

THE HIGH COURT

COMMERCIAL

Case No. 2016/4809P

THE DATA PROTECTION COMMISSIONER

PLAINTIFF

and

FACEBOOK IRELAND LTD.

AND

DEFENDANTS

MAXIMILLIAN SCHREMS

HEARING HEARD BEFORE BY MS. JUSTICE COSTELLO

ON WEDNESDAY, 8th FEBRUARY 2017 - DAY 2

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INDEX

PROCEEDING

PAGE

SUBMISSION - MR. MICHAEL COLLINS (CONTD.) 6 - 201

1 THE HEARING RESUMED AS FOLLOWS ON WEDNESDAY, 8TH
2 FEBRUARY 2017

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

5 **REGISTRAR:** Matter at hearing, Data Protection 10:46
6 Commissioner -v- Facebook Ireland Ltd. and another.

7 **MR. MICHAEL COLLINS:** May it please you, Judge.

8 **MS. JUSTICE COSTELLO:** Yes, Mr. Collins.

9 **MR. MICHAEL COLLINS:** Judge, just two preliminary
10 matters. First, I am told that for those using tablets 10:46
11 the five books of European authorities are on Book 13
12 on the tablet and there are five books of US
13 authorities which I'm told are on Book 14 of the
14 tablet.

15 **MS. JUSTICE COSTELLO:** Mm hmm. 10:46

16 **MR. MICHAEL COLLINS:** The second thing is, Judge, could
17 I correct something I inadvertently said yesterday
18 I think at page 117 of the transcript.

19
20 I was drawing your attention to the fact that national 10:47
21 courts cannot declare that Commission decisions are
22 invalid and I think the way it has come across on the
23 transcript, I said that the national court has no role
24 in relation to the *validity* of Commission decisions.
25 But that's not entirely correct. 10:47

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

27 **MR. MICHAEL COLLINS:** The national court cannot say
28 that they are *invalid* but you could of course say that
29 they are valid.

1 **MS. JUSTICE COSTELLO:** Say they are valid, yes.

2 **MR. MICHAEL COLLINS:** I inadvertently I misspoke in
3 that regard.

4 **MS. JUSTICE COSTELLO:** I think I recall Ms. Barrington
5 making a similar point at a directions hearing. 10:47

6 **MS. BARRINGTON:** Ms. Hyland.

7 **MS. JUSTICE COSTELLO:** Ms. Hyland, I beg your pardon.

8 **MR. MICHAEL COLLINS:** Judge, what I was going to do is
9 I was going to open to you the Draft Decision of the
10 Commissioner and thereafter you will see that she 10:47
11 relies in part on an analysis of US law. And I'm going
12 to, with some trepidation, try to bring you then
13 through the relevant provisions, the statutory
14 provisions of US law that are referred to in the Draft
15 Decision and are relevant for you to subsequently 10:47
16 consider and I think that will also help make sense of
17 the US experts' reports which refer to these
18 provisions.

19 **MS. JUSTICE COSTELLO:** Hmm.

20 **MR. MICHAEL COLLINS:** My plan is thereafter to try to 10:48
21 open the reports to a greater or lesser extent to you,
22 and that certainly will take me into tomorrow while I'm
23 doing that. So that's where I am going in the
24 immediate future.

25 **MS. JUSTICE COSTELLO:** which book are we starting on? 10:48

26 **MR. MICHAEL COLLINS:** We're on trial booklet 1 Tab 18
27 which is the Draft Decision of the Commissioner.
28
29 She outlines in the introduction that she is

1 identifying and trying to decide whether, by reference
2 to the adequacy criteria identified in Article 25(2) of
3 the Directive that we looked at yesterday, the US
4 ensures adequate protection for the data protection
5 rights of EU citizens. That's the first issue; then, 10:48
6 secondly, to the extent that it doesn't provide
7 adequate protection, whether or not the derogations
8 provided for in Article 26 can be relied upon and she
9 goes on to identify that she is referring in particular
10 to the standard contractual clauses, the SCCs. 10:49

11
12 She expresses her conclusion in (b) on page 2, Judge,
13 where she says:

14
15 *"She has formed the view but on a draft basis and 10:49*
16 *pending such receipt of such further submissions as the*
17 *complainant or Facebook may wish to submit, that a*
18 *legal remedy compatible with Article 47 of the Charter*
19 *not available in the US to EU citizens whose data is*
20 *transferred to the US where it may be at risk of being 10:49*
21 *accessed and processed by US State agencies for*
22 *national security purposes in a manner incompatible*
23 *with Articles 7 and 8."*

24
25 Then she goes on to say that it is against that 10:49
26 background she considers the standard contractual
27 clauses and again emphasises that this is only a
28 provisional view that she has reached but explains in
29 article (c) that she considers herself bound by

1 paragraph 65 of the Schrems judgment that I opened to
2 you yesterday to engage in proceedings before the
3 court, to bring the matter before the court and if you
4 share her doubts to then make a reference to the
5 European court. 10:50

6
7 She says in particular at the top of page 3 that she
8 considers she cannot conclude her investigation without
9 obtaining a ruling of the Court of Justice on the
10 validity of the SCC decisions. She then reiterates the 10:50
11 draft nature of the decision and says at the end of
12 paragraph or section 2 there:

13
14 *"I believe it is appropriate that I would commence*
15 *these proceedings forthwith so that the substance of* 10:50
16 *the complainant's complaint and the view I formed in*
17 *relation to a portion of that complaint can be examined*
18 *and determined by a court of competent jurisdiction at*
19 *the earliest possible opportunity."*

20 10:50
21 The decision then goes on, Judge, to set out the
22 background, set out the history to define the issues
23 and so forth, all of which material I have covered
24 yesterday from the original source material and so,
25 subject to anything anybody wants to direct me to, I am 10:51
26 proposing to move on to about page 17 in the Draft
27 Decision.

28
29 Having identified what she calls strand 1 which was the

1 question of whether Facebook is transmitting data to
2 the US in reliance on the SCCs, she then deals with
3 Strand 2, as she calls it, and she identifies two
4 question questions:

5
6 *"1. Does the US ensure adequate protection for the*
7 *data protection rights of EU citizens?*

10:51

8
9 *2. If not, do the SCC Decisions in fact offer adequate*
10 *safeguards with respect to the protection of the*
11 *privacy and fundamental rights and freedoms of*
12 *individuals and as regards the exercise of their*
13 *corresponding rights."*

10:51

14
15 She refers at the end of that paragraph 37 to the fact
16 that:

10:51

17
18 *"The question is whether the protections of the SCC*
19 *Decisions provide adequate safeguards in accordance*
20 *with Article 26(2)."*

10:51

21
22 You will recall the distinction I drew between 26(1)
23 and 26(2) yesterday. 26(1) contain certain exceptions
24 such as somebody consenting where you may not
25 necessarily meet the adequacy standard of Article 25,
26 but Article 26(2) does refer to the adequacy standards
27 of Article 25 and I say that therefore, whatever the
28 procedure allowed for under Article 26(2) such as the
29 SCCs, must in substance amount to the same adequacy

10:52

1 standard as in Article 25.

2
3 She goes on in paragraph 39 to quote from the Schrems
4 judgment, and I'm not going to open that. I have
5 already opened that yesterday. She refers to the 10:52
6 communication from the European Commission to the
7 Parliament on 29th February 2016 at paragraph 41. This
8 updates matters of certain things that have occurred
9 since 2013. Just before going to open it, Judge, can
10 I very briefly tell you what those things are. 10:53

11
12 I mentioned yesterday the reference to presidential
13 orders or executive orders which can be made. These
14 are orders which are, I think have the force of law in
15 the US but do not, I think, give rise to enforceable 10:53
16 rights on the part of parties. And again when speaking
17 on any of these US law matters, I am of course subject
18 to the better views of the experts who will know more
19 than I know.

20 10:53
21 There has been, I suppose, three or four things that
22 have happened since 2013. First of all, there was a
23 presidential policy directive which is No. 28 known as
24 PPD 28 which sets out a number of high level principles
25 that should be observed by the intelligence agencies 10:53
26 particularly with regard to the rights of non-US
27 persons.

28
29 Secondly, there is the USA Freedom Act which was passed

1 in 2015. And you will recall I referred to the PATRIOT
2 Act yesterday, Judge, and the acronym that PATRIOT
3 stands for. The FREEDOM Act has the same acronym, it
4 stands for Uniting and Strengthening America By
5 Fulfilling Rights and Ending Eavesdropping, Dragnet 10:54
6 Collection and Online Monitoring Act, it's better
7 referred to as the Freedom Act.

8
9 There is also an act passed in January of 2016 called
10 the Judicial Redress Act. Now that's important, Judge, 10:54
11 because one of the original and early pieces of
12 legislation in the United States protecting privacy
13 rights of US citizens or US persons is a Privacy Act
14 from, I think, 1974 or thereabouts.

15 10:54
16 But the Privacy Act only gave remedies to US persons.
17 The Judicial Redress Act of 2016 extended in some ways,
18 and to some extent that we will be discussing, the
19 recommends of the Privacy Act to non-US persons if they
20 are designated - there's a whole system of, you 10:55
21 designate countries as covered countries and then you
22 designate various federal agencies that are also
23 affected by it. I think it's only in the last,
24 effective as of 1st February just now that the US
25 government has designated the EU and a number of EU 10:55
26 Member States as covered countries, excluding, I think,
27 UK and Denmark. Because you can only become a covered
28 country subject to certain conditions and one of those
29 is that you must accept, that you agree with an

1 agreement which was signed in June of 2016 between the
2 EU and the US called the Data Protection and Privacy
3 Agreement which covers criminal investigations.
4

5 That agreement from the middle of 2016, along with the 10:56
6 Judicial Redress Act and, I think, the Privacy Shield
7 that we have heard about, is sometimes referred to as
8 the umbrella agreement, although I think that's more a
9 descriptive term than a term of art.

10
11 So there have been these developments, some of which 10:56
12 obviously postdate the Commissioner's decision as well.
13 So she deals with such updates as were available to her
14 at the time in paragraph 41.

15 **MS. JUSTICE COSTELLO:** Sorry, what's the date of her 10:56
16 Draft Decision, I'm sure it's in the papers.

17 **MR. MICHAEL COLLINS:** May 2016, 24th May 2016.

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

19 **MR. MICHAEL COLLINS:** So she quotes from the
20 communication from the Commission of 29th February 2016 10:56
21 as follows:

22
23 *"In parallel, important initiatives were launched, that*
24 *led to significant changes in the US legal order. On*
25 *17 January 2014, President Obama announced reforms of*
26 *U.S. signals intelligence activities which were*
27 *subsequently laid down in Presidential Policy Directive*
28 *28. Importantly, these reforms provided for the*
29 *extension of certain privacy protections to*

1 *non-Americans as well as a refocussing of data*
2 *collection away from bulk collection towards an*
3 *approach that prioritised targeted collection and*
4 *access. The Commission welcomed those new orientations*
5 *as an important step in the right direction. This*
6 *reform process was also instrumental in informing the*
7 *discussions with the U.S. on the EU-US Privacy Shield.*
8 *Further changes have been introduced since. For*
9 *instance, in June 2015 the US passed the USA Freedom*
10 *Act which modified certain U.S. surveillance*
11 *programmes, strengthened judicial oversight and*
12 *increased about their use."*

13
14 If I pause there, Judge, I think it was under the
15 Freedom Act that it was introduced, the provision 10:57
16 I mentioned yesterday, that in the foreign surveillance
17 court, which previously operated entirely on an ex
18 parte basis where the relevant agency would make the
19 application, these six lawyers are nominated as amici
20 and they can participate in the court, although I think 10:57
21 it still conducts its business in private subject
22 publishing to some of its opinions in redacted form.

23
24 *"Finally, on 10 February 2016 the US Congress passed*
25 *the Judicial Redress Act which was signed into law by* 10:58
26 *President Obama."*

27
28 And that's the one that relates to the Privacy Act of
29 1974 and we'll come back to that interrelationship in

1 due course. She then goes on to say:

2
3 *"In light of these changes and given that, in its*
4 *decision in Schrems, the CJEU did not have the*
5 *opportunity to consider and weigh direct evidence of* 10:58
6 *the nature or extent of the interferences with the*
7 *Charter-protected rights of EU citizens once their*
8 *personal data had been transferred to the US or of the*
9 *safeguards by which such rights are protected under US*
10 *law, I consider it both necessary and appropriate that*
11 *I should examine and form my own independent view on*
12 *the question as to whether or not the US ensures*
13 *adequate protection for the data protection rights of*
14 *EU citizens whose data is transferred to that*
15 *jurisdiction. To assist in this regard, I have sought* 10:58
16 *independent expert advice on certain matters of US*
17 *law."*

18
19 And that's Mr. Andrew Serwin, Judge, who is one of the
20 two experts, you have their reports: *"For the sake of* 10:58
21 *completeness, I also note I have received unsolicited*
22 *submissions from the US Government comprising copies of*
23 *materials submitted by the US to the European*
24 *Commission in support of the Privacy Shield Framework."*

25
26 Then she says her investigation is ongoing: 10:59

27
28 *"But, subject to further submissions, it appears to me*
29 *that, notwithstanding the above-referred changes in the*

1 *US legal order, it remains the case that, even now, a*
2 *legal remedy compatible with Article 47 of the Charter*
3 *is not available in the US and transferred to the US to*
4 *EU citizens whose data is transferred to the US where*
5 *it may be of risk of being assessed and processed by US* 10:59
6 *state agencies for national security purposes in a*
7 *manner incompatible with Articles 7 and 8 of the*
8 *Charter.*

9
10 *44. In this regard, it is important to note that EU* 10:59
11 *citizens are not completely without redress in the US,*
12 *and that a number of remedial mechanisms are available*
13 *under US law."*

14
15 *And that is an important point to note, Judge, both in* 10:59
16 *fairness to the everybody concerned and in fairness to*
17 *the Commissioner who has taken account of that.*
18 *Because much of my Friend's evidence is devoted to*
19 *analysing what those alternative remedies are, both of*
20 *a judicial nature and of a non-judicial nature.* 10:59

21
22 *She goes on: "The problem is, as will now be set out*
23 *that, considered by reference to EU law, there are both*
24 *specific and general deficiencies in those remedial*
25 *mechanisms:*

26
27 *(1) From a specific perspective, the remedies are*
28 *fragmented, and subject to limitations that impact on*
29 *their effectiveness to a material extent; moreover,*

1 *they arise only in particular factual circumstances,*
2 *and are not sufficiently broad in scope to guarantee a*
3 *remedy in every situation in which there has been an*
4 *interference with the personal data of an EU data*
5 *subject contrary to Articles 7 and 8 of the Charter.*
6 *To that extent, the remedies are not complete.*

7
8 *(2) From a more general perspective, the 'standing'*
9 *admissibility requirements of the US federal courts*
10 *operate as a constraint on all forms of relief*
11 *available."*

11:00

12
13 She then turns, Judge, to the specific statutory
14 provisions which she deals with over the next few pages
15 in summary form. I will open this to you but it may
16 not be wholly meaningful until you actually look at the
17 actual statutory provisions themselves.

11:00

18
19 She starts with the Foreign Intelligence Surveillance
20 Act of 1978. And, as I mentioned yesterday, Judge, an
21 act of Congress when it is passed is published,
22 I think, in what's referred to as the statutes at large
23 and therefore will be referred to as the Foreign
24 Intelligence Surveillance Act of 1978, but it is then
25 added into the appropriate place in the US Code, which
26 is a code organised by titles, I think there is 52
27 titles dealing with various topics, and the Act is
28 placed and allocated an appropriate code number and
29 section numbers within the code so that it forms a

11:01

1 unified codified set of law on whatever the particular
2 topic is.

3
4 So an act can sometimes have perhaps different sections
5 of it dealing perhaps with somewhat different topics 11:01
6 which find themselves a home in some other part of the
7 code so it might get spread up sometimes and fragmented
8 to that extent, and that's not a criticism, it's just
9 the way in which it works.

10 11:01
11 The most obvious thing to keep in mind is that the code
12 numbers are different to the section numbers in the
13 original act. So if you see there, the Foreign
14 Intelligence Surveillance Act of 1978 is in fact 50,
15 the title is 50. That's Title 50 of the US Code 11:02
16 section 1801 and following, and we'll look at those
17 sections and the layout of all of that in just a
18 moment:

19
20 *"It provides a number of remedies recommends to 11:02*
21 *challenge unlawful electronic surveillance. These*
22 *include:*

23
24 *(1) The possibility for individuals to bring a civil 11:02*
25 *cause of action for money damages against the US when*
26 *information about them has been unlawfully and wilfully*
27 *used or disclosed. For money damages against US than*
28 *information about them unlawfully and wilfully used or*
29 *disclosed."*

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29

You will see a reference to a different title 18 USC and a section 2712. That's because that actually refers to a section in a different act called the Stored Communications Act but which in fact says 'here are certain remedies which apply not only to the Stored Communications Act but apply to various other acts as well and to specified sections of those other acts'. And so section 2712 is the place you go to to see where can I get or do I have a remedy under that provision of the Foreign Surveillance Act or do I have a remedy under some other Act, so it's in a different title.

"(2) The possibility for individuals to sue US government officials for damages where there has been unauthorised electronic surveillance or where information obtained by unauthorized electronic surveillance has been disclosed.

(3) The possibility for individuals to challenge the legality of surveillance (and to seek to suppress the information) in the event that the US government intends to use or disclose any information obtained or derived from electronic surveillance against the individual in judicial or administrative proceedings in the US.

These provisions are subject to a number of important limitations, material in their nature and extent. For

1 *example:*

2
3 *(i) An action under section 2712 requires a plaintiff*
4 *to establish, not just that the use or disclosure of*
5 *their information was unlawful, but that such violation*
6 *was 'wilful' in the sense that it was knowing or*
7 *reckless (although it does not appear to be necessary*
8 *to establish that the violation was done with the*
9 *conscious objective of committing a violation)."*

10
11 If I just pause there, Judge. That wilful requirement
12 comes from section 2712 itself. In some of the other
13 sections where the actual offence or liability is
14 created, it itself contains a provision for wilfulness
15 or intention and sometimes it doesn't. 11:04

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

17 **MR. MICHAEL COLLINS:** But even if it doesn't, if you
18 are invoking section 2712 there is this wilful
19 requirement to invoke the remedy even if the actual
20 commission of the original offence doesn't necessarily 11:04
21 involve a wilful requirement.

22
23 *"(2) An action under section 2712 is further limited by*
24 *the fact that section 1806 adopts a two-tiered*
25 *protection distinguishing between a 'United States* 11:04
26 *person', which, insofar as natural persons are*
27 *concerned, is defined as 'a citizen of the United*
28 *States, and an alien lawfully admitted for permanent*
29 *residence'. The data of a 'US person' acquired under*

1 *FISA is protected by what are described as*
2 *'minimization procedures' (designed to minimize*
3 *acquisition, retention and dissemination of*
4 *information), which 'minimisation procedures' do not*
5 *apply to the data of EU data subjects generally (as* 11:05
6 *opposed to those lawfully admitted for permanent*
7 *residence). Moreover, section 1845 stipulates that*
8 *further provisions must be observed for use and*
9 *disclosure of information acquired from pen registers*
10 *or trap and trace devices concerning US persons."* 11:05

11
12 I'm sure I'll get this wrong, Judge, but I think pen
13 registers are devices that track and take account of,
14 in simple terms, outgoing calls from a telephone. I am
15 sure they cover even more than that, but they enable 11:05
16 you to work out all the numbers that were called from a
17 particular phone.

18
19 A trap and trace device works the other way. It says,
20 for a particular phone, it tracks where do the incoming 11:05
21 calls come from and can identify what they are. It is
22 conceivable it is the other way around but I think it's
23 that way. Sorry, I just lost my place. Yes.

24
25 *"Thus, while all aggrieved persons (including all EU*
26 *data subjects) may bring suit under section 2712, EU*
27 *citizens who are not US citizens or residents would not*
28 *be able to bring a claim under section 2712 for*
29 *non-compliance with the minimization procedures or for*

1 *non-compliance with the other provisions identified by*
2 *section 1845."*

3
4 As I say we'll be looking at these sections, Judge, to
5 explain that with a little more clarity. Well, sorry, 11:06
6 that may be an optimistic statement, Judge.

7 **MS. JUSTICE COSTELLO:** Hmm.

8 **MR. MICHAEL COLLINS:** "3. *The significant limitation*
9 *with section 1810 is that this provision does not*
10 *operate as a waiver of sovereign immunity, which means* 11:06
11 *that the US cannot be held liable under this section*
12 *and the utility of pursuing individual officers may be*
13 *questionable.*

14
15 (4) *while it may operate as an important safeguard* 11:06
16 *within the overall statutory scheme established by*
17 *FISA, and while EU citizens have recourse to motions to*
18 *suppress unlawfully obtained data, the possibility of*
19 *challenging the legality of surveillance and*
20 *suppression of information (section 1806) does not, in*
21 *reality, comprise a remedy for unlawful interference*
22 *with personal data at all, given that it is not a*
23 *free-standing mechanism that can be invoked but is*
24 *rather is more akin to a defensive protection for the*
25 *individual in administrative and judicial proceedings."* 11:07
26

27 Meaning, Judge, that, if you are in a criminal trial,
28 for example, and a piece of evidence is going to be
29 produced against you which is in fact based on this

1 type of surveillance, well then you have rights in
2 those terms as a defence to say 'well that's not an
3 admissible piece of evidence because you didn't go
4 about getting it properly in some shape or form'. But
5 if that doesn't come up and you don't know of course 11:07
6 that the surveillance has taken place, then it's not a
7 free-standing remedy that you can do something about
8 it, it's a defensive thing of objecting to the
9 admissibility of evidence, be it criminal or other
10 types of proceedings. 11:07

11
12 *"48. EU data subjects may also seek, legal recourse*
13 *against government officials for unlawful government*
14 *access to, or use of, personal data, including for*
15 *purported national security purposes, pursuant to:* 11:07
16 *(1) The Computer Fraud Abuse Act;.*
17 *(2) the Electronic Communications Privacy Act; and*
18 *(3) the Right to Financial Privacy Act."*

19
20 Now, the Electronic Communication Privacy Act is a 11:08
21 particularly important one, Judge. It dates from,
22 I think, 1986 and it itself consists of two acts, as
23 I say I will be explaining this in more detail, the
24 Wiretap Act which is an act originally from 1968 but
25 I think which was then amended by the Electronic 11:08
26 Communications Privacy Act of 1986 and, in addition,
27 the Stored Communications Act of 1986. So there are
28 two legislative or two statutory components of that
29 Electronic Communications Privacy Act, the Wiretap Act

1 and the Stored Communications Act and I will come back
2 to that.

3
4 Again -- and, sorry, just where we fit it in. That
5 section 2712 that we were talking about a moment ago 11:08
6 that gives the remedies.

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

8 **MR. MICHAEL COLLINS:** It is now a section in the Stored
9 Communications Act, although it was only in fact added
10 in later in, I think, 2011, I think. I will check 11:09
11 that.

12 **MS. JUSTICE COSTELLO:** It's a bit like amendment by
13 substitution?

14 **MR. MICHAEL COLLINS:** There is a lot of that, Judge.

15 11:09
16 *"49. Again, these causes of action concern specific*
17 *data, targets and/or types of access (e.g. remote*
18 *access of a computer via the Internet) and are*
19 *available under certain conditions, (such as,*
20 *intentional or wilful conduct, conduct outside of*
21 *official capacity, harm suffered). The following*
22 *points are relevant in that context:*

23
24 *(1) while the Computer Fraud Abuse Act does afford a,*
25 *civil remedy in damages and/or injunctive relief where*
26 *a person has suffered 'damage or loss' due to a*
27 *violation, of the legislation, again there are a number*
28 *of limitations. In the first instance, some US courts*
29 *have held that federal government agencies and*

1 officials are immune from suit under the Computer Fraud
2 Abuse Act. Courts are also split as to whether
3 plaintiffs must allege both damage and loss in order to
4 have a stateable claim under this legislation, albeit
5 that some courts have concluded that alleging costs
6 reasonably occurred responding to an alleged offence
7 under the legislation may suffice. A requirement to
8 allege specific damage and loss, as will be considered
9 further below, is not in accordance with the
10 requirements of Article 47 of the Charter as
11 interpreted in the Schrems judgment."

12
13 And you will recall the bits of the Schrems judgment
14 I no doubt at overly tedious length emphasised
15 yesterday in terms of the very limited amount of loss 11:10
16 or damage that you have to show. If you had a feeling
17 that your data was subject to surveillance, that would
18 be sufficient.

19
20 "2. The Electronic Communications Privacy Act consists 11:10
21 of the Wiretap Act and the Stored Communications Act.
22 The provisions of these acts are focussed on
23 intentional unauthorised and electronic communications,
24 with the wiretap Act apply to communications that are
25 intercepted while in transmission, and the Stored 11:10
26 Communications Act applying to the unauthorised access
27 of stored communications. Pursuant to section 2712, a
28 person who is aggrieved by any wilful violation of the
29 Wiretap Act or the Stored Communications Act may bring

1 *an action in the US District Court against the US to*
2 *recover damages for wrongful collection of information*
3 *or wrongful use and disclosure of same. These claims*
4 *are subject to the constraints of the requirement of a*
5 *'wilful' violation which has already been discussed*
6 *above. There is also uncertainty as to the extent to*
7 *which damages actions are available against*
8 *governmental entities that breach either the Wiretap*
9 *Act or the Stored Communications Act."*

11:11

10
11 Then the Right to Financial Privacy Act is dealing with
12 disclosure of financial information.

11:11

13
14 There is also a Freedom of Information Act which is:
15 *"A means for non-US persons to seek access to existing*
16 *federal agency records, including where these contain*
17 *the individual's personal data. However, the Freedom*
18 *of Information Act an unsatisfactory from a remedial*
19 *perspective as it does not provide an avenue for*
20 *individual recourse against interference with personal*
21 *data in and of itself, but rather is intended to enable*
22 *individuals to obtain access to relevant information*
23 *held by national intelligence agencies. Even then,*
24 *further limitations arise, and agencies may withhold*
25 *information that falls within certain enumerated*
26 *exceptions, including access to classified national*
27 *security information and information concerning law*
28 *enforcement investigations.*

11:11

11:11

11:11

1 51. *It is also the case that the available remedies do*
2 *not deal with certain legal bases available to US*
3 *intelligence authorities to access and process data,*
4 *such as Executive Order 12333, which confers various*
5 *surveillance powers on intelligence agencies."* 11:12

6
7 If we just pause there, Judge. You will recall I think
8 I mentioned executive orders are, as I understand it,
9 orders which have been issued traditionally by the
10 President in the implementation of the executive 11:12
11 function given to the President under the constitution.
12 I think the presidential order like the PPD 28 is a
13 particular species of an executive order, although
14 I don't pretend to understand precisely the difference.
15 But I think they have the force of law, but I think 11:12
16 they don't necessarily give an individual cause of
17 action or right in relation to them.

18
19 He says: *"Accordingly, it is simply not possible to*
20 *assess whether or not the remedies outlined above are* 11:12
21 *sufficient to address the full extent of the activities*
22 *of the intelligence authorities in question.*

23
24 52. *From the more general perspective identified*
25 *above, an overarching issue applying to all of these* 11:13
26 *causes of actions is that arising from US*
27 *constitutional 'standing' requirements, which are*
28 *mandated by the 'case or controversy' condition of*
29 *Article III of the US constitution."*

1 So she is leaving aside now those particular statutory
2 provisions, Judge, and there is this second and more
3 general point about standing under Article III of the
4 US Constitution which contains the requirement that
5 courts have jurisdiction over a case or controversy, 11:13
6 very similar to our requirement that courts only deal
7 with justiciable controversies.

8
9 And she says: *"In that regard, I note that, in its
10 recently-published draft decision on the implementation 11:13
11 of the proposed 'Privacy Shield', the European
12 Commission has observed, in relation to the redress
13 mechanisms available to EU citizens pre Privacy Shield,
14 that:*

15 11:13
16 *'Even where judicial redress possibilities in principle
17 do exist for non-US persons, such as for surveillance
18 under FISA, the available courses of action are limited
19 and claims brought by individuals (including US
20 persons) will be declared inadmissible where they
21 cannot show 'standing', which restricts access to
22 ordinary courts.*

23
24 53. *I understand that, as a matter of US law, an
25 individual must satisfy each of the following three 11:14
26 requirements in order to establish 'standing sufficient
27 to maintain an action in law:*

28
29 (1) *That he or she has suffered an injury in fact, an*

1 *invasion of a legally protected interest which is (a)*
2 *concrete and particularised; and (b) actual or*
3 *imminent, not conjectural or hypothetical."*

4
5 There is of course a huge body of case law on these 11:14
6 issues:

7
8 *"(2) That there is a causal connection between the*
9 *injury and the conduct complained of, i.e. the injury*
10 *has to be fairly traceable to the challenged action of 11:14*
11 *the defendant, and not the result of the independent*
12 *action, of some third party not before the court; and*

13
14 *(3) That it is likely, as opposed to merely*
15 *speculative, that the injury will be redressed by a 11:14*
16 *favourable decision.*

17
18 *54. On their terms I consider these requirements*
19 *appear to be incompatible with EU law in circumstances*
20 *where, as a matter of EU law, it is not necessary to 11:14*
21 *demonstrate an adverse consequence as a result of an*
22 *interference with Articles 7 and 8 of the Charter in*
23 *order to secure redress of a violation of the said*
24 *Articles. As the court observed at paragraph 87 of its*
25 *judgment in Schrems to: 11:15*

26
27 *'To establish the existence of an interference with the*
28 *fundamental right to respect for private life, it does*
29 *not matter whether the information in question relating*

1 to private life is sensitive or whether the person
2 considered have suffered any adverse consequences on
3 account of that interference'."

4
5 And I opened that yesterday.

11:15

6
7 55: "The extent to which the 'standing' requirements,
8 applicable under US law would appear to operate to
9 limit an individual's capacity to access a remedy in
10 this context in a manner incompatible with EU law is
11 illustrated by the decision of the US Supreme Court in
12 Clapper -v- Amnesty International."

13
14 A decision from 2013: "In that case, the plaintiffs
15 sought to pursue allegations that certain amendments to
16 FISA were unconstitutional because of the plaintiffs'
17 stated belief that there was an objectively reasonable
18 likelihood that their communications with foreign
19 contacts would be intercepted in the future."

11:15

20
21 This was Amnesty making this judgment.

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

23 **MR. MICHAEL COLLINS:** "Or, alternatively, because they
24 were already suffering injury because they found
25 themselves having to take costly and burdensome
26 measures to protect the confidentiality of their
27 international communications. The US Supreme Court
28 held that the plaintiffs lacked standing because, inter
29 alia, their fears were 'highly speculative' in nature

11:15

11:15

1 and because 'they could not demonstrate that the future
2 injury they purportedly fear is certainly impending and
3 because they cannot manufacture standing by incurring
4 costs in anticipation of non-imminent harm'.

11:16

5
6 I consider that such an approach is not reconcilable
7 with that outlined in Schrems where the CJEU made it
8 clear that a claimant cannot be required to demonstrate
9 that harm has in fact been suffered as a result of the
10 interference alleged.

11:16

11
12 56. It is also relevant to note in this context that,
13 under the Federal Rules of Procedure applicable in the
14 US - and this is I think a federal rule of civil
15 procedure Rule 11 - a claim may only be pursued by a
16 claimant where the claimant's lawyers certifies that
17 'the factual contentions made have evidentiary support
18 or, if specifically so identified, will likely have
19 evidentiary support after a reasonable opportunity for
20 further investigation or discovery'. Taken with the
21 analysis adopted by the Court in Clapper in connection
22 with the making of 'speculative' claims regarding
23 alleged violations of data privacy rights, the Federal
24 Rules of Procedure would appear to preclude the
25 bringing of precisely the kind of complaint now before
26 me. "

11:16

11:16

11:17

27
28 That's obviously a fact specific issue in any
29 individual case obviously is the evidence which you

1 have.

2

3

She then turns to the Privacy Act and the Judicial Redress Act and as I say while the Privacy Act is the oldest of the acts that we are dealing with and the

11:17

6

Judicial Redress Act one of the newest, they do travel together and we need to analyse them together because

8

of the extension to non-US persons contained in the Judicial Redress Act, whereas the Privacy Act was

9

10

entirely concerned only with the rights of US persons.

11:17

11

MS. JUSTICE COSTELLO: When you say US persons, is that US citizens and persons lawfully in the US, or is that going to be defined later?

12

13

14

MR. MICHAEL COLLINS: There is a specific definition of US persons in the Foreign Intelligence Surveillance Act. I think, subject to correction, the Privacy Act only referred to US citizens, but I'll just check that. I don't think anything turns on it specifically.

11:17

15

16

17

18

19

MS. JUSTICE COSTELLO: well it doesn't include EU citizens?

20

11:17

21

MR. MICHAEL COLLINS: It certainly doesn't include EU citizens which is the important point.

22

23

MS. JUSTICE COSTELLO: Okay.

24

MR. MICHAEL COLLINS: But it does under the Judicial Redress Act, once you get to the stage that the relevant covered countries are designated and the citizens of those countries can then avail of it and that has now happened as of 1st February in relation to most of the EU countries.

11:18

25

26

27

28

29

1 *"57. Subject to a range of exemptions, the Privacy Act*
2 *confers on US citizens a statutory right to access*
3 *records or information held about them by government*
4 *agencies, to review such records, and to have a copy*
5 *made. The Act also limits the extent to which federal*
6 *agencies can share and disclose information about*
7 *private individuals. In the event of a violation by*
8 *such an agency of particular provisions of the Act, the*
9 *individual affected may bring a civil action in which a*
10 *range of reliefs may be granted, including but not*
11 *limited, to damages.*

12
13 *58. I note that on 24 February 2016, the Judicial*
14 *Redress Act was signed into law in the US, albeit that*
15 *it will not become effective until 90 days after its*
16 *enactment. I understand that, in practical terms, the*
17 *JRA extends certain of the existing rights of action*
18 *(and remedies) available to US citizens under the*
19 *Privacy Act to non-US citizens (including citizens of*
20 *the European Union) such that an EU citizen will be*
21 *able to bring suit in a federal district court for*
22 *certain Privacy Act violations by designated government*
23 *agencies in the US."*

24
25 You will see in due course when we look at the Act,
26 Judge, that's an important qualification. Because the
27 remedies are only against certain federal agencies that
28 are designated by the Attorney-General who follows a
29 particular procedure in consultation with other persons

11:19

1 and some agencies have been designated and some
2 agencies have not been designated.

3
4 *"In this regard the JRA provides that, with respect to*
5 *'covered records', a citizen of a 'covered country' may* 11:19
6 *bring a civil action against a federal agency and*
7 *obtain civil remedies, broadly in the same manner, to*
8 *the same extent, and subject to the same limitations as*
9 *a US citizen or permanent legal resident under*
10 *identified provisions of the Privacy Act.* 11:19

11
12 59. *whilst, on the face of it, the JRA purports to*
13 *open up access for EU citizens to remedies that were*
14 *not previously available to them, the effectiveness of*
15 *those remedies is subject to a number of important*
16 *limitations and/or restrictions, including the*
17 *following:*

18
19 (1) *Not all of the remedies available to US citizens*
20 *under the Privacy Act have been extended to non-US* 11:20
21 *citizens. Notably, it will not be open to an EU*
22 *citizen to bring a civil action in the event that a*
23 *designated agency 'fails to maintain any record*
24 *concerning any individual with such accuracy, relevant,*
25 *timeliness and completeness as is necessary to ensure* 11:20
26 *fairness in any determination relating to the*
27 *qualifications, character, rights, or opportunities of*
28 *or benefits to the individual that may be made on the*
29 *basis of such record and consequently a determination*

1 *is made which is adverse to the individual'."*

2
3 So, in other words, if you had - the records were not
4 maintained accurately.

5 **MS. JUSTICE COSTELLO:** Mm hmm. 11:20

6 **MR. MICHAEL COLLINS:** And in consequence of that some
7 decision was made about you with adverse consequences
8 for you on the basis of that inaccurate record, you
9 wouldn't have a remedy as an EU citizen, although a US
10 person would have such a remedy and again we'll come to 11:20
11 these distinctions in due course.

12
13 *"(2) Certain of the remedies that will be made*
14 *available to non-US citizens will be available only in*
15 *those cases where an agency intentionally or wilfully 11:21*
16 *discloses a record in violation of a limited number of*
17 *provisions of the Act and where that disclosure can be*
18 *shown to have had 'an adverse effect' on the*
19 *individual."*

20 11:21
21 So there are two requirements there, wilful or
22 intentional and adverse consequence:

23
24 *"As noted at paragraph 47 above, the requirement to*
25 *establish that a disclosure complained of was made 11:21*
26 *wilfully necessarily operates to limit the*
27 *effectiveness of the remedy now to be made available to*
28 *non-US citizens.*

1 (3) *More importantly, although not yet clear because*
2 *the JRA has not been yet applied by the courts, it is*
3 *reasonable to expect that existing limitations that*
4 *apply to such remedies as are available to US citizens*
5 *under the Privacy Act will also apply to such remedies* 11:21
6 *as will be available to non-US citizens under the JRA."*

7
8 If I just pause there, Judge. The Privacy Act itself
9 contains certain limitations on its remedies,
10 particularly dealing with a modern situation, as you 11:21
11 would expect perhaps from a statute enacted in 1974.
12 So even if the Privacy Act is extended to EU citizens
13 it's only as good as it is, if I can put it that way.
14 So the EU citizen can still only avail of whatever
15 those remedies are, which themselves may have certain 11:22
16 deficiencies or certain gaps and we'll look at that as
17 well. That may be equally true for US citizens, of
18 course is equally true for US citizens, but that's
19 neither here nor there. It's not so much a matter of
20 comparing EU citizens and US citizens, it's a matter of 11:22
21 comparing the rights of US citizens in Europe versus
22 the rights of EU citizens in the US.

23
24 She goes on: *"This point is of particular importance*
25 *in the context of any examination of the remedies*
26 *available to EU citizens in contexts where US national*
27 *security interests are engaged because (for example)*
28 *regulations have been adopted by the National Security*
29 *Agency under relevant statutory exemption schemes, the*

1 *effect of which is to foreclose the availability of*
2 *remedies for US citizens under the Privacy Act in*
3 *respect of records exempted by the NSA or properly*
4 *classified pursuant to Executive Order to protect US*
5 *national security interests."*

11:22

6
7 So you will see, Judge, when we look at the sections
8 that the NSA has the power to effectively exempt itself
9 or except certain records in certain circumstances.

10
11:23

11 *"To the extent that such exemptions are likewise*
12 *applied to restrict the availability of remedies for*
13 *non-US citizens under the JRA, it necessarily follows*
14 *that the JRA will be of no utility in the context of a*
15 *complaint such as that made by the complainant herein."*

11:23

16
17 And I might add, Judge, that, I referred a moment ago
18 to certain agencies being designated for the purpose of
19 the Judicial Review [sic] Act and certain agencies not
20 being designated. As far as I know, certainly from the
21 Department of Justice's website, the National Security
22 Agency itself is not an agency that has been designated
23 to be covered by the Judicial Redress Act:

11:23

24
25 *"(4) Certain of the definitions deployed in the IRA*
26 *would also appear to operate to limit the remedies*
27 *afforded non-US citizens by its terms. The definition*
28 *of the terms 'designated Federal agency or component',*
29 *'covered record' and 'covered country' require*

1 *consideration in this context.*

2
3 *(5) The Act will apply only to a 'designated Federal*
4 *agency or component', defined as meaning a Federal*
5 *agency or component of an agency designated by the US*
6 *Attorney General in accordance with subsection (e) of*
7 *the Act. As matters stand it is unclear whether*
8 *agencies such as the NSA will be brought within its*
9 *scope."*

10
11 Now, as I say, at the time I don't think there were any
12 agencies designated when she was making her decision
13 but as I say just recently they have been but I think
14 not including the NSA as far as I know.

15
16 *"It is also important to note that, with some limited*
17 *exception, no agency may be brought within the scope of*
18 *the Act 'without the concurrence of the head of the*
19 *relevant agency, or the component of the agency to*
20 *which the component belongs'."*

21
22 In other words, the agencies can opt out by their own
23 volition if they don't want to be designated:

24
25 *"In practical terms, therefore, the intended scope of*
26 *the JRA is capable of becoming greatly narrowed.*

27
28 *A country or regional economic integration organisation*
29 *must meet certain requirements to be designated a*

1 *'covered country', including entering into an agreement*
2 *with the US regarding privacy protections for shared*
3 *information. A reading of this definition on its face*
4 *implies that private entities located within the US*
5 *will not fall within the definition of a 'covered*
6 *country'. This point will have relevance where there*
7 *are transfers of data from the EU to US private*
8 *entities and where the transferred data in turn comes*
9 *into the possession of a US security agency.*

10
11 *(7) The Act provides that the term 'covered record' has*
12 *the same meaning as the term 'record' in the Privacy*
13 *Act, once the record is transferred 'by a public*
14 *authority of, or private entity within', a covered*
15 *country, 'to a designated Federal agency or component*
16 *for purposes of preventing, investigating, detecting,*
17 *or prosecuting criminal offenses'. This definition is*
18 *problematic in two respects.*

19
20 *a. First, it is not clear if a record originating in a*
21 *foreign covered country (or a private entity therein)*
22 *that was provided to the designated agency or component*
23 *indirectly (for example, by or through a related*
24 *private entity established in the US) could still be*
25 *considered a 'covered record'."*

26
27 In other words, if the record is transferred, not
28 directly from the EU to the designated agency in the
29 US, but goes to a private entity in the US and the --

1 **MS. JUSTICE COSTELLO:** Os you are saying if it goes
2 from Facebook Ireland to Facebook Inc. and then from
3 Facebook Inc. on, is that what you are saying?

4 **MR. MICHAEL COLLINS:** Is it a covered record? I don't
5 think there is a definitive answer to that question 11:26
6 because no court has adjudicated on it. But the
7 experts seems to say that on one reading of the
8 definition it would not be a covered record in those
9 circumstances. As I say these are more questions
10 perhaps than answers. 11:26

11
12 *"b. Second, interpretation of the term 'covered*
13 *country' affects the definition of a record as a*
14 *'covered record'. As noted above, a strict reading of*
15 *the definition of the term 'covered country' would 11:26*
16 *indicate that the US itself would not be considered a*
17 *'covered country'.*

18
19 *Because the JRA implicates sovereign immunity, a US*
20 *court may strictly construe the statutory language to*
21 *find that a record that was transferred to a designated*
22 *US Federal agency or component not directly by an*
23 *authority or private entity within a foreign covered*
24 *country but indirectly by or through a related private*
25 *entity established within the US would thus not qualify*
26 *as a 'covered record'.*

27
28 *(8) Clearly, a narrow reading of the terms 'covered*
29 *country' and 'covered record' would impact directly*

1 (and adversely) on the accessibility of remedies under
2 the JRA. Importantly, such a reading would result in a
3 situation where a remedy would not be available to the
4 complainant in the context of the complaint presently
5 under investigation. 11:27

6
7 (9) I have set out above in general terms the position
8 as I understand it to be in connection with the issue
9 of standing as it arises under US law. A particular
10 'standing' arises in relation to the capacity of a 11:27
11 non-US citizen to access a remedy under the JRA.
12 Specifically, I understand that the US Supreme Court
13 has held that the complaint seeking to 'recover
14 statutory damages under the Privacy Act must prove not
15 just that 'actual damages' have been incurred, but that
16 he or she has incurred pecuniary loss or damage. Given
17 that the JRA operates by extending Privacy Act remedies
18 to non-US citizens, it follows that a requirement to
19 prove pecuniary loss or damage will also operate as a
20 precondition to the availability of particular remedies
21 under the JRA. On the basis of the CJEU's findings in
22 Schrems, such a requirement is not compatible with EU.

