to be more important and available. 15:56 15:57 15:57

443 Q. And what have you to establish to get relief under Section 1810?

A. To get a refund?

444 Q. Relief under Section 1810.
A. Oh, sorry. So you have to establish that the defendant, who presumably, if you're seeking damages, would have to be a government officer in his personal capacity, knowingly or intentionally violated FISA as defined in 50 USC Section 1809. 15:57
445 Q. So the person who finds, rather like the plaintiffs in the cases that we're looking at here, that their data has been disclosed as a result of a negligent or reckless act - and that in fact is what is occurring in almost all of these cases; none of them, as far as I can see, involve willfulness - they can't get damages under 1810? 15:57
A. They certainly cannot if they can't meet that bar, I agree. 15:58
446 Q. No. They can't get damages under 1810, they can't get an injunction --
A. But, Judge, can I just clarify? They can't get an injunction to stop the collection, since, as Mr. Murray suggested, it happened in the past. I do think they might be able to pursue an injunction if the government is still holding onto the records, right, on the theory that the retention causes a concrete harm. There would still be a forward looking harm that would be remediable through an injunction. The relief, as I said, Mr. Murray, would be limited, it would be -- 15:58
447 Q. Yeah. But the retention, you can only stop retention if it's unlawful.
A. That's right.

448 Q. Yeah. But imagine it's an entirely lawful retention - I think is it six years under FISA?

A. One other question is whether there's a violation of the minimisation requirements. So I don't mean to prejudge the merits, Judge, my point is just that an injunction would be available in that context not to remedy the prior collection violation, but perhaps if you had a claim that the retention was itself unlawful, perhaps to go after that. 15:58

449 Q. Okay. But where you have a negligent disclosure - no declaration, no injunction, no damages? 15:59

A. Negligent disclosure and the claim was simply about the disclosure and not the retention? Yes.

MR. MURRAY: Judge, I will be a little while more.

MS. JUSTICE COSTELLO: Yes. Well, we'll take it up in the morning then. 15:59

MR. MURRAY: May it please the court.

THE HEARING WAS THEN ADJOURNED UNTIL WEDNESDAY, 1ST MARCH AT 11:00 16:00

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