23
24 For all of the reasons outlined above, therefore,
25 I have formed the view, subject to considerations of 11:27
26 such submissions as may be submitted in due course by
27 the complainant and Facebook, that at least on the
28 question of redress."
29

1 And you will note there, Judge, that she is focussing
2 her analysis on the question of redress: "*The*
3 *objections raised by the CJEU in its judgment in*
4 *Schrems have not yet been answered.*"

11:28

5
6 I think that is important to the question of what's
7 relevant for the purpose of considering whether a
8 reference should be made. Because, as I mentioned
9 yesterday, much of Facebook's evidence is directed to
10 other forms of non-judicial remedies and oversight by
11 Congress and various bodies and authorities that have
12 been set up to engage in oversight of intelligence
13 agencies but which do not in themselves necessarily
14 involve redress. And it may be and no doubt is the
15 case that there is such oversight, undoubtedly there is
16 such oversight, but the Commissioner's point is that
17 isn't necessarily relevant to the question of the
18 adequacy of remedies that she is considering in the
19 context of Articles 25 and 26.

11:28

11:28

11:28

20
21 She says at 61 -- she moves on then, Judge, to a
22 different point. That is in a sense how she has
23 answered the first question that she posed herself and
24 then the second question that she posed herself is, if
25 that be so, do the standard contractual clauses in a
26 sense fill the gap or do they bring the situation about
27 that there is still the necessary adequate level of
28 protection contemplated by Articles 25 and 26 and
29 that's what she analyses now.

11:29

1 And she says: "It is also my view that the safeguards
2 purportedly constituted by the standard contractual
3 clauses set out in the annexes to the SCC Decisions do
4 not address the CJEU's objections concerning the
5 absence of an effective remedy compatible with the 11:29
6 requirements of Article 47 of the Charter, as outlined
7 in Schrems. Nor could they. On their terms, the
8 standard contract clauses in question do no more than
9 establish a right in contract in favour of data
10 subjects to a remedy against either or both of the data 11:29
11 exporter and importer. Importantly, for current
12 purposes, there is no question but that the SCC
13 Decisions are not binding on any US government agency
14 or other US public body, nor do they purport to be so
15 binding. It follows that they make no provision
16 whatsoever for a right in favour of data subjects to
17 access an effective remedy in the event that their data
18 is (or may be) the subject of interference by a US
19 public authority, whether acting on national security
20 grounds, or otherwise. On this basis, I have formed
21 the view, subject to consideration of such further
22 submissions as may be filed by the Complainant and
23 FB-I, that the protections purportedly provided by the
24 standard contract clauses contained in the Annexes to
25 the SCC Decisions are limited in their extent and in
26 their application. So far as the question of access to
27 an effective remedy is concerned, it is my view that
28 they cannot be said to ensure adequate safeguards for
29 the protection of the privacy and fundamental rights

1 *and freedoms of EU citizens whose data is transferred*
2 *to the US.*

3
4 62. *Accordingly, I consider that the SCC Decisions are*
5 *likely to offend against Article 47 of the Charter* 11:30
6 *insofar as they purport to legitimise the transfer of*
7 *the personal data of EU citizens to the US in the*
8 *absence in many cases of any possibility for any such*
9 *citizen to pursue effective legal remedies in the US in*
10 *the event of any contravention by a US public authority* 11:30
11 *of their rights under Articles 7 and 8 of the Charter.*
12 *That being the case, I consider that the Complainant's*
13 *contention that SCC decisions cannot be relied upon to*
14 *legitimise the transfer of the personal data of US*
15 *citizens to the US in such circumstances is well* 11:31
16 *founded.*

17
18 63. *As a matter of EU law, however, the validity of*
19 *the SCC Decisions cannot be determined by me, or,*
20 *indeed, by the national courts of any jurisdiction."* 11:31

21
22 In the sense of coming to a conclusion of *invalidity*.

23
24 *"Accordingly, I consider that I am bound by the*
25 *judgment of the CJEU delivered on 6 October 2015 to*
26 *engage in legal proceedings before a national court so*
27 *that (a) I may put, forward to that national court the*
28 *objections to the SCC Decisions, which appear to me to*
29 *be well-founded; and (b) the national court may in*

1 *turn, if it shares my doubts as to the validity of*
2 *those decisions, make a reference for a preliminary*
3 *ruling by the court for the purpose of establishing the*
4 *validity or otherwise of the SCC decisions."*

11:31

5
6 So the ultimate decision you have to take, Judge, is
7 whether you share the Commissioner's doubts as to these
8 deficiencies in redress in terms of remedies for EU
9 citizens under the relevant US legislation. And, to do
10 that, you have to look at and decide what the US law is
11 in this respect in terms of those statutory provisions
12 and make those findings as findings of fact as to what
13 the foreign law is and that's what the US law experts
14 are here to help you to come to a conclusion in that
15 respect, and we will obviously help you too insofar as
16 we can.

11:32

11:32

17
18 So she sets out her conclusions then: "*That she has*
19 *formed the view, pending receipt of such further*
20 *submissions as the parties wish to submit, that a legal*
21 *remedy compatible with Article 47 of the Charter is not*
22 *available in the US to EU citizens."*

11:32

23
24 And she sets it out in terms that I don't think I need
25 to read, Judge, and she sets out why she thinks she has
26 to bring it before this court and ask for a reference.

11:32

27
28 And then at 68 she says: "*A final decision will be*
29 *issued following conclusion of the proceedings."*

1 So obviously depending on what you or the European
2 court, if appropriate, decide, then she takes her final
3 decision and she refers to the possibility of an
4 appeal.

5
6 So that decision was given on 24th May 2016, Judge, and
7 it was consequent upon that then that these proceedings
8 were issued for that purpose, and you know the
9 procedural history of the case. I think it was
10 case-managed by Mr. Justice McGovern, there were 11:33
11 applications by the amici to be admitted, he admitted
12 some of them. The status of their, after giving
13 liberty to deliver affidavits, but the status of
14 whether they were entitled to deliver affidavits or to
15 be admissible in evidence is an issue that remains to 11:33
16 be decided which we can talk about next week.

17
18 what I want to do now, Judge, is to attempt to look at
19 those US statutory provisions in a little bit more
20 detail in an attempt to explain them. Primarily what 11:33
21 you need for this purpose, Judge, there are five books
22 of agreed core books of US law materials and you need
23 Book 1 of those.

24 **MS. JUSTICE COSTELLO:** Are these are new ones that were
25 handed in? 11:34

26 **MR. MICHAEL COLLINS:** Yes, and as I say on the tablet
27 I think they are Book 14. It's document B, I'm told,
28 rather than Book 14, there is no Book 14 apparently.

29 **MS. JUSTICE COSTELLO:** Tab 14, did you say?

1 **MR. MICHAEL COLLINS:** No, ignore 14, Judge, that was
2 just about the tablet. Book 1 is what I'm looking at
3 in terms of the hard copy.

4 **MS. JUSTICE COSTELLO:** Yes.

5 **MR. MICHAEL COLLINS:** Sorry I am a Luddite in this 11:34
6 respect. And I'm going to, as I say, attempt to
7 explain these statutory provisions, Judge. I'm quite
8 sure I'll get it wrong in some respects, I'm quite
9 happy to take corrections if I have got something
10 wrong, but I will do my best to try to explain it and 11:35
11 of course it will be ultimately a matter for the US
12 experts who will do so much better than I can do it.

13
14 Could I ask you just to look at the index first to look
15 at what we are dealing with here. First of all, at 11:35
16 Tab 3 you'll see there is the Foreign Intelligence
17 Surveillance Act, that's the Act from 1978, and there
18 are various specific sections that are provided there.

19
20 You'll see, when it deals with section 1861 there to 11:35
21 1862, 1861 is the section that was originally known as
22 section 215, and people still refer to it as section
23 215. Similarly you see there a section 1881a.
24 Sometimes there's a section which in the Code, when it
25 gets dropped in logically after an original section 11:35
26 such as section 1881, it is simply called 1881a.

27
28 And just to also note, the nomenclature, when you come
29 to designate subsections, they are not designated by

1 number but by letter. So the first subsection would be
2 subsection A. So you might have section 1881a (a) to
3 indicate the subsection, so we'll come to that. And
4 then there are subparagraphs within that and so forth.

5 11:36

6 So there is that 1978 Act, the FISA as it is called.

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

8 **MR. MICHAEL COLLINS:** Secondly, or the second important
9 act that I want to refer to is Tab 6, the Electronic
10 Communications Privacy Act of 1986. Now that, as
11 I say, contains two acts, the Stored Communications
12 Act, and that is made up of those sections -- sorry,
13 this is all in title 18.

11:36

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

15 **MR. MICHAEL COLLINS:** It's made up of sections 2701 to
16 2712, so that's the Stored Communications Act. And
17 then 2510 to 2522, those sections constitute the
18 Wiretap Act. As I say the Wiretap Act was originally
19 an Act from 1968 but was updated and then integrated as
20 part of the Electronic Communications Privacy Act in
21 1986. And it is also, the Code is divided into
22 chapters and chapter 19 is the Wiretap Act so you
23 sometimes see references to chapter 19 as well. And --

11:36

11:37

24 **MS. JUSTICE COSTELLO:** Is that in Roman numerals or is
25 it?

11:37

26 **MR. MICHAEL COLLINS:** No, that's just regular numbers.

27 **MS. JUSTICE COSTELLO:** Regular.

28 **MR. MICHAEL COLLINS:** Thankfully. In the Stored
29 Communications Act the last of those sections, 2712, is

1 the important one I was talking about a few moments ago
2 that contains the remedies in terms of describing the
3 various other sections for which you are given a
4 remedy. And that was added by the Patriot Act, I think
5 I said 2011 a minute ago, I think it is 2001 in fact it 11:38
6 was added by the Patriot Act. I am subject to
7 correction on that but I think that's right. So that's
8 the second piece of legislation I'm going to be looking
9 at itself consisting of two pieces of legislation.

10
11 The third general piece of legislation I'm looking at
12 is the combination of the one at No. 7, the Judicial
13 Redress Act of 2015, plus, if you go over the page at
14 10, the Privacy Act of 1974 for the reasons that I have
15 already described. I'm going to look at those two acts 11:38
16 together.

17
18 I'll also looking briefly at No. 9, the Administrative
19 Procedure Act, which is essentially an act that
20 specifies a type of judicial review type remedy is 11:38
21 available for what's called final agency action,
22 meaning final decisions taken by administrative
23 agencies are subject to judicial review, very similar
24 to our concept of judicial review of administrative
25 actions here. 11:39

26
27 Then there are the other acts which the Commissioner
28 has referred to in her decision, but, as you can see
29 from the decision, while there are certain criticisms

1 made of them, they are perhaps less crucial, certainly
2 less difficult to understand the criticisms or the
3 structure of the Acts than the three blocks of
4 statutory provisions that I have identified. So most
5 of what I am going to be saying to you is going to 11:39
6 concentrate on those three blocks and I am going to
7 start with the Foreign Intelligence Surveillance Act of
8 1978 which you will find at Tab 3.

9
10 This Act, Judge, was enacted partly I think as a 11:39
11 consequence of two things. There was a case in 1972
12 called United States -v- United States District Court
13 which, because of the uninformative nature of the
14 title, is generally called I think the Keith decision
15 after the name of the judge who gave it, which was 11:40
16 concerned with warrantless electronic surveillance and
17 says it had to be subject to the principles of the
18 Fourth Amendment to the US constitution which is the
19 prohibition on unreasonable search and seizure, and
20 we'll be coming to the Fourth Amendment in due course. 11:40

21
22 In the course of that judgment it was suggested that
23 Congress might look at the question of perhaps
24 providing for procedures which would still comply with
25 the Fourth Amendment but would nonetheless serve the 11:40
26 necessary purposes of intelligence surveillance and so
27 forth and the legitimate purposes.

28
29 The second thing I think that prompted the Foreign

1 Surveillance Act was the whole Watergate scandal and
2 everything that flowed from that in terms of the type
3 of warrantless surveillance that was revealed to have
4 been proceeding under the Nixon administration with the
5 FBI and so forth. There was a commission, I think a 11:41
6 Congressional committee or commission set up called the
7 Church Committee which made a report in relation to
8 that as to what should be done. So as a consequence of
9 all of those factors the Foreign Intelligence
10 Surveillance Act of 1978 was enacted. 11:41

11
12 If we can just look at the structure of it first,
13 Judge, and this is in the US Code. And you'll see at
14 the top left, Judge, there are page numbers, so from
15 time to time the easiest way is I'm going to be 11:41
16 directing you to the page numbers so I am on page 199
17 at the moment.

18 **MS. JUSTICE COSTELLO:** Yes.

19 **MR. MICHAEL COLLINS:** And you will see that the Act is
20 slotted in as a chapter 36 in the Code. It's in 11:41
21 Title 50, Title 50 itself deals with war and national
22 defence, that's the broad subject. So you have a whole
23 range of statutes that come under Title 50.

24
25 Subchapter 1 deals with electronic surveillance and 11:42
26 there are various provisions there which in effect say
27 that you have to, if the director of the National
28 Security Agency or whoever wants to get a form of,
29 engage in a form of electronic surveillance on US

1 citizens, they go to a court that was specially set up
2 under this Act that we referred to yesterday, the
3 Foreign Intelligence Surveillance Court, which is a
4 full Article III court in the sense that judges are
5 designated I think by the Chief Justice and it has 11:42
6 independence and it is a recognised court as a
7 constitutional court under Article III of the
8 US constitution but as I say it operated entirely in
9 secret and entirely originally on an ex parte basis,
10 But you would get your approval for various forms of 11:42
11 surveillance from that court.

12
13 There are certain civil liabilities there. If you see
14 section 1810, it refers to civil liability and in due
15 course we'll just look at that section and what it 11:43
16 provides for.

17
18 Subchapter II deals with physical searches and these
19 are where you are looking to actually physically search
20 a premises and so you get your permission to go and do 11:43
21 that. Subchapter III deals with the pen registers and
22 trap and trace devices, so if you want to install such
23 a device on somebody's phone or similar
24 telecommunications equipment, that's what subchapter
25 III deals with. 11:43
26

27 Subchapter IV deals with access to certain business
28 records for foreign intelligence purposes. That refers
29 to its definition in particular to the production of

1 tangible things. So you often see this section
2 referred to specifically as the section dealing with
3 tangible things like business records, books,
4 documents, thing of that sort and section 1861 is the
5 section that in the original Act was section 215. 11:43

6
7 So you will frequently see references to section 215
8 searches or authorisations under the Foreign
9 Intelligence Act and that's what they are talking about
10 there, section 1861. 11:44

11
12 Subchapter V deals with oversight. There's a
13 semi-annual report of the Attorney-General on these
14 matters. Then subchapter VI, which is of particular
15 importance, is additional procedures regarding certain 11:44
16 persons outside the United States. And what it is
17 dealing with is forms of surveillance that are
18 undertaken on non-US persons who are outside of the
19 United States. And that section, section 1881a, is in
20 the original section 702. So this is the section 11:44
21 specifically dealing with searches in relation to
22 persons outside the US and that's where I want to
23 start, Judge, with that section 1881 and 1881a.

24
25 So you'll find that, Judge, I think at page 249 in the 11:45
26 book. I think section 702 was the basis, Judge, for
27 the operations that we referred to yesterday such as
28 the prism and the upstream operations.

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

1 **MR. MICHAEL COLLINS:** Because, although the searching
2 is done in the US in the sense of the data flows are in
3 the US, but it's in respect of persons who are non-US
4 persons and who are outside the US. So I might send an
5 e-mail to Mr. Gallagher and, although he is only three 11:45
6 feet away from me or less, the e-mail might in fact be
7 routed through companies in the United States and back
8 again. So an enormous amount of traffic, as
9 I understand it from the evidence, from the experts,
10 flows through the United States, even though it 11:45
11 originates from non-US persons and ends up being sent
12 to non-US persons. But it can still be accessed
13 through the relevant internet service provider
14 companies and telecommunications companies in the
15 United States. 11:46

16
17 So if we look at section 1881a it says: "*Procedures*
18 *for targeting certain persons outside the United States*
19 *other than United States persons.*" Then there is
20 subsection (a) authorisation: 11:46

21
22 "*Notwithstanding any other provision of law, upon the*
23 *issuance of an order in accordance with subsection*
24 *(i)(3) or a determination under subsection (c)(2), the*
25 *Attorney General and the Director of National 11:46*
26 *Intelligence may authorize jointly, for a period of up*
27 *to 1 year from the effective date of the authorization,*
28 *the targeting of persons reasonably believed to be*
29 *located outside the United States to acquire foreign*

1 *intelligence information."*

2
3 So it's a form of certification, Judge, that they go
4 before the court, they set out what it is that they
5 want to do and they set out compliance with the 11:46
6 procedures that are required under the Act and they get
7 authorisation which is valid for a year.

8 **MS. JUSTICE COSTELLO:** Hmm.

9 **MR. MICHAEL COLLINS:** And then they can conduct those
10 searches and surveillance and interception or whatever 11:47
11 it may amount to during the course of that particular
12 year.

13
14 You'll see there it says: "*Upon the issuance of an*
15 *order in accordance with the (i)(3)."* 11:47

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

17 **MR. MICHAEL COLLINS:** If I bring you to subsection
18 (i)(3), which you will find on page 252, and do you see
19 half way down on the right-hand column there is a
20 heading "*3 orders*". And it says: 11:47

21
22 "*If the court finds that a certification submitted in*
23 *accordance with subsection (g) - I'm going to have to*
24 *go back to subsection (g) in a second - contains all*
25 *the required elements and that the targeting and 11:47*
26 *minimisation procedures adopted in accordance with*
27 *subsections (d) and (e) are consistent with the*
28 *requirements of those subsections."*

29

1 So if I pause there. What the court looks at is to say
2 you're telling me what you are planning to do in terms
3 of this surveillance, there are certain procedures
4 under the Act, these minimisation procedures, designed
5 to minimise the extent to which persons other than the 11:48
6 targets of the surveillance might be, their data might
7 be collected.

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

9 **MR. MICHAEL COLLINS:** And there is targeting
10 requirements; in other words, you are supposed to focus 11:48
11 it to some extent as opposed to a broad-brush approach.
12 So show me that I have complied with the requirements
13 of the Act in relation to targeting and minimisation.

14
15 So you have to demonstrate that it's consistent with 11:48
16 those procedures: "*And are consistent with the*
17 *requirement of those subsections and with the fourth*
18 *amendment to the Constitution of the United States.*"

19
20 And, as we will see, Judge, when we look at the Fourth 11:48
21 Amendment of the United States or of the Constitution
22 of the United States, it only applies to non-US
23 citizens if there is a certain specific degree of
24 connection between the person, the non-US person, and
25 the United States itself. So that if, for example, 11:49
26 somebody is completely outside the United States with
27 no connection with the United States, then, as
28 I understand it, the Fourth Amendment doesn't apply or
29 cannot be invoked by that person and there is of course

1 case law in respect of that and I will direct you to
2 the relevant principles a little bit later on.

3
4 It says: "*The Court shall enter an order approving the*
5 *certification and the use, or continued use in the case* 11:49
6 *of an acquisition authorised pursuant to a*
7 *determination under subsection (c)(2), of the*
8 *procedures for the acquisition.*"

9
10 So we need to look, therefore, at subsection (g) to see 11:49
11 what is required and indeed at the targeting and
12 minimisation procedures.

13
14 So subsection (g), Judge, you will find at page 250,
15 which is the previous page, and it is headed 11:50
16 "*Certification*". And it says (A): "*Requirement.*
17 *Subject to subparagraph (b) prior --*"

18 **MS. JUSTICE COSTELLO:** Just a moment, I haven't quite
19 got there.

20 **MR. MICHAEL COLLINS:** Sorry, Judge. 11:50

21 **MS. JUSTICE COSTELLO:** The previous page? Did you say
22 250 or 251?

23 **MR. MICHAEL COLLINS:** Page 250, sorry, two pages back.

24 **MS. JUSTICE COSTELLO:** Sorry. Yes, I have it. Thank
25 you. 11:50

26 **MR. MICHAEL COLLINS:** "*Subject to subparagraph (B)*
27 *prior to the implementation of an authorisation under*
28 *subsection (a) - that's the general authorisation that*
29 *we referred to at the very start - the Attorney General*

1 *and the Director of National Intelligence shall provide*
2 *to the Foreign Intelligence Surveillance Court a*
3 *written certification and any supporting affidavit,*
4 *under oath and under seal, in accordance with this*
5 *subsection."*

11:50

6
7 So this is where they go in for their annual
8 certification to get the certificate that lasts for the
9 year. There is an exception if it's very urgent, that
10 they don't have time to do that in some particular
11 circumstance, in which case they have to provide all
12 the necessary certification within seven days after
13 they do whatever they do.

11:50

14
15 Then (2) deals with the requirements: "*A certification*
16 *made under this subsection shall - (A) attest that*
17 *(i) there are procedures in place that have been*
18 *approved, have been submitted for approval or will be*
19 *submitted for approval by the Foreign Intelligence*
20 *Surveillance Court that are reasonably designed to -*
21 *ensure a number of matters."*

11:51

11:51

22
23 And I'll let the stenographers change.

24
25 So the first is:

11:51

26
27 "*Ensure that any acquisition authorized under*
28 *subsection (a) is limited to targeting persons*
29 *reasonably believed to be located outside the United*

1 States."

2
3 So that's the first point, Section 702 is dealing with
4 people outside the US.

5
6 "2. Prevent the intentional acquisition of any
7 communication as to which the sender and all intended
8 recipients are known at the time of the acquisition to
9 be located in the US."

10
11 So you can't *intentionally* acquire information about
12 people within the US, although clearly you may do so
13 either inadvertently or as a collateral matter to the
14 information that you do acquire about the person
15 outside the US.

16
17 "3" -- sorry, that's all under the first sub (i)
18 requirement.

19 **MS. JUSTICE COSTELLO:** (i), yes.

20 **MR. MICHAEL COLLINS:** Then sub (ii): The minimisation
21 procedures to be used with respect to such acquisition
22 "*meet the definition of minimisation procedures under*
23 *Section 801(h) or 1821(4) of this title as*
24 *appropriate.*" And that's depending upon whether it's
25 electronic communication or physical searches -- or,
26 sorry, I'm wrong about that. Let me come back to that,
27 Judge.

28
29 "*Have been approved, have been submitted for approval*

1 *or will be submitted with the certification for*
2 *approval by the Foreign Intelligence Surveillance*
3 *Court."*

4
5 So let's look at the definition of the minimisation 11:53
6 procedures under those two sections, 1801(h) and
7 1821(4). 1801(h), Judge, can be found on page 201.
8 This is in the definitions section, which is 1801
9 itself, which starts on the very first page we started
10 at actually, 199. (h) refers to minimisation 11:53
11 procedures with respect to electronic surveillance.
12 It's on the left-hand column halfway down. It says:

13
14 *"Specific procedures, which shall be adopted by the*
15 *Attorney General, that are reasonably designed in light*
16 *of the purpose and technique of the particular*
17 *surveillance, to minimize the acquisition and*
18 *retention, and prohibit the dissemination, of*
19 *non-publicly available information concerning*
20 *unconsenting United States persons" - that's the 11:54*
21 important phrase there, "unconsenting United States
22 persons" - "*consistent with the need of the United*
23 *States to obtain, produce and disseminate foreign*
24 *intelligence information."*

25
26 So the procedures have to be designed to ensure that it 11:54
27 minimises acquiring data about US persons. But the
28 procedures *don't* have to be designed to ensure that you
29 minimise the acquisition of data about non-US persons.

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And similarly, in sub 2 it goes on:

"Procedures that require that non-publicly available information, which is not foreign intelligence information, as defined in subsection (e)(1) of this section, shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance."

So you've got to try to, as far as possible, minimise the dissemination of information, but only insofar as it might disseminate information about a US person, not a non-US person. 11:55

Then in 3 it refers to procedures about disseminating information if its evidence of a crime. And at 4, at the top of the right hand column: 11:55

"Notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 1802(a) of this title, procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours."

1 Unless you get a court order or unless the Attorney
2 General determines that the information indicates a
3 threat of death or serious bodily harm to any person.
4 So you can't disclose it and you can't retain it for
5 longer than 72 hours if it relates to a US person. But 11:56
6 not in relation to a non-US person, these procedures
7 seemingly don't apply.

8
9 Similarly, Judge, the other reference was to 1821(4),
10 which is the same type of procedure but in the context 11:56
11 of physical searches. I actually was right about what
12 I said earlier about physical searches.

13 **MS. JUSTICE COSTELLO:** What page is that

14 **MR. MICHAEL COLLINS:** Sorry, page 221, I beg your
15 pardon. This is dealing with the subchapter on 11:56
16 physical searches. And if you look at the definitions
17 at subsection 4 on the left-hand column, about three
18 quarters of the way down the page: "*Minimisation*
19 *procedures', with respect to a physical search.*" And
20 it goes on to set out, in very similar terms to the 11:56
21 terms I've just read out, and I don't need to read
22 these out again, but you'll see it has the same
23 qualifications concerning unconsenting United States
24 persons, not identifying United States persons, not
25 disclosing or retaining for more than 72 hours 11:57
26 information about United States persons.

27
28 Could I also draw your attention while I'm here, Judge,
29 to page 216, section 1806?

1 MS. JUSTICE COSTELLO: 216?
2 MR. MICHAEL COLLINS: 216.
3 MS. JUSTICE COSTELLO: Section?
4 MR. MICHAEL COLLINS: 1806. It's the bottom of the
5 left-hand column, dealing with the use of information: 11:57
6
7 *"Compliance with minimization procedures; privileged*
8 *communications; lawful purposes.*
9 *Information acquired from an electronic surveillance*
10 *conducted pursuant to this subchapter concerning any*
11 *United States person" - so again we have the limitation*
12 *there - "may be used and disclosed by Federal officers*
13 *and employees without the consent of the United States*
14 *person only in accordance with the minimization*
15 *procedures required by this subchapter."*
16
17 And it goes on to preserve the privileged character of
18 communications. So again that's perhaps the corollary
19 of what we've just seen in terms of the definition of
20 it; it says you can't disclose it in relation to any US 11:58
21 person without the consent of that person other than in
22 accordance with the minimisation procedures. And again
23 a protection that's entirely on US persons but not on
24 non-US persons.
25
26 So if I go back to page 250, these requirements for
27 certification when you're making your application under
28 Section 702 to the FISC court. I was at 2 (i): *"Meet*
29 *the definition of minimization procedures."* And of

1 course, you can easily, therefore, meet those
2 minimisation procedures even if you've got *no*
3 minimisation procedures vis-à-vis non-US persons, such
4 as EU citizens. And (ii): "Have been approved, have
5 been submitted for approval or will be submitted for
6 approval for the Foreign Intelligence Surveillance
7 Court." Then (iii):

11:59

8
9 *"Guidelines have been adopted in accordance with*
10 *subsection (f) to ensure compliance with the*
11 *limitations in subsection (b)...*

11:59

12 *(iv) The procedures and guidelines referred to in*
13 *clauses (i), (ii) and (iii) are consistent with*
14 *requirements of the Fourth Amendment to the*
15 *Constitution...*

11:59

16 *(v) A significant purpose of the acquisition is to*
17 *obtain foreign intelligence information."*

18
19 So that is the primary purpose of a Section 702
20 surveillance, it's for the obtaining of foreign
21 intelligence information. But I might just look at the
22 definition of that term, Judge. And the definitions
23 are actually not organised in alphabetical order and
24 I've just lost it, I'm afraid, where the definition of
25 foreign intelligence -- I'll come back to it -- oh,
26 sorry, it's here, it's on page 200. It's in the
27 definitions section, 1801. And it says, there's
28 paragraph (e) about halfway down the right hand column.

11:59

11:59

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

1 **MR. MICHAEL COLLINS:** *"Information that relates to,*
2 *and if concerning a United States person is necessary*
3 *to, the ability of the United States to protect against*
4 *(A) actual or potential attack or other grave hostile*
5 *acts of a foreign power or an agent of a foreign power;*
6 *(B) sabotage, international terrorism, or the*
7 *international proliferation of weapons of mass*
8 *destruction by a foreign power or an agent of a foreign*
9 *power; or*
10 *(C) clandestine intelligence activities by an*
11 *intelligence service or network of a foreign power or*
12 *by an agent of a foreign power; or*
13
14 *(2) information with respect to a foreign power or*
15 *foreign territory that relates to, and if concerning a*
16 *United States person is necessary to –*
17 *(A) the national defense or the security of the United*
18 *States; or*
19 *(B) the conduct of the foreign affairs of the United*
20 *States."*

21
22 And a comment is made, I think, by some of the experts
23 that that latter in particular is extremely wide, the
24 conduct of the foreign affairs of the United States.
25 All of that is what constitutes or can come within
26 foreign intelligence information.

12:01

27
28 So going back to page 250, near the top of the right
29 hand column at 7: *"The acquisition complies with the*

1 *limitations in subsection (b)."* Then capital B:
2 *"Includes the procedures adopted in accordance with*
3 *subsections (d) and (e)."* Now, to see -- they are the
4 targeting procedures and the minimisation procedures.
5 And you'll find those subsection (d) and (e) on the 12:01
6 previous page, Judge, on page 249. And if you see the
7 right hand column about halfway down, there is a
8 subsection (d) called "Targeting Procedures". So 1 is:

9
10 *"Requirement to adopt*
11 *The Attorney General, in consultation with the Director*
12 *of National Intelligence, shall adopt targeting*
13 *procedures that are reasonably designed to –*
14 *(A) ensure that any acquisition authorized under*
15 *subsection (a) is limited to targeting persons*
16 *reasonably believed to be located outside the United*
17 *States; and*
18 *(B) prevent the intentional acquisition of any*
19 *communication as to which the sender and all intended*
20 *recipients are known at the time of the acquisition to*
21 *be located in the United States."*

22
23 So that's the targeting procedure. And the procedures
24 you outline to the court when the Director of National
25 Security is making his application or her application 12:02
26 has to comply and show the procedures that are designed
27 to comply with this type of targeting procedure.

28
29 Then (e) is the minimisation procedure:

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*"(1) Requirement to adopt
The Attorney General, in consultation with the Director
of National Intelligence, shall adopt minimization
procedures that meet the definition of minimization
procedures under section 1801(h) of this title" -
that's the one we looked at just a moment ago about
electronic surveillance - "or section 1821(4) of this
title" - and we looked about that a moment ago about
physical searches - "as appropriate, for acquisitions
authorized under subsection (a)."*

12:03

So going back to page 250. So you have to demonstrate
to the court that you have procedures in place that are
designed to comply with all of that. Then C: *"Be
supported, as appropriate, by the affidavit of any
appropriate official."* And it sets out what his
qualifications have to be.

12:03

So that's the form of procedure that has to take place
when they go in -- and the Director of the National
Security Agency, with the Attorney General, they go in
before the court and they say 'We have procedures in
place to engage in foreign intelligence surveillance of
people outside the US, our procedures comply with these
particular requirements' and the court looks and
ascertains and satisfies itself that that is so and, as
a result, it then grants a certificate that's valid for
a year and the Section 702 surveillance can then take

12:03

1 place pursuant to that certificate as I understand it.

2
3 Now, there are -- if I go back, Judge, all of that
4 sprang from subsection (a), "Authorisation". Because
5 that referred to the various requirements that I say 12:04
6 you'll find scattered through the rest of the section.
7 But if I go back then to subsection (b), "Limitations".
8 And could I just make clear, Judge - it probably *is*
9 clear - the procedure as I understand it doesn't,
10 therefore, require any prior approval by FISC to an 12:04
11 individual piece of surveillance that they might engage
12 in. If, three months later, they want to engage in a
13 particular piece of surveillance, they don't go back to
14 the court; they have the benefit of certificate that
15 they've got that's valid for a year and they carry on 12:04
16 in relation to that. So there's no warrant, in other
17 words, for this surveillance. And that's why it's
18 often referred to as that this section, Section 702,
19 provides for warrantless electronic surveillance of
20 non-US persons. 12:05

21
22 Then there are limitations set out in (b): "*An*
23 *acquisition authorised under subsection (a).*" And
24 "acquisition" is the technical term they're using for
25 the acquisition of the data, in other words the 12:05
26 surveillance that is to take place.

27
28 "*(1) may not intentionally target any person known at*
29 *the time of acquisition to be located in the United*

1 States;

2 (2) may not intentionally target a person reasonably
3 believed to be located outside the United States if the
4 purpose of such acquisition is to target a particular,
5 known person reasonably believed to be in the United
6 States;

7 (3) may not intentionally target a United States person
8 reasonably believed to be located outside the United
9 States;

10 (4) may not intentionally acquire any communication
11 as to which the sender and all intended recipients are
12 known at the time of the acquisition to be located in
13 the United States."

14
15 And that's an interesting one perhaps, Judge. Because 12:05
16 it prohibits you from, intentionally at least, trying
17 to acquire communications where all of the -- both the
18 sender and all of the recipients are located in the US.
19 But it would seem that if some of them are outside the
20 US, that particular limitation doesn't apply. 12:06

21
22 "5. Shall be conducted in a manner consistent with the
23 Fourth Amendment to the Constitution."
24

25 But of course, as I said and I'll elaborate later on, 12:06
26 there are significant constraints on the application of
27 the Fourth Amendment of the Constitution to parties
28 outside the US.
29

1 The conduct of the acquisition is under C:

2
3 *"(1) In general*

4 *An acquisition authorized under subsection (a) shall be*
5 *conducted only in accordance with –*

6 *(A) the targeting and minimization procedures adopted*
7 *in accordance with subsections (d) and (e); and*

8 *(B) upon submission of a certification in accordance*
9 *with subsection (g)."*

10
11 So these are the only statutory limitations that exist
12 on surveillance conducted under Section 702. And if
13 you are a non-US person outside the US then Section
14 702, subject to these limitations and constraints,
15 effectively empowers the National Security Agency or 12:07
16 the appropriate agency to conduct that surveillance -
17 but on, of course, data that is being transmitted
18 within or flowing across the cables and so on within
19 the United States. I think as a broad principle one
20 can say that actual intelligence activities that take 12:07
21 place *outside* the United States I *think* are conducted
22 pursuant to Executive Order 12333, with which we're not
23 really concerned, because we're only concerned with
24 what happens to data when it goes *to* the US and how is
25 it processed or accessed within the US. So we're not 12:07
26 actually concerned that much with Executive Order
27 12333.

28
29 There are certain judicial review procedures provided

1 here in the section. So if you look again - I'm still
2 on page 249 - and if you look at, under the targeting
3 procedures, subsection (d), you'll see a subparagraph 2
4 headed "Judicial Review". It says:

5
6 *"The procedures adopted in accordance with paragraph*
7 *(1)" - so we're just talking now specifically about the*
8 *targeting procedures - "shall be subject to judicial*
9 *review pursuant to subsection (i)."*

10
11 And you'll find subsection (i) on page 252. And this
12 provides for -- I'm sorry, before I leave it, Judge,
13 before I leave page 249, the same provision applies in
14 relation to the minimisation procedures. Do you see
15 there subsection (e) and there's a paragraph 2,
16 "Judicial Review"? And that provides also for judicial
17 review.

18
19 So those judicial review procedures are dealt with in
20 subsection (i), which you'll find on page 252. And it
21 says:

22
23 *"Review by the Foreign Intelligence Surveillance Court*
24 *The Foreign Intelligence Surveillance Court shall have*
25 *jurisdiction to review a certification submitted in*
26 *accordance with subsection (g)."*

27
28 So remember, the Director comes to the court with the
29 Attorney General and he says 'Here's a certificate, I'm

1 saying that I have complied with, or the agency has
2 complied with these targeting and minimisation
3 procedures and we're proposing to carry out', or 'we
4 want approval to carry out our surveillance and so on
5 once you certify these procedures, you're satisfied 12:09
6 these procedures have been complied with'. And that's
7 the review, that's the form of judicial review that the
8 court engages in in granting the certificate. It's not
9 an ex post type of review.

10
11 So it reviews the certification submitted in accordance 12:09
12 with subsection (g) and the targeting and minimisation
13 procedures adopted in accordance with subsections (d)
14 and (e). So it's looking at the form of the procedures
15 that the agency is telling you that you're going to 12:10
16 adopt, rather than a specific piece of surveillance
17 itself, and amendments such procedures or certification
18 or procedures. It has to be done within 30 days.
19 There can be amended procedures submitted.

20
21 Then top of the right hand column in subparagraph 2:
22

23 *"Review*

24 *The Court shall review the following:*

25 *(A) Certification*

26 *A certification submitted in accordance with subsection*
27 *(g) to determine whether the certification contains all*
28 *the required elements."*
29

1 That's the first thing the court does; it looks at it,
2 goes down the boxes and sees have you got all the
3 elements? "*(B) Targeting procedures.*" And what it does
4 there is, "*to assess whether the procedures are*
5 *reasonably designed to*", and then it sets out the 12:10
6 objectives we've already set out, i.e. that they're
7 confined to targeting persons reasonably believed to be
8 in the US and to prevent the intentional acquisition of
9 communications on which *everybody* on the communication
10 is in the US. 12:11

11
12 And similarly, the minimisation procedures; the court
13 looks at those, again to assess whether the procedures
14 meet the definition of minimisation procedures under
15 the two various definitions, whether it's electronic 12:11
16 surveillance or physical searches, as appropriate.
17 Then the court makes an order granting or approving the
18 certificate. This is 3(A), "Approval":

19
20 "*If the Court finds that a certification submitted in*
21 *accordance with subsection (g) contains all the*
22 *required elements and that the targeting and*
23 *minimization procedures adopted in accordance with*
24 *subsections (d) and (e) are consistent with the*
25 *requirements of those subsections and with the fourth*
26 *amendment to the Constitution of the United States, the*
27 *Court shall enter an order approving the certification*
28 *and the use, or continued use in the case of an*
29 *acquisition authorized pursuant to a determination*

1 *under subsection (c)(2), of the procedures for the*
2 *acquisition."*

3
4 And you'll see at the bottom of the page, Judge, (C),
5 "Requirement For Written Statement":

12:11

6
7 *"In support of an order under this subsection, the*
8 *court shall provide simultaneously with the order for*
9 *the record a written statement of the reasons for the*
10 *order."*

12:12

11
12 And as I say, those are in the form of really reasoned
13 decisions, which were not released until recently, and
14 only some then are released, but obviously redacted,
15 sometimes heavily, and understandably so for national
16 security purposes.

12:12

17
18 There is an appeal from that certification procedure -
19 obviously only if the certificate is refused. And I
20 think the evidence from the experts, Judge, is - I
21 forget the numbers, I haven't got a note of them in
22 front of me - but of the thousands of applications, I
23 think, that have been made over the years, I think a
24 very, very small number have ever been, the certificate
25 has been refused by the court. But if it *is* refused,
26 the government has a right of appeal to another court.
27 And you see that on page 253, paragraph 4, halfway down
28 the left-hand column. There's a court of review, which
29 I think is a three-judge court, I think. It says:

12:12

12:12

1
2 *"The Government may file a petition with the Foreign*
3 *Intelligence Surveillance Court of Review for review of*
4 *an order under this subsection."*

5
6 And they've jurisdiction to consider the petition and
7 they can modify it and so on and have to give reasons
8 in relation to it. So obviously, since nobody else is
9 before the court in terms of something as it was
10 originally set up, the government *would* be the only 12:13
11 person to appeal, and an appeal would only arise in
12 circumstances where the certificate was refused. It
13 doesn't arise where the certificate is granted, because
14 there's nobody to appeal.

15 **MS. JUSTICE COSTELLO:** what about the six lawyers? 12:13

16 **MR. MICHAEL COLLINS:** That, I don't know, Judge. I
17 meant to check that. Under the new -- I'm assuming,
18 but I'm subject to correction - but since the Code is
19 constantly updated, I'm assuming we have the most
20 recent edition of the code - that if there *was* such a 12:13
21 procedure for appeal by the amici, that it would be
22 provided. So I'm working on the assumption, but it's
23 only an assumption and an assumption based on
24 ignorance, that there isn't an appeal by the six amici.
25 But I'm happy to be corrected on that if it turns out 12:13
26 that that's not so.

27
28 So it's interesting perhaps to note the things that the
29 court does *not* review under this section. It doesn't

1 review, most obviously, probable cause, which is one
2 the standard principles that one looks at when one is
3 applying for a warrant of some sort, because there's no
4 *need* for probable cause under a Section 702
5 surveillance. It doesn't review whether the target is 12:14
6 in fact a foreign power. It doesn't review whether the
7 target is in fact engaged in criminal activity. And
8 the government, it appears, doesn't have to specify
9 what are the particular specific facilities or the
10 places at which the electronic surveillance is 12:14
11 directed.

12
13 So that's the Section 702 procedure, Judge. I think
14 next if I move on to -- sorry, I beg your pardon. Yes,
15 sorry, Mr. Gallagher draws my attention to, on page 12:15
16 251, challenging of directives. And in fact, before
17 even I do *that*, Judge, there's a section I should've
18 drawn your attention to, and I should also have drawn
19 Mr. Gallagher's attention. If you go back to page 250,
20 at the bottom of the page there's a subsection (h) 12:15
21 which is headed "Directives and Judicial Review of
22 Directives". And the first is "Authority":

23
24 *"with respect to an acquisition authorized under*
25 *subsection (a), the Attorney General and the Director*
26 *of National Intelligence may direct, in writing, an*
27 *electronic communication service provider."*

28
29 If I just pause there, Judge. This is the mechanism by

1 which, when they decide that they're going to engage in
2 some surveillance and they want to intercept data,
3 let's say held by an internet service provider - and
4 this, I think, is where the original account of the
5 Snowden leaks was the subject of criticism when it said 12:16
6 the government could *directly* access the servers - what
7 happens is this procedure: The Director of the National
8 Intelligence Agency and the Attorney General, they
9 direct the electronic communications service provider,
10 such as the internet service provider, to provide the 12:16
11 information in question. So what they have to do is:

12
13 "*(A) immediately provide the Government with all*
14 *information, facilities, or assistance necessary to*
15 *accomplish the acquisition in a manner that will*
16 *protect the secrecy of the acquisition and produce a*
17 *minimum of interference with the services that such*
18 *electronic communication service provider is providing*
19 *to the target of the acquisition.*"

20
21 So once the Director decides he wants to go to whoever
22 the internet service provider or the telecommunications
23 company or whatever it is, he simply draws up an order
24 himself or herself, serves it on the company, which
25 then is under a statutory obligation to immediately 12:17
26 provide the company with all the information necessary
27 and all the facilities necessary to achieve the object
28 of the interception and to do so in a manner which will
29 protect the acquisition, the secrecy of the

1 acquisition. And that, of course, is perfectly
2 understandable, because you're engaged in secret
3 surveillance for counter terrorism and national
4 security purposes and so forth.

12:17

5
6 Then (B):

7
8 *"Maintain under security procedures approved by the*
9 *Attorney General and the Director of National*
10 *Intelligence any records concerning the acquisition or*
11 *the aid furnished that such electronic communication*
12 *service provider wishes to maintain."*

13
14 And there's a provision for some compensation to be
15 given to the company for doing that. Then under 4,
16 "Challenging of Directives", there's authority to
17 challenge:

12:17

18
19 *"An electronic communication service provider receiving*
20 *a directive issued pursuant to paragraph (1) may file a*
21 *petition to modify or set aside such directive with the*
22 *Foreign Intelligence Surveillance Court, which shall*
23 *have jurisdiction to review such petition."*

24
25 Then it sets out the procedures; the presiding judge
26 assigns a judge. Standards for review:

12:18

27
28 *"A judge considering a petition filed under*
29 *subparagraph (a) may grant such petition only if the*

1 *judge finds the directive does not meet the*
2 *requirements of this section or is otherwise unlawful."*

3
4 In other words, he looks at the question of whether the
5 procedures that have been approved originally by the 12:18
6 court have in fact been complied with in the particular
7 acquisition itself. And there's procedures then set
8 out in slightly more detail. I don't think, unless
9 Mr. Gallagher wants me to, I need concern ourselves
10 with the detail of that. 12:18

11
12 That, of course, is a right given to the company, who's
13 served in secret. It's not, of course, a right given
14 to the person whose data it is which is being accessed.

15 12:19
16 I think I now have at least covered all I intended to
17 cover on the Section 702 procedure. What I want to
18 look at now, Judge, is subchapter 1 on electronic
19 surveillance. And in particular, remember I drew your
20 attention to Section 1810 when we were looking at the 12:19
21 index to this chapter on civil liability? And you'll
22 find 1810 on page --

23 **MS. JUSTICE COSTELLO:** Are we still within the FISA?

24 **MR. MICHAEL COLLINS:** We're still within the FISA.

25 All of this is within FISA. Page 219. 12:19

26 **MS. JUSTICE COSTELLO:** 219. Thank you, yes.

27 **MR. MICHAEL COLLINS:** And this is a remedy for
28 somebody who has been subjected to electronic
29 surveillance. And it provides at 1810, headed "Civil

1 Liability": "An aggrieved person" -- and I think
2 there's a definition of an aggrieved person at the
3 beginning, Judge... Sorry, I've just lost it. But
4 I'll come back to it. It's obvious anyhow in general
5 terms what it means.

12:20

6
7 "An aggrieved person, other than a foreign power or an
8 agent of a foreign power, as defined in section 1801(a)
9 or (b)(1)(A) of this title, respectively, who has been
10 subjected to an electronic surveillance or about whom
11 information obtained by electronic surveillance of such
12 person has been disclosed or used in violation of
13 section 1809 of this title shall have a cause of action
14 against any person who committed such violation and
15 shall be entitled to recover -

16 (a) actual damages, but not less than... \$1,000 or \$100
17 per day for each day of violation...

18 (b) punitive damages; and

19 (c) reasonable attorney's fees" - one of the statutory
20 exceptions to the normal rule in the United States that 12:21
21 each side bears their own costs.

22
23 So that's a remedy which you have if, first of all, if
24 you know about the fact that you've been the subject of
25 the surveillance. Because there's no notification 12:21
26 obligation to tell the person, obviously, that they've
27 been the subject of the surveillance. That only arises
28 under some sections, Judge, when the government
29 proposes to use the information in some context, such

1 as a prosecution or something of that sort, in which
2 case there are statutory provisions which say you then
3 have to tell the person 'we've got this information
4 from some form of surveillance'. But bar, I think,
5 cases such as that and particular exceptions such as 12:22
6 that, there's no notification obligation as I
7 understand it to tell the person. So they may never be
8 in a position to bring such an action as contemplated
9 by this particular section.

10
11 But secondly and importantly, you can bring the civil
12 action if the information has been disclosed in
13 violation of section 1809. So you have to show a
14 section 1809 violation in order to have a cause of
15 action under section 1810. And if you look at what is 12:22
16 prohibited under section 1809, it says:

17
18 *"Prohibited Activities*

19 *A person is guilty of an offense if he intentionally –*
20 *(1) engages in electronic surveillance under colour of*
21 *law except as authorized by this chapter... or any*
22 *express statutory authorization that is an additional*
23 *exclusive means for conducting electronic surveillance*
24 *under section 1812 of this title;*

25 *(2) discloses or uses information obtained under colour*
26 *of law by electronic surveillance, knowing or having*
27 *reason to know that the information was obtained*
28 *through electronic surveillance not authorized by this*
29 *chapter, chapter 119, 121, or 206 of title 18, or any*

1 *express statutory authorization.*"

2
3 So, of course, the key point is that it has to be an
4 intentional violation by the person concerned, that
5 they've not just breach some of the procedures that 12:23
6 they're supposed to breach if they're engaging in
7 electronic surveillance or they've made a mistake about
8 it, or even that they've been negligent about it, they
9 must have intentionally decided that they're going to
10 breach some of the procedures. And as I mentioned, 12:23
11 Judge, for US persons, of course, if the searches are
12 conducted against them, you get the warrant from the
13 judge. I'll draw your attention to those provisions in
14 a moment. Section 702 is the one that you *don't* need
15 the warrant when you're trying to survey or intercept 12:23
16 the data of non-US persons outside the United States.

17
18 And you'll notice, Judge, that the reference to
19 "engaging in electronic surveillance under cover of law
20 except as authorised by this chapter, chapter 119" and 12:24
21 so forth doesn't appear to encompass Section 702. So
22 that if there *was* a violation of Section 702, as I
23 understand it - again subject to correction - it
24 doesn't seem that that comes within the section 1809
25 violation. 12:24

26
27 There's a defence provided in (b):

28
29 "*It is a defence to a prosecution under subsection (a)*

1 *of this section that the defendant was a law*
2 *enforcement or investigative officer engaged in the*
3 *course of his official duties and the electronic*
4 *surveillance was authorised by and conducted pursuant*
5 *to a search warrant or court order of a court of*
6 *competent jurisdiction."*

7
8 So it would seem to be the case that even if you did so
9 *intentionally*, if you're a law enforcement officer or
10 an investigative officer - and presumably, nearly all 12:25
11 of the forms of surveillance that would be undertaken
12 that we're concerned with would be carried out by such
13 persons; could, of course, be carried out by civilians
14 with their own hacking and surveillance equipment, I
15 suppose, who could try to access it - but if it's 12:25
16 carried out by officials, by law enforcement officials
17 and you're doing so in the course of your duties
18 pursuant to a search warrant, well, then you have a
19 full defence to the matter, even if, apparently, you
20 intentionally violated it in some respect. 12:25

21
22 If you turn over the page, Judge, at Section 1812 it
23 says:

24
25 "*Statement of exclusive means by which electronic*
26 *surveillance and interception of certain communications*
27 *may be conducted*

28 *(a) Except as provided in subsection (b), the*
29 *procedures of chapters 119, 121, and 206... and this*

1 *chapter shall be the exclusive means by which*
2 *electronic surveillance and the interception of*
3 *domestic wire, oral, or electronic communications may*
4 *be conducted."*

5
6 And we'll be looking at those other provisions in just
7 a moment. Just to be clear, Judge, if you're under
8 these electronic surveillance carried out vis-à-vis US
9 persons, as I said, you need to apply to a court for a
10 warrant. And you'll find that, Judge, in Section 1804. 12:26
11 And you'll find that on page 209. And it says:

12
13 *"(a) Submission by Federal officer; approval of*
14 *Attorney General; contents*
15 *Each application for an order approving electronic*
16 *surveillance under this subchapter shall be made by a*
17 *Federal officer in writing upon oath or affirmation to*
18 *a judge having jurisdiction under section 1803 of this*
19 *title."*

20
21 And if I bring you back to Section 1803, Judge, you
22 will see this is the section that sets up the Foreign
23 Intelligence Surveillance Court. So it is says:

24
25 *"The Chief Justice of the United States shall publicly 12:27*
26 *designate 11 District Court judges from at least seven*
27 *of the US judicial circuits, of whom no fewer than" --*

28 **MS. JUSTICE COSTELLO:** Sorry, which page is it?

29 **MR. MICHAEL COLLINS:** Sorry, page 206.

1 MS. JUSTICE COSTELLO: Sorry, I was -- 206? That's --
2 MR. MICHAEL COLLINS: Section 1803, left-hand column
3 halfway down the page. And the heading is "Court to
4 Hear Applications and Grant Orders".
5 MS. JUSTICE COSTELLO: Just a moment. Oh, sorry, 12:27
6 that's 208. The numbering is small.
7 MR. MICHAEL COLLINS: It's very small. 206.
8 MS. JUSTICE COSTELLO: 206. "Court Review"? No?
9 MR. MICHAEL COLLINS: It's the heading "Designation of
10 Judges". 12:27
11 MS. JUSTICE COSTELLO: Yes, thank you.
12 MR. MICHAEL COLLINS: *"The Chief Justice of the United
13 States shall publicly designate 11 district court
14 judges from at least seven of the United States
15 judicial circuits of whom no fewer than 3 shall reside
16 within 20 miles of the District of Columbia who shall
17 constitute a court which shall have jurisdiction to
18 hear applications for and grant orders approving
19 electronic surveillance anywhere within the United
20 States under the procedures set forth in this chapter."*
21
22 Then it sets out various other provisions and
23 qualifications, the detail of which I don't think
24 matters. But that's the setting up of the FISC court.
25 But you'll see the new provision, Judge, if you go to 12:28
26 page 207, at the bottom of the left-hand column - again
27 it's slotted into the code - subsection (i), "Amicus
28 Curiae":
29

1 "(1) Designation

2 *The presiding judges of the courts established under*
3 *subsections (a) and (b) shall, not later than 180 days*
4 *after June 2, 2015" - that's because this was*
5 introduced under the Patriot -- sorry, the Freedom Act 12:28
6 of 2015 - "*jointly designate not fewer than 5*
7 *individuals" - sorry, I think I said six - "to be*
8 *eligible to serve as amicus curiae, who shall serve*
9 *pursuant to rules the presiding judges may establish.*
10 *In designating such individuals, the presiding judges*
11 *may consider individuals recommended by any source,*
12 *including members of the Privacy and Civil Liberties*
13 *Oversight Board" - that's a body you'll hear about,*
14 Judge, because it's one of the bodies that are set up
15 to engage in a form of oversight of intelligence 12:29
16 activities generally and make reports. And it has
17 engaged and made a very, very substantial report on
18 Section 702 itself - "*the judges determine*
19 *appropriate."*

20
21 Then it sets out more details about their 12:29
22 qualifications, expertise, security clearance and so
23 on. And I don't think I need refer to that. But as
24 far as I know, there's no provision in the legislation
25 for an appeal by the amicus curiae. As I say, I'm of 12:29
26 course subject to correction on that.

27
28 I was dealing with Section 1804, Judge, which is that
29 you have to make an application to a judge of the FISC

1 for approval for the electronic surveillance - this is
2 in relation to US persons - and you get the approval of
3 the Attorney General. And then if you go to page 211,
4 it deals with the issuance of the order and the type of
5 order that's made:

12:30

6
7 *"Necessary findings*

8 *Upon an application made pursuant to section 1804 of*
9 *this title, the judge shall enter an ex parte order as*
10 *requested or as modified approving the electronic*
11 *surveillance if he finds that -*

12 *(1) the application has been made by a Federal officer*
13 *and approved by the Attorney General;*

14 *(2) on the basis of the facts submitted by the*
15 *applicant there is probable cause to believe that -*

16 *(A) the target of the electronic surveillance is a*
17 *foreign power or an agent of a foreign power: Provided,*
18 *that no United States person may be considered a*
19 *foreign power or an agent of a foreign power solely*
20 *upon the basis of activities protected by the first*
21 *amendment to the Constitution."*

22
23 So the mere fact that you're making speeches and
24 proclamations in favour of whatever it may be from
25 which people might infer that you're an agent of a
26 foreign power, you can't rely on that alone -
27 reflecting, of course, the importance of the First
28 Amendment protection of free speech in the United
29 States.

12:31

1
2 "(B) each of the facilities or places at which the
3 electronic surveillance is directed is being used, or
4 is about to be used, by a foreign power or an agent of
5 a foreign power." 12:31

6
7 So I suppose it's striking in some respects the
8 difference between the things you have to show for the
9 purpose of getting the warrant under Section 1805 and
10 following, as compared with the Section 702 procedures 12:31
11 that we've looked at.

12
13 If I go back, Judge, if I may, to Section 1809. The
14 other issue that arises under the possibility of a
15 civil liability action under 1810 is -- 12:31

16 **MS. JUSTICE COSTELLO:** Sorry, the page again,
17 Mr. Collins?

18 **MR. MICHAEL COLLINS:** Sorry, page 219.

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

20 **MR. MICHAEL COLLINS:** Is the question of -- firstly, 12:32
21 there's the question that you have to show an
22 intentional violation and you have to get around the
23 defence that he was a law enforcement officer or an
24 intelligence official who was acting under the type of
25 search warrant that I've just described, even if he was 12:32
26 intentional.

27
28 But the other difficulty is that the courts have
29 interpreted these provisions in a very restrictive way,

1 in particular to say that these sections do not amount
2 to a waiver of sovereign immunity, so that you cannot
3 in fact bring action against the US Government, even if
4 you can satisfy the various criteria in relation to
5 this. So if you have your EU citizen who's 12:32
6 contemplating such an action, he has, apart from the
7 general standing point that I'll come to in due course,
8 he has the particular statutory difficulties
9 surrounding this, but he's also got the difficulty that
10 it appears, certainly on some authorities, that he's 12:32
11 not entitled to sue the US Government.

12
13 And there's a decision, Judge, that I might ask you
14 very briefly to look at, it's called Al-Haramain
15 Islamic Foundation -v- Obama. 12:33

16 **MS. JUSTICE COSTELLO:** You'll have to spell that one
17 for me.

18 **MR. MICHAEL COLLINS:** It's A-L-H-A-R-A-M-A-I-N Islamic
19 Foundation -v- Obama. And you'll find it in the US
20 books of authorities at book two at tab 30. And I'm 12:33
21 only going to refer to a very short part of this,
22 Judge.

23 **MS. JUSTICE COSTELLO:** Just a moment. Thank you.

24 **MR. MICHAEL COLLINS:** This is a decision of the Ninth
25 Circuit of the US Court of Appeals. And you'll see on 12:34
26 - the page numbers are rather faint, Judge, but they're
27 at the bottom right-hand corner.

28 **MS. JUSTICE COSTELLO:** Yes.

29 **MR. MICHAEL COLLINS:** So on the first page, in what we

1 would call the head-note, it says:

2
3 *"Islamic foundation designated as terrorist*
4 *organisation by United States, and foundation's*
5 *attorneys, brought challenge against federal*
6 *government's terrorist surveillance program (TSP),*
7 *alleging violations of Fourth Amendment and other*
8 *constitutional provisions, Foreign Intelligence*
9 *Surveillance Act (FISA), and international law. The*
10 *United States District Court for the Northern District*
11 *of California... denied government's motion to dismiss,*
12 *asserted on basis of state secrets privilege.*
13 *Foundation sought interlocutory appeal. The Court of*
14 *Appeals... reversed and remanded. On remand, the*
15 *United States District Court for the Northern District*
16 *of California... granted summary judgment in part for*
17 *plaintiffs. Defendants appealed.*

18
19 *The Court of Appeals, McKeown, Circuit Judge, held*
20 *that:*

21 *[1] government did not waive sovereign immunity under*
22 *civil liability provision of FISA and*
23 *[2] Director of Federal Bureau of Investigation (FBI)*
24 *was not liable."*

25
26 if you move over, Judge, to page four, under the
27 heading on the left-hand column "Analysis"/"Sovereign
28 Immunity", the court's opinion states as follows:

1 *"The key and dispositive issue on appeal is whether the*
2 *government waived sovereign immunity under FISA's civil*
3 *liability provision."*

4
5 Then you'll see there's a footnote there, Judge, where 12:35
6 it says: *"Sovereign immunity is a limitation on the*
7 *district court's subject matter jurisdiction"*, citing
8 Adam -v- Norton.

9 **MS. JUSTICE COSTELLO:** Sorry -- oh, yes.

10 **MR. MICHAEL COLLINS:** The footnote is just immediately 12:35
11 --

12 **MS. JUSTICE COSTELLO:** It's in the middle of it, yes.

13 **MR. MICHAEL COLLINS:** It's in the middle of it rather
14 than at the bottom.

15
16 *"In light of our decision on sovereign immunity, we*
17 *need not address the constitutional and prudential*
18 *standing issues, nor the question of statutory*
19 *standing, namely whether Al-Haramain meets the*
20 *'aggrieved person' requirement of 50 USC, Section*
21 *1810."*

22
23 They're the statutory FISA provisions we've been
24 looking at. And it gives the citation.

25
26 *"A 'federal court has leeway to choose among threshold*
27 *grounds for denying audience to a case on the merits'."*

28
29 So if there's a few jurisdictional or other issues, you

1 can pick any of one of them and say 'You fail for that
2 reason'. So going back to the judgment itself:

3
4 *"Contrary to the district court's reliance on implied
5 waiver, '[a] waiver of sovereign immunity cannot be
6 implied but must be unequivocally expressed'...*

7
8 We have the benefit of the Supreme Court's most recent
9 pronouncement in this area. Earlier this year, the
10 Court interpreted the waiver provision of the Privacy
11 Act of 1974, which, like FISA, protects individuals
12 against the government's collection, use, and
13 disclosure of information."

14
15 And that's Federal Aviation Administration -v- Cooper, 12:36
16 a case we'll be coming back to, Judge, from 2012

17
18 "According to the Privacy Act, 'the United States shall
19 be liable to [an] individual in an amount equal to the
20 sum of ... actual damages'." 12:36

21
22 And that's under the Privacy Act, which is 5 USC. And
23 we will be looking at the Privacy Act also.

24
25 *"In determining that the scope of the immunity waiver
26 '[did] not unequivocally authorise an award of damages
27 for mental or emotional distress'," - citing Cooper -
28 "the Court reiterated the standard for sovereign
29 immunity: 'what we thus require is that the scope of*

1 *Congress' waiver be clearly discernable from the*
2 *statutory text in light of traditional interpretive*
3 *tools. If it is not, then we take the interpretation*
4 *most favourable to the Government'."*

5
6 And that's, I think, a consistent principle of US law,
7 that the principle of sovereign immunity is interpreted
8 restrictively precisely because it *is* a form of
9 immunity. If I move over, Judge, to the bottom of page
10 five, in the right hand column, it says about halfway
11 down that last paragraph:

12:37

12
13 *"Because FISA did not, on its own terms, waive*
14 *sovereign immunity, an initial version of the PATRIOT*
15 *Act" - that was the 2001 Act - "proposed a sovereign*
16 *immunity waiver for violations of Section 1810... This*
17 *proposed amendment to Section 1810 was deleted the very*
18 *next day; instead, a waiver of sovereign immunity was*
19 *incorporated into... Section 2712."*

20
21 We haven't looked yet at 2712, Judge, but it's the one
22 I have referred to before that says 'You have a cause
23 of action under the following sections of various
24 acts'. And we'll come to Section 2712 in the Stored
25 Communications Act in a few moments.

12:37

26
27 Then it says:

28
29 *"while section 2712 creates United States liability for*

1 *certain FISA violations such as those [under] Section*
2 *1806, it does not include claims under section 1810" -*
3 *and that's the one we're dealing with at the moment,*
4 *Judge - "Thus, our conclusion is consistent with*
5 *congressional consideration and later rejection of an*
6 *immunity waiver for violations of Section 1810.*

7
8 *Contrasting Section 1810 liability, for which sovereign*
9 *immunity is not explicitly waived, with Section 1806*
10 *liability, for which it is, also illuminates*
11 *congressional purpose. Liability under the two*
12 *sections, while similar in its reach, is not identical.*
13 *Section 1806, combined with 18 USC Section 2712,*
14 *renders the United States liable only for the 'use and*
15 *disclos[ure]' of information 'by Federal officers and*
16 *employees' in an unlawful manner. Section 1810, by*
17 *contrast, also creates liability for the actual*
18 *collection of the information in the first place,*
19 *targeting 'electronic surveillance or ... disclos[ure]*
20 *or use' of that information. Under this scheme,*
21 *Al-Haramain can bring a suit for damages against the*
22 *United States for use of the collected information, but*
23 *cannot bring suit against the government for collection*
24 *of the information itself."*

25
26 Then finally, Judge, at the very last or second last
27 page, seven and eight, they deal with the question
28 of -- there was a claim for personal liability against
29 the Director of the FBI and at the bottom of page seven

1 it says:

2
3 *"When the district court finally reached the issue of*
4 *Mueller's individual liability, it noted that Mueller*
5 *was 'the only defendant against whom plaintiffs seek to*
6 *proceed in an individual capacity.'* *The district court*
7 *then dismissed, without leave to amend, all claims*
8 *against Mueller in his individual capacity because 'the*
9 *nature of the wrongdoing by governmental actors alleged*
10 *and established herein is official rather than*
11 *individual or personal'."*

12
13 And it's not clear to me, Judge, but perhaps it is
14 ancillary to sovereign immunity because he was acting
15 in an official capacity, although I'll defer to 12:39
16 whatever US law experts say on that. And then they go
17 on to say that, in any event, the allegations against
18 him were extremely bare bones and wouldn't stand up to
19 judgment.

20 12:39
21 So I just draw attention to that, Judge, as saying
22 that -- because it's not explicit from the section, you
23 wouldn't necessarily infer from the section what the
24 position is about sovereign immunity, but it appears,
25 at least in the Ninth Circuit's decision, that 12:39
26 sovereign immunity has not been waived.

27
28 I should explain, Judge, and I'm sure you know, that
29 between the different circuits in the United States,

1 sometimes the judges of those circuits, their decisions
2 are binding on the judges obviously *in* that circuit and
3 in the states that make up that circuit, but not
4 necessarily binding on judges of *other* circuits. And
5 so you sometimes have conflicting decisions between 12:40
6 different circuits which, if important enough, may
7 ultimately be resolved by a decision of the US Supreme
8 Court if they give certiorari.

9
10 Sorry, Mr. Gallagher just wants me to read the whole of 12:40
11 that paragraph seven in the decision there, Judge, or
12 at least the beginning of it.

13 **MS. JUSTICE COSTELLO:** Paragraph? You mean page seven?

14 **MR. MICHAEL COLLINS:** Page seven and it happens to be
15 page seven as well: 12:40

16
17 *"During the many years this case was litigated in the*
18 *district court, Al-Haramain's suit against FBI Director*
19 *Mueller in his individual capacity was nothing more*
20 *than a sideshow, over-shadowed by the core claims*
21 *against the government. Al-Haramain never vigorously*
22 *pursued its claims against Mueller. Rather, in a*
23 *hearing at the district court, Al-Haramain emphasized*
24 *that 'we believe Mr. Mueller is a corollary we needn't*
25 *get to'."*

26
27 Then it goes on with the bit I read out; when they
28 finally reached the issue, they held what they held.

29 **MS. JUSTICE COSTELLO:** Are we finished with this book

1 for now?

2 **MR. MICHAEL COLLINS:** No. Oh, sorry, you're finished
3 with the authority, the book of -- yes, sorry. But not
4 the legislation book. So I've dealt with, Judge -- if
5 we just go back to the very beginning of this chapter 12:41
6 36 on page 199 just to see where we are. I've dealt
7 with subchapter 1, which is the electronic surveillance
8 --

9 **MS. JUSTICE COSTELLO:** I'm sorry, which page are you
10 on? 199, I have it, yes. Thank you, yes. 12:41

11 **MR. MICHAEL COLLINS:** 199. It's just useful to keep
12 that index in mind to see where we are. So that's
13 electronic surveillance. I now want to look briefly at
14 physical searches, which is under subchapter 2. And if
15 I can ask you to go to section 1821, which you'll find 12:42
16 on page 221. And I can deal with this perhaps more
17 briefly, Judge, because it's repetitive in some
18 respects of a number of similar type matters that we've
19 already dealt with.

20 12:42
21 First of all, in the definitions sections you'll see
22 there in subsection 4 there's a definition of
23 minimisation procedures. And it's, I think, for all
24 practical purposes, the same as the definition we've
25 looked at previously, it just happens to be with 12:42
26 respect to physical searches. But again it's
27 concerning US persons only and doesn't seem to
28 encompass non-US persons and so same point arises here
29 as arises in the electronic surveillance point.

1
2 Again you have to apply to the court, to the FISC court
3 for a warrant, which you apply under Section 1823,
4 which you'll find on page 223. And again the
5 procedures are set out there and I don't think I need 12:43
6 to go through that. On page 227 you find a similar
7 provision at 1825 about the use of the information,
8 where it says:

9
10 *"Information acquired from a physical search conducted*
11 *pursuant to this subchapter concerning any United*
12 *States person may be used and disclosed by Federal*
13 *officers and employees without the consent of the*
14 *United States person only in accordance with the*
15 *minimization procedures required by this subchapter."*
16

17 Again that's the reflection of the fact that the
18 minimisation procedures only apply to US persons and,
19 therefore, the use is objectionable only if you don't
20 have the consent of the US person affected. 12:44

21
22 That Section 1825(a), Judge, you might want to just
23 note in the margin, because sometimes it's referred to
24 in its original form, and that was section 305(a) in
25 the -- 12:44

26 **MS. JUSTICE COSTELLO:** Little a or capital A?

27 **MR. MICHAEL COLLINS:** Little a.

28 **MS. JUSTICE COSTELLO:** No brackets?

29 **MR. MICHAEL COLLINS:** No, there is a bracket around

1 it, yes.

2 **MS. JUSTICE COSTELLO:** 305(a)?

3 **MR. MICHAEL COLLINS:** 350(a). It's a subsection (a).
4 The 305 is the equivalent to the 1825.

5 **MS. JUSTICE COSTELLO:** Okay. 12:44

6 **MR. MICHAEL COLLINS:** If you then, Judge, go on to
7 page 229 you'll find a similar type civil liability to
8 the one that we've just looked at in the context of
9 electronic communications. 1828 is headed "Civil
10 Liability": 12:44

11

12 *"An aggrieved person, other than a foreign power...
13 whose premises, property, information, or material has
14 been subjected to a physical search within the United
15 States or about whom information obtained by such a
16 physical search has been disclosed or used in violation
17 of section 1827 of this title shall have a cause of
18 action against any person who committed such
19 violation."*

20

21 So again you have to go back to the previous section,
22 to 1827, the section that creates the offence, to see
23 what's necessary under that and you find the same
24 requirement that the person must have *intentionally*
25 violated the provisions. So a person is guilty of an 12:45
26 offence if he *intentionally*, under cover of law, for
27 the purpose of obtaining foreign intelligence
28 information, executes a physical search within the US,
29 except as authorised by statute. And it goes on to

1 deal with disclosure and again deals with the defence;
2 if you're a law enforcement or investigative officer,
3 you're on official duties and you have your warrant,
4 well, then you're not in fact liable. So the same
5 points really apply there, Judge.

12:45

6
7 Can I then turn to subchapter 3? This is dealing with
8 the pen registers and the wire tap - these are the
9 calls in and out of the telephones and communications
10 devices that I was referring to earlier. An aggrieved
11 person has a particular definition here, Judge, in 1841
12 - this is page 230.

12:46

13 **MS. JUSTICE COSTELLO:** which? 230?

14 **MR. MICHAEL COLLINS:** Page 230.

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

12:46

16 **MR. MICHAEL COLLINS:** There is a definition of the
17 terms "pen register" and "trap and trace device" and
18 the meanings given to such terms in Section 3127 of
19 Title 18, but I'm not going to go there, because life
20 is too short.

12:46

21
22 *"(3) The term 'aggrieved person' means any person -*
23 *(A) whose telephone line was subject to the*
24 *installation or use of a pen register or trap and trace*
25 *device authorized by this subchapter; or*
26 *(B) whose communication instrument or device was*
27 *subject to the use of a pen register or trap and trace*
28 *device authorised by this subchapter to capture*
29 *incoming electronic or other communications impulses."*

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And there's an expression also, Judge, "specific selection term", you'll see there in 4(a) is a term that specifically identifies a person, account, address or personal device or any other specific identifier. 12:47
So it can be anything from a telephone number to an ISP number or anything else, and is used to limit, to the greatest extent reasonably practical, the scope of information sought consistent with the purpose for seeking the use of the pen register or the trap and trace device. 12:47

Then section 1842 provides again for a form of application which has to be made to the judge to get, in effect, a warrant. I should say, Judge, I've said you make the application to the FISC court and I think that is the normal procedure as far as I understand it, but you'll see that there *is* provision also to apply, if you look at page 230, section 1842, subsection (b), halfway down, or three quarters of the way down the page, you can also apply to a United States magistrate judge who is publicly designated the Chief Justice to have power to hear applications for and grant orders approving the installation or the use of pen register or trap and trace device on behalf of a judge of that court. 12:48
So there may be, obviously, specifically designated judges for this purpose as well. 12:48

Procedures are set out there, but what is perhaps

1 striking is -- well, sorry, there's the use of the
2 information. And if you go to page 234 you'll find a
3 similar type use of information section dealing with
4 information which is acquired which is used or
5 disclosed by Federal officers without the consent of 12:48
6 the United States persons. And that can only be done
7 in accordance with the provisions of this section, and
8 again it's confined to US persons. One difference
9 perhaps to the other sections that we've looked at is
10 that, for some reason, under this section you *don't* 12:49
11 find a civil liability section that gives some cause of
12 action, albeit restricted in the way that I've just
13 described. But this *is* one of the sections that we'll
14 see is cross-referenced in Section 2712, so that there
15 *is* an ability to bring an action for a breach of this 12:49
16 section, not within its own terms, but by reference to
17 the procedure outlined in Section 2712, although as we
18 will see, that section in turn requires an intentional
19 violation of the provision in question.

20
21 I now want to deal - and this is the last part,
22 happily, Judge, of the Foreign Intelligence
23 Surveillance Act I need to deal with - with
24 subchapter 4. This is the access to certain business
25 records for foreign intelligence purposes, sometimes 12:50
26 called the production of tangible things, and Section
27 1861, otherwise known as Section 215. And you'll find
28 that on page 235. And again it's somewhat similar. At
29 1861, subsection (a), paragraph 1:

1
2 *"Subject to paragraph (3), the Director of the Federal*
3 *Bureau of Investigation or a designee of the Director"*
4 *- whose rank is of a certain level - "may make an*
5 *application for an order requiring the production of*
6 *any tangible things (including books, records, papers,*
7 *documents, and other items) for an investigation to*
8 *obtain foreign intelligence information not concerning*
9 *a United States person or to protect against*
10 *international terrorism or clandestine intelligence*
11 *activities, provided that such investigation of a*
12 *United States person is not conducted solely upon the*
13 *basis of activities protected by the first amendment to*
14 *the Constitution."*

15
16 So that's the particular scope of a Section 215 order.
17 So it's different in terms of its scope because it's
18 obtaining foreign intelligence information *not*
19 concerning a United States person - so it's an ability
20 to go after non-US persons - *or* to protect against 12:51
21 international terrorism, or clandestine intelligence
22 activities. And the only constraint on it is you can't
23 breach peoples' First Amendment rights in terms of just
24 relying solely on what they've said in some respect.
25 But you have to make your application to the court 12:51
26 still to get such an order - you'll see that on the
27 next page under (b) at the top of the page, left:

28
29 *"Each application under this section -*

1 (1) shall be made to –
2 (A) a judge of the court established by section
3 1803(a)..."

4
5 Or a specially designated magistrate judge. 12:51
6 Minimisation procedures, in the context of these
7 tangible things applications, are dealt with in
8 subsection (g), which you'll find on page 238. And
9 again the minimisation procedures are defined in terms
10 that are now familiar to us and in particular are to 12:52
11 minimise the dissemination of non-publicly available
12 information concerning unconsenting United States
13 persons consistent with the need of the US to produce
14 and disseminate the foreign intelligence information.

15 12:52
16 Just as a piece of trivia, Judge, on page 240 you'll
17 see the USA Freedom Act where there's an annotation to
18 the text which gives you the full words that make up
19 the acronym. I think we'll store that vital piece of
20 information away. 12:52

21
22 So that's the Foreign Intelligence Surveillance Act,
23 Judge. And as you see, it's divided into, very
24 broadly, two very broad sections; there's the section
25 702, as it's called, vis-à-vis people outside the US 12:53
26 and then there are the various procedures within the US
27 for people within the US. There are specific
28 restraints, or *constraints* on the ability to bring
29 action even by people within the US themselves, but

1 there are also constraints in terms of the definition
2 of minimisation and targeting procedures, which are
3 defined in terms of protecting US persons but non-US
4 persons.

5
6 So what I want to turn to now, Judge, if you go back to
7 the index to the whole book just so we see where we're
8 going, is the Electronic Communications Privacy Act of
9 1986, which is, in reality, the two Acts, the Stored
10 Communications Act and the Wire Tap Act. As I say, the 12:53
11 Wire Tap Act is made up of Sections 2701 to 2712. And
12 you'll find those, Judge, at...

13 **MS. JUSTICE COSTELLO:** Tab six, isn't it?

14 **MR. MICHAEL COLLINS:** It's tab six, page 606. And I
15 think I probably have covered this legislative history, 12:54
16 Judge, but the Wire Tap Act was enacted originally in
17 1968. It was then amended by this Act itself. The
18 Stored Communications Act was enacted as part of this
19 Electronic Communications Privacy Act, as I say, which
20 combines these two Acts, or at least puts them in one 12:54
21 place together - they are still, I think, two separate
22 Acts. And the 2712, Section 2712 that we're talking
23 about wasn't originally part of the Stored
24 Communications Act, but was introduced, I think, in
25 2001. 12:55

26
27 If I just look firstly briefly, Judge, as to what the
28 offences are under the Stored Communications Act - I
29 don't need to spend too long on this, I think. If you

1 look at page 606, Section 2701, the offence is:

2
3 *"Except as provided in subsection (c) of this section*
4 *whoever –*

5 *(1) intentionally accesses without authorisation a*
6 *facility through which an electronic communication*
7 *service is provided; or*

8 *(2) intentionally exceeds an authorization to access*
9 *that facility;*

10 *and thereby obtains, alters, or prevents authorized*
11 *access to a wire or electronic communication while it*
12 *is in electronic storage in such system shall be*
13 *punished as provided in subsection (b) of this*
14 *section."*

15
16 As you know, Judge, the distinction between the two
17 Acts, as is obvious from their title perhaps, the
18 Stored Communications Act is talking about accessing
19 information that's stored somewhere, whereas the wire
20 Tap Act is concerned with communications which are 12:56
21 flowing along a wire, if I could put it in simplistic
22 terms, and which are intercepted in the course of
23 communication rather than having been stored somewhere.

24
25 The punishment for that is set out, Judge, at the 12:56
26 bottom of the page in terms of a fine or imprisonment.
27 So clearly the sanction that is brought to bear in
28 relation to this is a government sanction in the form
29 of a prosecution by the relevant state authorities to

1 bring a prosecution.

2
3 In Section 702 there are various prohibitions on
4 voluntary disclosure of customer communications or
5 records - in other words, the companies who are 12:56
6 providing the telecommunications services are not to
7 knowingly divulge the contents of a communication in
8 storage by that service. And there are certain
9 exceptions set out and again I don't think the
10 substance of that is of any great import for what we're 12:57
11 concerned with. What's much more relevant, Judge, is
12 Section 2712 itself, which you'll find on page 617.

13 **MS. JUSTICE COSTELLO:** 617?

14 **MR. MICHAEL COLLINS:** 617.

15 **MS. JUSTICE COSTELLO:** I beg your pardon. 12:57

16 **MR. MICHAEL COLLINS:** This is a slightly densely
17 packed little section, Judge. But if you look at
18 subsection (a), it says: "*Any person who is aggrieved*
19 *by any willful violation.*" And then it goes on to
20 provide for certain sections. But the important point 12:57
21 to note, or the first important point to note is that
22 even if it's not a requirement under the section itself
23 which is creating the particular offence or prohibition
24 or obligation, that the breach of it be willful, to
25 have a remedy, have a civil action against the US you 12:58
26 have to prove that it's a willful violation. So that's
27 an additional level or burden that is imposed upon
28 anybody, be it a US person or a non-US person, who is
29 seeking a remedy for breaches.

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"willful violation of this chapter" - and this chapter is the Stored Communications Act, because that's where this section belongs, so that's what that means - "or of chapter 119 of this title" - and chapter 119 is the Wire Tap Act if I'm correct - I want to just make sure I'm right about that, Judge. Yes. It's hard to keep track of these things

12:58

MS. JUSTICE COSTELLO: Sorry, I want to make sure I'm not getting lost. You said this Act --

12:58

MR. MICHAEL COLLINS: When it says "wilful violation of this chapter" --

MS. JUSTICE COSTELLO: It includes --

MR. MICHAEL COLLINS: The Act as a whole --

MS. JUSTICE COSTELLO: I thought we were dealing with the wire Tapping Act part of the Electronic Communications Privacy Act?

12:58

MR. MICHAEL COLLINS: No. No, Section 2712 belongs to the Stored Communications Act.

MS. JUSTICE COSTELLO: Sorry. Okay.

12:59

MR. MICHAEL COLLINS: It's the --

MS. JUSTICE COSTELLO: Stored communications, okay.

MR. MICHAEL COLLINS: -- last section, I think. Well maybe not -- yes, it *is* the last section in the Stored Communications Act.

12:59

MS. JUSTICE COSTELLO: That's fine. So I understand why it's referring to the wire tapping now.

MR. MICHAEL COLLINS: Yes. So you've willful violation of the stored collection Act, or of chapter

1 119, which is the Wire Tap Act, or Sections 106(a) -
2 106(a), Judge, is section 1806(a), which is the
3 electronic surveillance and the minimisation procedures
4 and so forth that we've looked at.

5 **MS. JUSTICE COSTELLO:** Of FISA? 12:59

6 **MR. MICHAEL COLLINS:** Of FISA, yes. 305(a) - 305(a)
7 is section 1825, dealing with the physical searches
8 that we've looked at under FISA - or 405(a) - and
9 405(a) is section 1843 about the pen register and the
10 trap and trace devices. So those three sections are 13:00
11 the three particular sections that we've just looked at
12 of FISA. And if you want, Judge, in case you get
13 confused about that, which certainly I've got confused
14 about it for a long time, if you turn over the page to
15 618, do you see "References in Text" at the bottom 13:00
16 left-hand column?

17 **MS. JUSTICE COSTELLO:** Oh, yes.

18 **MR. MICHAEL COLLINS:** It tells you what the
19 cross-references are between those sections and how
20 they're classified in the sections of Title 50 of the 13:00
21 USC.

22 **MS. JUSTICE COSTELLO:** USC?

23 **MR. MICHAEL COLLINS:** United States Code. In other
24 words, the United States Code and all these different
25 titles -- 13:01

26 **MS. JUSTICE COSTELLO:** No, I understand. I'm just not
27 great at acronyms.

28 **MR. MICHAEL COLLINS:** And this is occurring in Title
29 18, Crimes and Criminal Procedure. We'd previously

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been talking about Title 50.

MS. JUSTICE COSTELLO: I am going to ask that I get a break now.

MR. MICHAEL COLLINS: I think that would be a good idea, Judge. Thank you very much.

13:01

(LUNCHEON ADJOURNMENT)

1 THE HEARING RESUMED AFTER THE LUNCHEON ADJOURNMENT AS
2 FOLLOWS

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

5 **MR. MICHAEL COLLINS:** May it please you, Judge. Judge, 14:05
6 I was looking at section 2712 --

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

8 **MR. MICHAEL COLLINS:** -- of the Stored Communications
9 Act. And the point is, I suppose, fairly
10 straightforward. There is this overarching requirement 14:06
11 of showing a wilful violation for the various specified
12 statutory provisions that are specifically mentioned in
13 section 2712. And you will notice over the page,
14 that's on page 618, in subsection (d) it provides:

15
16 *"Any action against the United States under this*
17 *subsection shall be the exclusive remedy against the*
18 *United States for any claims within the purview of this*
19 *section."*

20
21 So, in respect of those claims, this is the only 14:07
22 section, the exclusive method by which you bring a
23 claim so that the wilful violation provision has to be
24 satisfied.

25
26 what wilful means is not defined in the statute. It 14:07
27 has been, however, the subject of judicial
28 consideration. I'm not sure I need to ask you to go to
29 the trouble of actually getting it out, Judge, but

1 there is a case called Fikre, if I'm pronouncing it
2 correctly, versus the FBI which is in Book 2.

3 **MS. JUSTICE COSTELLO:** Could you spell it?

4 **MR. MICHAEL COLLINS:** F-I-K-R-E.

5 **MS. JUSTICE COSTELLO:** Thank you. 14:07

6 **MR. MICHAEL COLLINS:** It's in Book 2 of the US
7 authorities at Tab 29. This was a case brought by
8 somebody who was put on the FBI's 'no fly' list meaning
9 you are not allowed to fly into or over the United
10 States or indeed, I think, Canada and he alleged that 14:08
11 his placement on the list had violated his
12 constitutional rights in a number of respects.

13
14 But one of his claims was brought pursuant to section
15 2712 and the court, which was the United States 14:08
16 District Court for the District Court of Oregon, dealt
17 specifically with the meaning of wilfulness and it
18 deals with it in a short passage on page 13. Perhaps
19 if I just read out the passage, Judge, without you
20 having to go to the trouble of opening the case: 14:08

21
22 *"Relying on Ratzlaf -v- United States, the official*
23 *capacity of defendants contend the wilfulness element*
24 *of section 2712(a) requires plaintiff to allege*
25 *plausibly that the government agents engaged in conduct 14:08*
26 *with the conscious objective of committing a violation.*
27 *Plaintiff, on the other hand, contends Defendants do*
28 *not cite the correct standard for the 'willfulness'*
29 *mental state. Instead Plaintiff contends when*

1 *'willfulness is a statutory condition of civil*
2 *liability, [the Supreme Court has] generally taken it*
3 *to cover not only knowing violations of a standard, but*
4 *reckless ones as well'. The Court agrees with*
5 *Plaintiff that the willfulness requirement of section*
6 *2712(a) waives the United States' sovereign immunity*
7 *against lawsuits for damages as to both knowing and*
8 *reckless violations of the statutory provisions*
9 *referred to in section 2712(a). Notably, the **Burr***
10 *Court specifically distinguished the understanding of*
11 *'willfulness' in the context of criminal statutes and*
12 *explained why such a formulation is inappropriate in*
13 *the context of civil liability before noting 'a common*
14 *law term in a statute comes with a common law meaning,*
15 *absent anything pointing another way'. Because the*
16 *Court does not find any persuasive evidence that*
17 *Congress intended to give the term 'willful' any*
18 *meaning other than its common-law definition, the Court*
19 *concludes that the willfulness standard in **Burr** applies*
20 *to claims brought under section 2712(a)."*

21
22 So to recap, that standard, therefore, whilst it covers
23 knowing violations of a standard, reckless violations
24 of a standard but you do not have to show that the
25 government agent engaged in the conduct with the
26 conscious objective of committing a violation. So that
27 appears to be what wilful means in that context.

14:09

28
29 And, therefore, just to summarise, Judge, in relation

1 to these matters, insofar as FISA itself is concerned
2 in total the statutory mechanism to bring the claim
3 under those particular sections, 1806a, 1825 and 1845
4 requires the showing of a wilful violation. The
5 substance of many of the breaches may involve breaches 14:10
6 of the minimisation or targeting procedures but they
7 are of no avail to a non-US person because those
8 procedures are not designed to protect non-US persons.
9 And there are some procedures which are not referred to
10 at all in section 2712. 14:11

11
12 So, for example, if you are compelled by a warrant to
13 produce the tangible things under section 1861, that's
14 not one of the sections that's referred to in section
15 2712, so you don't have a remedy under section 2712 for 14:11
16 that. And of course there's no reference to section
17 702 FISA surveillance in section 2712 either and you
18 have to look to that part of the Act containing section
19 702 for such remedies as you have which we have already
20 looked at and which we have seen. 14:11

21
22 So they are the constraints that we say arise under
23 both the FISA Act, because there's an interaction
24 obviously between 2712, although it's in the Stored
25 Communications Act, because it is cross referencing 14:11
26 back to some of the provisions of the FISA Act, and of
27 course it's referring to provisions in the Stored
28 Communications Act and the Wiretap Act itself.
29

1 The other point I think to note, Judge, about the
2 Wiretap Act is that, and the experts I think deal with
3 this in their reports, I'm not going to elaborate upon
4 it. But it seems to be unclear as to whether the
5 government, the US government, can be sued for 14:12
6 violations of the wiretap Act because the definition of
7 'person' under the Act does not include governmental
8 entities and that seems to be at least an open issue.
9

10 And, secondly, there seems to be a division among the 14:12
11 courts as to whether government entities or government
12 officials can be liable for violations of the Stored
13 Communications Act. Again there seem to be different
14 views expressed in different circuits on that and the
15 experts have discussed that as well in their reports. 14:12
16

17 So I want to move on from that, Judge, if I may, on to
18 the Privacy Act and the Judicial Redress Act. It, as
19 I have noted, you will find at Tab 7 and 10 of the
20 book. 14:13
21

22 The Privacy Act certainly goes back I think to 1974, it
23 may even have had origins in an early piece of
24 legislation, I think from 1996 [sic], and I want to
25 start with the Privacy Act first, Judge, and then look 14:13
26 at the Judicial Redress Act of 2015 and see how that
27 intersects with it, so I will ask you to go to Tab 10
28 in the book of US authorities.
29

1 Before looking at the substantive provisions, can
2 I just note first of all that there are certain
3 exemptions from the operation of the Privacy Act which
4 are permitted under its own terms. The Privacy Act,
5 Judge, I should say, it begins at Section 552a on page 14:14
6 44 at Tab 10.

7 **MS. JUSTICE COSTELLO:** Just a moment, am I in the right
8 book here?

9 **MR. MICHAEL COLLINS:** It's Book 1 of the --

10 **MS. JUSTICE COSTELLO:** Tab 10. 14:14

11 **MR. MICHAEL COLLINS:** Tab 10, and you'll see a section
12 in the right-hand column towards the bottom of the page
13 552a "*records maintained on individuals*".

14 **MS. JUSTICE COSTELLO:** No, I am in the wrong book. It
15 says Judicial Redress Act clause, it's the first page 14:14
16 at Tab 10. I don't have your double columns.

17 **MR. MICHAEL COLLINS:** Oh.

18 **MS. JUSTICE COSTELLO:** May I hand you my book and you
19 can see.

20 **MR. MICHAEL COLLINS:** Certainly, Judge, yes. (SAME 14:15
21 HANDED)

22 **MS. JUSTICE COSTELLO:** That's probably quicker I find.

23 **MR. MICHAEL COLLINS:** Oh for some reason, Judge,
24 apparently it's Tab 7 in your book.

25 **MS. JUSTICE COSTELLO:** Okay. 14:15

26 **MR. MICHAEL COLLINS:** Perhaps it's with the Judicial
27 Redress Act, Judge, which is logical but --

28 **MS. JUSTICE COSTELLO:** I don't mind, we'll deal with
29 Tab 7 so.

1 **MR. MICHAEL COLLINS:** All right. So you should have a
2 at page 44, Judge, with section 552a towards the bottom
3 right-hand column called --

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

5 **MR. MICHAEL COLLINS:** -- "*records maintained on* 14:15
6 *individuals*".

7 **MS. JUSTICE COSTELLO:** I am with you now.

8 **MR. MICHAEL COLLINS:** And that is, I think, the
9 beginning of the Privacy Act. Can I just, first of
10 all, bring you to page 49, Judge. This is, first of 14:15
11 all, Judge, it's a piece of legislation which its
12 essential purpose is to permit US citizens to access
13 records held by government agencies about them and to
14 impose prohibitions on government agencies disclosing
15 information about people except in certain 14:16
16 circumstances.

17
18 But you will see in Section 552a subsection (, judge,)
19 on page 49.

20 **MS. JUSTICE COSTELLO:** Hang on. 552a, yes, middle of 14:16
21 the left column.

22 **MR. MICHAEL COLLINS:** Middle of the left column,
23 exactly. You see there's a heading "*General*
24 *Exemptions*" and then further down the page in the same
25 column at (okay) there are "*Specific Exemptions*". 14:16

26 I just want to look at both of those exemptions to the
27 Act first before we look at the substance of the Act.

28

29 So the general exemptions says: "*The head of any*

1 agency may promulgate rules in accordance with the
2 requirements (including general notice) of those
3 specified sections to exempt any system of records
4 within the agency from any part of this section except
5 various subsections if the system of records is - 14:17

6
7 (1) maintained by the Central Intelligence Agency; or
8 (2) maintained by an agency or component thereof which
9 performs as its principal function any activity
10 pertaining to the enforcement of criminal laws, 14:17
11 including police efforts to prevent, control or reduce
12 crime or apprehend criminals etc.."

13
14 And it goes on with further detail in relation to that.

15 14:17
16 So there's a general exemption where the agency itself
17 or the head of the agency can in effect exempt certain
18 of its records under those two particular conditions.
19 First of all, CIA records are obviously maintained and,
20 secondly, if it's a law enforcement type agency. 14:17

21
22 Then there are in (okay) specific exemptions which say:
23 "The head of any agency may promulgate rules, in
24 accordance with the requirements (including general
25 notice) of those sections of this title, to exempt any 14:17
26 system of records within the agency from various
27 specified subsections if the system of records is -

28
29 (1) subject to the provisions of section 552(b)(i) of

1 *the title;*

2 *(2) investigatory material compiled for law enforcement*
3 *purposes, other than material within the scope of*
4 *subsections (, judge,)(2) of the section."*

14:18

5
6 And then there is a proviso about maintaining
7 privilege: "*(3) maintained in connection with*
8 *providing protective services to the President of the*
9 *United States."*

14:18

10
11 And a number of other exceptions, the detail of which
12 don't concern us. But I think for present purposes
13 what matters is, again according to the expert
14 evidence, I think Prof. Vladeck in particular deals
15 with this, the NSA have availed of that exemption or
16 that provision and they have exempted all the systems
17 of records that they maintain from the purview of the
18 Act to the extent that the system contains any
19 information properly classified under Executive Order
20 12958 and that is required by executive order to be
21 kept secret in the interests of national defence or
22 foreign policy. That's something that's referred to in
23 Prof. Vladeck's report.

14:18

14:19

24
25 That of course is an understandable provision perhaps
26 because the NSA obviously is entitled or you can see
27 the logic of saying 'well if I have got records in
28 relation to a suspected terrorist I'm not going to give
29 the terrorist the right to come along and say well

14:19

1 I would like to see the files which you compile on me',
2 or at least that's the logic to it. Of course there
3 will be other people who say 'well I'm not actually a
4 terrorist and I would like to see the files'. But, be
5 that as it may, one can see the logic behind it. 14:19

6
7 If you go back, there's a series of definitions first,
8 Judge, in Section 552a (a). Subsection (b) begins on
9 page 46 on the left-hand column on the top and it is
10 headed "*Conditions of Disclosure*". And it says: 14:20

11
12 "*No agency shall disclose any record which is contained*
13 *in a system of records by any means of communication to*
14 *any person, or to another agency, except pursuant to a*
15 *written request by or with the prior written consent* 14:20
16 *of, the individual to whom the record pertains, unless*
17 *disclosure of the record would be.*"

18
19 And then there are 12 exceptions that are set out to
20 the prohibition on disclosure. So while the 14:20
21 fundamental principle is that the agency is not
22 supposed to disclose the system of records except
23 pursuant to a written request on consent of the
24 individual, they are not supposed to disclose it to
25 other agencies or to anybody else, the disclosure can 14:20
26 be made if you come within one of the 12 exceptions.
27 And I just want to draw attention perhaps to three of
28 the exceptions in particular, I'm not going to go
29 through them all.

1 The first one is: *"To those officers and employees of*
2 *an agency which maintains the record who have a need*
3 *for the record in the performance of their duties."*

4 **MS. JUSTICE COSTELLO:** which number is that?

5 **MR. MICHAEL COLLINS:** Sorry, it's the first one, no. 1. 14:21

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

7 **MR. MICHAEL COLLINS:** Under (b). So the agency which
8 maintains the records, obviously the people who need to
9 have access to it are entitled to do so for the purpose
10 of their duties. But No. 3 is: *"For a routine use as* 14:21
11 *defined in subsection (a)(7) of this section and*
12 *described under subsection (e)(4)(D) of this section."*

13
14 Now *"routine use"* is defined, if you go back a page,
15 Judge, to page 45 you'll see paragraph 7 there on the 14:21
16 left-hand column about a third of the way down the
17 page, it says: *"The term 'routine use' means, with*
18 *respect to the disclosure of a record, the use of such*
19 *record for a purpose which is compatible with the*
20 *purpose for which it was collected."* 14:21

21
22 And you will see there was also a reference to
23 (e)(4)(D) and you will find (e)(4)(D) at the top of
24 page 47, right-hand column, and it says: *"Each routine*
25 *use of the records contained in the system, including* 14:22
26 *the categories of users and the purpose of such use."*

27 **MS. JUSTICE COSTELLO:** Sorry, I didn't quite catch
28 that, top of page 47, where was it?

29 **MR. MICHAEL COLLINS:** Page 47, right-hand column, very

1 top, do you see a letter (D) there.

2 **MS. JUSTICE COSTELLO:** Yes.

3 **MR. MICHAEL COLLINS:** It is just a cross reference,
4 Judge.

5 **MS. JUSTICE COSTELLO:** Sorry, I couldn't find the 4, 14:22
6 yes.

7 **MR. MICHAEL COLLINS:** Nothing turns on it: "*Each*
8 *routine use of the records contained in the system*
9 *including the categories of users and the purpose of*
10 *such use.*" 14:22

11
12 I suppose the first thing and one of the points which
13 the experts make is that routine use is a very wide
14 use, the reference to "*a purpose which is compatible*
15 *with the purpose for which it is collected*" could 14:22
16 encompass a whole range of purposes. I think one of
17 the experts says that it has the potential to be the
18 proverbial exception that swallows the rule. So it
19 seems on one view or interpretation of it to involve a
20 very wide exception. 14:23

21
22 Sorry, I was just meant to draw your attention, Judge,
23 to one passage in our own experts' reports, I don't
24 know if you have.

25 **MS. JUSTICE COSTELLO:** I am sure I do, it's a question 14:23
26 of what book.

27 **MR. MICHAEL COLLINS:** It's Trial Book 2 and it has the
28 evidence of Mr. Serwin and Prof. Richards who are the
29 two experts on behalf of the Commissioner.

1 **MS. JUSTICE COSTELLO:** Yes.

2 **MR. MICHAEL COLLINS:** And if you go to Mr. Richards'
3 report, which you will find at Tab 6. I will be coming
4 back to these reports obviously, Judge, but he just
5 comments here on this particular routine use and if 14:23
6 I could, it's on page 16, paragraph 47 of
7 Prof. Richards' report, and it is just perhaps helpful
8 to refer to it here when dealing with the section, if
9 you see that, Judge?

10 **MS. JUSTICE COSTELLO:** Yes. 14:24

11 **MR. MICHAEL COLLINS:** He says, about four or five lines
12 down: *"This is a very broad exception that, in the*
13 *minds of many distinguished scholarly and practical*
14 *commentators on privacy law, has the potential to be*
15 *the proverbial exception that swallows the rule. For*
16 *example, Paul Schwartz has noted that 'Federal agencies*
17 *have cited this exemption to justify virtually any*
18 *disclosure of information without the individual's*
19 *permission'."*

20
21 And he gives the article, the citation:

22
23 *"Robert Gellman is even more critical of the routine*
24 *use exemption, suggesting that."*

25
26 And he quotes from again an academic chapter in a book: 14:24

27
28 *"The Privacy Act limits the use of personal data to*
29 *those officers and employees of the agency maintaining*

1 the data who have a need for the data in the
2 performance their duties. This vague standard is not a
3 significant barrier to the sharing of personal
4 information within agencies. No administrative process
5 exists to control or limit internal agency uses. Suits 14:25
6 have been brought by individuals who objected to
7 specific uses, but most uses have been upheld. The
8 legislation left most decisions about external uses to
9 the agencies, and this created the biggest loophole in
10 the law. An agency can establish a 'routine use' if it
11 determines that a disclosure is compatible with the
12 purpose for which the record was collected. This vague
13 formula has not created much of a substantive barrier
14 to external disclosure of personal information. Later
15 legislation, political pressures, and bureaucratic
16 convenience tended to overwhelm the law's weak
17 limitations. Without any effective restriction on
18 disclosure, the Privacy Act lost much of its vitality
19 and became more procedural and more symbolic."

20
21 The second exception, Judge, that I want to draw
22 specific attention to is at subparagraph 7 on page 46,
23 about two thirds of the way down the left-hand column
24 where the disclosure is:

25
26 "To another agency or to an instrumentality of any
27 governmental jurisdiction within or under the control
28 of the United States for a civil or criminal law
29 enforcement activity if the activity is authorised by

1 *law, and if the head of the agency or instrumentality*
2 *has made a written request to the agency which*
3 *maintains the record specifying the particular portion*
4 *desired and the law enforcement activity for which the*
5 *record is sought."*

14:26

6
7 So other agencies can get the information if it's
8 involving a civil or criminal law enforcement activity
9 and the head of the other agency writes and makes clear
10 the purpose for which it is required.

14:26

11
12 The remedies then that are provided for breaches of the
13 Act, Judge, arise under or at page 48 and in particular
14 subsection (g) which is about three quarters of the way
15 down the left-hand column on page 48. And (g) is
16 headed "*Civil Remedies*" and provides as follows.

14:27

17 **MS. JUSTICE COSTELLO:** Sorry, I haven't quite got
18 there.

19 **MR. MICHAEL COLLINS:** Page 48, left-hand column, two
20 thirds of the way down (g)(1).

14:27

21 **MS. JUSTICE COSTELLO:** Small (g), yes, sorry.

22 **MR. MICHAEL COLLINS:** Small G. It's subsection (g) of
23 the overall section.

24 **MS. JUSTICE COSTELLO:** Yes.

25 **MR. MICHAEL COLLINS:** And you will see here, Judge,
26 that there are four paragraphs, (A), (B), (C) and (D),
27 each of which contain a separate topic of complaint or
28 potential complaint. So it says:

14:27

1 *"wherever any agency - (A) makes a determination under*
2 *subsection (d)(3) of this section not to amend an*
3 *individual's record in accordance with his request, or*
4 *fails to make such review in conformity with that*
5 *subsection."*

14:28

6
7 So somebody comes along and says 'I want you to amend
8 the record that you hold about me because it's
9 inaccurate in some respect'. But the agency for
10 whatever reason doesn't do so, decides it's not going
11 to amend it. That's the first circumstance. And the
12 that's the (A).

14:28

13
14 (B): *"Refuses to comply with an individual request*
15 *under subsection (d)(1) of this subsection."*

14:28

16
17 So again -- (d)(1) is on page 46 and is concerned with
18 access to records. So somebody who makes a request
19 that he wants to have access to his requests, it says:

20
21 *"Upon request by any individual to gain access to his*
22 *records or to any information pertaining to him which*
23 *is contained in the system, permit him and upon his*
24 *request, a person of his own choosing to accompany him,*
25 *to review the record and have a copy made of all or any*
26 *portion thereof in a form comprehensible to him, except*
27 *that the agency may require the individual to furnish a*
28 *written statement authorizing discussion of that*
29 *individual's record in the accompanying person's*

14:28

1 *presence.*"

2
3 So that's the request for access to the records; if
4 that's refused that's the circumstance described in
5 (B), (g)(1)(B). 14:29

6
7 (g)(I)(C) is: "*Fails to maintain any record concerning*
8 *any individual with such accuracy, relevance,*
9 *timeliness, and completeness as is necessary to assure*
10 *fairness in any determination relating to the* 14:29
11 *qualifications, character, rights, or opportunities of,*
12 *or benefits the individual that may be made on the*
13 *basis of such record, and consequently a determination*
14 *is made which is adverse to the individual."*

15 14:29
16 So that's maintaining an inaccurate record, that has
17 some impact on some determination about the character
18 or the rights of the individual and results in some
19 adverse decision being taken. So somebody takes the
20 decision not to hire him for a job because there's 14:29
21 something on the record that seems detrimental or
22 adverse to him when in fact that may not be the case
23 because it's not accurate.

24
25 And then (D), the last one is: "*Fails to comply with* 14:30
26 *any other provision of this section, or any rule*
27 *promulgated thereunder, in such a way as to have an*
28 *adverse effect on the individual."*
29

1 So that's something of a catch-all perhaps. It shows
2 or it provides that if there's any breach of any other
3 provision of the section or any rule under that then
4 you can bring action provided you can show an adverse
5 effect on you.

14:30

6
7 So in any of those circumstances: *"The individual may*
8 *bring a civil action against the agency, and the*
9 *district courts of the United States shall have*
10 *jurisdiction in the matters under the provisions of*
11 *this subsection."*

14:30

12
13 Now that's subsection 1 of (g) and then subsection (2),
14 which is at the top of page 48, right-hand column,
15 deals with what the remedies are for each of these
16 particular breaches.

14:30

17
18 So (A) says: *"In any suit brought under the provisions*
19 *of subsection (g)(1)(A) of this section - that's not*
20 *amending the record to correct some inaccuracy - the*
21 *court may order the agency to amend the individual's*
22 *record in accordance with his request or in such other*
23 *way as the court may determine. In such a case the*
24 *court should determine the matter de novo."*

14:31

25
26 So the remedy is that you get the record corrected but
27 you don't get any damages, there is no reference to any
28 entitlement to damages. (B):

14:31

1 *"The court assess against the United States reasonable*
2 *attorney fees and other litigation costs."*

3
4 So you may get your costs. Then subparagraph 3(A):

14:31

5
6 *"In any suit brought under the provisions of subsection*
7 *(g)(1)(B) of this section - and that's the one about*
8 *'I have asked for access to my records and you haven't*
9 *given it to me' - the court may enjoin the agency from*
10 *withholding the records and order the production to the*
11 *complainant of any agency records improperly withheld*
12 *from him. In such a case the court shall determine the*
13 *matter de novo, and may examine the contents of any*
14 *agency records in camera to determine whether the*
15 *records or any portion thereof may be withheld under*
16 *any of the exemptions set forth in subsection (okay) of*
17 *the section and the burden is on the agency to sustain*
18 *its action."*

19
20 So again you're not entitled to damages, the remedy is 14:32
21 the agency may be directed to actually produce the
22 records that you have requested. And again you may get
23 your reasonable attorneys' fees but not damages.

24
25 And then paragraph 4: *"In any suit brought under the* 14:32
26 *provisions of subsection (g)(1)(C) or (D)."*

27
28 So here are the two subsections, both of which involve
29 some adverse consequence for you.

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

2 **MR. MICHAEL COLLINS:** (C) is the one about that the
3 record was maintained inaccurately and it resulted in
4 some decision made that was adverse to you and (D) is
5 any other breach which nonetheless still results in an 14:32
6 adverse consequence. I'm going back to paragraph 4:
7 "*In which the court determines that the agency acted in*
8 *a manner which was intentional or wilful.*"
9

10 So you may breach (C) and (D) but you can't actually 14:32
11 bring an action in respect of it unless you show that
12 the breach was intentional or wilful and, if you show
13 that, the United States shall be liable to the
14 individual, it's not the agency, this is against the
15 US: "*In an amount equal to the amount of (a) actual 14:33*
16 *damages sustained by the individual with not less than*
17 *a \$1,000 and (b) the costs of the action as determined*
18 *by reasonable attorneys fees.*"
19

20 So (A) and (B) the remedy is you get the record fixed 14:33
21 or produced as the case may be, in (C) and (D) where
22 there's an adverse consequence for you, you may get
23 damages but you have to show that the breach was
24 intentional or wilful. And those are obviously two
25 quite distinct different words. we have looked already 14:33
26 at the meaning of the word "*wilful*" and "*intentional*"
27 obviously has that concept of some form of conscious
28 violation.
29

1 But in order to bring such a claim, I mean that's
2 obviously a restriction in itself and it's of course
3 applicable -- this Act, as it was originally designed,
4 Judge, was entirely applicable just to US persons. So
5 it's not a point of discrimination against non-US
6 persons, US persons face these obstacles.

14:34

7
8 There is the further obstacle that, even if you say
9 that you have suffered an adverse effect in some shape
10 or form by virtue of a violation and even if you can
11 see that it was wilful or intentional, you still have
12 to show that the harm or the adverse effect is in the
13 nature of financial harm rather than some form of
14 non-economic harm.

14:34

15
16 That's on foot of a Supreme Court decision that was
17 referred to in one of the earlier cases I opened
18 earlier today, Judge, Federal Aviation Administration
19 -v- Cooper and I would like to look at that case very
20 briefly, if I may, Judge. It's in Book 2 of the US
21 authorities at Tab 32.

14:34

22
23 It's a Supreme Court decision, Judge, and I'm just
24 going to open the headnote, I'm not going to open the
25 actual opinion of the court itself. It's a matter for
26 the experts to comment further on it as they see fit.

14:35

27
28 The essence of it, Judge, was that a pilot who had HIV,
29 but didn't disclose it and it was ultimately found out

1 that he did, ultimately lost his licence and so forth
2 and took an action for wrongful disclosure of the
3 records in relation to HIV alleging that he suffered
4 from various forms of emotional distress and so forth
5 by virtue of the disclosure but the court held that 14:35
6 that wasn't an adverse effect within the meaning of the
7 Privacy Act provisions:

8
9 *"Respondent Cooper, a licensed pilot, failed to*
10 *disclose his HIV diagnosis to the Federal Aviation* 14:36
11 *Administration (FAA) at a time when the agency did not*
12 *issue medical certificates, which are required to*
13 *operate an aircraft, to persons with HIV.*
14 *Subsequently, respondent applied to the Social Security*
15 *Administration (SSA) and received long-term disability*
16 *benefits on the basis of his HIV status. Thereafter,*
17 *he renewed his certificate with the FAA on several*
18 *occasions, each time intentionally withholding*
19 *information about his condition. The Department of*
20 *Transportation (DOT), the FAA's parent agency, launched*
21 *a joint criminal investigation with the SSA to identify*
22 *medically unfit individuals who had obtained FAA*
23 *certifications. The Department of Transport provided*
24 *the SSA with the names of licensed pilots, and the SSA,*
25 *in turn, provided the Department of Transportation with*
26 *a spreadsheet containing information on those pilots*
27 *who had also received disability benefits.*
28 *Respondent's name appeared on the spreadsheet, and an*
29 *investigation led to his admission that he had*

1 intentionally withheld information about his HIV status
2 from the FAA. His pilot certificate was revoked, and
3 he was indicted for making false statements to a
4 Government agency. He pleaded guilty and was fined and
5 sentenced to probation. He then filed suit, alleging
6 that the FAA, DOT, and SSA violated the Privacy Act of
7 1974 which contains a detailed set of requirements for
8 the management of records held by Executive Branch
9 agencies."

10
11 And it refers to the Section 552a (g) that we have just
12 been looking at, Judge:

13
14 "If the Government intentionally or willfully violates
15 the Act's requirements in such a way as to adversely
16 affect the individual. Specifically, respondent
17 claimed that the unlawful disclosure to the DOT of his
18 confidential medical information had caused him mental
19 and emotional distress. The District Court concluded
20 that the Government had violated the Act. But, finding
21 the term 'actual damages' ambiguous, the court relied
22 on the sovereign immunity canon, which provides that
23 sovereign immunity waivers must be strictly construed
24 in the Government's favor, to hold that the Act does
25 not authorize the recovery of nonpecuniary damages.
26 Reversing the District Court, the Ninth Circuit
27 concluded that 'actual damages' in the Act is not
28 ambiguous and includes damages for mental and emotional
29 distress."

1
2 Held, this is by the Supreme Court: "*The Privacy Act*
3 *does not unequivocally authorize damages for mental or*
4 *emotional distress and therefore does not waive the*
5 *Government's sovereign immunity from liability for such*
6 *harms.*

7
8 (a) *A waiver of sovereign immunity must be*
9 *unequivocally expressed in statutory text -- and gives*
10 *the citation -- and any ambiguities are to be construed* 14:38
11 *in favor of immunity. Ambiguity exists if there is a*
12 *plausible interpretation of the statute that would not*
13 *allow money damages against the Government."*

14
15 So it is quite a loaded test in that sense, if there's 14:38
16 a plausible interpretation it will favour the
17 government:

18
19 "*(b) The term 'actual damages' in the Privacy Act is a*
20 *legal term of art, and Congress, when it employs a term*
21 *of art "'presumably knows and adopts the cluster of*
22 *ideas that were attached to each borrowed word in the*
23 *body of learning from which it was taken'". Even as a*
24 *legal term, the precise meaning of 'actual damages' is*
25 *far from clear. Although the term is sometimes*
26 *understood to include nonpecuniary harm, it has also*
27 *been used or construed more narrowly to cover damages*
28 *for only pecuniary harm. Because of the term's*
29 *chameleon-like quality, it must be considered in the*

1 *particular context in which it appears."*

2
3 (c): *"The Privacy Act serves interests similar to*
4 *those protected by defamation and privacy torts. Its*
5 *remedial provision, under which plaintiffs can recover*
6 *a minimum award of \$1,000 if they first prove at least*
7 *some 'actual damages', 'parallels' the common-law torts*
8 *of libel per quod and slander, under which plaintiffs*
9 *can recover 'general damages' if they first prove*
10 *'special damages'. Doe -v- Chao."*

11
12 That's also in your book, Judge, it's in Book 3 at
13 Tab 37 of that book and I'm going to refer to that
14 briefly in a moment:

15
16 *"'special damages' are limited to actual pecuniary*
17 *loss, which must be specially pleaded and proved.*
18 *'General damages' cover nonpecuniary loss and need not*
19 *be pleaded or proved. This parallel suggests the*
20 *possibility that Congress intended the term 'actual*
21 *damages' to mean 'special damages', thus barring*
22 *Privacy Act victims from any recovery unless they can*
23 *first show some actual pecuniary harm. That Congress*
24 *would choose 'actual damages' instead of 'special*
25 *damages' is not without precedent, as the terms have*
26 *occasionally been used interchangeably. Furthermore,*
27 *any doubt about the plausibility of construing 'actual*
28 *damages' as special damages in the Privacy Act is put*
29 *to rest by Congress' deliberate refusal to allow*

14:39

1 recovery for 'general damages'. In common-law
2 defamation and privacy cases, special damages is the
3 only category of compensatory damages other than
4 general damages. Because Congress declined to
5 authorize general damages, it is reasonable to infer
6 that Congress intended the term 'actual damages' in the
7 Act to mean special damages for proven pecuniary loss.

8
9 (d) Although the contrary reading of the Privacy Act
10 accepted by the Ninth Circuit and advanced by
11 respondent is not inconceivable, it is plausible to
12 read the Act as authorizing only damages for economic
13 loss. Because Congress did not speak unequivocally,
14 the Court adopts an interpretation of 'actual damages'
15 limited to proven pecuniary harm. To do otherwise
16 would expand the scope of Congress' sovereign immunity
17 waiver beyond what the statutory text clearly requires.

18
19 (e) Respondent raises several counterarguments: (1)
20 common-law cases often define 'actual damages' to mean
21 all compensatory damages; (2) the elimination of
22 'general damages' from the Privacy Act means that there
23 can be no recovery for presumed damages, but plaintiffs
24 can still recover for proven mental and emotional
25 distress; (3) because some courts have construed
26 'actual damages' in similar statutes to include mental
27 and emotional distress, Congress must have intended
28 'actual damages' in the Act to include mental and
29 emotional distress as well; and (4) precluding

1 *nonpecuniary damages would lead to absurd results,*
2 *thereby frustrating the Act's remedial purpose. None*
3 *of these arguments overcomes the sovereign immunity*
4 *canon."*

14:41

5
6 So again perhaps underscoring the strength of the
7 presumption that is made about the restrictive nature
8 of the sovereign immunity or extensive nature of it
9 depending on which way you look at it.

14:41

10
11 Similarly, Judge, and it's only a small part I want to
12 refer to in that Doe -v- Chao case that was referenced
13 there, that's in Book 3 of the book of US authorities
14 and it's at Tab 37.

14:41

15
16 And the point here was there is a statutory provision
17 that says if you prove a violation of the Act then you
18 get damages subject to a minimum of a \$1,000. And the
19 issue was, well even if you don't prove actual damage
20 do you still get the minimum \$1,000? And the court
21 said no. So the summary of the Supreme Court's
22 decision at the start by Justice Souter:

14:41

23
24 *"The United States is subject to a cause of action for*
25 *the benefit of at least some individuals adversely*
26 *affected by a Federal agency's violation of the Privacy*
27 *Act of 1974. The question before us is whether*
28 *plaintiffs must prove some actual damages to qualify*
29 *for a minimum statutory award of \$1,000. We hold that*

1 *they must.*"

2
3 And if you move over in the opinion, Judge, to page 4,
4 section 3, towards the bottom of the page:

5
6 *"Doe argues that subsection (g)(4)(A) - which we've*
7 *been looking at - entitles any plaintiff adversely*
8 *affected by an intentional or willful violation to the*
9 *\$1,000 minimum on proof of nothing more than a*
10 *statutory violation: anyone suffering an adverse*
11 *consequence of intentional or willful disclosure is*
12 *entitled to recovery. The Government claims the*
13 *minimum guarantee goes only to victims who prove some*
14 *actual damages. We think the Government has the better*
15 *side of the argument."*

14:42

14:42

16
17 And over the page, Judge, on page 6 he says: *"Doe's*
18 *manner of reading 'entitle[ment] to recovery' as*
19 *satisfied by adverse effect caused by intentional or*
20 *willful violation is in tension with more than the*
21 *text, however. It is at odds with the traditional*
22 *understanding that tort recovery requires not only*
23 *wrongful act plus causation reaching to the plaintiff,*
24 *but proof of some harm for which damages can reasonably*
25 *be assessed."*

26
27 And he cites a textbook:

28
29 *"Doe, instead, identifies a person as entitled to*

1 *recover without any reference to proof of damages,*
2 *actual or otherwise. Doe might respond that it makes*
3 *sense to speak of a privacy tort victim as entitled to*
4 *recover without reference to damages because analogous*
5 *common law would not require him to show particular*
6 *items of injury in order to receive a dollar recovery.*
7 *Traditionally, the common law has provided such victims*
8 *with a claim for 'general' damages, which for privacy*
9 *and defamation torts are presumed damages: a monetary*
10 *award calculated without reference to specific harm.*

11
12 *Such a rejoinder would not pass muster under the*
13 *Privacy Act, however, because a provision of the Act*
14 *not previously mentioned indicates beyond serious doubt*
15 *that general damages are not authorized for a statutory* 14:43
16 *violation. An uncodified section of the Act*
17 *established a Privacy Protection Study Commission,*
18 *which was charged, among its other jobs, to consider*
19 *'whether the Federal Government should be liable for*
20 *general damages incurred by an individual as the result*
21 *of a willful or intentional violation of the provisions*
22 *of sections 552a(g)(1)(C) or (D) of title 5'. Congress*
23 *left the question of general damages, that is, for*
24 *another day. Because presumed damages are therefore*
25 *clearly unavailable, we have no business treating just*
26 *any adversely affected victim of an intentional or*
27 *willful violation as entitled to recovery, without*
28 *something more."*

1 So it's quite stark, Judge. You can show an
2 intentional and wilful violation, you can show that
3 there is an adverse consequence for you, but you still
4 can't recover a dollar unless you can show that there
5 is some actual harm suffered in terms of some actual 14:44
6 monetary damage that are entitled to or that you are
7 able to establish.

8
9 So I just draw intention to, therefore, the
10 interpretation that is being put first of all on the 14:44
11 Privacy Act itself as a matter of US law applicable to
12 all citizens in the US which is obviously very
13 restrictive.

14
15 And of course in their nature violations of privacy 14:45
16 laws and data protection laws, it is frequently very
17 difficult to show a particular financial consequence
18 that may flow from it because, by its nature, the
19 objection is to the invasion of privacy and what the
20 Schrems court referred to as the feeling that your data 14:45
21 is being looked at and scrutinised by somebody else.

22
23 Now that's the Privacy Act itself, Judge. That was
24 then extended to non-US citizens by the Judicial
25 Redress Act of 2015. I'm going to have to ask you, 14:46
26 Judge, if you can, to keep a pen or a finger or
27 something on that page 48 of the Privacy Act because
28 I want to look to see how those four circumstances in
29 (A), (B), (C) and (D) can dealt with under the Judicial

1 Redress Act.

2 **MS. JUSTICE COSTELLO:** Yes. And that's behind Tab 10
3 in my book?

4 **MR. MICHAEL COLLINS:** Hmm, yes. I gather 7 and 10 have
5 been reversed between your book and my book. So yours 14:46
6 is in Tab 10, which certainly chronologically perhaps
7 makes more sense.

8
9 This Act is a mercifully short act. You will see at
10 section 2, Judge, it says: "*Extension of Privacy Act 14:46*
11 *remedies to citizens of designated countries.*"

12
13 And then subsection (a) says: "*with respect to covered*
14 *records, a covered person.*"

15 14:47

16 And these are the specific terms you will recall the
17 Commissioner considered.

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

19 **MR. MICHAEL COLLINS:** "*May bring a civil action against*
20 *an agency and obtain civil remedies in the same manner 14:47*
21 *and to the same extent and subject to the same*
22 *limitations, including exemptions and exceptions, as an*
23 *individual may bring and obtain with respect to records*
24 *under.*"

25 14:47

26 Then they refer firstly, rather curiously at least in
27 reverse alphabetical order, to section 552a(g)(1)(D).
28 So of the four that we've been talking about they refer
29 to (D), that's the one about any breach of the

1 provisions of the Privacy Act but you have to show an
2 adverse effect on an individual. And they say, they
3 refer to that section: "*But only with respect to*
4 *disclosures intentionally or willfully made in*
5 *violation of Section 552a (b) of such title.*" 14:48

6
7 So the requirement, although the requirement under the
8 Privacy Act itself is to show the adverse effect, this
9 provides for the intentional and wilful requirement in
10 relation to subsection or subparagraph (D). 14:48

11
12 And then in (a)(2) they deal with subparagraphs (A) and
13 (B), and they say: "*Subparagraphs (A) and (B) of*
14 *Section 552a (g)(1) of Title 5, but such an action may*
15 *only be brought against a designated federal agency or* 14:48
16 *component.*"

17
18 So the agency has to be designated under the Judicial
19 Redress Act. You will recall this morning I said that
20 a number of agencies have recently been designated as 14:48
21 we understand it but not, I think, including the NSA
22 itself, the National Security Agency.

23
24 So there's no such limitation of course for US citizens
25 in terms of an action which they bring under (A) and 14:49
26 (B) to correct the records or to get access to the
27 records, they are entitled, whatever the agency is, to
28 have that remedy; but for the non-US citizen, a non-US
29 person, they don't have the same width or breadth of

1 the agencies against whom they can go. They can only
2 go against the agencies who have been designated. And
3 there is a list, and I thought I had it somewhere,
4 Judge, on the website but we will get it of the
5 Department of Justice's website where they have
6 recently designated them I think as of 1st February of
7 this year.

14:49

8
9 The interesting thing is, however, there's no reference
10 to a cause of action in respect of paragraph (C) of
11 subsection (g)(1). Paragraph (C) is the one whereby
12 the record is inaccurate, somebody has made some
13 decision on foot of that inaccurate record and you have
14 suffered some adverse consequence as a result of that.
15 So, even if you can show a violation in respect of
16 that, and even if you can show that it was intentional
17 or wilful, which of course is required itself under the
18 Privacy Act by virtue of subparagraph 4, there's no
19 parallel, there's no cross referencing or incorporation
20 of that remedy into the Judicial Redress Act. So the
21 EU citizen has no right of remedy against the agency in
22 those circumstances because for whatever reason it has
23 simply been left out.

14:49

14:50

14:50

24
25 Furthermore, you'll see in the Judicial Redress Act
26 section 2 subsection (b) exclusive remedies: "*The*
27 *remedies set forth in subsection (a) are the exclusive*
28 *remedies available to a covered person under this*
29 *section.*"

14:50

1 **MS. JUSTICE COSTELLO:** I am sorry, which page did you
2 go to there?

3 **MR. MICHAEL COLLINS:** Sorry, it's the first page of the
4 Judicial Redress Act, Judge.

5 **MS. JUSTICE COSTELLO:** Yes. Oh (b), "*Exclusive* 14:51
6 *Remedies*", yes.

7 **MR. MICHAEL COLLINS:** (b) "*Exclusive Remedies*":
8 "*Remedies set forth in subsection (a) are the exclusive*
9 *remedies available to a covered person under this*
10 *subsection.*" 14:51

11

12 So the EU citizen has all the problems that the US
13 citizen faces. It has got the problems, general
14 problems of standing of course that I'll come to in due
15 course. He has got the problems of showing intentional 14:51
16 or wilful violation, he has got the problems of showing
17 an adverse effect, he has got the problem of showing a
18 non-pecuniary adverse effect is not enough, he is going
19 to have to show some form of actual damages, special
20 damages as we would call them perhaps, rather than just 14:51
21 some general damages, emotional harm or something like
22 that is not sufficient.

23

24 And, in the case of subparagraphs (a) and (b) in the
25 Privacy Act, he can only go against certain designated 14:51
26 agencies where, you will recall, that the agencies, as
27 we'll see in a moment, under the Privacy Act they
28 themselves can opt out of the Privacy Act to start with
29 and they have to be designated then under the Judicial

1 Redress Act to come within the EU citizens.

2
3 So there's a range of obstacles there that are
4 presented to EU citizens which have no parallel in EU
5 law under Article 47 of the Charter that we spent so 14:52
6 much time talking about yesterday subject to the
7 ordinary rules of standing and so on that apply as a
8 matter of EU law.

9
10 In subsection (c), Judge, refers to application of the 14:52
11 Privacy Act with respect of the covered person. And it
12 says that a covered person:

13
14 *"For the purpose of a civil action described in*
15 *subsection (a), a covered person shall have the same 14:52*
16 *rights, and be subject to the same limitations and so*
17 *forth as a person pursuing a remedy under the Privacy*
18 *Act, under those sections."*

19
20 And then it deals with the designation of the covered 14:52
21 country in subsection (d) and that provides that
22 basically: *"The Attorney General, in conjunction with*
23 *a number of other parties, Secretary of State, the*
24 *Secretary of the Treasury and the Secretary of Homeland*
25 *Security can designate a foreign country or certain 14:53*
26 *types of foreign economic organisations as a covered*
27 *country if they meet certain criteria."*

28
29 They have entered into a particular type of agreement

1 with the US for the detection and prevention,
2 prosecuting crimes; the Attorney General has determined
3 that it has effectively a shared information with the
4 US for that purpose, it permits the transfer of
5 personal data for commercial purposes between the 14:53
6 countries and the Attorney General has certified that
7 the policies about the transfer of personal data do not
8 materially impede the national security interests of
9 the US.

10
11 Now, as I say I think all of the EU countries have
12 recently, and the EU itself, have recently been
13 designated as covered countries, as I say with the
14 exception of the United Kingdom and Denmark.

15
16 Then, equally, the designation can be removed by the
17 Attorney General with the concurrence of the same
18 people, that's under subparagraph 2. If all of those
19 various conditions that were necessary for the
20 designation as a covered country, if any of those cease 14:54
21 to be satisfied.

22
23 Subsection (e) deals with the designation of the
24 designated federal agency or component. Again this is
25 something which the Attorney General does. She 14:54
26 determines, or he as it is now, whether an agency or
27 component is a designated federal agency or component:

28
29 *"The Attorney General shall not designate any agency*

1 *other than the Department of Justice without the*
2 *concurrence of the head of the relevant agency, or of*
3 *the agency to which the component belongs."*

4
5 So an agency cannot be compelled to be designated 14:54
6 against its will, an agency can opt out of being
7 designated under the Judicial Redress Act and, whether
8 it's for that reason or otherwise I don't know, but as
9 I say the NSA have not been designated.

10
11 There are certain requirements for designation set out, 14:55
12 I don't think anything turns on that in particular.
13 But it is perhaps of some significance that the
14 decision to either designate somebody as an agency, a
15 designated agency or the decision to designate somebody 14:55
16 as a covered country are non-reviewable decisions. So
17 if you look at subsection (f) in the second page of the
18 Act, it says:

19
20 *"The Attorney General shall publish each determination 14:55*
21 *made under subsections (d) and (e)."*

22
23 That's in respect of the country and in respect of the
24 agency: *"Such determination shall not be subject to*
25 *judicial or administrative review."* 14:55

26
27 And then finally there are some definitions, Judge,
28 including 'covered country' and 'covered person'.
29 Covered country: *"The term 'covered country' means a*

1 *country or regional economic integration organization,*
2 *or member country of such organization, designated in*
3 *accordance with subsection (d)."*

4
5 Now you will recall that subsection (d) refers to the 14:56
6 designation of a foreign country. So it would seem
7 that you can't designate the United States as a covered
8 country because the United States is not a foreign
9 country from the perspective of the United States. And
10 that seems to raise difficulties to which the 14:56
11 controller has, the Commissioner has adverted to in her
12 opinion. And, similarly, that flows into then the
13 definition of covered person because the term 'covered
14 person' in subparagraph 3 means:

15 14:56
16 *"A natural person (other than an individual) who is a*
17 *signature of a covered country."*

18
19 And if the United States is not a covered country we'll
20 then the citizens of the United States would not in 14:56
21 fact be covered persons. That of course, there's no
22 decision on that, there's no interpretation of that,
23 that's simply a point that has been raised and its
24 implications remain to be worked out.

25 14:56
26 So the proposition, Judge, that is sometimes asserted
27 where it is said that the Judicial Redress Act extends
28 all of the protections of the Privacy Act to non-US
29 citizens while is a very broad and general proposition,

1 that's clearly the area that we are in, but it's not
2 true as an actual proposition in terms of what it
3 actually does. It doesn't extend the same level of
4 protections that even US citizens have under the
5 Privacy Act and, secondly, under the Privacy Act itself 14:57
6 there are a series of restrictions in terms of the
7 remedies available, whether you be a US citizen or an
8 EU citizen. So cumulatively those together amount to a
9 number of significant constraints on the remedies that
10 are available vis-à-vis the Privacy Act which the 14:57
11 Commissioner has taken into account in her valuation of
12 whether the protection available to an EU citizen in
13 the United States meets the adequacy test of
14 Articles 25 and 26 of the Directive, taking into
15 account the judicial interpretations of things like 14:58
16 adverse effect and so on in cases such as FAA -v-
17 Cooper, Doe -v- Chao and so forth; and the doctrine of
18 sovereign immunity as well and the very strict
19 construction that the US courts adopt in relation to
20 the doctrine of sovereign immunity. And even if you 14:58
21 get around all of those problems you then face the
22 problem of standing, the overarching problem of
23 standing.

24
25 So I am, with enormous relief, Judge, going to leave 14:58
26 the -- sorry, just before I leave the statutory
27 provisions, I'm not going to go through them in any
28 particular detail, but I should just refer to some of
29 the other Acts just to see what they are.

1 First of all, Judge, at Tab 9 you'll see the
2 Administrative Procedure Act. That is an Act which was
3 originally enacted in 1946.

4 **MS. JUSTICE COSTELLO:** Sorry. It is just I find these
5 very dense to read. 14:59

6 **MR. MICHAEL COLLINS:** Yes. No, they are, Judge.

7 **MS. JUSTICE COSTELLO:** I've got, this is Title 5,
8 government organisations, page 122 section 701, is that
9 the right page?

10 **MR. MICHAEL COLLINS:** Sorry, where are you? 14:59

11 **MS. JUSTICE COSTELLO:** I'll hand it down to you. It's
12 quicker.

13 **MR. MICHAEL COLLINS:** They all tell me you are right,
14 Judge.

15 **MS. JUSTICE COSTELLO:** well, the page is 122 at the 14:59
16 top, it looks different to yours, Mr. Collins, this is
17 what I'm looking at.

18 **MR. MICHAEL COLLINS:** It's a different layout but I'm
19 told it is the same, Judge. So it's subchapter II
20 "*Administrative Procedure*". 14:59

21 **MS. JUSTICE COSTELLO:** well, no, hang on a second,
22 I don't think I have that.

23 **MR. MICHAEL COLLINS:** Section 551?

24 **MS. JUSTICE COSTELLO:** No, I am on 701, I think.

25 **MR. MICHAEL COLLINS:** Ah. 15:00

26 **MS. JUSTICE COSTELLO:** what's the Act, I'll look at my
27 index?

28 **MR. MICHAEL COLLINS:** No, you are right, Judge, I have
29 some additional, I have an additional section in my

1 book of definitions which apparently is not in your
2 book, and there's no reason to worry about that. You
3 should have section 702 headed "*Right of Review*"?

4 **MS. JUSTICE COSTELLO:** I do, it's on the next page.

5 **MR. MICHAEL COLLINS:** Thank you, Judge, and that's page 15:00
6 123 if you are operating on the two column version.

7 **MS. JUSTICE COSTELLO:** Yes.

8 **MR. MICHAEL COLLINS:** What this Act does in effect,
9 Judge, is it provides for, I think, something very
10 similar to what we understand by judicial review. It 15:00
11 provides for the control of agencies and in particular
12 what they called "*final agency action*", that when an
13 agency takes a final decision it is subject to judicial
14 review by the courts on a series of grounds that are
15 very similar to the sort of grounds that we are 15:01
16 familiar with in terms of administrative law and the
17 judicial review remedies that we have.

18
19 So if you look at section, the coincidentally entitled
20 section 702, "*Right of Review*", but nothing to do with 15:01
21 the other section 702:

22
23 "*A person suffering legal wrong because of agency*
24 *action, or adversely affected or aggrieved by agency*
25 *action within the meaning of a relevant statute, is 15:01*
26 *entitled to judicial review thereof. An action in a*
27 *court of the United States seeking relief other than*
28 *money damages and stating a claim that an agency or an*
29 *officer or employee thereof acted or failed to act in*

1 *an official capacity or under color of legal authority*
2 *shall not be dismissed nor relief therein be denied on*
3 *the ground that it is against the United States or that*
4 *the United States is an indispensable party."*

5
6 So you can't invoke sovereign immunity: "*The United*
7 *States may be named as a defendant in any such action,*
8 *and a judgment or decree may be entered against the*
9 *United States: Provided, that any mandatory or*
10 *injunctive decree shall specify the Federal officer or*
11 *officers (by name or by title). Nothing herein (1)*
12 *affects other limitations on judicial review or the*
13 *power or duty of the court to dismiss any action or*
14 *deny relief on any other appropriate legal or equitable*
15 *grounds; or (2) confers authority to grant relief if*
16 *any other statute that grants consent to suit expressly*
17 *or impliedly forbids the relief which is sought."*

18
19 So if you have another statute that deals with the area
20 in question and if it says this is the sort of remedy 15:02
21 that's there, this is the limit of the remedy and so
22 forth, that statute governs, this doesn't create some
23 new remedy or some new cause of action that doesn't
24 otherwise exist. I will let the stenographer change.

25
26 If you look at Section 704, Judge, on the right hand
27 column, "Actions Reviewable":

28
29 "*Agency action made reviewable by statute and final*

1 *agency action for which there is no other adequate*
2 *remedy in a court are subject to judicial review."*

3
4 So obviously, if you have a specific remedy under a
5 specific statute, you can invoke that. If there's a
6 specific decision for which there's no other adequate
7 remedy in a court, you've judicial review in the
8 ordinary way.

15:03

9
10 *"A preliminary, procedural, or intermediate agency*
11 *action or ruling not directly reviewable is subject to*
12 *review on the review of the final agency action."*

15:03

13
14 And final agency action is in fact a defined term,
15 Judge -- or agency action, sorry, is a defined term.
16 I'm not sure if it's in your book, but it's paragraph
17 13 of Section 551. It includes "*the whole or part of*
18 *an agency rule, order, licence, sanction, relief or the*
19 *equivalent or denial thereof or failure to act."*

15:03

20
21 Then continuing Section 704:

15:04

22
23 *"Except as otherwise expressly required by statute,*
24 *agency action otherwise final is final for the purposes*
25 *of this section whether or not there has been presented*
26 *or determined an application for a declaratory order,*
27 *for any form of reconsideration, or, unless the agency*
28 *otherwise requires by rule and provides that the action*
29 *meanwhile is inoperative, for an appeal to superior*

1 *agency authority.*"

2
3 Then over the page, Judge, the last section of the Act,
4 Section 706, "Scope of Review":

5
6 *"To the extent necessary to decision and when*
7 *presented, the reviewing court shall decide all*
8 *relevant questions of law, interpret constitutional and*
9 *statutory provisions, and determine the meaning or*
10 *applicability of the terms of an agency action. The*
11 *reviewing court shall –*

12 (1) *compel agency action unlawfully withheld or*
13 *unreasonably delayed; and*

14 (2) *hold unlawful and set aside agency action,*
15 *findings, and conclusions found to be –*

16 (A) *arbitrary, capricious, an abuse of discretion, or*
17 *otherwise not in accordance with law;*

18 (B) *contrary to constitutional right, power, privilege,*
19 *or immunity;*

20 (C) *in excess of statutory jurisdiction, authority, or*
21 *limitations, or short of statutory right;*

22 (D) *without observance of procedure required by law;*

23 (E) *unsupported by substantial evidence in a case*
24 *subject to sections 556 and 557... or otherwise*
25 *reviewed on the record of an agency hearing provided by*
26 *statute; or*

27 (F) *unwarranted by the facts to the extent that the*
28 *facts are subject to trial de novo by the reviewing*
29 *court.*

1
2 *In making the foregoing determinations, the court shall*
3 *review the whole record or those parts of it cited by a*
4 *party, and due account shall be taken of the rule of*
5 *prejudicial error."*
6

7 So allowing for some differences of language and
8 perhaps some differences in detail, it's very similar
9 to the types of grounds which we would be familiar with
10 in terms of our own judicial review. 15:05

11
12 I'm not going to, in the interests of time and
13 otherwise, Judge, go through the other statutory
14 provisions that are in the book. One of them that's
15 referred to by the Commissioner in her decision is the 15:05
16 Computer Fraud and Abuse Act, which is there in the
17 book. And I'm not going to attempt to summarise the
18 provisions of it again. But one of the points which is
19 made by the experts is that some courts have held that
20 Federal governments and agencies are immune from suit 15:06
21 under that statute. And again the experts can deal
22 with that insofar as is necessary.

23
24 So could I turn, Judge, to the overarching problem of
25 standing? And you will, however, still need this book - 15:06
26 not, happily, for the statutes, but because it actually
27 contains some of the cases. There's just really two
28 cases I want to refer to, Judge. And I think it fair
29 to say, looking at the experts' reports and looking at

1 a document that you haven't yet seen, Judge, but I will
2 bring to your attention, which is a report following
3 the meeting of the experts which took place where they
4 attempted to identify areas of agreement and
5 disagreement - and happily, they have identified many 15:07
6 areas of agreement between them, and perhaps
7 unsurprisingly that would be so - even in terms of
8 standing, the difference between them, I think, is more
9 a question of the fact that, as one of the authorities
10 or commentators puts it, jurisprudence in relation to 15:07
11 standing is simple at one level in the United States in
12 the sense that the principles can be laid out quite
13 simply, but the way in which they're applied sometimes
14 by the courts can differ and it's sometimes hard to
15 make a sense of a coherent whole of it. 15:07

16
17 But nonetheless, some fundamental principles do stand
18 out and the experts don't really disagree on those
19 fundamentals, although I think they disagree on some of
20 the nuances and the extent to which you can say 'well, 15:07
21 there's a decision, but there is another different
22 circuit decision that perhaps goes another way and
23 might be decided differently'. But I think what you
24 *will* be satisfied, Judge, is that irrespective of
25 whatever the ranges of options are, the range of 15:07
26 options are in terms of how cases might be decided one
27 way or the other, the requirements are still in
28 significant respects markedly more strict than the
29 requirements for standing as outlined in the European

1 Court of Justice jurisprudence and as outlined in
2 Schrems, Digital Rights Ireland cases and so forth that
3 I've already opened to you.

4
5 I really only want to, for the sake of illustrating the 15:08
6 principles, Judge, I just want to refer, I think, just
7 to two cases, or possibly three at most. The first of
8 them is the Supreme Court's decision that is referred
9 to expressly in the Commissioner's decision and it's
10 referred to in all of the expert reports, Clapper -v- 15:08
11 Amnesty International USA. And you'll find that at tab
12 16 in this same book that we've been looking at. And
13 the essence of it has already been summarised in the
14 Commissioner's decision. There are a number of cases
15 involving the name Clapper, but that is, of course, 15:09
16 because Mr. Clapper was at the time the Director of the
17 National Intelligence Agency.

18
19 If I ask you to look at the head-note or analysis
20 first, Judge, if I may? It says: 15:09

21
22 *"Attorneys and human rights, labor, legal, and media*
23 *organizations brought action seeking a declaration that*
24 *provision of Foreign Intelligence Surveillance Act*
25 *(FISA) allowing surveillance of individuals who were*
26 *not 'United States persons' and were reasonably*
27 *believed to be located outside the United States, was*
28 *unconstitutional, as well as an injunction against*
29 *surveillance authorized by the provision. The United*

1 *States District Court for the Southern District of New*
2 *York... granted summary judgment in favor of*
3 *defendants, and plaintiffs appealed. The United States*
4 *Court of Appeals for the Second Circuit, Gerard E.*
5 *Lynch, Circuit Judge, reversed... and denied rehearing*
6 *en banc, 667 F.3d 163. Defendants petitioned for*
7 *certiorari.*

8
9 *The Supreme Court, Justice Alito, held that" --*

10
11 As you know, Judge, you have to petition for certiorari
12 in order to get your right to appeal to begin with.
13 And this was that hearing.

14
15 *"The Supreme Court, Justice Alito, held that:* 15:10
16 *(1) plaintiffs failed to demonstrate the future injury*
17 *they purportedly feared was certainly impending;*
18 *(2) plaintiffs failed to establish the future injury*
19 *they purportedly feared was fairly traceable to the*
20 *FISA provision at issue; and*
21 *(3) costs plaintiffs incurred to avoid surveillance*
22 *were not fairly traceable to the FISA provision at*
23 *issue."*

24
25 And so it was reversed. If I bring you on, Judge, to - 15:10
26 the judgment, I think, is also helpful because it's
27 dealing, as it happens, with the FISA piece of
28 legislation and is perhaps a helpful review in that
29 respect - to page 1146. And if you look at the right

1 hand column under section II, it says:

2
3 *"Article III of the Constitution limits federal courts'*
4 *jurisdiction to certain 'Cases' and 'Controversies.'*
5 *As we have explained, '[n]o principle is more*
6 *fundamental to the judiciary's proper role in our*
7 *system of government than the constitutional limitation*
8 *of federal-court jurisdiction to actual cases or*
9 *controversies'."*

10
11 And I'm going to skip all the citations.

12
13 *"'One element of the case-or-controversy requirement'*
14 *is that plaintiffs 'must establish that they have*
15 *standing to sue'...*

16
17 *The law of Article III standing, which is built on*
18 *separation-of-powers principles, serves to prevent the*
19 *judicial process from being used to usurp the powers of*
20 *the political branches."*

21
22 Again various citations.

23
24 "In keeping with the purpose of this doctrine, '[o]ur
25 standing inquiry has been especially rigorous when
26 reaching the merits of the dispute would force us to
27 decide whether an action taken by one of the other two
28 branches of the Federal Government was
29 unconstitutional'... 'Relaxation of standing

1 requirements is directly related to the expansion of
2 judicial power'... and we have often found a lack of
3 standing in cases in which the Judiciary has been
4 requested to review actions of the political branches
5 in the fields of intelligence gathering and foreign
6 affairs."

7
8 And cites the Richardson case:

9
10 *"Plaintiff lacked standing to challenge the*
11 *constitutionality of a statute permitting the Central*
12 *Intelligence Agency to account for its expenditures*
13 *solely on the certificate of the CIA Director);*
14 *Schlesinger... (plaintiffs lacked standing to challenge*
15 *the Armed Forces Reserve membership of Members of*
16 *Congress); Laird... (plaintiffs lacked standing to*
17 *challenge an Army intelligence-gathering program)."*

18
19 And that's perhaps of some importance, Judge, to show
20 that the court does seem to take a more restrictive 15:12
21 view of standing, particularly in areas such as foreign
22 intelligence gathering and security, because it views
23 that as an area that is uniquely suited to the province
24 of the executive arm of government and, therefore,
25 under separation of powers considerations, an area that 15:12
26 the court would be particularly slow and loath to
27 interfere with what the other branches of government
28 are doing in that respect.
29

1 Continuing on:
2

3 *"To establish Article III standing, an injury must be*
4 *'concrete, particularised, and actual or imminent;*
5 *fairly traceable to the challenged action; and*
6 *redressable by a favourable ruling'" - citing **Monsanto***
7 *- "'Although imminence is concededly a somewhat elastic*
8 *concept, it cannot be stretched beyond its purpose,*
9 *which is to ensure that the alleged injury is not too*
10 *speculative for Article III purposes - that the injury*
11 *is certainly impending'... Thus, we have repeatedly*
12 *reiterated that 'threatened injury must be certainly*
13 *impending to constitute injury in fact,' and that*
14 *"[a]llegations of possible future injury' are not*
15 *sufficient'."*

16
17 Then at the next section:
18

19 *"Respondents assert that they can establish injury in*
20 *fact that is fairly traceable to Section 1881a because*
21 *there is an objectively reasonable likelihood that*
22 *their communications with their foreign contacts will*
23 *be intercepted under Section 1881a at some point in the*
24 *future. This argument fails. As an initial matter,*
25 *the Second Circuit's 'objectively reasonable*
26 *likelihood' standard is inconsistent with our*
27 *requirement that 'threatened injury must be certainly*
28 *impending to constitute injury in fact'...*
29 *Furthermore, respondents' argument rests on their*

1 highly speculative fear that: (1) the Government will
2 decide to target the communications of non-US persons
3 with whom they communicate; (2) in doing so, the
4 Government will choose to invoke its authority under
5 Section 1881a rather than utilising another method of
6 surveillance; (3) the Article III judges who serve on
7 the Foreign Intelligence Surveillance Court will
8 conclude that the Government's proposed surveillance
9 procedures satisfy Section 1881a's many safeguards and
10 are consistent with the Fourth Amendment; (4) the
11 Government will succeed in intercepting the
12 communications of respondents' contacts; and (5)
13 respondents will be parties to the particular
14 communications that the Government intercepts. As
15 discussed below, respondents' theory of standing, which
16 relies on a highly attenuated chain of possibilities,
17 does not satisfy the requirement that threatened injury
18 must be certainly impending... Moreover, even if
19 respondents could demonstrate injury in fact, the
20 second link in the above-described chain of
21 contingencies – which amounts to mere speculation about
22 whether surveillance would be under Section 1881a or
23 some other authority – shows that respondents cannot
24 satisfy the requirement that any injury in fact must be
25 fairly traceable to Section 1881a.

26
27 First, it is speculative whether the Government will
28 imminently target communications to which respondents
29 are parties. Section 1881a expressly provides that

1 *respondents, who are US persons, cannot be targeted for*
2 *surveillance under section 1881a... Accordingly, it is*
3 *no surprise that respondents fail to offer any evidence*
4 *that their communications have been monitored under*
5 *section 1881a, a failure that substantially undermines*
6 *their standing theory... Indeed, respondents do not*
7 *even allege that the Government has sought the FISC's*
8 *approval for surveillance of their communications.*
9 *Accordingly, respondents' theory necessarily rests on*
10 *their assertion that the Government will target other*
11 *individuals – namely, their foreign contacts.*

12
13 *Yet respondents have no actual knowledge of the*
14 *Government's... targeting practices. Instead,*
15 *respondents merely speculate and make assumptions about*
16 *whether their communications with their foreign*
17 *contacts will be acquired under 1881a... For example,*
18 *journalist Christopher Hedges states: 'I have no choice*
19 *but to assume that any of my international*
20 *communications may be subject to government*
21 *surveillance, and I have to make decisions... in light*
22 *of that assumption'... Similarly, attorney Scott McKay*
23 *asserts that, '[b]ecause of the [FISA Amendments Act],*
24 *we now have to assume that every one of our*
25 *international communications may be monitored by the*
26 *government'... 'The party invoking federal*
27 *jurisdiction bears the burden of establishing' standing*
28 *– and, at the summary judgment stage, such a party 'can*
29 *no longer rest on ... "mere allegations", but must "set*

1 *forth" by affidavit or other evidence "specific*
2 *facts"... Respondents, however, have set forth no*
3 *specific facts demonstrating that the communications of*
4 *their foreign contacts will be targeted. Moreover,*
5 *because 1881a at most authorizes – but does not mandate*
6 *or direct – the surveillance that respondents fear,*
7 *respondents' allegations are necessarily conjectural...*
8 *Simply put, respondents can only speculate as to how*
9 *the Attorney General and the Director of National*
10 *Intelligence will exercise their discretion in*
11 *determining which communications to target.*

12
13 *Second, even if respondents could demonstrate that the*
14 *targeting of their foreign contacts is imminent,*
15 *respondents can only speculate as to whether the*
16 *Government will seek to use 1881a authorized*
17 *surveillance (rather than other methods) to do so. The*
18 *Government has numerous other methods of conducting*
19 *surveillance, none of which is challenged here. Even*
20 *after the enactment of the FISA Amendments Act, for*
21 *example, the Government may still conduct electronic*
22 *surveillance of persons abroad under the older*
23 *provisions of FISA" – that's the Section 702 we were*
24 *discussing – "so long as" --*

25 **MS. JUSTICE COSTELLO:** 702 is it, or 72?

15:16

26 **MR. MICHAEL COLLINS:** I thought it was 702, Judge.

27 **MS. JUSTICE COSTELLO:** That's what I was asking. I
28 thought you just said 72 and I was asking was it 702?

29 **MR. MICHAEL COLLINS:** Oh, no, sorry, 702.

1
2 *"So long as it satisfies the applicable requirements,*
3 *including a demonstration of probable cause to believe*
4 *that the person is a foreign power or agent of a*
5 *foreign power... The Government may also obtain*
6 *information from the intelligence services of foreign*
7 *nations... And, although we do not reach the question,*
8 *the Government contends that it can conduct FISA-exempt*
9 *human and technical surveillance programs that are*
10 *governed by Executive Order 12333."*

11
12 And it refers to that.

13
14 *"Even if respondents could demonstrate that their*
15 *foreign contacts will imminently be targeted – indeed,*
16 *even if they could show that interception of their own*
17 *communications will imminently occur – they would still*
18 *need to show that their injury is fairly traceable to*
19 *1881a. But, because respondents can only speculate as*
20 *to whether any (asserted) interception would be under*
21 *1881a or some other authority, they cannot satisfy the*
22 *'fairly traceable' requirement.*

23
24 *Third, even if respondents could show that the*
25 *Government will seek the Foreign Intelligence*
26 *Surveillance Court's authorisation to acquire the*
27 *communications of respondents' foreign contacts under*
28 *1881a, respondents can only speculate as to whether*
29 *that court will authorize such surveillance. In the*

1 past, we have been reluctant to endorse standing
2 theories that require guesswork as to how independent
3 decision makers will exercise their judgment. In
4 Whitmore, for example, the plaintiff's theory of
5 standing hinged largely on the probability that he
6 would obtain federal habeas relief and be convicted
7 upon retrial. In holding that the plaintiff lacked
8 standing, we explained that '[i]t is just not possible
9 for a litigant to prove in advance that the judicial
10 system will lead to any particular result in his
11 case'...

12
13 We decline to abandon our usual reluctance to endorse
14 standing theories that rest on speculation about the
15 decisions of independent actors. Section 1881a
16 mandates that the Government must obtain the Foreign
17 Intelligence Surveillance Court's approval of targeting
18 procedures, minimisation procedures, and a governmental
19 certification regarding proposed surveillance... The
20 Court must, for example, determine whether the
21 Government's procedures are 'reasonably designed... to
22 minimise the acquisition and retention, and prohibit
23 the dissemination, of non-publicly available
24 information concerning unconsenting United States
25 persons'... And, critically, the Court must also
26 assess whether the Government's targeting and
27 minimization procedures comport with the Fourth
28 Amendment...

1 *Fourth, even if the Government were to obtain the*
2 *Foreign Intelligence Surveillance Court's approval to*
3 *target respondents' foreign contacts under section*
4 *1881a, it is unclear whether the Government would*
5 *succeed in acquiring the communications of respondents'*
6 *foreign contacts. And fifth, even if the Government*
7 *were to conduct surveillance of respondents' foreign*
8 *contacts, respondents can only speculate as to whether*
9 *their own communications with their foreign contacts*
10 *would be incidentally acquired.*

11
12 *In sum, respondents' speculative chain of possibilities*
13 *does not establish that injury based on potential*
14 *future surveillance is certainly impending or is fairly*
15 *traceable to 1881a.*

16
17 *Respondents' alternative argument – namely, that they*
18 *can establish standing based on the measures that they*
19 *have undertaken to avoid 1881a – authorized*
20 *surveillance – fares no better. Respondents assert*
21 *that they are suffering ongoing injuries that are*
22 *fairly traceable to 1881a because the risk of*
23 *surveillance under 1881a requires them to take costly*
24 *and burdensome measures to protect the confidentiality*
25 *of their communications. Respondents claim, for*
26 *instance, that the threat of surveillance sometimes*
27 *compels them to avoid certain e-mail and phone*
28 *conversations, to 'tal[k] in generalities rather than*
29 *specifics,' or to travel so that they can have*

1 *in-person conversations... The Second Circuit panel*
2 *concluded that, because respondents are already*
3 *suffering such ongoing injuries, the likelihood of*
4 *interception under 1881a is relevant only to the*
5 *question whether respondents' ongoing injuries are*
6 *'fairly traceable' to 1881a... Analysing the 'fairly*
7 *traceable' element of standing under a relaxed*
8 *reasonableness standard... the Second Circuit then held*
9 *that 'plaintiffs have established that they suffered*
10 *present injuries in fact – economic and professional*
11 *harms – stemming from a reasonable fear of future*
12 *harmful government conduct'...*

13
14 *The Second Circuit's analysis improperly allowed*
15 *respondents to establish standing by asserting that*
16 *they suffer present costs and burdens that are based on*
17 *a fear of surveillance, so long as that fear is not*
18 *'fanciful, paranoid, or otherwise unreasonable'...*
19 *This improperly waters down the fundamental*
20 *requirements of Article III."*

21
22 *And I'd just invite the court to note that in*
23 *particular and in comparison to the statements of the*
24 *European Court of Justice on this type of issue.*

25
26 *"Respondents' contention that they have standing*
27 *because they incurred certain costs as a reasonable*
28 *reaction to a risk of harm is unavailing – because the*
29 *harm respondents seek to avoid is not certainly*

15:20

1 *impending. In other words, respondents cannot*
2 *manufacture standing merely by inflicting harm on*
3 *themselves based on their fears of hypothetical future*
4 *harm that is not certainly impending... Any ongoing*
5 *injuries that respondents are suffering are not fairly*
6 *traceable to 1881a.*

7
8 *If the law were otherwise, an enterprising plaintiff*
9 *would be able to secure a lower standard for Article*
10 *III standing simply by making an expenditure based on a*
11 *non-paranoid fear. As Judge Raggi accurately noted,*
12 *under the Second Circuit panel's reasoning, respondents*
13 *could, 'for the price of a plane ticket... transform*
14 *their standing burden from one requiring a showing of*
15 *actual or imminent... interception to one requiring a*
16 *showing that their subjective fear of such interception*
17 *is not fanciful, irrational, or clearly*
18 *unreasonable'... Thus, allowing respondents to bring*
19 *this action based on costs they incurred in response to*
20 *a speculative threat would be tantamount to accepting a*
21 *repackaged version of respondents' first failed theory*
22 *of standing...*

23
24 *Another reason that respondents' present injuries are*
25 *not fairly traceable to 1881a is that even before 1881a*
26 *was enacted, they had a similar incentive to engage in*
27 *many of the countermeasures that they are now taking...*
28 *For instance, respondent Scott McKay's declaration."*
29

1 And he deals with the factual detail of that, Judge,
2 which perhaps I don't need to deal with. But if I go
3 to the next paragraph:
4

5 *"Because respondents do not face a threat of certainly*
6 *impending interception under 1881a, the costs that they*
7 *have incurred to avoid surveillance are simply the*
8 *product of their fear of surveillance, and our decision*
9 *in Laird makes it clear that such a fear is*
10 *insufficient to create standing."*
11

12 Again I draw the comparison with the European
13 jurisprudence.
14

15 *"The plaintiffs in Laird argued that their exercise of*
16 *First Amendment rights was being 'chilled by the mere*
17 *existence, without more, of [the Army's] investigative*
18 *and data-gathering activity'."*
19

15:21

20 And again think of the facts in the Digital Rights
21 Ireland case, for example, where the Garda Commissioner
22 was directing telecommunications companies to simply
23 store the data for a certain period.
24

15:22

25 *"while acknowledging that prior cases had held that*
26 *constitutional violations may arise from the chilling*
27 *effect of 'regulations that fall short of a direct*
28 *prohibition against the exercise of First Amendment*
29 *rights,' the Court declared that none of those cases*

15:22

1 involved a 'chilling effect aris[ing] merely from the
2 individual's knowledge that a governmental agency was
3 engaged in certain activities or from the individual's
4 concomitant fear that, armed with the fruits of those
5 activities, the agency might in the future take some
6 other and additional action detrimental to that
7 individual'... Because '[a]llegations of a subjective
8 "chill" are not an adequate substitute for a claim of
9 specific present objective harm or a threat of specific
10 future harm'... the plaintiffs in Laird – and
11 respondents here – lack standing."

12
13 Then at the bottom of the page: "For the reasons
14 discussed above, respondents'" -- sorry, I might refer
15 to the United Presbyterian Church reference there,
16 Judge, just before that:

15:23

17
18 "(Holding that plaintiffs lacked standing to challenge
19 the legality of an Executive Order relating to
20 surveillance because 'the "chilling effect" which is
21 produced by their fear of being subjected to illegal
22 surveillance and which deters them from conducting
23 constitutionally protected activities, is foreclosed as
24 a basis for standing'...

25
26 For the reasons discussed above, respondents'
27 self-inflicted injuries are not fairly traceable to the
28 Government's purported activities under 1881a, and
29 their subjective fear of surveillance does not give

1 *rise to standing.*"

2
3 In the next paragraph, Judge, they say:

4
5 *"Respondents incorrectly maintain that '[t]he kinds of*
6 *injuries incurred here – injuries incurred because of*
7 *[respondents'] reasonable efforts to avoid greater*
8 *injuries that are otherwise likely to flow from the*
9 *conduct they challenge – are the same kinds of injuries*
10 *that this Court held to support standing in cases such*
11 *as' Laidlaw, Meese... and Monsanto... As an initial*
12 *matter, none of these cases holds or even suggests that*
13 *plaintiffs can establish standing simply by claiming*
14 *that they experienced a 'chilling effect' that resulted*
15 *from a governmental policy that does not regulate,*
16 *constrain, or compel any action on their part."*

17
18 And again I draw the comparison and the stark
19 comparison with the difference in European law. Can I
20 skip the next bit, Judge, and go over the page to the 15:24
21 last section I want to refer to in the opinion, on page
22 1154 and 13:

23
24 *"Respondents also suggest that they should be held to*
25 *have standing because otherwise the constitutionality*
26 *of 1881a could not be challenged. It would be wrong,*
27 *they maintain, to 'insulate the government's*
28 *surveillance activities from meaningful judicial*
29 *review'... Respondents' suggestion is both legally and*

1 *factually incorrect. First, '[t]he assumption that if*
2 *respondents have no standing to sue, no one would have*
3 *standing, is not a reason to find standing'...*

4
5 *Second, our holding today by no means insulates 1881a*
6 *from judicial review. As described above, Congress*
7 *created a comprehensive scheme in which the Foreign*
8 *Intelligence Surveillance Court evaluates the*
9 *Government's certifications, targeting procedures, and*
10 *minimisation procedures – including assessing whether*
11 *the targeting and minimisation procedures comport with*
12 *the Fourth Amendment... Any dissatisfaction that*
13 *respondents may have about the Foreign Intelligence*
14 *Surveillance Court's rulings – or the congressional*
15 *delineation of that court's role – is irrelevant to our*
16 *standing analysis.*

17
18 *Additionally, if the Government intends to use or*
19 *disclose information obtained or derived from an 1881a*
20 *acquisition in judicial or administrative proceedings,*
21 *it must provide advance notice of its intent, and the*
22 *affected person may challenge the lawfulness of the*
23 *acquisition."*

24
25 And that, Judge, is what I referred to earlier today 15:25
26 when I said that there's no notification obligation to
27 tell people that they're the subject of surveillance,
28 but it might come up if they propose to actually use it
29 in the course of a criminal trial or an administrative

1 proceeding, they have to tell you then that they got
2 this information in this way.

3
4 *"Although the foreign client might not have a viable*
5 *Fourth Amendment claim, see, e.g., United States -v-* 15:25
6 *Verdugo-Urquidez"* - if I'm pronouncing that correctly;
7 and I said to you, Judge, I was going to come back to
8 the Fourth Amendment and that's the decision I *am* going
9 to draw your attention to, because there is a
10 requirement to invoke the Fourth Amendment, or indeed 15:25
11 *many* constitutional protections, that you have to show
12 a certain level of connection between the foreign
13 person and the United States. In that particular case,
14 a Mexican who was charged with various crimes who was
15 involuntarily present in the United States for a few 15:26
16 days, having been brought across the border, was held
17 not to have the sufficient connection with the United
18 States that would entitle him to invoke Fourth
19 Amendment rights. I'll come to that in just a moment.

20
21 So they say:

22
23 *"Although the foreign client might not have a viable*
24 *Fourth Amendment claim... it is possible that the*
25 *monitoring of the target's conversations with his or*
26 *her attorney would provide grounds for a claim of*
27 *standing on the part of the attorney."*

28
29 So, interestingly, they refer to the attorney, but not

1 on the part of the client himself.

2
3 *"Such an attorney would certainly have a stronger*
4 *evidentiary basis for establishing standing than do*
5 *respondents in the present case. In such a situation,*
6 *unlike in the present case, it would at least be clear*
7 *that the Government had acquired the foreign client's*
8 *communications using 1881a-authorized surveillance.*

9
10 *Finally, any electronic communications service provider*
11 *that the Government directs to assist in 1881a*
12 *surveillance may challenge the lawfulness of that*
13 *directive before the FISC."*

14
15 And you'll recall I opened that to you.

15:27

16
17 *"Indeed, at the behest of a service provider, the*
18 *Foreign Intelligence Surveillance Court of Review*
19 *previously analysed the constitutionality of electronic*
20 *surveillance directives issued pursuant to a*
21 *now-expired set of FISA amendments...*

22
23 *we hold that respondents lack Article III standing*
24 *because they cannot demonstrate that the future injury*
25 *they purportedly fear is certainly impending and*
26 *because they cannot manufacture standing by incurring*
27 *costs in anticipation of non-imminent harm."*

28
29 And they therefore reverse. While I just remember,

1 Judge, when it comes up, thinking of the FISC court, we
2 were discussing this morning whether the amici had any
3 right of appeal. The experts have produced, as I say,
4 a document on foot of their meeting and I note that,
5 from that document, one of the agreed positions is that 15:27
6 there is no right of appeal by the amici as such, but
7 that there is an informal procedure apparently pursuant
8 to which the amici can ask the court to in some way
9 certify, I think, for the possibility of an appeal. I
10 don't quite know what that means or how that operates, 15:28
11 but there's a reference to that in the agreed statement
12 from the experts. So if I get more information on
13 that, Judge, I will certainly tell you.

14 **MS. BARRINGTON:** Judge, Mr. Collins has made
15 reference to this agreed report between the experts. 15:28
16 we've been provided, we the amici have been provided
17 with all of the expert reports, but we haven't yet seen
18 this agreed report, certainly my client hasn't. I
19 wonder if there would be any issue with sharing that as
20 soon as possible with the amici? 15:28

21 **MS. JUSTICE COSTELLO:** well, I'll certainly ask not
22 only Mr. Collins, but also Mr. Gallagher and
23 Mr. McCullough. But I presume...

24 **MR. GALLAGHER:** we've no objection.

25 **MR. MICHAEL COLLINS:** I don't see any difficulty at 15:28
26 all. No, Judge, it's --

27 **MS. JUSTICE COSTELLO:** No, no, I presume not.

28 **MR. GALLAGHER:** I think it must be done if
29 they're entitled to make submissions, Judge.

1 **MS. JUSTICE COSTELLO:** Yes.

2 **MR. MICHAEL COLLINS:** Absolutely, Judge. It's a
3 document, I have to say, Judge, that I haven't had an
4 opportunity to consider myself.

5 **MR. GALLAGHER:** It just was produced late last 15:28
6 night, that's why it hasn't --

7 **MS. JUSTICE COSTELLO:** No, no, I understand that they
8 were only meeting in accordance with directions very
9 recently. There's no criticism of anybody there. And
10 obviously, as far as I'm aware, it's not in these 15:29
11 documents either.

12 **MR. GALLAGHER:** Not at all.

13 **MR. MICHAEL COLLINS:** No, you don't have it, Judge,
14 and I have to say I haven't had an opportunity in fact
15 to even consider it, because I've had the delights of 15:29
16 the US --

17 **MS. JUSTICE COSTELLO:** A delight in store.

18 **MR. MICHAEL COLLINS:** -- statutory provisions to think
19 about.

20 **MS. BARRINGTON:** Thank you, Judge. 15:29

21 **MR. MICHAEL COLLINS:** Can I refer, Judge, to one other
22 decision on the standing issue, which is in book two of
23 the US books of authorities -- sorry, I beg your
24 pardon, Judge, I've the wrong book

25 **MS. JUSTICE COSTELLO:** What tab is it? 15:29

26 **MR. MICHAEL COLLINS:** The right book is the first
27 problem, Judge. It's book three, I beg your pardon,
28 Judge. It's book three and it's tab 35. And it's, if
29 I'm pronouncing it correctly, it's Spokeo -v- Robins.

1 This is a fairly recent decision of the US Supreme
2 Court, decided on 16th May 2016. And I can deal with
3 this quite briefly, Judge, because there's -- I'll just
4 read the head-note and then there's just a few pages in
5 the relatively short judgment that I want to refer to,
6 or short opinion I should say.

7
8 The syllabus, Judge, which is the equivalent of the
9 head-note, says:

10
11 *"The Fair Credit Reporting Act of 1970 (FCRA) requires*
12 *consumer reporting agencies to 'follow reasonable*
13 *procedures to assure maximum possible accuracy of'*
14 *consumer reports... and imposes liability on '[a]ny*
15 *person who willfully fails to comply with any*
16 *requirement [of the Act] with respect to any'*
17 *individual...*

18
19 *Petitioner Spokeo Inc., an alleged consumer reporting*
20 *agency, operates a 'people search engine', which*
21 *searches a wide spectrum of databases to gather and*
22 *provide personal information about individuals to a*
23 *variety of users, including employers wanting to*
24 *evaluate prospective employees. After respondent*
25 *Thomas Robins discovered that his Spokeo-generated*
26 *profile contained inaccurate information, he filed a*
27 *federal class-action complaint against Spokeo, alleging*
28 *that the company willfully failed to comply with the*
29 *FCRA's requirements.*

1
2 *The District Court dismissed Robins' complaint, holding*
3 *that he had not properly pleaded injury in fact as*
4 *required by Article III. The Ninth Circuit reversed.*
5 *Based on Robins' allegation that 'Spokeo violated his*
6 *statutory rights' and the fact that Robins' 'personal*
7 *interests in the handling of his credit information are*
8 *individualized,' the court held that Robins had*
9 *adequately alleged an injury in fact.*

10
11 *Held: Because the Ninth Circuit failed to consider both*
12 *aspects of the injury-in-fact requirement, its Article*
13 *III standing analysis was incomplete...*

14
15 *(a) A plaintiff invoking federal jurisdiction bears the*
16 *burden of establishing the 'irreducible constitutional*
17 *minimum' of standing by demonstrating (1) an injury in*
18 *fact, (2) fairly traceable to the challenged conduct of*
19 *the defendant, and (3) likely to be redressed by a*
20 *favourable judicial decision."*

15:32

21
22 And **Lujan** is the case that's always cited for that.

23
24 *"(b) As relevant here, the injury-in-fact requirement*
25 *requires a plaintiff to show that he or she suffered*
26 *'an invasion of a legally protected interest' that is*
27 *'concrete and particularized' and 'actual or imminent,*
28 *not conjectural or hypothetical'."*

1 Again referring to Lujan.

2
3 *"The Ninth Circuit's injury-in-fact analysis elided the*
4 *independent 'concreteness' requirement. Both*
5 *observations it made concerned only*
6 *'particularization', i.e., the requirement that an*
7 *injury 'affect the plaintiff in a personal and*
8 *individual way'... but an injury in fact must be both*
9 *concrete and particularized... Concreteness is quite*
10 *different from particularization and requires an injury*
11 *to be 'de facto', that is, to actually exist...*

12
13 *(2) The Ninth Circuit also failed to address whether*
14 *the alleged procedural violations entail a degree of*
15 *risk sufficient to meet the concreteness requirement.*
16 *A 'concrete' injury need not be a 'tangible' injury...*
17 *To determine whether an intangible harm constitutes*
18 *injury in fact, both history and the judgment of*
19 *Congress are instructive. Congress is well positioned*
20 *to identify intangible harms that meet minimum Article*
21 *III requirements, but a plaintiff does not*
22 *automatically satisfy the injury-in-fact requirement*
23 *whenever a statute grants a right and purports to*
24 *authorize a suit to vindicate it. Article III standing*
25 *requires a concrete injury even in the context of a*
26 *statutory violation. This does not mean, however, that*
27 *the risk of real harm cannot satisfy that requirement."*

28
29 And it refers to Clapper -v- Amnesty that we've looked

1 at.

2
3 *"The violation of a procedural right granted by statute*
4 *can be sufficient in some circumstances to constitute*
5 *injury in fact; in such a case, a plaintiff need not*
6 *allege any additional harm beyond the one identified by*
7 *Congress... This Court takes no position on the*
8 *correctness of the Ninth Circuit's ultimate conclusion,*
9 *but these general principles demonstrate two things:*
10 *That Congress plainly sought to curb the dissemination*
11 *of false information by adopting procedures designed to*
12 *decrease that risk and that Robins cannot satisfy the*
13 *demands of Article III by alleging a bare procedural*
14 *violation."*

15
16 And in the opinion of Justice Alito, Judge, can I bring
17 you on to page seven? In the second paragraph he says:

18
19 *"To establish injury in fact, a plaintiff must show*
20 *that he or she suffered 'an invasion of a legally*
21 *protected interest' that is 'concrete and*
22 *particularized' and 'actual or imminent, not*
23 *conjectural or hypothetical'...*

24
25 *For an injury to be 'particularized', it 'must affect*
26 *the plaintiff in a personal and individual way...*
27 *(standing requires that the plaintiff "'personally has*
28 *suffered some actual or threatened injury"'.."*
29

1 And they refer to some cases.

2
3 *"Particularisation is necessary to establish injury in*
4 *fact, but it is not sufficient. An injury in fact must*
5 *also be 'concrete.' Under the Ninth Circuit's*
6 *analysis, however, that independent requirement was*
7 *elided. As previously noted, the Ninth Circuit*
8 *concluded that Robins' complaint alleges 'concrete, de*
9 *facto' injuries for essentially two reasons... First,*
10 *the court noted that Robins 'alleges that Spokeo*
11 *violated his statutory rights, not just the statutory*
12 *rights of other people'... Second, the court wrote*
13 *that 'Robins's personal interests in the handling of*
14 *his credit information are individualised rather than*
15 *collective'... Both of these observations concern*
16 *particularization, not concreteness. We have made it*
17 *clear time and time again that an injury in fact must*
18 *be both concrete and particularized...*

19
20 A 'concrete' injury must be 'de facto'; that is, it
21 must actually exist... When we have used the adjective
22 'concrete,' we have meant to convey the usual meaning
23 of the term 'real,' and not 'abstract'...
24 Concreteness, therefore, is quite different from
25 particularization.

26
27 'Concrete' is not, however, necessarily synonymous with
28 'tangible.' Although tangible injuries are perhaps
29 easier to recognize, we have confirmed in many of our

1 *previous cases that intangible injuries can*
2 *nevertheless be concrete...*

3
4 *In determining whether an intangible harm constitutes*
5 *injury in fact, both history and the judgment of*
6 *Congress play important roles. Because the doctrine of*
7 *standing derives from the case-or-controversy*
8 *requirement, and because that requirement in turn is*
9 *grounded in historical practice, it is instructive to*
10 *consider whether an alleged intangible harm has a close*
11 *relationship to a harm that has traditionally been*
12 *regarded as providing a basis for a lawsuit in English*
13 *or American courts... In addition, because Congress is*
14 *well positioned to identify intangible harms that meet*
15 *minimum Article III requirements, its judgment is also*
16 *instructive and important. Thus, we said in Lujan that*
17 *Congress may 'elevat[e] to the status of legally*
18 *cognisable injuries concrete, de facto injuries that*
19 *were previously inadequate in law'... Similarly,*
20 *Justice Kennedy's concurrence in that case explained*
21 *that 'Congress has the power to define injuries and*
22 *articulate chains of causation that will give rise to a*
23 *case or controversy where none existed before'...*

24
25 *Congress' role in identifying and elevating intangible*
26 *harms does not mean that a plaintiff automatically*
27 *satisfies the injury-in-fact requirement whenever a*
28 *statute grants a person a statutory right and purports*
29 *to authorise that person to sue to vindicate that*

1 right. Article III standing requires a concrete injury
2 even in the context of a statutory violation. For that
3 reason, Robins could not, for example, allege a bare
4 procedural violation, divorced from any concrete harm,
5 and satisfy the injury-in-fact requirement of Article
6 III...

7
8 This does not mean, however, that the risk of real harm
9 cannot satisfy the requirement of concreteness... For
10 example, the law has long permitted recovery by certain
11 tort victims even if their harms may be difficult to
12 prove or measure... Just as the common law permitted
13 suit in such instances, the violation of a procedural
14 right granted by statute can be sufficient in some
15 circumstances to constitute injury in fact. In other
16 words, a plaintiff in such a case need not allege any
17 additional harm beyond the one Congress has
18 identified."

19
20 And they refer to the Akins case confirming a group of 15:37
21 voters' inability to obtain information that congress
22 had decided to make public is a sufficient injury in
23 fact to satisfied Article III.

24
25 "In the context of this particular case, these general 15:37
26 principles tell us two things: On the one hand,
27 Congress plainly sought to curb the dissemination of
28 false information by adopting procedures designed to
29 decrease that risk. On the other hand, Robins cannot

1 *satisfy the demands of Article III by alleging a bare*
2 *procedural violation. A violation of one of the FCRA's*
3 *procedural requirements may result in no harm. For*
4 *example, even if a consumer reporting agency fails to*
5 *provide the required notice to a user of the agency's*
6 *consumer information, that information regardless may*
7 *be entirely accurate. In addition, not all*
8 *inaccuracies cause harm or present any material risk of*
9 *harm. An example that comes readily to mind is an*
10 *incorrect zip code. It is difficult to imagine how the*
11 *dissemination of an incorrect zip code, without more,*
12 *could work any concrete harm.*

13
14 *Because the Ninth Circuit failed to fully appreciate*
15 *the distinction between concreteness and*
16 *particularization, its standing analysis was*
17 *incomplete. It did not address the question framed by*
18 *our discussion, namely, whether the particular*
19 *procedural violations alleged in this case entail a*
20 *degree of risk sufficient to meet the concreteness*
21 *requirement. We take no position as to whether the*
22 *Ninth Circuit's ultimate conclusion that Robins*
23 *adequately alleged an injury in fact was correct."*

24
25 Now, there are many, many cases on standing, Judge, and 15:38
26 some of them are cited by the experts and some of them
27 say 'well, you do have standing in this particular
28 case' and there are cases which one would see on the
29 facts to say 'well, maybe it doesn't look so strict and

1 there's a case where some relatively slight injury
2 seems sufficient'. But I think the principles are
3 fairly clear, even though they may be difficult to
4 apply in any given factual situation.

15:38

5
6 But what I think *is* clear - and I'm not going to go
7 over and repeat the principles I was extracting
8 yesterday from the European Court jurisprudence - but I
9 think when one looks at that, at cases that like
10 **Digital Rights Ireland**, like the **Schrems** decision and 15:39
11 so forth, the contrast between the type of very strict
12 requirements that the Supreme Court of the United
13 States has laid down in its Article III jurisprudence
14 and what the European Court of Justice has laid down is
15 very significant. 15:39

16
17 And that is one of the important points that the
18 Commissioner relied upon in her decision in this case,
19 where she identified both the various statutory
20 provisions that I've gone through with you and the 15:39
21 various problems in terms of bringing a case. But she
22 also pointed to this overarching concern in relation to
23 standing. And I respectfully say that that
24 constitutional standing issue, as a matter of US law,
25 is one that really does present an insuperable 15:39
26 difficulty for anybody who wishes to argue that there
27 is in fact equivalent protection as a matter of redress
28 in terms of adequate remedies and redress within the
29 meaning of Articles 25 and 26 of the Directive. I say

1 that standing issue does present insuperable
2 difficulties to the argument that in fact there is
3 essential equivalence between the two.

4
5 Certainly, Judge, it is an issue, even on its own and 15:40
6 certainly in conjunction with the various statutory
7 provisions to which I've referred, that I respectfully
8 say to you fully entitles you to say 'I share the
9 Commissioner's concerns that the protection is not
10 adequate. I'm not going to come to a final decision in 15:40
11 relation to it, but I'm certainly going to ask the
12 European Court of Justice to look at this question and
13 to ask them what do *they* understand by adequate
14 protection under Articles 25 and 26 and is it met in
15 the circumstances of this case where these differences 15:40
16 in the levels of redress are provided?' And I say there
17 may be other questions as well.

18
19 But I say there's *ample* evidence on which, Judge, you
20 should share the concerns of the Commissioner and I 15:41
21 respectfully say that it would be in some respects an
22 almost unusual thing to do when faced with an
23 obligation deriving from a Community law decision or a
24 court decision which said 'If the matter is brought
25 before the court and if you share the concerns, it 15:41
26 really *must* be transferred, or referred to the European
27 Court'.

28
29 I mean, obviously if you *don't* share the concerns, you

1 think 'This doesn't amount to *anything* and it's really
2 quite clear that the issue is' -- 'that there's
3 adequate protection', that's different, of course. But
4 references are made usually, not necessarily because
5 the court is convinced of one particular point of view, 15:41
6 but because it's simply not clear in relation to it.
7 And so I respectfully say it would be impossible, I
8 would respectfully submit, to come to the conclusion
9 that the Commissioner's concerns really can be simply
10 discounted and that the position is in fact quite clear 15:41
11 and that the level of protection is adequate.

12
13 I said I was going to refer - I'm keeping this book,
14 sorry - I was going to refer to the Fourth Amendment
15 point insofar as how can non-US persons invoke the 15:42
16 protection of the fourth amendment, and what I want to
17 refer to there is the same book, Judge, book three, tab
18 41, which is United States -v- Verdugo-Urquidez. And
19 that's the Mexican accused case to which I referred.

20
21 If I read the syllabus, Judge, at page 259:
22

23 *"After the Government obtained an arrest warrant for*
24 *respondent - a Mexican citizen and resident believed to*
25 *be a leader of an organization that smuggles narcotics*
26 *into this country - he was apprehended by Mexican*
27 *police and transported here, where he was arrested.*
28 *Following his arrest, Drug Enforcement Administration*
29 *agents, working with Mexican officials, searched his*

1 Mexican residences and seized certain documents. The
2 District Court granted his motion to suppress the
3 evidence, concluding that the Fourth Amendment - which
4 protects 'the people' against unreasonable searches and
5 seizures - applied to the searches, and that the DEA
6 agents had failed to justify searching the premises
7 without a warrant. The Court of Appeals affirmed.
8 Citing Reid -v- Covert... which held that American
9 citizens tried abroad by United States military
10 officials were entitled to Fifth and Sixth Amendment
11 protections - the court concluded that the Constitution
12 imposes substantive constraints on the Federal
13 Government, even when it operates abroad. Relying on
14 INS -v- Lopez-Mendoza... where a majority assumed that
15 illegal aliens in the United States have Fourth
16 Amendment rights - the court observed that it would be
17 odd to acknowledge that respondent was entitled to
18 trial-related rights guaranteed by the Fifth and Sixth
19 Amendments, but not to Fourth Amendment protection.

20
21 Held: The Fourth Amendment does not apply to the search
22 and seizure by United States agents of property owned
23 by a nonresident alien and located in a foreign
24 country...

25
26 (a) If there were a constitutional violation in this
27 case, it occurred solely in Mexico, since a Fourth
28 Amendment violation is fully accomplished at the time
29 of an unreasonable governmental intrusion whether or

1 not the evidence seized is sought for use in a criminal
2 trial. Thus, the Fourth Amendment functions
3 differently from the Fifth Amendment, whose privilege
4 against self-incrimination is a fundamental trial right
5 of criminal defendants...

6
7 (b) The Fourth Amendment phrase 'the people' seems to
8 be a term of art used in select parts of the
9 Constitution, and contrasts with the words 'person' and
10 'accused' used in Articles of the Fifth and Sixth
11 Amendments regulating criminal procedures. This
12 suggests that 'the people' refers to a class of persons
13 who are part of a national community or who have
14 otherwise developed sufficient connection with this
15 country to be considered part of that community."

16
17 And that's an important part of the test.

18
19 "(c) The Fourth Amendment's drafting history shows that
20 its purpose was to protect the people of the United
21 States against arbitrary action by their own
22 Government, and not to restrain the Federal
23 Government's actions against aliens outside United
24 States territory. Nor is there any indication that the
25 Amendment was understood by the Framers' contemporaries
26 to apply to United States activities directed against
27 aliens in foreign territory or in international
28 waters...

1 (d) The view that every constitutional provision
2 applies wherever the Government exercises its power is
3 contrary to this Court's decisions in the Insular
4 Cases, which held that not all constitutional
5 provisions apply to governmental activity even in
6 territories where the United States has sovereign
7 power. See, e.g., Balzac -v- Porto Rico... Indeed,
8 the claim that extraterritorial aliens are entitled to
9 rights under the Fifth Amendment - which speaks in the
10 relatively universal term of 'person' - has been
11 emphatically rejected...

12
13 (e) Respondent's reliance on Reid... is misplaced,
14 since that case stands only for the proposition that
15 United States citizens stationed abroad could invoke
16 the protection of the Fifth and Sixth Amendments.
17 Similarly, those cases in which aliens have been
18 determined to enjoy certain constitutional rights
19 establish only that aliens receive such protections
20 when they have come within the territory of, and have
21 developed substantial connections with, this country...
22 Respondent, however, is an alien with no previous
23 significant voluntary connection with the United
24 States, and his legal but involuntary presence here
25 does not indicate any substantial connection with this
26 country. The Court of Appeals' reliance on INS -v-
27 Lopez-Mendoza... is also misplaced, since that case
28 assumed that, but did not expressly address the
29 question whether, the Fourth Amendment applies to

1 *illegal aliens in the United States. Even assuming*
2 *such aliens - who are in this country voluntarily and*
3 *presumably have accepted some societal obligations -*
4 *would be entitled to Fourth Amendment protections,*
5 *their situation differs from that of respondent, who*
6 *had no voluntary connection with this country that*
7 *might place him among 'the people'. This Court's*
8 *decisions expressly according differing protection to*
9 *aliens than to citizens also undermine respondent's*
10 *claim that treating aliens differently under the Fourth*
11 *Amendment violates the equal protection component of*
12 *the Fifth Amendment...*

13
14 *(f) The Court of Appeals' rule would have significant*
15 *and deleterious consequences for the United States in*
16 *conducting activities beyond its borders. The rule*
17 *would apply not only to law enforcement operations*
18 *abroad, but also to other foreign operations - such as*
19 *armed forces actions - which might result in 'searches*
20 *and seizures.'* Under the rule, aliens with no
21 attachment to this country might bring actions for
22 damages to remedy claimed violations of the Fourth
23 Amendment in foreign countries or in international
24 waters, and Members of the Executive and Legislative
25 Branches would be plunged into a sea of uncertainty as
26 to what might be reasonable in the way of searches and
27 seizures conducted abroad. Any restrictions on
28 searches and seizures incident to American action
29 abroad must be imposed by the political branches

1 *through diplomatic understanding, treaty, or*
2 *legislation."*

3
4 Then if I bring you on, Judge, to page 265 in the
5 opinion of the court, which was given by Chief Justice 15:47
6 Rehnquist. He quotes, first of all, the Fourth
7 Amendment at the top of the page, Judge. The Fourth
8 Amendment, as you know, has really two components to
9 it; it has the unreasonable search and seizure
10 prohibition and then it has the requirement that a 15:47
11 warrant can only be issued on probable cause and which
12 is describing the place to be searched and so forth.

13
14 Chief Justice Rehnquist says:

15
16 *"That text, by contrast with the Fifth and Sixth*
17 *Amendments, extends its reach only to 'the people'."* 15:47

18
19 And then describes some of the historical language and
20 the preamble of the other provisions. Then halfway 15:47
21 down the page:

22
23 *"while this textual exegesis is by no means conclusive,*
24 *it suggests that 'the people' protected by the Fourth*
25 *Amendment, and by the First and Second Amendments, and*
26 *to whom rights and powers are reserved in the Ninth and*
27 *Tenth Amendments, refers to a class of persons who are*
28 *part of a national community or who have otherwise*
29 *developed sufficient connection with this country to be*

1 *considered part of that community."*

2
3 And of course, if I just pause there and comment,
4 Judge, there's no necessary reason to say that that an
5 EU citizen who is sending e-mails or whatever it may be 15:48
6 which are passing through the United States and are
7 being intercepted or otherwise, whether it's the
8 meta-data, as it's called, or other information being
9 accessed by the agencies whether under Section 702 or
10 the other procedures, that person may have no 15:48
11 connection with the United States and no necessary
12 reason to think that they are part of the Community of
13 "the people" of the United States protected by the US
14 Constitution, who would then be entitled to invoke
15 constitutional protections such as the Fourth 15:48
16 Amendment.

17
18 If I go on a few pages, Judge, to page 268 in the
19 opinion. It says:

20
21 *"The global view taken by the Court of Appeals of the*
22 *application of the Constitution is also contrary to*
23 *this Court's decisions in the Insular Cases, which held*
24 *that not every constitutional provision applies to*
25 *governmental activity" --* 15:49

26 **MS. JUSTICE COSTELLO:** Sorry, I've a 259 and a 269;
27 which page is it?

28 **MR. MICHAEL COLLINS:** 268.

29 **MS. JUSTICE COSTELLO:** I'm just looking, there seems to

1 be two numbers on it.

2 **MR. MICHAEL COLLINS:** You're missing some pages, are
3 you, Judge?

4 **MS. JUSTICE COSTELLO:** No, I've got a 268, but one page
5 had two numbers and I was just wondering where that 15:49
6 went. But anyway, okay, I've got a 268. "*The global*
7 *view taken*", that's what you're reading?

8 **MR. MICHAEL COLLINS:** Oh, yes, I see what you're
9 saying, Judge, I see it on the next page. Yes, how
10 odd. I can't explain that, Judge. 15:49

11
12 "*The global view taken by the Court of Appeals of the*
13 *application of the Constitution is also contrary to*
14 *this Court's decisions in the Insular Cases, which held*
15 *that not every constitutional provision applies to*
16 *governmental activity even where the United States has*
17 *sovereign power.*"

18
19 And it gives a variety of authorities there that I
20 don't need to go through. But if you go to the bottom 15:49
21 of that page, Judge:

22
23 "*If that is true with respect to territories ultimately*
24 *governed by Congress, respondent's claim that the*
25 *protections of the Fourth Amendment extend to aliens in*
26 *foreign nations is even weaker. And certainly, it is*
27 *not open to us in light of the Insular Cases to endorse*
28 *the view that every constitutional provision applies*
29 *wherever the United States Government exercises its*

1 *power.*

2
3 *Indeed, we have rejected the claim that aliens are*
4 *entitled to Fifth Amendment rights outside the*
5 *sovereign territory of the United States."*

6
7 And it goes on to deal with the case of Johnson -v-
8 Eisentrager. And about three quarters of the way down
9 that page, he says:

10
11 *"If such is true of the Fifth Amendment, which speaks*
12 *in the relatively universal term of 'person,' it would*
13 *seem even more true with respect to the Fourth*
14 *Amendment, which applies only to 'the people'."*

15
16 If you move over the page, Judge, to 270, at the very
17 bottom of the page:

18
19 *"Verdugo-Urquidez also relies on a series of cases in*
20 *which we have held that aliens enjoy certain*
21 *constitutional rights."*

22
23 Then he cites cases such as Plyer -v- Doe and a variety
24 of other cases.

25
26 *"These cases, however, establish only that aliens*
27 *receive constitutional protections when they have come*
28 *within the territory of the United States and developed*
29 *substantial connections with this country."*

15:50

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And they give various authorities. Then at the end of the paragraph:

"Respondent is an alien who has had no previous significant voluntary connection with the United States, so these cases avail him not."

Then it refers to Justice Stevens' concurrence. And I've just a couple of sentences to draw attention to, Judge. On page 274, at the top of the page, he says:

15:51

"were respondent to prevail, aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters."

And it refers to Bivens -v- Six Unknown Federal Narcotics Agents, and that's often known as the Bivens doctrine in terms of being able to bring suit in that context.

15:51

On page 275, Justice Stevens says:

"For better or for worse, we live in a world of nation-states in which our Government must be able to 'functio[n] effectively in the company of sovereign nations'... Some who violate our laws may live outside our borders under a regime quite different from that

1 *which obtains in this country. Situations threatening*
2 *to important American interests may arise halfway*
3 *around the globe, situations which in the view of the*
4 *political branches of our Government require an*
5 *American response with armed force. If there are to be*
6 *restrictions on searches and seizures which occur*
7 *incident to such American action, they must be imposed*
8 *by the political branches through diplomatic*
9 *understanding, treaty, or legislation."*

10
11 So that's all I want to say, Judge, in relation to the
12 Fourth Amendment. Finally, Judge, could I just refer -
13 I'm not going back to any of the statutory provisions,
14 Judge, but I did, I meant to say this earlier and I
15 just forgot to do it, so I might just use a couple of 15:52
16 minutes to deal with it now; I was referring to the
17 update in the US law that had occurred since 2013 and I
18 had referred to the USA Freedom Act of 2015 and the
19 FISC court and the amici, I'd referred to the Judicial
20 Redress Act, I had made reference to, but I don't think 15:53
21 I had opened to you the Presidential Policy Directive
22 28 and I think I should refer to that. That is to be
23 found -- I've forgotten. It's book three, I think,
24 Judge, the one we were just looking at. Yes, tab 43.
25 If you have tab 43, Judge? 15:54

26 **MS. JUSTICE COSTELLO:** Yes.

27 **MR. MICHAEL COLLINS:** You'll see that this was a
28 Presidential Policy Directive on signal intelligence
29 activities. I'm not going to read it all out, but

1 there are certain principles set out. If you look at
2 page three of 13, if you see at the top right-hand
3 corner of the pages?

4 **MS. JUSTICE COSTELLO:** Yes.

5 **MR. MICHAEL COLLINS:** At the very bottom of the page, 15:54
6 section 1: "Principles Governing the Protection of
7 Signals Intelligence". And it says:

8
9 *"signals intelligence collection shall be authorized
10 and conducted consistent with the following principles:*

11
12 *(a) The collection of signals intelligence shall be
13 authorized by statute or Executive Order, proclamation,
14 or other Presidential directive, and undertaken in
15 accordance with the Constitution and applicable
16 statutes, Executive Orders, proclamations, and
17 Presidential directives.*

18
19 *(b) Privacy and civil liberties shall be integral
20 considerations in the planning of U.S. signals
21 intelligence activities. The United States shall not
22 collect signals intelligence for the purpose of
23 suppressing or burdening criticism or dissent, or for
24 disadvantaging persons based on their ethnicity, race,
25 gender, sexual orientation, or religion. Signals
26 intelligence shall be collected exclusively where there
27 is a foreign intelligence or counterintelligence
28 purpose to support national and departmental missions
29 and not for any other purposes.*

1
2 (c) *The collection of foreign private commercial*
3 *information or trade secrets is authorized only to*
4 *protect the national security of the United States or*
5 *its partners and allies. It is not an authorised*
6 *foreign intelligence or counterintelligence purpose to*
7 *collect such information to afford a competitive*
8 *advantage to U.S. companies and U.S. business sectors*
9 *commercially.*

10
11 (d) *signals intelligence activities shall be as*
12 *tailored as feasible. In determining whether to*
13 *collect signals intelligence, the United States shall*
14 *consider the availability of other information,*
15 *including from diplomatic and public sources. Such*
16 *appropriate and feasible alternatives to signals*
17 *intelligence should be prioritised."*

18
19 Then it goes on to deal with limitations on the use of
20 signals intelligence collected in bulk. Section three 15:55
21 on page five deals with refining the process for
22 collecting signals intelligence. And section four
23 deals with safeguarding personal information collected
24 through signals intelligence, and there's a great deal
25 of detail about that. Then on page ten there's a 15:56
26 provision for certain reports to update the President
27 on the progress of the implementation of Section 4 of
28 the Directive and certain other general provisions.
29

1 So that was a clear signal, if you like, albeit in the
2 form of a Presidential Policy Directive, as distinct
3 from a piece of legislation by congress, in terms of
4 respect for privacy rights which didn't draw a
5 distinction between US citizens and non-US citizens. 15:56
6 Mr. Gallagher refers to the minimisation rights as well
7 in terms of, in the principles that I've read out, the
8 reference to ensuring that it's *tailored* to achieving
9 the particular objectives and so forth. And that *is* an
10 important Presidential Policy Directive and it comes 15:56
11 down, of course, to the fact -- or at least one of the
12 important facts is that that Directive, nonetheless,
13 does not in fact give any enforceable rights to persons
14 to bring any form of action, as I understand it, on
15 foot of a Presidential Policy Directive of that sort. 15:57

16
17 I just want to make sure I'm correct about that, Judge.
18 Yes, I think that is the case.

19
20 The other updating thing that I need to draw your 15:57
21 attention to, Judge, is to explain about the Privacy
22 Shield Agreement that has been introduced, and I
23 thought perhaps I might do that tomorrow.

24 **MS. JUSTICE COSTELLO:** You can do that tomorrow, yes.

25 **MR. MICHAEL COLLINS:** What I'm hoping then to do, 15:57
26 Judge, is I'll have finished my excursion into trying
27 to explain as best I can - and probably very badly -
28 the principles of the statutory provisions and the US
29 law, I'm then going to turn specifically to the expert

1 reports dealing with US law, including obviously
2 Ms. Gorsky's report, which I'll make sure that I cover
3 tomorrow, so that - she's giving evidence on Friday -
4 so that that report will have been opened to you in
5 some shape or form.

15:58

6
7 Some of the reports, particularly Prof. Swire's report,
8 is extremely long, so I'm not going to open all of it
9 or anything like all of it. But I will open, I hope,
10 the critical sections. And there is a summary section,
11 it does extend to 40 pages, but it is at least a
12 summary of all it and I'll certainly open that to you,
13 Judge. And I'll get through as many of those reports
14 tomorrow as I can.

15:58

15
16 It's unlikely I will finish the opening tomorrow,
17 Judge, because there are a number of legal issues and
18 legal principles to which I still need to refer, but
19 hopefully I will finish them on Wednesday of the
20 following week or sometime during that day.

15:58

21 **MS. JUSTICE COSTELLO:** Then we have the is statements
22 from Mr. Gallagher and...

23 **MR. MICHAEL COLLINS:** Mr. McCullough.

24 **MS. JUSTICE COSTELLO:** ... Mr. McCullough, in due
25 course.

15:58

26 **MR. MICHAEL COLLINS:** Yes.

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

28 **MR. MICHAEL COLLINS:** Thank you, Judge.

29 **MS. JUSTICE COSTELLO:** So 10:30 tomorrow.

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MR. MICHAEL COLLINS: Thank you, Judge.

**THE HEARING WAS THEN ADJOURNED UNTIL THURSDAY, 9TH
FEBRUARY AT 10:30**

\$	158:4	1	1	
\$1,000 [7] - 79:16, 129:17, 134:6, 136:18, 136:20, 136:29, 137:9	'covered [19] - 33:5, 36:29, 38:1, 38:5, 38:11, 38:25, 39:12, 39:14, 39:15, 39:17, 39:26, 39:28, 39:29, 146:28, 146:29, 147:13	'reasonably [1] - 165:21	1 [42] - 2:32, 6:26, 8:29, 9:6, 15:27, 17:24, 22:16, 23:24, 27:29, 33:19, 45:23, 46:2, 50:25, 53:27, 60:22, 65:8, 66:2, 67:28, 69:3, 70:7, 77:20, 78:18, 80:20, 85:1, 86:12, 89:21, 96:7, 101:29, 103:1, 105:5, 115:9, 117:7, 117:29, 120:5, 127:13, 135:19, 151:11, 153:12, 157:16, 161:1, 178:17, 198:6	1801(a) [1] - 79:8 1801(h) [3] - 59:6, 59:7, 66:6 1802(a) [1] - 60:24 1803 [3] - 83:18, 83:21, 84:2 1803(a) .. [1] - 103:3 1804 [3] - 83:10, 85:28, 86:8 1805 [1] - 87:9 1806 [7] - 19:24, 21:20, 61:29, 62:4, 93:2, 93:9, 93:13 1806(a) [1] - 108:2 1806a [1] - 113:3 1809 [6] - 79:13, 80:13, 80:14, 80:16, 81:24, 87:13 1810 [13] - 21:9, 51:14, 78:20, 78:22, 78:29, 80:15, 87:15, 90:21, 92:17, 93:2, 93:6, 93:8, 93:16 1810 .. [1] - 92:16 1812 [2] - 80:24, 82:22 1821 [1] - 96:15 1821(4) [3] - 58:23, 61:9, 66:8 1821(4) [1] - 59:7 1823 [1] - 97:3 1825 [4] - 97:7, 98:4, 108:7, 113:3 1825(a) [1] - 97:22 1827 [2] - 98:17, 98:22 1828 [1] - 98:9 1841 [1] - 99:11 1842 [2] - 100:13, 100:19 1843 [1] - 108:9 1845 [3] - 20:7, 21:2, 113:3 1861 [7] - 46:20, 46:21, 52:4, 52:10, 101:27, 101:29, 113:13 1862 [1] - 46:21 1881 [2] - 46:26, 52:23 1881a [35] - 46:23, 46:26, 47:2, 52:19, 52:23, 53:17, 160:20, 160:23, 161:5, 161:22, 161:25, 161:29, 162:5, 163:5, 163:16, 164:19, 164:21, 164:28, 165:15, 166:4, 166:15, 166:19,
'	'damage [1] - 23:26 'de [2] - 179:11, 181:20 'designated [2] - 36:28, 37:3 'electronic [1] - 93:19 'entitlement [1] - 137:18 'even [1] - 27:16 'fails [1] - 33:23 'fairly [3] - 164:22, 167:6 'fanciful [1] - 167:18 'federal [2] - 90:26, 122:16 'follow [1] - 177:12 'for [1] - 168:13 'general [4] - 134:9, 134:18, 135:1, 135:22 'general' [1] - 138:8 'here [1] - 18:5 'highly [1] - 29:29 'if [1] - 186:24 'insulate [1] - 171:27 'irreducible [1] - 178:16 'minimisation [2] - 20:4, 61:18 'minimization [1] - 20:2 'must [2] - 158:14, 180:25 'no [1] - 111:8 'objectively [1] - 160:25 'One [1] - 158:13 'parallels' [1] - 134:7 'particularization' [1] - 179:6 'particularized' [1] - 180:25 'people [1] - 177:20 'person [1] - 195:12 'person' [3] - 114:7, 189:9, 190:10 'personal [1] - 178:6 'plaintiffs [1] - 167:9 'presumably [1] - 133:21 'Privacy [1] - 27:11 'real [1] - 181:23	'record' [1] - 38:12 'regulations [1] - 169:27 'Relaxation [1] - 158:29 'routine [2] - 120:17, 123:10 'searches [1] - 191:19 'special [3] - 134:10, 134:21, 134:24 'speculative' [1] - 30:22 'Spokeo [1] - 178:5 'standing [1] - 27:26 'standing' [5] - 16:8, 26:27, 27:21, 29:7, 40:10 'tangible [1] - 181:28 'tangible' [1] - 179:16 'that [1] - 187:2 'the [13] - 30:17, 91:18, 94:5, 94:8, 162:26, 170:20, 188:4, 189:7, 189:12, 191:7, 192:17, 192:24, 195:14 'they [1] - 30:1 'This [1] - 187:1 'threatened [2] - 160:12, 160:27 'to [2] - 28:27, 38:15 'United [2] - 19:25, 156:26 'US [1] - 19:29 'use [1] - 93:14 'we [3] - 66:23, 71:3, 95:24 'We've [1] - 80:3 'well [6] - 22:2, 118:27, 119:3, 155:20, 184:27, 184:29 'What [1] - 91:29 'whether [1] - 138:19 'wilful' [2] - 19:6, 25:5 'willful' [1] - 112:17 'willfulness [1] - 112:1 'willfulness' [2] - 111:28, 112:11 'without [1] - 37:18 'You [2] - 91:1, 92:22	10 [11] - 13:24, 48:14, 114:19, 114:27, 115:6, 115:10, 115:11, 115:16, 140:2, 140:4, 140:6 106(a) [2] - 108:1, 108:2 10:30 [2] - 201:29, 202:4 11 [3] - 30:15, 83:26, 84:13 1146 [1] - 157:29 1154 [1] - 171:22 117 [1] - 5:18 119 [6] - 80:29, 81:20, 82:29, 107:5, 108:1 12 [2] - 119:19, 119:26 121 [2] - 80:29, 82:29 122 [2] - 149:8, 149:15 123 [1] - 150:6 12333 [4] - 26:4, 69:22, 69:27, 164:10 12958 [1] - 118:20 13 [5] - 5:11, 111:18, 152:17, 171:22, 198:2 14 [6] - 5:13, 45:27, 45:28, 45:29, 46:1 16 [2] - 122:6, 156:12 163 [1] - 157:6 16th [1] - 177:2 17 [2] - 8:26, 12:25 18 [7] - 6:26, 18:2, 47:13, 80:29, 93:13, 99:19, 108:29 180 [1] - 85:3 1801 [3] - 17:16, 59:8, 63:27	
'personally [1] - 180:27 'special [1] - 134:16 '[a]llegations [1] - 170:7 '[a]ny [1] - 177:14 '[b]ecause [1] - 162:23 '[d]id [1] - 91:26 '[o]jur [1] - 158:24 '[t]he [2] - 171:5, 172:1 'accused' [1] - 189:10 'actual [16] - 40:15, 132:21, 132:27, 133:19, 133:24, 134:7, 134:20, 134:24, 134:27, 135:6, 135:14, 135:20, 135:26, 135:28, 178:27, 180:22 'affect [1] - 179:7 'aggrieved [2] - 90:20, 99:22 'alleges [1] - 181:10 'Although [1] - 160:7 'an [3] - 34:18, 178:26, 180:20 'by [2] - 38:13, 93:15 'can [1] - 162:28 'case [1] - 26:28 'Cases' [1] - 158:4 'chilled [1] - 169:16 'chilling [2] - 170:1, 171:14 'concrete [6] - 160:4, 178:27, 180:21, 181:5, 181:8, 181:22 'concrete' [3] - 179:16, 181:20, 181:27 'concreteness' [1] - 179:4 'Congress [1] - 182:21 'Controversies [1] -				

166:22, 166:23,
167:4, 168:6, 168:25,
169:6, 170:28,
171:26, 172:5,
172:19, 174:8, 174:11
1881a's [1] - 161:9
1881a-authorized [1]
- 174:8
1881a.. [3] - 162:2,
162:17, 167:6
19 [2] - 47:22, 47:23
1946 [1] - 149:3
1968 [3] - 22:24,
47:19, 104:17
1970 [1] - 177:11
1972 [1] - 49:11
1974 [8] - 11:14,
13:29, 35:11, 48:14,
91:11, 114:22, 132:7,
136:27
1978 [7] - 16:20,
16:24, 17:14, 46:17,
47:6, 49:8, 50:10
1986 [6] - 22:22,
22:26, 22:27, 47:10,
47:21, 104:9
199 [5] - 50:16,
59:10, 96:6, 96:10,
96:11
1996 [1] - 114:24
1st [3] - 11:24, 31:28,
142:6
1ST [1] - 2:9

2

2 [50] - 1:18, 2:7,
2:17, 2:23, 2:27, 2:27,
7:12, 8:12, 9:3, 9:9,
16:8, 18:14, 19:23,
22:17, 24:20, 28:8,
34:13, 57:15, 58:6,
60:2, 60:22, 62:28,
64:14, 68:2, 70:3,
70:15, 71:21, 80:25,
85:4, 86:14, 89:23,
96:14, 105:8, 111:2,
111:6, 117:8, 118:2,
121:27, 127:13,
130:20, 135:21,
140:10, 142:26,
145:18, 151:15,
153:14, 157:18,
161:3, 178:18, 179:13
20 [1] - 84:16
200 [1] - 63:26
2001 [3] - 48:5,
92:15, 104:25
201 [2] - 4:5, 59:7

2011 [2] - 23:10, 48:5
2012 [1] - 91:16
2013 [4] - 10:9,
10:22, 29:14, 197:17
2014 [1] - 12:25
2015 [9] - 11:1, 13:9,
43:25, 48:13, 85:4,
85:6, 114:26, 139:25,
197:18
2016 [12] - 10:7,
11:9, 11:17, 12:1,
12:5, 12:17, 12:20,
13:24, 32:13, 45:6,
177:2
2016/4809P [1] - 1:5
2017 [2] - 1:18, 5:2
206 [5] - 80:29,
83:29, 84:1, 84:7,
84:8
206.. [1] - 82:29
207 [1] - 84:26
208 [1] - 84:6
209 [1] - 83:11
211 [1] - 86:3
215 [6] - 46:22,
46:23, 52:5, 52:7,
101:27, 102:16
216 [3] - 61:29, 62:1,
62:2
219 [3] - 78:25,
78:26, 87:18
221 [2] - 61:14, 96:16
223 [1] - 97:4
227 [1] - 97:6
229 [1] - 98:7
230 [4] - 99:12,
99:13, 99:14, 100:19
234 [1] - 101:2
235 [1] - 101:28
238 [1] - 103:8
24 [1] - 32:13
240 [1] - 103:16
249 [4] - 52:25, 65:6,
70:2, 70:13
24th [2] - 12:17, 45:6
25 [8] - 9:25, 9:27,
10:1, 41:19, 41:28,
148:14, 185:29,
186:14
25(2) [1] - 7:2
250 [7] - 56:14,
56:22, 56:23, 62:26,
64:28, 66:13, 75:19
251 [2] - 56:22, 75:16
2510 [1] - 47:17
252 [3] - 54:18,
70:11, 70:20
2522 [1] - 47:17
253 [1] - 73:27
259 [2] - 187:21,

193:26
26 [6] - 7:8, 41:19,
41:28, 148:14,
185:29, 186:14
26(1) [2] - 9:22, 9:23
26(2) [3] - 9:23, 9:26,
9:28
26(2) [1] - 9:20
265 [1] - 192:4
268 [4] - 193:18,
193:28, 194:4, 194:6
269 [1] - 193:26
270 [1] - 195:16
2701 [3] - 47:15,
104:11, 105:1
2712 [32] - 18:3,
18:9, 19:3, 19:12,
19:18, 19:23, 20:26,
20:28, 23:5, 24:27,
47:16, 47:29, 92:19,
92:21, 92:24, 92:29,
93:13, 101:14,
101:17, 104:11,
104:22, 106:12,
107:18, 110:6,
110:13, 111:15,
113:10, 113:15,
113:17, 113:24
2712(a) [2] - 111:24,
112:6
2712(a) [2] - 112:9,
112:20
274 [1] - 196:11
275 [1] - 196:23
28 [6] - 2:31, 10:23,
10:24, 12:28, 26:12,
197:22
29 [1] - 111:7
29th [2] - 10:7, 12:20
2ND [1] - 2:14

3 [27] - 8:7, 18:20,
21:8, 22:18, 28:14,
35:1, 46:16, 49:8,
54:20, 58:17, 60:18,
60:22, 68:7, 84:15,
99:7, 99:22, 102:2,
118:7, 120:10,
134:12, 135:25,
136:13, 137:4,
147:14, 157:21,
161:6, 178:19
3(A) [2] - 72:18, 128:4
30 [2] - 71:18, 88:20
305 [1] - 98:4
305(a) [4] - 97:24,
98:2, 108:6

3127 [1] - 99:18
32 [1] - 130:21
323 [1] - 3:3
35 [1] - 176:28
350(a) [1] - 98:3
36 [2] - 50:20, 96:6
37 [3] - 9:15, 134:13,
136:14
37-42 [1] - 2:22
39 [1] - 10:3

4

4 [18] - 2:12, 21:15,
36:25, 60:19, 61:17,
68:10, 73:27, 77:15,
96:22, 101:24, 121:5,
128:25, 129:6,
135:29, 137:3,
142:18, 161:10,
199:27
4(a) [1] - 100:3
40 [1] - 201:11
405(a) [2] - 108:8,
108:9
41 [3] - 10:7, 12:14,
187:18
43 [2] - 197:24,
197:25
44 [3] - 15:10, 115:6,
116:2
45 [1] - 120:15
46 [3] - 119:9,
123:22, 125:17
47 [12] - 7:18, 15:2,
24:10, 34:24, 42:6,
43:5, 44:21, 120:24,
120:28, 120:29,
122:6, 144:5
48 [6] - 22:12,
124:13, 124:15,
124:19, 127:14,
139:27
49 [3] - 23:16,
116:10, 116:19

5 [8] - 2:17, 37:3,
68:22, 85:6, 91:22,
141:14, 149:7, 161:12
5' [1] - 138:22
50 [9] - 17:14, 17:15,
50:21, 50:23, 90:20,
108:20, 109:1
51 [1] - 26:1
52 [2] - 16:26, 26:24
53 [1] - 27:24
54 [1] - 28:18

55 [1] - 29:7
551 [2] - 149:23,
152:17
552(b)(i) [1] - 117:29
552a [9] - 115:5,
115:13, 116:2,
116:18, 116:20,
119:8, 132:11, 141:5,
141:14
552a(g)(1)(C) [1] -
138:22
552a(g)(1)(D) [1] -
140:27
556 [1] - 153:24
557.. [1] - 153:24
56 [1] - 30:12
57 [1] - 32:1
58 [1] - 32:13
59 [1] - 33:12

6

6 [5] - 4:5, 43:25,
47:9, 122:3, 137:17
606 [2] - 104:14,
105:1
61 [1] - 41:21
617 [3] - 106:12,
106:13, 106:14
618 [2] - 108:15,
110:14
62 [1] - 43:4
63 [1] - 43:18
65 [1] - 8:1
667 [1] - 157:6
68 [1] - 44:28

7

7 [15] - 3:5, 7:23,
15:7, 16:5, 28:22,
38:11, 43:11, 48:12,
64:29, 114:19,
115:24, 115:29,
120:15, 123:22, 140:4
7/8 [1] - 2:6
701 [2] - 149:8,
149:24
702 [30] - 52:20,
52:26, 58:3, 62:28,
63:19, 66:29, 67:18,
69:12, 69:14, 75:4,
75:13, 78:17, 81:14,
81:21, 81:22, 85:18,
87:10, 103:25, 106:3,
113:17, 113:19,
150:3, 150:20,
150:21, 163:23,
163:25, 163:26,

163:28, 163:29, 193:9
704 [2] - 151:26,
152:21
706 [1] - 153:4
72 [5] - 60:28, 61:5,
61:25, 163:25, 163:28

8

8 [6] - 7:23, 15:7,
16:5, 28:22, 39:28,
43:11
801(h) [1] - 58:23
87 [1] - 28:24
8TH [1] - 5:1
8th [1] - 1:18

9

9 [3] - 40:7, 48:18,
149:1
90 [1] - 32:15
9TH [1] - 202:3

A

A&L [1] - 2:31
A) [1] - 125:12
a) [4] - 66:11, 67:23,
98:3, 119:8
a)(2) [1] - 141:12
a)(7) [1] - 120:11
abandon [1] - 165:13
ABBAY [1] - 3:4
ability [4] - 64:3,
101:15, 102:19,
103:28
able [6] - 20:28,
32:21, 139:7, 168:9,
196:20, 196:26
above-described [1]
- 161:20
above-named [1] -
1:26
above-referred [1] -
14:29
abroad [7] - 163:22,
188:9, 188:13,
190:15, 191:18,
191:27, 191:29
absence [2] - 42:5,
43:8
absent [1] - 112:15
absolutely [1] -
176:2
abstract'.. [1] -
181:23
absurd [1] - 136:1

Abuse [4] - 22:16,
23:24, 24:2, 154:16
abuse [1] - 153:16
academic [1] -
122:26
accept [1] - 11:29
accepted [2] -
135:10, 191:3
accepting [1] -
168:20
access [30] - 13:4,
22:14, 23:17, 23:18,
24:26, 25:15, 25:22,
25:26, 26:3, 27:21,
29:9, 32:2, 33:13,
40:11, 42:17, 42:26,
51:27, 76:6, 82:15,
101:24, 105:8,
105:11, 116:12,
120:9, 125:18,
125:19, 125:21,
126:3, 128:8, 141:26
accessed [5] - 7:21,
53:12, 69:25, 78:14,
193:9
accesses [1] - 105:5
accessibility [1] -
40:1
accessing [1] -
105:18
accompany [1] -
125:24
accompanying [1] -
125:29
accomplish [1] -
76:15
accomplished [1] -
188:28
accordance [32] -
9:19, 24:9, 37:6,
53:23, 54:15, 54:23,
54:26, 57:4, 62:14,
62:22, 63:9, 65:2,
69:5, 69:7, 69:8, 70:6,
70:26, 71:11, 71:13,
71:26, 72:21, 72:23,
97:14, 101:7, 117:1,
117:24, 125:3,
127:22, 147:3,
153:17, 176:8, 198:15
According [1] -
91:18
according [2] -
118:13, 191:8
Accordingly [3] -
43:24, 162:2, 162:9
accordingly [2] -
26:19, 43:4
account [9] - 15:17,
20:13, 29:3, 76:4,

100:4, 148:11,
148:15, 154:4, 159:12
accuracy [3] - 33:24,
126:8, 177:13
accurate [2] -
126:23, 184:7
accurately [2] - 34:4,
168:11
accused [1] - 187:19
achieve [1] - 76:27
achieving [1] - 200:8
acknowledge [1] -
188:17
acknowledging [1] -
169:25
acquire [6] - 53:29,
58:11, 58:14, 68:10,
68:17, 164:26
acquired [8] - 19:29,
20:9, 62:9, 97:10,
101:4, 162:17,
166:10, 174:7
acquiring [2] - 59:27,
166:5
acquisition [36] -
20:3, 56:6, 56:8,
57:27, 58:6, 58:8,
58:21, 59:17, 59:29,
63:16, 64:29, 65:14,
65:18, 65:20, 67:23,
67:24, 67:25, 67:29,
68:4, 68:12, 69:1,
69:4, 72:8, 72:29,
73:2, 75:24, 76:15,
76:16, 76:19, 76:29,
77:1, 77:10, 78:7,
165:22, 172:20,
172:23
acquisitions [1] -
66:10
acronym [3] - 11:2,
11:3, 103:19
acronyms [1] -
108:27
Act [229] - 10:29,
11:2, 11:3, 11:6, 11:7,
11:10, 11:13, 11:16,
11:17, 11:19, 12:6,
13:10, 13:15, 13:25,
13:28, 16:20, 16:24,
16:27, 17:14, 18:5,
18:7, 18:11, 18:12,
22:17, 22:18, 22:20,
22:24, 22:26, 22:27,
22:29, 23:1, 23:9,
23:24, 24:2, 24:20,
24:21, 24:24, 24:26,
24:29, 25:9, 25:11,
25:14, 25:18, 31:3,
31:4, 31:6, 31:9,

31:16, 31:25, 32:1,
32:5, 32:8, 32:14,
32:19, 32:22, 32:25,
33:10, 33:20, 34:17,
35:5, 35:8, 35:12,
36:2, 36:19, 36:23,
37:3, 37:7, 37:18,
38:11, 38:13, 40:14,
40:17, 46:17, 47:6,
47:10, 47:12, 47:16,
47:18, 47:19, 47:20,
47:22, 47:29, 48:4,
48:6, 48:13, 48:14,
48:19, 49:7, 49:10,
50:1, 50:10, 50:19,
51:2, 52:5, 52:9, 54:6,
55:4, 55:13, 85:5,
89:9, 91:11, 91:18,
91:22, 91:23, 92:15,
92:25, 101:23,
103:17, 103:22,
104:8, 104:10,
104:11, 104:16,
104:17, 104:18,
104:19, 104:24,
104:28, 105:18,
105:20, 107:3, 107:6,
107:10, 107:14,
107:16, 107:17,
107:19, 107:25,
107:29, 108:1, 110:9,
113:18, 113:23,
113:25, 113:26,
113:28, 114:2, 114:6,
114:7, 114:13,
114:18, 114:22,
114:25, 114:26,
115:3, 115:4, 115:15,
115:27, 116:9,
116:27, 118:18,
122:28, 123:18,
124:13, 130:3, 131:7,
132:6, 132:20,
132:24, 132:27,
133:2, 133:19, 134:3,
134:22, 134:28,
135:7, 135:9, 135:12,
135:22, 135:28,
136:17, 136:27,
138:13, 138:16,
139:11, 139:23,
139:25, 139:27,
140:1, 140:9, 140:10,
141:1, 141:8, 141:19,
142:18, 142:20,
142:25, 143:4,
143:25, 143:27,
143:28, 144:1,
144:11, 144:18,
146:7, 146:18,
147:27, 147:28,

148:5, 148:10, 149:2,
149:26, 150:8, 153:3,
154:16, 156:24,
162:23, 163:20,
177:11, 177:16,
197:18, 197:20
act [12] - 11:9, 16:21,
17:4, 17:13, 18:4,
22:24, 47:9, 48:19,
137:23, 140:9,
150:29, 152:19
Act's [2] - 132:15,
136:2
Act; [1] - 22:16
acted [2] - 129:7,
150:29
acting [3] - 42:19,
87:24, 94:14
action [71] - 1:27,
17:25, 19:3, 19:23,
23:16, 25:1, 26:17,
27:18, 27:27, 28:10,
28:12, 32:9, 32:17,
33:6, 33:22, 48:21,
79:13, 80:8, 80:12,
80:15, 87:15, 88:3,
88:6, 92:23, 98:18,
101:12, 101:15,
103:29, 106:25,
110:16, 127:4, 127:8,
128:18, 129:11,
129:17, 131:2,
136:24, 140:19,
141:14, 141:25,
142:10, 144:14,
150:12, 150:24,
150:25, 150:26,
151:7, 151:13,
151:23, 151:29,
152:1, 152:11,
152:12, 152:14,
152:15, 152:24,
152:28, 153:10,
153:12, 153:14,
156:23, 158:27,
160:5, 168:19, 170:6,
171:16, 177:27,
189:21, 191:28,
197:7, 200:14
Actions [1] - 151:27
actions [8] - 25:7,
26:26, 48:25, 159:4,
189:23, 191:19,
191:21, 196:14
Activities [1] - 80:18
activities [19] -
12:26, 26:21, 64:10,
69:20, 85:16, 86:20,
102:11, 102:13,
102:22, 170:3, 170:5,

170:23, 170:28,
171:28, 189:26,
191:16, 197:29,
198:21, 199:11
activity [9] - 75:7,
117:9, 123:29, 124:4,
124:8, 190:5, 193:25,
194:16
activity' [1] - 169:18
actors [2] - 94:9,
165:15
Acts [6] - 49:3,
104:9, 104:20,
104:22, 105:17,
148:29
acts [8] - 18:7, 22:22,
24:22, 31:5, 47:11,
48:15, 48:27, 64:5
acts' [2] - 18:8, 92:24
actual [26] - 16:17,
19:13, 19:19, 28:2,
64:4, 69:20, 79:16,
91:20, 93:17, 129:15,
130:25, 134:16,
134:23, 136:19,
136:28, 137:14,
138:2, 139:5, 143:19,
148:2, 158:8, 160:4,
162:13, 168:15,
180:28
Adam [1] - 90:8
add [1] - 36:17
added [4] - 16:25,
23:9, 48:4, 48:6
addition [3] - 22:26,
182:13, 184:7
additional [8] -
52:15, 80:22, 106:27,
149:29, 170:6, 180:6,
183:17
Additionally [1] -
172:18
address [7] - 26:21,
42:4, 90:17, 100:4,
179:13, 184:17,
190:28
adequacy [6] - 7:2,
9:25, 9:26, 9:29,
41:18, 148:13
adequate [16] - 7:4,
7:7, 9:6, 9:9, 9:19,
14:13, 41:27, 42:28,
152:1, 152:6, 170:8,
185:28, 186:10,
186:13, 187:3, 187:11
adequately [2] -
178:9, 184:23
adjective [1] -
181:21
ADJOURNED [1] -
202:3
ADJOURNMENT [2]
- 109:8, 110:1
adjudicated [1] -
39:6
Administration [5] -
91:15, 130:18,
131:11, 131:15,
187:28
administration [1] -
50:4
administrative [9] -
18:25, 21:25, 48:22,
48:24, 123:4, 146:25,
150:16, 172:20,
172:29
Administrative [3] -
48:18, 149:2, 149:20
admissibility [2] -
16:9, 22:9
admissible [2] -
22:3, 45:15
admission [1] -
131:29
admitted [4] - 19:28,
20:6, 45:11
adopt [6] - 65:10,
65:12, 66:2, 66:4,
71:16, 148:19
adopted [10] - 30:21,
35:28, 54:26, 59:14,
63:9, 65:2, 69:6, 70:6,
71:13, 72:23
adopting [2] -
180:11, 183:28
adopts [3] - 19:24,
133:21, 135:14
advance [2] - 165:9,
172:21
advanced [1] -
135:10
advantage [1] -
199:8
adverse [27] - 28:21,
29:2, 34:1, 34:7,
34:18, 34:22, 126:14,
126:19, 126:22,
126:28, 127:4,
128:29, 129:4, 129:6,
129:22, 130:9,
130:12, 131:6,
137:10, 137:19,
139:3, 141:2, 141:8,
142:14, 143:17,
143:18, 148:16
adversely [6] - 40:1,
132:15, 136:25,
137:7, 138:26, 150:24
adverted [1] - 147:11
advice [1] - 14:16
affairs [3] - 64:19,
64:24, 159:6
affect [2] - 132:16,
180:25
affected [8] - 11:23,
32:9, 97:20, 136:26,
137:8, 138:26,
150:24, 172:22
affects [2] - 39:13,
151:12
affidavit [3] - 57:3,
66:16, 163:1
affidavits [2] - 45:13,
45:14
affirmation [1] -
83:17
affirmed [1] - 188:7
afford [2] - 23:24,
199:7
afforded [1] - 36:27
afraid [1] - 63:24
AFTER [1] - 110:1
afternoon [1] - 110:4
agencies [38] - 7:21,
10:25, 11:22, 15:6,
23:29, 25:23, 25:24,
26:5, 32:4, 32:6,
32:23, 32:27, 33:1,
33:2, 36:18, 36:19,
37:8, 37:12, 37:22,
41:13, 48:23, 116:13,
116:14, 119:25,
122:16, 123:4, 123:9,
124:7, 132:9, 141:20,
142:1, 142:2, 143:26,
150:11, 154:20,
177:12, 193:9
Agency [11] - 35:29,
36:22, 50:28, 66:22,
69:15, 76:8, 117:7,
141:22, 151:29,
156:17, 159:12
agency [97] - 13:18,
25:16, 32:8, 33:6,
33:23, 34:15, 36:22,
36:28, 37:4, 37:5,
37:17, 37:19, 38:9,
38:15, 38:22, 38:28,
39:22, 42:13, 48:21,
69:16, 71:1, 71:15,
117:1, 117:4, 117:8,
117:16, 117:17,
117:20, 117:23,
117:26, 119:12,
119:14, 119:21,
120:2, 120:7, 122:29,
123:5, 123:10,
123:26, 124:1, 124:2,
124:9, 125:1, 125:9,
125:27, 127:8,
127:21, 128:9,
128:11, 128:14,
128:17, 128:21,
129:7, 129:14,
131:11, 131:20,
132:4, 140:20,
141:15, 141:18,
141:27, 142:21,
145:24, 145:26,
145:27, 145:29,
146:2, 146:3, 146:5,
146:6, 146:14,
146:15, 146:24,
150:12, 150:13,
150:23, 150:24,
150:28, 152:1,
152:10, 152:12,
152:14, 152:15,
152:18, 152:24,
152:27, 153:1,
153:10, 153:12,
153:14, 153:25,
170:2, 170:5, 177:20,
184:4
agency's [2] -
136:26, 184:5
agent [10] - 64:5,
64:8, 64:12, 79:8,
86:17, 86:19, 86:25,
87:4, 112:25, 164:4
agents [4] - 111:25,
187:29, 188:6, 188:22
Agents [1] - 196:19
aggrieved [9] -
20:25, 24:28, 79:1,
79:2, 79:7, 98:12,
99:10, 106:18, 150:24
ago [6] - 23:5, 36:17,
48:1, 48:5, 66:7, 66:9
agree [1] - 11:29
agreed [5] - 45:22,
175:5, 175:11,
175:15, 175:18
agreement [7] - 12:1,
12:5, 12:8, 38:1,
144:29, 155:4, 155:6
Agreement [2] -
12:3, 200:22
agrees [1] - 112:4
AHERN [1] - 2:16
aid [1] - 77:11
aircraft [1] - 131:13
akin [1] - 21:24
Akins [1] - 183:20
Al [5] - 88:14, 93:21,
95:18, 95:21, 95:23
Al-Haramain [4] -
88:14, 93:21, 95:21,
95:23
Al-Haramain's [1] -
95:18
albeit [4] - 24:4,
32:14, 101:12, 200:1
ALHARAMAIN [1] -
88:18
alia [1] - 29:29
alien [4] - 19:28,
188:23, 190:22, 196:5
aliens [16] - 188:15,
189:23, 189:27,
190:8, 190:17,
190:19, 191:1, 191:2,
191:9, 191:10,
191:20, 194:25,
195:3, 195:20,
195:26, 196:13
Alito [3] - 157:9,
157:15, 180:16
allegation [1] - 178:5
allegations [4] -
29:15, 94:17, 162:29,
163:7
allege [7] - 24:3,
24:8, 111:24, 162:7,
180:6, 183:3, 183:16
alleged [12] - 24:6,
30:10, 30:23, 94:9,
111:10, 160:9,
177:19, 178:9,
179:14, 182:10,
184:19, 184:23
alleges [1] - 181:8
alleging [7] - 24:5,
89:7, 131:3, 132:5,
177:27, 180:13, 184:1
Alliance [1] - 2:25
allies [1] - 199:5
allocated [1] - 16:28
allow [2] - 133:13,
134:29
allowed [3] - 9:28,
111:9, 167:14
allowing [3] - 154:7,
156:25, 168:18
almost [1] - 186:22
alone [1] - 86:26
alphabetical [2] -
63:23, 140:27
alternative [2] -
15:19, 166:17
alternatively [1] -
29:23
alternatives [1] -
199:16
alters [1] - 105:10
Al-Haramain [1] -
90:19
ambiguities [1] -
133:10
Ambiguity [1] -

133:11
ambiguous [2] - 132:21, 132:28
amend [5] - 94:7, 125:2, 125:7, 125:11, 127:21
amended [3] - 22:25, 71:19, 104:17
amending [1] - 127:20
Amendment [45] - 49:18, 49:20, 49:25, 55:21, 55:28, 63:14, 68:23, 68:27, 86:28, 89:7, 102:23, 161:10, 169:16, 169:28, 173:5, 173:8, 173:10, 173:19, 173:24, 187:14, 188:3, 188:10, 188:16, 188:19, 188:21, 188:28, 189:2, 189:3, 189:7, 189:25, 190:9, 190:29, 191:4, 191:11, 191:23, 192:7, 192:8, 192:25, 193:16, 194:25, 195:4, 195:11, 195:14, 196:15, 197:12
amendment [7] - 23:12, 55:18, 72:26, 86:21, 92:17, 102:13, 187:16
Amendment's [1] - 189:19
Amendment.. [3] - 165:28, 172:12, 191:12
Amendments [8] - 162:23, 163:20, 188:19, 189:11, 190:16, 192:17, 192:25, 192:27
amendments [2] - 29:15, 71:17
amendments.. [1] - 174:21
AMERICA [1] - 2:19
America [1] - 11:4
American [6] - 182:13, 188:8, 191:28, 197:2, 197:5, 197:7
Americans [1] - 13:1
amici [10] - 13:19, 45:11, 74:21, 74:24, 175:2, 175:6, 175:8, 175:16, 175:20, 197:19
Amicus [1] - 84:27
amicus [2] - 85:8, 85:25
Amnesty [4] - 29:12, 29:21, 156:11, 179:29
amount [10] - 9:29, 24:15, 53:8, 54:11, 88:1, 91:19, 129:15, 148:8, 187:1
amounts [1] - 161:21
ample [1] - 186:19
analogous [1] - 138:4
analyse [1] - 31:7
analysed [1] - 174:19
analyses [1] - 41:29
analysing [1] - 15:19
Analysing [1] - 167:6
analysis [10] - 6:11, 30:21, 41:2, 156:19, 167:14, 172:16, 178:13, 179:3, 181:6, 184:16
Analysis"/"
Sovereign [1] - 89:27
ancillary [1] - 94:14
AND [1] - 1:13
and.. [1] - 201:22
Andrew [1] - 14:19
annexes [1] - 42:3
Annexes [1] - 42:24
annotation [1] - 103:17
announced [1] - 12:25
annual [2] - 52:13, 57:7
answer [1] - 39:5
answered [2] - 41:4, 41:23
answers [1] - 39:10
anticipation [2] - 30:4, 174:27
any' [1] - 177:16
anyhow [1] - 79:4
anyway [1] - 194:6
apart [1] - 88:6
appeal [16] - 45:4, 73:18, 73:26, 74:11, 74:14, 74:21, 74:24, 85:25, 89:13, 90:1, 152:29, 157:12, 175:3, 175:6, 175:9
appealed [2] - 89:17, 157:3
Appeals [6] - 88:25, 89:19, 157:4, 188:7, 193:21, 194:12
Appeals' [2] - 190:26, 191:14
Appeals.. [1] - 89:14
appear [7] - 19:7, 28:19, 29:8, 30:24, 36:26, 43:28, 81:21
APPEARANCES [1] - 2:3
appeared [1] - 131:28
appellant [1] - 3:10
applicability [1] - 153:10
applicable [7] - 29:8, 30:13, 130:3, 130:4, 139:11, 164:2, 198:15
applicant [1] - 86:15
application [19] - 13:19, 42:26, 62:27, 65:25, 68:26, 83:15, 85:29, 86:8, 86:12, 100:14, 100:16, 102:5, 102:25, 102:29, 144:10, 152:26, 193:22, 194:13
Applications [1] - 84:4
applications [5] - 45:11, 73:22, 84:18, 100:23, 103:7
applied [5] - 35:2, 36:12, 131:14, 155:13, 188:5
applies [9] - 55:22, 70:13, 112:19, 190:2, 190:29, 193:24, 194:15, 194:28, 195:14
apply [23] - 18:6, 18:7, 20:5, 24:24, 35:4, 35:5, 37:3, 55:28, 61:7, 68:20, 83:9, 97:2, 97:3, 97:18, 99:5, 100:18, 100:21, 144:7, 185:4, 188:21, 189:26, 190:5, 191:17
applying [3] - 24:26, 26:25, 75:3
appreciate [1] - 184:14
apprehend [1] - 117:12
apprehended [1] - 187:26
approach [3] - 13:3, 30:6, 55:11
appropriate [14] - 8:14, 14:10, 16:25, 16:28, 45:2, 58:24, 66:10, 66:16, 66:17, 69:16, 72:16, 85:19, 151:14, 199:16
Approval [1] - 72:18
approval [15] - 51:10, 57:18, 57:19, 58:29, 59:2, 63:5, 63:6, 67:10, 71:4, 83:13, 86:1, 86:2, 162:8, 165:17, 166:2
approved [7] - 57:18, 58:29, 60:23, 63:4, 77:8, 78:5, 86:13
approving [7] - 56:4, 72:17, 72:27, 83:15, 84:18, 86:10, 100:24
arbitrary [2] - 153:16, 189:21
area [5] - 91:9, 148:1, 151:19, 159:23, 159:25
areas [3] - 155:4, 155:6, 159:21
argue [1] - 185:26
argued [1] - 169:15
argues [1] - 137:6
argument [5] - 137:15, 160:24, 160:29, 166:17, 186:2
arguments [1] - 136:3
aris[ing] [1] - 170:1
arise [8] - 16:1, 25:24, 74:11, 74:13, 113:22, 124:13, 169:26, 197:2
arises [6] - 40:9, 40:10, 79:27, 87:14, 96:28, 96:29
arising [1] - 26:26
arm [1] - 159:24
armed [3] - 170:4, 191:19, 197:5
Armed [1] - 159:15
Army [1] - 159:17
Army's [1] - 169:17
arrest [2] - 187:23, 187:28
arrested [1] - 187:27
art [4] - 12:9, 133:20, 133:21, 189:8
Article [38] - 7:2, 7:8, 7:18, 9:20, 9:25, 9:26, 9:27, 9:28, 10:1, 15:2, 24:10, 26:29, 27:3, 42:6, 43:5, 44:21, 51:4, 51:7, 144:5, 158:3, 158:17, 160:3, 160:10, 161:6, 167:20, 168:9, 174:23, 178:4, 178:12, 179:20, 179:24, 180:13, 182:15, 183:1, 183:5, 183:23, 184:1, 185:13
article [2] - 7:29, 122:21
Articles [12] - 7:23, 15:7, 16:5, 28:22, 28:24, 41:19, 41:28, 43:11, 148:14, 185:29, 186:14, 189:10
articulate [1] - 182:22
AS [2] - 5:1, 110:1
as' [1] - 171:11
ascertains [1] - 66:27
aside [3] - 27:1, 77:21, 153:14
aspects [1] - 178:12
assert [2] - 160:19, 166:20
asserted [3] - 89:12, 147:26, 164:20
asserting [1] - 167:15
assertion [1] - 162:10
asserts [1] - 162:23
assess [6] - 26:20, 60:11, 72:4, 72:13, 128:1, 165:26
assessed [2] - 15:5, 137:25
assessing [1] - 172:10
assigns [1] - 77:26
assist [2] - 14:15, 174:11
assistance [1] - 76:14
assume [2] - 162:19, 162:24
assumed [2] - 188:14, 190:28
assuming [3] - 74:17, 74:19, 191:1
assumption [4] - 74:22, 74:23, 172:1
assumption'.. [1] - 162:22
assumptions [1] - 162:15
assure [2] - 126:9, 177:13
AT [1] - 202:4
at.. [1] - 104:12
attached [1] - 133:22

attachment [2] - 191:21, 196:13
attack [1] - 64:4
attempt [4] - 45:18, 45:20, 46:6, 154:17
attempted [1] - 155:4
attention [15] - 5:20, 61:28, 75:15, 75:18, 75:19, 78:20, 81:13, 94:21, 119:27, 121:22, 123:22, 155:2, 173:9, 196:10, 200:21
attenuated [1] - 161:16
attest [1] - 57:16
Attorney [25] - 32:28, 37:6, 52:13, 53:25, 56:29, 59:15, 61:1, 65:11, 66:3, 66:22, 70:29, 75:25, 76:8, 77:9, 83:14, 86:3, 86:13, 144:22, 145:2, 145:6, 145:17, 145:25, 145:29, 146:20, 163:9
attorney [6] - 128:2, 162:22, 173:26, 173:27, 173:29, 174:3
attorney's [1] - 79:19
Attorney-General [2] - 32:28, 52:13
attorneys [2] - 89:5, 129:18
Attorneys [1] - 156:22
attorneys' [1] - 128:23
audience [1] - 90:27
authorisation [6] - 53:20, 54:7, 56:27, 56:28, 105:5, 164:26
Authorisation" [1] - 67:4
authorisations [1] - 52:8
authorise [2] - 91:26, 182:29
authorised [8] - 56:6, 67:23, 81:20, 82:4, 98:29, 99:28, 123:29, 199:5
authorities [16] - 5:11, 5:13, 26:3, 26:22, 41:11, 88:10, 88:20, 105:29, 111:7, 114:28, 130:21, 136:13, 155:9, 176:23, 194:19, 196:2
authority [13] - 38:14, 39:23, 42:19, 43:10, 77:16, 96:3, 151:1, 151:15, 153:1, 153:20, 161:4, 161:23, 164:21
Authority [1] - 75:22
authorization [4] - 53:27, 80:22, 81:1, 105:8
authorize [6] - 53:26, 132:25, 133:3, 135:5, 164:29, 179:24
authorized [18] - 57:27, 65:14, 66:11, 69:4, 72:29, 75:24, 80:21, 80:28, 99:25, 105:10, 138:15, 156:29, 163:16, 166:19, 174:8, 198:9, 198:13, 199:3
authorizes [1] - 163:5
authorizing [2] - 125:28, 135:12
automatically [2] - 179:22, 182:26
avail [4] - 31:27, 35:14, 113:7, 196:7
availability [4] - 36:1, 36:12, 40:20, 199:14
available [32] - 7:19, 12:13, 15:3, 15:12, 16:11, 23:19, 25:7, 26:1, 26:2, 27:13, 27:18, 32:18, 33:14, 33:19, 34:14, 34:27, 35:4, 35:6, 35:26, 40:3, 44:22, 48:21, 59:19, 60:4, 103:11, 142:28, 143:9, 148:7, 148:10, 148:12, 165:23
availed [1] - 118:15
avenue [1] - 25:19
Aviation [3] - 91:15, 130:18, 131:10
avoid [6] - 157:21, 166:19, 166:27, 167:29, 169:7, 171:7
award [4] - 91:26, 134:6, 136:29, 138:10
aware [1] - 176:10

B

b [2] - 65:1, 120:7
b(1)(A) [1] - 79:9
b). [1] - 63:11
background [2] - 7:26, 8:22
badly [1] - 200:27
Balzac [1] - 190:7
banc [1] - 157:6
BANK [1] - 2:11
bar [1] - 80:4
bare [4] - 94:18, 180:13, 183:3, 184:1
barrier [2] - 123:3, 123:13
barring [1] - 134:21
BARRINGTON [4] - 2:19, 6:6, 175:14, 176:20
Barrington [1] - 6:4
BARROW [1] - 2:12
Based [1] - 178:5
based [9] - 21:29, 74:23, 166:13, 166:18, 167:16, 168:3, 168:10, 168:19, 198:24
bases [1] - 26:2
basis [17] - 7:15, 13:18, 33:29, 34:8, 40:21, 42:20, 51:9, 52:26, 86:14, 86:20, 89:12, 102:13, 126:13, 131:16, 170:24, 174:4, 182:12
bear [1] - 105:27
bears [3] - 79:21, 162:27, 178:15
became [1] - 123:19
become [2] - 11:27, 32:15
becoming [1] - 37:26
BEFORE [1] - 1:17
before.. [1] - 182:23
beg [6] - 6:7, 61:14, 75:14, 106:15, 176:23, 176:27
begin [1] - 157:12
beginning [4] - 79:3, 95:12, 96:5, 116:9
begins [2] - 115:5, 119:8
behalf [2] - 100:25, 121:29
behest [1] - 174:17
behind [2] - 119:5, 140:2
belief [1] - 29:17
belongs [3] - 107:4, 107:18, 146:3
belongs' [1] - 37:20
below [2] - 24:9, 161:15
benefit [3] - 67:14, 91:8, 136:25
benefits [4] - 33:28, 126:12, 131:16, 131:27
best [2] - 46:10, 200:27
better [6] - 10:18, 11:6, 46:12, 137:14, 166:20, 196:25
between [21] - 9:22, 12:1, 19:25, 28:8, 55:24, 87:8, 94:29, 95:5, 105:16, 108:19, 113:24, 140:5, 145:5, 155:6, 155:8, 173:12, 175:15, 184:15, 185:11, 186:3, 200:5
beyond [6] - 135:17, 138:14, 160:8, 180:6, 183:17, 191:16
biggest [1] - 123:9
binding [4] - 42:13, 42:15, 95:2, 95:4
bit [5] - 23:12, 45:19, 56:2, 95:27, 171:20
bits [1] - 24:13
Bivens [2] - 196:18, 196:19
BL [7] - 2:5, 2:10, 2:15, 2:20, 2:25, 2:30, 3:2
blocks [2] - 49:3, 49:6
Board [1] - 85:13
bodies [2] - 41:11, 85:14
bodily [1] - 61:3
body [4] - 28:5, 42:14, 85:13, 133:23
bones [1] - 94:18
book [37] - 6:25, 52:26, 88:20, 95:29, 96:3, 96:4, 104:7, 114:20, 114:28, 115:8, 115:14, 115:18, 115:24, 121:26, 122:26, 134:12, 134:13, 136:13, 140:3, 140:5, 150:1, 150:2, 152:16, 154:14, 154:17, 154:25, 156:12, 176:22, 176:24, 176:26, 176:27, 176:28, 187:13, 187:17, 197:23
Book [14] - 5:11, 5:13, 45:23, 45:27, 45:28, 46:2, 111:2, 111:6, 115:9, 121:27, 130:20, 134:12, 136:13
booklet [1] - 6:26
books [8] - 5:11, 5:12, 45:21, 45:22, 52:3, 88:20, 102:6, 176:23
border [1] - 173:16
borders [2] - 191:16, 196:29
borrowed [1] - 133:22
bottom [17] - 62:4, 73:4, 75:20, 84:26, 88:27, 90:14, 92:9, 93:29, 105:26, 108:15, 115:12, 116:2, 137:4, 170:13, 194:20, 195:17, 198:5
bound [2] - 7:29, 43:24
boxes [1] - 72:2
bracket [1] - 97:29
brackets [1] - 97:28
Branch [1] - 132:8
Branches [1] - 191:25
branches [7] - 158:20, 158:28, 159:4, 159:27, 191:29, 197:4, 197:8
breach [13] - 25:8, 81:5, 81:6, 81:10, 101:15, 102:23, 106:24, 127:2, 129:5, 129:10, 129:12, 129:23, 140:29
breaches [5] - 106:29, 113:5, 124:12, 127:16
breadth [1] - 141:29
break [1] - 109:3
BRIAN [1] - 2:4
briefly [9] - 10:10, 48:18, 88:14, 96:13, 96:17, 104:27, 130:20, 134:14, 177:3
bring [41] - 6:12, 8:3, 17:24, 20:26, 20:28, 24:29, 32:9, 32:21, 33:6, 33:22, 41:26, 44:26, 54:17, 80:8, 80:11, 83:21, 88:3, 93:21, 93:23, 101:15, 103:28, 106:1, 110:22, 113:2, 116:10, 127:4, 127:8, 129:11, 130:1, 140:19, 140:23, 141:25, 155:2, 157:25, 168:18,

180:16, 191:21,
192:4, 196:14,
196:20, 200:14
bringing [2] - 30:25,
185:21
broad [7] - 16:2,
50:22, 55:11, 69:19,
103:24, 122:12,
147:29
broad-brush [1] -
55:11
broadly [2] - 33:7,
103:24
brought [16] - 27:19,
37:8, 37:17, 89:5,
105:27, 111:7,
111:14, 112:20,
123:6, 127:18, 128:6,
128:25, 141:15,
156:23, 173:16,
186:24
brush [1] - 55:11
BSA [1] - 2:25
BUILDING [1] - 3:4
built [1] - 158:17
bulk [2] - 13:2,
199:20
burden [5] - 106:27,
128:17, 162:27,
168:14, 178:16
burdening [1] -
198:23
burdens [1] - 167:16
burdensome [2] -
29:25, 166:24
Bureau [2] - 89:23,
102:3
bureaucratic [1] -
123:15
Burr [2] - 112:9,
112:19
business [6] - 13:21,
51:27, 52:3, 101:24,
138:25, 199:8
BY [1] - 1:17

C

c(2) [3] - 53:24, 56:7,
73:1
cables [1] - 69:18
CAHILL [1] - 2:30
calculated [1] -
138:10
California.. [2] -
89:11, 89:16
camera [1] - 128:14
Canada [1] - 111:10
CANAL [1] - 2:27

cannot [26] - 5:21,
5:27, 8:8, 21:11,
27:21, 30:3, 30:8,
42:28, 43:13, 43:19,
55:29, 88:2, 91:5,
93:23, 146:5, 160:8,
161:23, 162:1,
164:21, 168:1,
174:24, 174:26,
179:27, 180:12,
183:9, 183:29
canon [2] - 132:22,
136:4
capable [1] - 37:26
capacity [9] - 23:21,
29:9, 40:10, 94:6,
94:8, 94:15, 95:19,
111:23, 151:1
CAPEL [1] - 3:4
capital [2] - 65:1,
97:26
capricious [1] -
153:16
capture [1] - 99:28
carried [4] - 82:12,
82:13, 82:16, 83:8
carry [3] - 67:15,
71:3, 71:4
case [57] - 15:1,
26:1, 27:5, 28:5,
29:14, 30:29, 41:15,
43:12, 45:9, 45:10,
49:11, 56:1, 56:5,
57:11, 72:28, 80:2,
82:8, 90:27, 91:16,
95:17, 108:12, 111:1,
111:7, 111:20,
126:22, 127:23,
128:12, 129:21,
130:19, 136:12,
143:24, 153:23,
158:13, 159:8,
169:21, 173:13,
174:5, 174:6, 178:22,
180:5, 182:7, 182:20,
182:23, 183:16,
183:20, 183:25,
184:19, 185:1,
185:18, 185:21,
186:15, 187:19,
188:27, 190:14,
190:27, 195:7, 200:18
Case [1] - 1:5
case' [1] - 184:28
case'.. [1] - 165:11
case-managed [1] -
45:10
case-or-
controversy [2] -
158:13, 182:7

cases [30] - 34:15,
43:8, 80:5, 130:17,
135:2, 135:20,
148:16, 154:27,
154:28, 155:26,
156:2, 156:7, 156:14,
158:8, 159:3, 169:25,
169:29, 171:10,
171:12, 181:1, 182:1,
184:25, 184:28,
185:9, 190:17,
195:19, 195:23,
195:24, 195:26, 196:7
Cases [4] - 190:4,
193:23, 194:14,
194:27
catch [2] - 120:27,
127:1
catch-all [1] - 127:1
categories [2] -
120:26, 121:9
category [1] - 135:3
causal [1] - 28:8
causation [2] -
137:23, 182:22
caused [2] - 132:18,
137:19
causes [2] - 23:16,
26:26
cease [1] - 145:20
CENTER [1] - 3:1
Central [2] - 117:7,
159:11
Certain [2] - 34:13,
36:25
certain [56] - 9:23,
10:8, 11:28, 12:29,
13:10, 14:16, 18:6,
23:19, 25:25, 26:2,
29:15, 32:17, 32:22,
32:27, 35:9, 35:15,
35:16, 36:9, 36:18,
36:19, 37:29, 48:29,
51:13, 51:27, 52:15,
53:18, 55:3, 55:23,
69:29, 82:26, 93:1,
101:24, 102:4, 106:8,
106:20, 115:2,
116:15, 117:17,
143:25, 144:25,
144:27, 146:11,
158:4, 166:27,
167:27, 169:23,
170:3, 173:12,
183:10, 188:1,
190:18, 195:20,
198:1, 199:26, 199:28
certainly [29] - 6:22,
30:2, 31:21, 36:20,
49:1, 88:10, 108:13,

114:22, 115:20,
140:6, 157:17,
160:11, 160:12,
160:27, 161:18,
166:14, 167:29,
168:4, 169:5, 174:3,
174:25, 175:13,
175:18, 175:21,
186:5, 186:6, 186:11,
194:26, 201:12
certificate [14] -
57:8, 66:28, 67:1,
67:14, 70:29, 71:8,
72:18, 73:19, 73:24,
74:12, 74:13, 131:17,
132:2, 159:13
certificates [1] -
131:12
Certification [1] -
71:25
certification [19] -
54:3, 54:22, 56:5,
57:3, 57:8, 57:12,
57:15, 59:1, 62:27,
69:8, 70:25, 71:11,
71:17, 71:26, 71:27,
72:20, 72:27, 73:18,
165:19
Certification" [1] -
56:16
certifications [2] -
131:23, 172:9
certified [1] - 145:6
certifies [1] - 30:16
certify [3] - 1:22,
71:5, 175:9
certiorari [3] - 95:8,
157:7, 157:11
chain [3] - 161:16,
161:20, 166:12
chains [1] - 182:22
challenge [11] -
17:21, 18:20, 77:17,
89:5, 159:10, 159:14,
159:17, 170:18,
171:9, 172:22, 174:12
challenged [5] -
28:10, 160:5, 163:19,
171:26, 178:18
challenging [2] -
21:19, 75:16
Challenging [1] -
77:16
chameleon [1] -
133:29
chameleon-like [1] -
133:29
change [2] - 57:23,
151:24
changes [4] - 12:24,

13:8, 14:3, 14:29
Chao [3] - 134:10,
136:12, 148:17
chapter [18] - 47:22,
47:23, 50:20, 78:21,
80:29, 81:20, 83:1,
84:20, 96:5, 107:2,
107:5, 107:12,
107:29, 122:26
chapter.. [1] - 80:21
chapters [2] - 47:22,
82:29
character [4] - 33:27,
62:17, 126:11, 126:17
charged [2] - 138:18,
173:14
Charter [12] - 7:18,
14:7, 15:2, 15:8, 16:5,
24:10, 28:22, 42:6,
43:5, 43:11, 44:21,
144:5
Charter-protected
[1] - 14:7
check [3] - 23:10,
31:17, 74:17
Chief [6] - 51:5,
83:25, 84:12, 100:22,
192:5, 192:14
chill [1] - 170:8
chilling [2] - 169:26,
170:20
choice [1] - 162:18
choose [3] - 90:26,
134:24, 161:4
choosing [1] -
125:24
Christopher [1] -
162:18
chronologically [1] -
140:6
Church [2] - 50:7,
170:15
CIA [2] - 117:19,
159:13
Circuit [14] - 88:25,
89:19, 132:26,
135:10, 157:4, 157:5,
167:1, 167:8, 168:12,
178:4, 178:11,
179:13, 181:7, 184:14
circuit [3] - 95:2,
95:3, 155:22
Circuit's [7] - 94:25,
160:25, 167:14,
179:3, 180:8, 181:5,
184:22
circuits [7] - 83:27,
84:15, 94:29, 95:1,
95:4, 95:6, 114:14
circumstance [3] -

57:11, 125:11, 126:4
circumstances [13] -
16:1, 28:19, 36:9,
39:9, 43:15, 74:12,
116:16, 127:7,
139:28, 142:22,
180:4, 183:15, 186:15
citation [3] - 90:24,
122:21, 133:10
citations [2] -
158:11, 158:22
cite [1] - 111:28
cited [4] - 122:17,
154:3, 178:22, 184:26
cites [3] - 137:27,
159:8, 195:23
citing [3] - 90:7,
91:27, 160:6
Citing [1] - 188:8
citizen [19] - 19:27,
32:20, 33:5, 33:9,
33:22, 34:9, 35:14,
40:11, 43:9, 88:5,
141:28, 142:21,
143:12, 143:13,
148:7, 148:8, 148:12,
187:24, 193:5
citizens [63] - 7:5,
7:19, 9:7, 11:13, 14:7,
14:14, 15:4, 15:11,
20:27, 21:17, 27:13,
31:12, 31:17, 31:20,
31:22, 31:27, 32:2,
32:18, 32:19, 33:13,
33:19, 33:21, 34:14,
34:28, 35:4, 35:6,
35:12, 35:17, 35:18,
35:20, 35:21, 35:22,
35:26, 36:2, 36:13,
36:27, 40:18, 43:1,
43:7, 43:15, 44:9,
44:22, 51:1, 55:23,
63:4, 116:12, 139:12,
139:24, 140:11,
141:24, 144:1, 144:4,
147:20, 147:29,
148:4, 188:9, 190:15,
191:9, 200:5
civil [26] - 17:24,
23:25, 30:14, 32:9,
33:6, 33:7, 33:22,
51:13, 51:14, 78:21,
80:11, 87:15, 89:22,
90:2, 98:7, 101:11,
106:25, 112:1,
112:13, 123:28,
124:8, 127:8, 140:19,
140:20, 144:14,
198:19
Civil [4] - 78:29,
85:12, 98:9, 124:16
civilians [1] - 82:13
CJEU [4] - 14:4,
30:7, 41:3, 43:25
CJEU's [2] - 40:21,
42:4
claim [17] - 20:28,
24:4, 30:15, 93:28,
110:23, 113:2, 130:1,
138:8, 150:28,
166:25, 170:8, 173:5,
173:26, 190:8,
191:10, 194:24, 195:3
claim.. [1] - 173:24
claimant [2] - 30:8,
30:16
claimant's [1] -
30:16
claimed [3] - 132:17,
191:22, 196:15
claiming [1] - 171:13
claims [12] - 25:3,
27:19, 30:22, 93:2,
94:7, 95:20, 95:22,
110:18, 110:21,
111:14, 112:20,
137:12
clandestine [3] -
64:10, 102:10, 102:21
Clapper [6] - 29:12,
30:21, 156:10,
156:15, 156:16,
179:29
CLARE [1] - 2:17
clarity [1] - 21:5
class [3] - 177:27,
189:12, 192:27
class-action [1] -
177:27
classified [4] -
25:26, 36:4, 108:20,
118:19
clause [1] - 115:15
clauses [7] - 7:10,
7:27, 41:25, 42:3,
42:8, 42:24, 63:13
clear [18] - 30:8,
35:1, 38:20, 67:8,
67:9, 83:7, 94:13,
124:9, 133:25, 169:9,
174:6, 181:17, 185:3,
185:6, 187:2, 187:6,
187:10, 200:1
clearance [1] - 85:22
Clearly [1] - 39:28
clearly [7] - 58:12,
92:1, 105:27, 135:17,
138:25, 148:1, 168:17
client [4] - 173:4,
173:23, 174:1, 175:18
client's [1] - 174:7
close [1] - 182:10
cluster [1] - 133:21
Code [9] - 16:25,
17:15, 46:24, 47:21,
50:13, 50:20, 74:18,
108:23, 108:24
code [9] - 16:26,
16:28, 16:29, 17:7,
17:11, 74:20, 84:27,
184:10, 184:11
codified [1] - 17:1
cognisable [1] -
182:18
coherent [1] - 155:15
coincidentally [1] -
150:19
collateral [1] - 58:13
collect [3] - 198:22,
199:7, 199:13
collected [8] - 55:7,
93:22, 120:20,
121:15, 123:12,
198:26, 199:20,
199:23
collecting [1] -
199:22
collection [11] -
13:2, 13:3, 25:2,
91:12, 93:18, 93:23,
107:29, 198:9,
198:12, 199:2
Collection [1] - 11:6
collective'.. [1] -
181:15
COLLINS [138] - 2:4,
2:25, 4:5, 5:7, 5:9,
5:16, 5:27, 6:2, 6:8,
6:20, 6:26, 12:17,
12:19, 19:17, 21:8,
23:8, 23:14, 29:23,
31:14, 31:21, 31:24,
34:6, 39:4, 45:26,
46:1, 46:5, 47:8,
47:15, 47:26, 47:28,
50:19, 53:1, 54:9,
54:17, 55:9, 56:20,
56:23, 56:26, 58:20,
61:14, 62:2, 62:4,
64:1, 74:16, 78:24,
78:27, 83:29, 84:2,
84:7, 84:9, 84:12,
87:18, 87:20, 88:18,
88:24, 88:29, 90:10,
90:13, 95:14, 96:2,
96:11, 97:27, 97:29,
98:3, 98:6, 99:14,
99:16, 104:14,
106:14, 106:16,
107:11, 107:14,
107:18, 107:21,
107:23, 107:28,
108:6, 108:18,
108:23, 108:28,
109:4, 110:5, 110:8,
111:4, 111:6, 115:9,
115:11, 115:17,
115:20, 115:23,
115:26, 116:1, 116:5,
116:8, 116:22, 120:5,
120:7, 120:29, 121:3,
121:7, 121:27, 122:2,
122:11, 124:19,
124:22, 124:25,
129:2, 140:4, 140:19,
143:3, 143:7, 149:6,
149:10, 149:13,
149:18, 149:23,
149:25, 149:28,
150:5, 150:8, 163:26,
163:29, 175:25,
176:2, 176:13,
176:18, 176:21,
176:26, 193:28,
194:2, 194:8, 197:27,
198:5, 200:25,
201:23, 201:26,
201:28, 202:1
Collins [5] - 5:8,
87:17, 149:16,
175:14, 175:22
COLM [1] - 3:1
color [1] - 151:1
colour [2] - 80:20,
80:25
Columbia [1] - 84:16
column [31] - 54:19,
59:12, 60:20, 61:17,
62:5, 63:28, 64:29,
65:7, 71:21, 73:28,
84:2, 84:26, 89:27,
92:10, 108:16,
115:12, 116:3,
116:21, 116:22,
116:25, 119:9,
120:16, 120:24,
120:29, 123:23,
124:15, 124:19,
127:14, 150:6,
151:27, 158:1
columns [1] - 115:16
combination [1] -
48:12
combined [1] - 93:13
combines [1] -
104:20
coming [4] - 43:22,
49:20, 91:16, 122:3
commence [1] - 8:14
comment [3] - 64:22,
130:26, 193:3
commentators [2] -
122:14, 155:10
comments [1] -
122:5
COMMERCIAL [1] -
1:3
commercial [2] -
145:5, 199:2
commercially [1] -
199:9
Commission [8] -
5:21, 5:24, 10:6,
12:20, 13:4, 14:24,
27:12, 138:17
commission [3] -
19:20, 50:5, 50:6
Commissioner [13] -
5:6, 6:10, 6:27, 15:17,
48:27, 121:29,
140:17, 147:11,
148:11, 154:15,
169:21, 185:18,
186:20
COMMISSIONER [1]
- 1:7
Commissioner's [7]
- 12:12, 41:16, 44:7,
156:9, 156:14, 186:9,
187:9
committed [2] -
79:14, 98:18
Committee [1] - 50:7
committee [1] - 50:6
committing [3] -
19:9, 111:26, 112:26
common [9] -
112:13, 112:14,
112:18, 134:7, 135:1,
135:20, 138:5, 138:7,
183:12
common-law [4] -
112:18, 134:7, 135:1,
135:20
communicate [1] -
161:3
communication [18]
- 10:6, 12:20, 58:7,
58:25, 60:25, 65:19,
68:10, 72:9, 75:27,
76:18, 77:11, 77:19,
99:26, 105:6, 105:11,
105:23, 106:7, 119:13
Communication [1] -
22:20
Communications
[34] - 18:5, 18:7,
22:17, 22:26, 22:27,
22:29, 23:1, 23:9,
24:20, 24:21, 24:26,

24:29, 25:9, 47:10, 47:11, 47:16, 47:20, 47:29, 92:25, 104:8, 104:10, 104:18, 104:19, 104:24, 104:28, 105:18, 107:3, 107:17, 107:19, 107:25, 110:8, 113:25, 113:28, 114:13

communications [37] - 24:23, 24:24, 24:27, 29:18, 29:27, 62:8, 62:18, 68:17, 72:9, 76:9, 82:26, 83:3, 98:9, 99:9, 99:29, 105:20, 106:4, 107:22, 160:22, 161:2, 161:12, 161:14, 161:28, 162:4, 162:8, 162:16, 162:20, 162:25, 163:3, 163:11, 164:17, 164:27, 166:5, 166:9, 166:25, 174:8, 174:10

Community [2] - 186:23, 193:12

community [4] - 189:13, 189:15, 192:28, 193:1

companies [6] - 53:7, 53:14, 106:5, 169:22, 199:8

company [7] - 76:23, 76:24, 76:26, 77:15, 78:12, 177:28, 196:27

compared [1] - 87:10

comparing [2] - 35:20, 35:21

comparison [4] - 167:23, 169:12, 171:18, 171:19

compatible [8] - 7:18, 15:2, 40:22, 42:5, 44:21, 120:19, 121:14, 123:11

compel [2] - 153:12, 171:16

compelled [2] - 113:12, 146:5

compels [1] - 166:27

compensation [1] - 77:14

compensatory [2] - 135:3, 135:21

competent [2] - 8:18, 82:6

competitive [1] - 199:7

compile [1] - 119:1

compiled [1] - 118:2

Complainant [2] - 40:4, 42:22

complainant [3] - 7:17, 36:15, 128:11

complainant's [1] - 8:16

Complainant's [1] - 43:12

complained [2] - 28:9, 34:25

complaint [12] - 8:16, 8:17, 30:25, 36:15, 40:4, 40:13, 40:27, 124:27, 124:28, 177:27, 178:2, 181:8

complete [1] - 16:6

completely [2] - 15:11, 55:26

completeness [3] - 14:21, 33:25, 126:9

compliance [4] - 20:29, 21:1, 54:5, 63:10

Compliance [1] - 62:7

complied [5] - 55:12, 71:1, 71:2, 71:6, 78:6

complies [1] - 64:29

comply [9] - 49:24, 65:26, 65:27, 66:15, 66:25, 125:14, 126:25, 177:15, 177:28

component [13] - 37:5, 37:19, 37:20, 38:15, 38:22, 39:22, 117:8, 141:16, 145:24, 145:27, 146:3, 191:11

component' [2] - 36:28, 37:4

components [2] - 22:28, 192:8

comport [2] - 165:27, 172:11

comprehensible [1] - 125:26

comprehensive [1] - 172:7

comprise [1] - 21:21

comprising [1] - 14:22

computer [1] - 23:18

Computer [4] - 22:16, 23:24, 24:1, 154:16

concededly [1] - 160:7

conceivable [1] - 20:22

concentrate [1] - 49:6

concept [3] - 48:24, 129:27, 160:8

concern [5] - 23:16, 78:9, 118:12, 181:15, 185:22

concerned [15] - 15:16, 19:27, 31:10, 42:27, 49:16, 69:23, 69:26, 81:4, 82:12, 105:20, 106:11, 113:1, 125:17, 179:5

concerning [17] - 20:10, 25:27, 33:24, 42:4, 59:19, 61:23, 62:10, 64:2, 64:15, 77:10, 96:27, 97:11, 102:8, 102:19, 103:12, 126:7, 165:24

concerns [5] - 186:9, 186:20, 186:25, 186:29, 187:9

conclude [2] - 8:8, 161:8

concluded [6] - 24:5, 132:19, 132:27, 167:2, 181:8, 188:11

concludes [1] - 112:19

concluding [1] - 188:3

conclusion [8] - 7:12, 43:22, 44:14, 44:29, 93:4, 180:8, 184:22, 187:8

conclusions [2] - 44:18, 153:15

conclusive [1] - 192:23

concomitant [1] - 170:4

concrete [8] - 28:2, 179:9, 179:25, 181:18, 182:18, 183:1, 183:4, 184:12

concrete.. [1] - 182:2

Concreteness [2] - 179:9, 181:24

concreteness [4] - 179:15, 181:16, 184:15, 184:20

concreteness.. [1] - 183:9

concurrence [5] - 37:18, 145:17, 146:2, 182:20, 196:9

condition [3] - 26:28, 112:1, 131:19

Conditions [1] - 119:10

conditions [4] - 11:28, 23:19, 117:18, 145:19

conduct [15] - 23:20, 28:9, 54:9, 64:19, 64:24, 69:1, 69:16, 111:25, 112:25, 163:21, 164:8, 166:7, 171:9, 178:18

conduct' [1] - 167:12

conducted [13] - 62:10, 68:22, 69:5, 69:12, 69:21, 81:12, 82:4, 82:27, 83:4, 97:10, 102:12, 191:27, 198:10

conducting [4] - 80:23, 163:18, 170:22, 191:16

conducts [1] - 13:21

confers [3] - 26:4, 32:2, 151:15

confidential [1] - 132:18

confidentiality [2] - 29:26, 166:24

confined [2] - 72:7, 101:8

confirmed [1] - 181:29

confirming [1] - 183:20

conflicting [1] - 95:5

conformity [1] - 125:4

confused [2] - 108:13

Congress [24] - 13:24, 16:21, 41:11, 49:23, 112:17, 133:20, 134:20, 134:23, 135:4, 135:6, 135:13, 135:27, 138:22, 159:16, 172:6, 179:19, 180:10, 182:6, 182:13, 182:17, 183:17, 183:27, 194:24

congress [2] - 183:21, 200:3

Congress' [4] - 92:1, 134:29, 135:16, 182:25

Congress.. [1] - 180:7

Congressional [1] - 50:6

congressional [3] - 93:5, 93:11, 172:14

conjectural [3] - 28:3, 178:28, 180:23

conjectural.. [1] - 163:7

conjunction [2] - 144:22, 186:6

connection [15] - 28:8, 30:21, 40:8, 55:24, 55:27, 118:7, 173:12, 173:17, 189:14, 190:23, 190:25, 191:6, 192:29, 193:11, 196:6

connections [2] - 190:21, 195:29

conscious [4] - 19:9, 111:26, 112:26, 129:27

consent [9] - 60:9, 62:13, 62:21, 97:13, 97:20, 101:5, 119:15, 119:23, 151:16

consenting [1] - 9:24

consequence [12] - 28:21, 34:6, 34:22, 49:11, 50:8, 128:29, 129:6, 129:22, 137:11, 139:3, 139:17, 142:14

consequences [3] - 29:2, 34:7, 191:15

consequent [1] - 45:7

consequently [2] - 33:29, 126:13

consider [16] - 6:16, 14:5, 14:10, 28:18, 30:6, 43:4, 43:12, 43:24, 74:6, 85:11, 138:18, 176:4, 176:15, 178:11, 182:10, 199:14

consideration [4] - 37:1, 42:21, 93:5, 110:28

considerations [3] - 40:25, 159:25, 198:20

considered [10] - 15:23, 24:8, 29:2, 38:25, 39:16, 86:18, 133:29, 140:17, 189:15, 193:1

considering [3] - 41:7, 41:18, 77:28

considers [3] - 7:26,

7:29, 8:8
consistent [13] - 54:27, 55:15, 55:16, 59:22, 63:13, 68:22, 72:24, 92:6, 93:4, 100:9, 103:13, 161:10, 198:10
consisting [1] - 48:9
consists [2] - 22:22, 24:20
constantly [1] - 74:19
constitute [6] - 47:17, 84:17, 160:13, 160:28, 180:4, 183:15
constituted [1] - 42:2
constitutes [3] - 64:25, 179:17, 182:4
Constitution [15] - 27:4, 55:18, 55:21, 68:23, 68:27, 72:26, 86:21, 102:14, 158:3, 188:11, 189:9, 193:14, 193:22, 194:13, 198:15
constitution [4] - 26:11, 26:29, 49:18, 51:8
Constitution.. [1] - 63:15
constitutional [22] - 26:27, 51:7, 89:8, 90:17, 111:12, 153:8, 153:18, 158:7, 169:26, 173:11, 178:16, 185:24, 188:26, 190:1, 190:4, 190:18, 193:15, 193:24, 194:15, 194:28, 195:21, 195:27
constitutionality [3] - 159:11, 171:25, 174:19
constitutionally [1] - 170:23
constrain [1] - 171:16
constraint [2] - 16:10, 102:22
constraints [8] - 25:4, 68:26, 69:14, 103:28, 104:1, 113:22, 148:9, 188:12
construction [1] - 148:19
construe [1] - 39:20
construed [4] - 132:23, 133:10, 133:27, 135:25
construing [1] - 134:27
consultation [3] - 32:29, 65:11, 66:3
consumer [5] - 177:12, 177:14, 177:19, 184:4, 184:6
contacts [13] - 29:19, 160:22, 161:12, 162:11, 162:17, 163:4, 163:14, 164:15, 164:27, 166:3, 166:6, 166:8, 166:9
contain [3] - 9:23, 25:16, 124:27
contained [7] - 31:8, 42:24, 119:12, 120:25, 121:8, 125:23, 177:26
containing [2] - 113:18, 131:26
contains [11] - 19:14, 27:4, 35:9, 47:11, 48:2, 54:24, 71:27, 72:21, 118:18, 132:7, 154:27
CONTD [1] - 4:5
contemplated [2] - 41:28, 80:8
contemplating [1] - 88:6
contemporaries [1] - 189:25
contend [1] - 111:23
contends [3] - 111:27, 111:29, 164:8
contention [2] - 43:13, 167:26
contentions [1] - 30:17
contents [4] - 60:25, 83:14, 106:7, 128:13
context [20] - 23:22, 29:10, 30:12, 35:25, 36:14, 37:1, 40:4, 41:19, 61:10, 79:29, 98:8, 103:6, 112:11, 112:13, 112:27, 134:1, 179:25, 183:2, 183:25, 196:21
contexts [1] - 35:26
contingencies [1] - 161:21
continued [2] - 56:5, 72:28
continuing [2] - 152:21, 160:1
contract [3] - 42:8, 42:9, 42:24
contractual [4] - 7:10, 7:26, 41:25, 42:2
contrary [6] - 16:5, 135:9, 153:18, 190:3, 193:22, 194:13
Contrary [1] - 91:4
contrast [3] - 93:17, 185:11, 192:16
Contrasting [1] - 93:8
contrasts [1] - 189:9
contravention [1] - 43:10
control [4] - 117:11, 123:5, 123:27, 150:11
controller [1] - 147:11
controversies [1] - 27:7
controversies' [1] - 158:9
controversy [4] - 27:5, 158:13, 182:7, 182:23
controversy' [1] - 26:28
convenience [1] - 123:16
conversations [2] - 166:28, 173:25
conversations.. [1] - 167:1
convey [1] - 181:22
convicted [1] - 165:6
convicted [1] - 187:5
Cooper [5] - 91:15, 91:27, 130:19, 131:9, 148:17
copies [1] - 14:22
copy [3] - 32:4, 46:3, 125:25
COPYRIGHT [1] - 3:8
core [2] - 45:22, 95:20
corner [2] - 88:27, 198:3
corollary [2] - 62:18, 95:24
correct [8] - 5:17, 5:25, 107:6, 111:28, 127:20, 141:26, 184:23, 200:17
corrected [2] - 74:25, 127:26
correction [5] - 31:16, 48:7, 74:18, 81:23, 85:26
corrections [1] - 46:9
correctly [3] - 111:2, 173:6, 176:29
correctness [1] - 180:8
corresponding [1] - 9:13
COSTELLO [136] - 1:17, 5:4, 5:8, 5:15, 5:26, 6:1, 6:4, 6:7, 6:19, 6:25, 12:15, 12:18, 19:16, 21:7, 23:7, 23:12, 29:22, 31:11, 31:19, 31:23, 34:5, 39:1, 45:24, 45:29, 46:4, 47:7, 47:14, 47:24, 47:27, 50:18, 52:29, 54:8, 54:16, 55:8, 56:18, 56:21, 56:24, 58:19, 61:13, 62:1, 62:3, 63:29, 74:15, 78:23, 78:26, 83:28, 84:1, 84:5, 84:8, 84:11, 87:16, 87:19, 88:16, 88:23, 88:28, 90:9, 90:12, 95:13, 95:29, 96:9, 97:26, 97:28, 98:2, 98:5, 99:13, 99:15, 104:13, 106:13, 106:15, 107:9, 107:13, 107:15, 107:20, 107:22, 107:26, 108:5, 108:17, 108:22, 108:26, 109:2, 110:4, 110:7, 111:3, 111:5, 115:7, 115:10, 115:14, 115:18, 115:22, 115:25, 115:28, 116:4, 116:7, 116:20, 120:4, 120:6, 120:27, 121:2, 121:5, 121:25, 122:1, 122:10, 124:17, 124:21, 124:24, 129:1, 140:2, 140:18, 143:1, 143:5, 149:4, 149:7, 149:11, 149:15, 149:21, 149:24, 149:26, 150:4, 150:7, 163:25, 163:27, 175:21, 175:27, 176:1, 176:7, 176:17, 176:25, 193:26, 193:29, 194:4, 197:26, 198:4, 200:24, 201:21, 201:24, 201:29
costly [2] - 29:25, 166:23
costs [12] - 24:5, 30:4, 79:21, 128:2, 128:4, 129:17, 157:21, 167:16, 167:27, 168:19, 169:6, 174:27
counter [1] - 77:3
counterarguments [1] - 135:19
counterintelligence [2] - 198:27, 199:6
countermeasures [1] - 168:27
countries [12] - 11:21, 11:26, 31:26, 31:27, 31:29, 140:11, 145:6, 145:11, 145:13, 191:23, 196:16
country [29] - 11:28, 37:28, 38:15, 38:21, 39:24, 144:21, 144:25, 144:27, 145:20, 146:16, 146:23, 146:29, 147:1, 147:2, 147:6, 147:8, 147:9, 147:17, 147:19, 187:26, 189:15, 190:26, 191:2, 191:6, 191:21, 192:29, 195:29, 196:14, 197:1
country' [10] - 33:5, 36:29, 38:1, 38:6, 39:13, 39:15, 39:17, 39:29, 146:28, 146:29
country.. [2] - 188:24, 190:21
couple [2] - 196:10, 197:15
course [47] - 5:28, 10:17, 14:1, 22:5, 28:5, 32:25, 34:11, 35:18, 40:26, 46:11, 49:20, 49:22, 51:15, 54:11, 55:29, 63:1, 68:25, 69:17, 77:1, 78:12, 78:13, 81:3, 81:11, 82:3, 82:13, 82:17, 85:26, 86:27, 88:7, 105:22, 113:16, 113:27, 118:25, 119:2, 130:2, 139:15, 141:24, 142:17, 143:14, 143:15, 147:21, 156:15, 172:29, 187:3, 193:3,

200:11, 201:25
courses [1] - 27:18
Court [71] - 8:9, 25:1, 29:11, 29:27, 30:21, 40:12, 49:12, 51:3, 56:4, 57:2, 57:20, 59:3, 63:7, 70:23, 70:24, 71:24, 72:20, 72:27, 74:3, 77:22, 83:23, 83:26, 84:3, 84:8, 88:25, 89:10, 89:13, 89:15, 89:19, 91:10, 91:28, 95:8, 111:16, 112:2, 112:4, 112:10, 112:16, 112:18, 130:16, 130:23, 132:19, 132:26, 133:2, 135:14, 156:1, 157:1, 157:4, 157:9, 157:15, 161:7, 165:20, 165:25, 167:24, 169:29, 171:10, 172:8, 174:18, 177:2, 178:2, 180:7, 185:8, 185:12, 185:14, 186:12, 188:2, 188:7, 190:26, 191:14, 193:21, 194:12
COURT [1] - 1:2
court [102] - 5:23, 5:27, 8:3, 8:5, 8:18, 13:17, 13:20, 28:12, 28:24, 32:21, 39:6, 39:20, 43:26, 43:27, 43:29, 44:3, 44:26, 45:2, 51:1, 51:4, 51:6, 51:7, 51:11, 54:4, 54:22, 55:1, 61:1, 62:28, 65:24, 66:14, 66:23, 66:26, 67:14, 70:28, 71:8, 72:1, 72:12, 72:17, 73:8, 73:25, 73:26, 73:28, 73:29, 74:9, 74:29, 78:6, 82:5, 83:9, 84:13, 84:17, 84:24, 90:26, 94:3, 94:6, 95:18, 95:23, 97:2, 100:16, 100:26, 102:25, 103:2, 111:15, 127:21, 127:23, 127:24, 128:1, 128:9, 128:12, 129:7, 130:25, 131:5, 132:21, 136:20, 139:20, 150:27, 151:13, 152:2, 152:7, 153:7, 153:11, 153:29, 154:2, 158:8, 159:20, 159:26,

164:29, 167:22, 175:1, 175:8, 178:8, 181:10, 181:12, 186:24, 186:25, 187:5, 188:11, 188:16, 192:5, 197:19
Court' [1] - 186:27
court's [3] - 89:28, 90:7, 91:4
Court's [11] - 91:8, 136:21, 156:8, 164:26, 165:17, 166:2, 172:14, 190:3, 191:7, 193:23, 194:14
Courts [1] - 24:2
courts [18] - 5:21, 16:9, 23:28, 24:5, 27:5, 27:6, 27:22, 35:2, 43:20, 85:2, 87:28, 114:11, 127:9, 135:25, 148:19, 150:14, 154:19, 155:14
courts' [1] - 158:3
courts.. [1] - 182:13
court's [1] - 172:15
cover [8] - 20:15, 78:17, 81:19, 98:26, 112:3, 133:27, 134:18, 201:2
covered [31] - 8:23, 11:21, 11:26, 11:27, 31:26, 36:23, 38:14, 38:21, 39:4, 39:8, 39:23, 78:16, 104:15, 140:13, 140:14, 142:28, 143:9, 144:11, 144:12, 144:15, 144:20, 144:26, 145:13, 145:20, 146:16, 146:29, 147:7, 147:13, 147:17, 147:19, 147:21
covers [2] - 12:3, 112:22
Covert.. [1] - 188:8
create [2] - 151:22, 169:10
created [4] - 19:14, 123:9, 123:13, 172:7
creates [3] - 92:29, 93:17, 98:22
creating [1] - 106:23
Credit [1] - 177:11
credit [2] - 178:7, 181:14
crime [2] - 60:19, 117:12
Crimes [1] - 108:29

crimes [2] - 145:2, 173:14
criminal [14] - 12:3, 21:27, 22:9, 38:17, 75:7, 112:11, 117:10, 123:28, 124:8, 131:21, 172:29, 189:1, 189:5, 189:11
Criminal [1] - 108:29
criminals [1] - 117:12
criteria [3] - 7:2, 88:4, 144:27
critical [2] - 122:23, 201:10
critically [1] - 165:25
criticism [4] - 17:8, 76:5, 176:9, 198:23
criticisms [2] - 48:29, 49:2
cross [5] - 101:14, 108:19, 113:25, 121:3, 142:19
cross-referenced [1] - 101:14
cross-references [1] - 108:19
crucial [1] - 49:1
cumulatively [1] - 148:8
curb [2] - 180:10, 183:27
Curiae [1] - 84:28
curiae [2] - 85:8, 85:25
curiously [1] - 140:26
CURRAN [1] - 2:11
current [1] - 42:11
CUSH [1] - 2:29
customer [1] - 106:4

D

d [1] - 147:3
D [2] - 128:26, 141:10
d(1) [2] - 125:15, 125:17
d(3) [1] - 125:2
damage [7] - 24:3, 24:8, 24:16, 40:16, 40:19, 136:19, 139:6
damages [52] - 17:25, 17:27, 18:15, 23:25, 25:2, 25:7, 32:11, 40:14, 79:16, 79:18, 91:26, 93:21, 112:7, 127:27,

127:28, 128:20, 128:23, 129:16, 129:23, 132:25, 132:28, 133:3, 133:13, 133:27, 134:28, 135:2, 135:3, 135:4, 135:5, 135:7, 135:12, 135:21, 135:23, 136:1, 136:18, 136:28, 137:14, 137:24, 138:1, 138:4, 138:8, 138:9, 138:15, 138:20, 138:23, 138:24, 143:19, 143:20, 143:21, 150:28, 191:22, 196:14
damages' [23] - 40:15, 91:20, 132:21, 132:27, 133:19, 133:24, 134:7, 134:9, 134:10, 134:16, 134:18, 134:21, 134:24, 134:25, 134:28, 135:1, 135:6, 135:14, 135:20, 135:22, 135:26, 135:28
Data [2] - 5:5, 12:2
data [54] - 7:4, 7:19, 9:1, 9:7, 13:1, 14:8, 14:13, 14:14, 15:4, 16:4, 19:29, 20:5, 20:26, 21:18, 21:22, 22:12, 22:14, 23:17, 24:17, 25:17, 25:21, 26:3, 30:23, 38:7, 38:8, 42:9, 42:10, 42:16, 42:17, 43:1, 43:7, 43:14, 53:2, 55:6, 59:27, 59:29, 67:25, 69:17, 69:24, 76:2, 78:14, 81:16, 122:28, 123:1, 139:16, 139:20, 145:5, 145:7, 169:18, 169:23, 193:8
DATA [1] - 1:7
data-gathering [1] - 169:18
databases [1] - 177:21
date [2] - 12:15, 53:27
dates [1] - 22:21
DAY [1] - 1:18
days [5] - 32:15, 57:12, 71:18, 85:3, 173:16

de [5] - 127:24, 128:13, 153:28, 181:8, 182:18
DEA [1] - 188:5
deal [17] - 26:2, 27:6, 93:27, 96:16, 99:1, 101:21, 101:23, 114:2, 115:28, 141:12, 154:21, 169:2, 177:2, 195:7, 197:16, 199:19, 199:24
dealing [21] - 16:27, 17:5, 25:11, 31:5, 35:10, 46:15, 52:2, 52:17, 52:21, 58:3, 61:15, 62:5, 85:28, 93:3, 99:7, 101:3, 107:15, 108:7, 122:8, 157:27, 201:1
deals [23] - 9:2, 12:13, 16:14, 46:20, 50:21, 50:25, 51:18, 51:21, 51:25, 51:27, 52:12, 57:15, 86:4, 99:1, 111:18, 118:14, 127:15, 144:20, 145:23, 151:19, 169:1, 199:21, 199:23
dealt [7] - 70:19, 96:4, 96:6, 96:19, 103:7, 111:16, 139:29
death [1] - 61:3
decide [7] - 7:1, 44:10, 45:2, 76:1, 153:7, 158:27, 161:2
decided [6] - 45:16, 81:9, 155:23, 155:26, 177:2, 183:22
decides [2] - 76:21, 125:10
Decision [5] - 6:9, 6:15, 6:27, 8:27, 12:16
decision [53] - 8:11, 8:21, 12:12, 14:4, 27:10, 28:16, 29:11, 29:14, 34:7, 37:12, 44:6, 44:28, 45:3, 45:6, 48:28, 48:29, 49:14, 88:13, 88:24, 90:16, 94:25, 95:7, 95:11, 126:19, 126:20, 129:4, 130:16, 130:23, 136:22, 142:13, 146:14, 146:15, 147:22, 150:13, 152:6, 153:6, 154:15, 155:21, 155:22,

156:8, 156:9, 156:14, 165:3, 169:8, 173:8, 176:22, 177:1, 178:20, 185:10, 185:18, 186:10, 186:23, 186:24

Decisions [8] - 9:9, 9:19, 42:3, 42:13, 42:25, 43:4, 43:19, 43:28

decisions [17] - 5:21, 5:24, 8:10, 43:13, 44:2, 44:4, 48:22, 73:13, 95:1, 95:5, 123:8, 146:16, 165:15, 190:3, 191:8, 193:23, 194:14

decisions.. [1] - 162:21

declaration [2] - 156:23, 168:28

declaratory [1] - 152:26

declare [1] - 5:21

declared [2] - 27:20, 169:29

decline [1] - 165:13

declined [1] - 135:4

decrease [2] - 180:12, 183:29

decree [2] - 151:8, 151:10

defamation [3] - 134:4, 135:2, 138:9

defence [8] - 22:2, 50:22, 81:27, 81:29, 82:19, 87:23, 99:1, 118:21

defendant [5] - 28:11, 82:1, 94:5, 151:7, 178:19

DEFENDANT [2] - 2:9, 2:14

defendants [2] - 111:23, 157:3

DEFENDANTS [1] - 1:13

Defendants [3] - 89:17, 111:27, 157:6

defendants.. [1] - 189:5

defense [1] - 64:17

defensive [2] - 21:24, 22:8

defer [1] - 94:15

deficiencies [3] - 15:24, 35:16, 44:8

define [3] - 8:22, 135:20, 182:21

defined [12] - 19:27, 31:13, 37:4, 60:6, 79:8, 103:9, 104:3, 110:26, 120:11, 120:14, 152:14, 152:15

definition [26] - 31:14, 36:27, 38:3, 38:5, 38:17, 39:8, 39:13, 39:15, 51:29, 58:22, 59:5, 62:19, 62:29, 63:22, 63:24, 66:5, 72:14, 79:2, 96:22, 96:24, 99:11, 99:16, 104:1, 112:18, 114:6, 147:13

definitions [10] - 36:25, 59:8, 61:16, 63:22, 63:27, 72:15, 96:21, 119:7, 146:27, 150:1

definitive [1] - 39:5

degree [3] - 55:23, 179:14, 184:20

delayed [1] - 153:13

deleted [1] - 92:17

deleterious [1] - 191:15

deliberate [1] - 134:29

delight [1] - 176:17

delights [1] - 176:15

delineation [1] - 172:15

deliver [2] - 45:13, 45:14

delivered [1] - 43:25

demands [2] - 180:13, 184:1

demonstrate [11] - 28:21, 30:1, 30:8, 55:15, 66:13, 157:16, 161:19, 163:13, 164:14, 174:24, 180:9

demonstrating [2] - 163:3, 178:17

demonstration [1] - 164:3

denial [1] - 152:19

denied [3] - 89:11, 151:2, 157:5

Denmark [2] - 11:27, 145:14

dense [1] - 149:5

densely [1] - 106:16

deny [1] - 151:14

denying [1] - 90:27

Department [6] - 36:21, 131:19, 131:23, 131:25, 142:5, 146:1

departmental [1] - 198:28

deployed [1] - 36:25

derived [2] - 18:24, 172:19

derives [1] - 182:7

deriving [1] - 186:23

derogations [1] - 7:7

described [9] - 20:1, 48:15, 87:25, 101:13, 120:12, 126:4, 144:14, 161:20, 172:6

describes [1] - 192:19

describing [2] - 48:2, 192:12

descriptive [1] - 12:9

designate [11] - 11:21, 11:22, 46:29, 83:26, 84:13, 85:6, 144:25, 145:29, 146:14, 146:15, 147:7

designated [41] - 11:20, 11:25, 31:26, 32:22, 32:28, 33:1, 33:2, 33:23, 36:18, 36:20, 36:22, 37:5, 37:12, 37:23, 37:29, 38:15, 38:22, 38:28, 39:21, 46:29, 51:5, 89:3, 100:22, 100:27, 103:5, 140:11, 141:15, 141:18, 141:20, 142:2, 142:6, 143:25, 143:29, 145:13, 145:24, 145:27, 146:5, 146:7, 146:9, 146:15, 147:2

designating [1] - 85:10

designation [6] - 144:20, 145:16, 145:20, 145:23, 146:11, 147:6

Designation [2] - 84:9, 85:1

designed [14] - 20:2, 55:4, 57:20, 59:15, 59:26, 59:28, 65:13, 65:26, 66:15, 72:5, 113:8, 130:3, 180:11, 183:28

designed.. [1] - 165:21

designed [1] - 102:3

desired [1] - 124:4

destruction [1] - 64:8

detail [11] - 22:23, 45:20, 78:8, 78:10, 84:23, 117:14, 118:11, 148:28, 154:8, 169:1, 199:25

detailed [1] - 132:7

details [1] - 85:21

detecting [1] - 38:16

detection [1] - 145:1

determination [11] - 33:26, 33:29, 53:24, 56:7, 72:29, 125:1, 126:10, 126:13, 126:17, 146:20, 146:24

determinations [1] - 154:2

determine [9] - 71:27, 85:18, 127:23, 127:24, 128:12, 128:14, 153:9, 165:20, 179:17

determined [6] - 8:18, 43:19, 129:17, 145:2, 152:26, 190:18

determines [4] - 61:2, 123:11, 129:7, 145:26

determining [4] - 91:25, 163:11, 182:4, 199:12

deters [1] - 170:22

detrimental [2] - 126:21, 170:6

developed [4] - 189:14, 190:21, 192:29, 195:28

developments [1] - 12:11

device [9] - 20:19, 51:23, 99:17, 99:25, 99:26, 99:28, 100:5, 100:11, 100:25

devices [5] - 20:10, 20:13, 51:22, 99:10, 108:10

devoted [1] - 15:18

diagnosis [1] - 131:10

differ [1] - 155:14

difference [5] - 26:14, 87:8, 101:8, 155:8, 171:19

differences [3] - 154:7, 154:8, 186:15

different [21] - 17:4, 17:5, 17:12, 18:2, 18:4, 18:12, 41:22, 94:29, 95:6, 102:17, 108:24, 114:13, 114:14, 129:25, 149:16, 149:18, 155:21, 179:10, 181:24, 187:3, 196:29

differently [2] - 189:3, 191:10

differently' [1] - 155:23

differing [1] - 191:8

differs [1] - 191:5

difficult [5] - 49:2, 139:17, 183:11, 184:10, 185:3

difficulties [3] - 88:8, 147:10, 186:2

difficulty [4] - 87:28, 88:9, 175:25, 185:26

DIGITAL [1] - 2:29

Digital [3] - 156:2, 169:20, 185:10

diplomatic [3] - 192:1, 197:8, 199:15

direct [7] - 8:25, 14:5, 56:1, 75:26, 76:9, 163:6, 169:27

directed [5] - 41:9, 75:11, 87:3, 128:21, 189:26

directing [2] - 50:16, 169:22

direction [1] - 13:5

directions [2] - 6:5, 176:8

directive [6] - 10:23, 77:20, 77:21, 78:1, 174:13, 198:14

Directive [11] - 7:3, 12:27, 148:14, 185:29, 197:21, 197:28, 199:28, 200:2, 200:10, 200:12, 200:15

Directives [2] - 75:21, 77:16

directives [3] - 75:16, 174:20, 198:17

Directives" [1] - 75:22

directly [6] - 38:28, 39:22, 39:29, 76:6, 152:11, 159:1

Director [19] - 53:25, 57:1, 65:11, 65:24, 66:3, 66:21, 70:28, 75:25, 76:7, 76:21, 77:9, 89:23, 93:29, 95:18, 102:2, 102:3, 156:16, 159:13, 163:9

director [1] - 50:27

directs [1] - 174:11

disability [2] - 131:15, 131:27

disadvantaging [1] - 198:24
disagree [2] - 155:18, 155:19
disagreement [1] - 155:5
discernable [1] - 92:1
disclos[ure] [2] - 93:15, 93:19
disclose [10] - 18:23, 32:6, 61:4, 62:20, 119:12, 119:22, 119:24, 130:29, 131:10, 172:19
disclosed [10] - 17:27, 17:29, 18:18, 60:27, 62:12, 79:12, 80:12, 97:12, 98:16, 101:5
discloses [2] - 34:16, 80:25
disclosing [2] - 61:25, 116:14
disclosure [22] - 19:4, 20:9, 25:3, 25:12, 34:17, 34:25, 91:13, 99:1, 106:4, 119:17, 119:20, 119:25, 120:18, 122:18, 123:11, 123:14, 123:18, 123:24, 131:2, 131:5, 132:17, 137:11
Disclosure" [1] - 119:10
disclosures [1] - 141:4
discounted [1] - 187:10
discovered [1] - 177:25
discovery [1] - 30:20
discretion [2] - 153:16, 163:10
discrimination [1] - 130:5
discussed [5] - 25:5, 114:15, 161:15, 170:14, 170:26
discussing [3] - 11:18, 163:24, 175:2
discussion [2] - 125:28, 184:18
discussions [1] - 13:7
dismiss [2] - 89:11, 151:13
dismissed [3] - 94:7, 151:2, 178:2
dispositive [1] - 90:1
dispute [1] - 158:26
dissatisfaction [1] - 172:12
disseminate [3] - 59:23, 60:15, 103:14
disseminated [2] - 60:7, 60:27
disseminating [1] - 60:18
dissemination [8] - 20:3, 59:18, 60:14, 103:11, 165:23, 180:10, 183:27, 184:11
dissent [1] - 198:23
distinct [2] - 129:25, 200:2
distinction [4] - 9:22, 105:16, 184:15, 200:5
distinctions [1] - 34:11
distinguished [2] - 112:10, 122:13
distinguishing [1] - 19:25
distress [7] - 131:4, 132:19, 132:29, 133:4, 135:25, 135:27, 135:29
distress' [1] - 91:27
district [9] - 32:21, 84:13, 90:7, 91:4, 94:3, 94:6, 95:18, 95:23, 127:9
District [16] - 25:1, 49:12, 83:26, 84:16, 89:10, 89:15, 111:16, 132:19, 132:26, 157:1, 178:2, 188:2
divided [2] - 47:21, 103:23
division [1] - 114:10
divorced [1] - 183:4
divulge [1] - 106:7
doctrine [5] - 148:17, 148:20, 158:24, 182:6, 196:20
document [5] - 45:27, 155:1, 175:4, 175:5, 176:3
documents [4] - 52:4, 102:7, 176:11, 188:1
Doe [6] - 134:10, 136:12, 137:29, 138:2, 148:17, 195:23
doe [1] - 137:6
doe's [1] - 137:17
DOHERTY [1] - 2:15
dollar [2] - 138:6, 139:4
domestic [1] - 83:3
done [6] - 19:8, 50:8, 53:2, 71:18, 101:6, 175:28
DONNELLY [1] - 2:5
DOT [3] - 131:20, 132:6, 132:17
double [1] - 115:16
doubt [4] - 24:14, 41:14, 134:27, 138:14
doubts [3] - 8:4, 44:1, 44:7
down [25] - 12:27, 54:19, 59:12, 61:18, 63:28, 65:7, 72:2, 73:27, 84:3, 92:11, 100:20, 116:24, 120:16, 122:12, 123:23, 124:15, 124:20, 149:11, 167:19, 185:13, 185:14, 192:21, 195:8, 200:11
Draft [5] - 6:9, 6:14, 6:27, 8:26, 12:16
draft [3] - 7:15, 8:11, 27:10
drafting [1] - 189:19
Dragnet [1] - 11:5
draw [13] - 61:28, 81:13, 94:21, 119:27, 121:22, 123:21, 139:9, 169:12, 171:18, 173:9, 196:10, 200:4, 200:20
drawing [1] - 5:20
drawn [2] - 75:18
draws [2] - 75:15, 76:23
drew [2] - 9:22, 78:19
dropped [1] - 46:25
Drug [1] - 187:28
DUBLIN [7] - 2:7, 2:12, 2:17, 2:23, 2:27, 2:32, 3:5
due [11] - 14:1, 23:26, 32:25, 34:11, 40:26, 49:20, 51:14, 88:7, 143:14, 154:4, 201:24
During [1] - 95:17
during [2] - 54:11, 201:20
duties [6] - 82:3, 82:17, 99:3, 120:3, 120:10, 123:2
duty [1] - 151:13

E

e [3] - 65:3, 71:14, 146:21
e)(1) [1] - 60:6
e)(4)(D) [3] - 120:12, 120:23
e-mail [3] - 53:5, 53:6, 166:27
e-mails [1] - 193:5
e.g [3] - 23:17, 173:5, 190:7
earliest [1] - 8:19
early [2] - 11:11, 114:23
easier [1] - 181:29
easiest [1] - 50:15
easily [1] - 63:1
Eavesdropping [1] - 11:5
economic [6] - 37:28, 130:14, 135:12, 144:26, 147:1, 167:10
edition [1] - 74:20
effect [19] - 36:1, 50:26, 100:15, 117:17, 126:28, 127:5, 130:9, 130:12, 131:6, 137:19, 141:2, 141:8, 143:17, 143:18, 148:16, 150:8, 169:27, 170:1, 170:20
effect' [2] - 34:18, 171:14
effective [8] - 11:24, 32:15, 42:5, 42:17, 42:27, 43:9, 53:27, 123:17
effectively [4] - 36:8, 69:15, 145:3, 196:27
effectiveness [3] - 15:29, 33:14, 34:27
efforts [2] - 117:11, 171:7
eight [1] - 93:27
Eisentrager [1] - 195:8
either [6] - 25:8, 42:10, 58:13, 113:17, 146:14, 176:11
elaborate [2] - 68:25, 114:3
elastic [1] - 160:7
electronic [54] - 17:21, 18:16, 18:17, 18:24, 24:23, 49:16, 50:25, 50:29, 58:25, 59:11, 60:23, 62:9, 66:8, 67:19, 72:15, 75:10, 75:27, 76:9, 76:18, 77:11, 77:19, 78:18, 78:28, 79:10, 79:11, 80:20, 80:23, 80:26, 80:28, 81:7, 81:19, 82:3, 82:25, 83:2, 83:3, 83:8, 83:15, 84:19, 86:1, 86:10, 86:16, 87:3, 96:7, 96:13, 96:29, 98:9, 99:29, 105:6, 105:11, 105:12, 108:3, 163:21, 174:10, 174:19
ELECTRONIC [1] - 3:1
Electronic [10] - 22:17, 22:20, 22:25, 22:29, 24:20, 47:9, 47:20, 104:8, 104:19, 107:16
element [3] - 111:23, 158:13, 167:7
elements [4] - 54:25, 71:28, 72:3, 72:22
elevat[e] [1] - 182:17
elevating [1] - 182:25
elided [2] - 179:3, 181:7
eligible [1] - 85:8
elimination [1] - 135:21
emotional [9] - 91:27, 131:4, 132:19, 132:28, 133:4, 135:24, 135:27, 135:29, 143:21
emphasised [1] - 24:14
emphases [1] - 7:27
emphasized [1] - 95:23
emphatically [1] - 190:11
employee [1] - 150:29
employees [5] - 62:13, 97:13, 120:1, 122:29, 177:24
employees' [1] - 93:16
employers [1] - 177:23
employs [1] - 133:20

empowers [1] - 69:15
en [1] - 157:6
enable [2] - 20:15, 25:21
enacted [7] - 35:11, 49:10, 50:10, 104:16, 104:18, 149:3, 168:26
enactment [2] - 32:16, 163:20
encompass [3] - 81:21, 96:28, 121:16
end [3] - 8:11, 9:15, 196:2
Ending [1] - 11:5
endorse [3] - 165:1, 165:13, 194:27
ends [1] - 53:11
enforceable [2] - 10:15, 200:13
enforcement [13] - 25:28, 82:2, 82:9, 82:16, 87:23, 99:2, 117:10, 117:20, 118:2, 123:29, 124:4, 124:8, 191:17
Enforcement [1] - 187:28
engage [10] - 8:2, 41:12, 43:26, 50:29, 66:24, 67:11, 67:12, 76:1, 85:15, 168:26
engaged [8] - 35:27, 75:7, 77:2, 82:2, 85:17, 111:25, 112:25, 170:3
engages [2] - 71:8, 80:20
engaging [2] - 81:6, 81:19
engine' [1] - 177:20
English [1] - 182:12
enjoin [1] - 128:9
enjoy [2] - 190:18, 195:20
enormous [2] - 53:8, 148:25
ensure [10] - 9:6, 33:25, 42:28, 57:21, 57:27, 59:26, 59:28, 63:10, 65:14, 160:9
ensures [2] - 7:4, 14:12
ensuring [1] - 200:8
entail [2] - 179:14, 184:19
enter [3] - 56:4, 72:27, 86:9
entered [2] - 144:29, 151:8
entering [1] - 38:1
enterprising [1] - 168:8
entirely [8] - 5:25, 13:17, 31:10, 51:8, 51:9, 62:23, 130:4, 184:7
entities [5] - 25:8, 38:4, 38:8, 114:8, 114:11
entitle [1] - 173:18
entitled [21] - 45:14, 79:15, 88:11, 118:26, 120:9, 128:20, 137:12, 137:29, 138:3, 138:27, 139:6, 141:27, 150:19, 150:26, 175:29, 188:10, 188:17, 190:8, 191:4, 193:14, 195:4
entitlement [1] - 127:28
entitles [2] - 137:7, 186:8
entity [6] - 38:14, 38:21, 38:24, 38:29, 39:23, 39:25
enumerated [1] - 25:25
equal [3] - 91:19, 129:15, 191:11
equally [3] - 35:17, 35:18, 145:16
equipment [2] - 51:24, 82:14
equitable [1] - 151:14
equivalence [1] - 186:3
equivalent [4] - 98:4, 152:19, 177:8, 185:27
error [1] - 154:5
especially [1] - 158:25
essence [2] - 130:28, 156:13
essential [2] - 116:12, 186:3
essentially [2] - 48:19, 181:9
establish [21] - 19:4, 19:8, 27:26, 28:27, 34:25, 42:9, 85:9, 123:10, 139:7, 157:18, 158:14, 160:3, 160:19, 166:13, 166:18, 167:15, 171:13, 180:19, 181:3, 190:19, 195:26
established [8] - 21:16, 38:24, 39:25, 85:2, 94:10, 103:2, 138:17, 167:9
establishing [3] - 44:3, 174:4, 178:16
establishing' [1] - 162:27
etc. [1] - 117:12
ethnicity [1] - 198:24
EU [55] - 7:5, 7:19, 9:7, 11:25, 12:2, 13:7, 14:7, 14:14, 15:4, 15:10, 15:23, 16:4, 20:5, 20:25, 20:26, 21:17, 22:12, 27:13, 28:19, 28:20, 29:10, 31:19, 31:21, 31:29, 32:20, 33:13, 33:21, 34:9, 35:12, 35:14, 35:20, 35:22, 35:26, 38:7, 38:28, 40:22, 43:1, 43:7, 43:18, 44:8, 44:22, 63:4, 88:5, 142:21, 143:12, 144:1, 144:4, 144:8, 145:11, 145:12, 148:8, 148:12, 193:5
EU-US [1] - 13:7
Europe [1] - 35:21
EUROPE [1] - 2:29
European [15] - 5:11, 8:5, 10:6, 14:23, 27:11, 32:20, 45:1, 155:29, 167:24, 169:12, 171:19, 185:8, 185:14, 186:12, 186:26
evaluate [1] - 177:24
evaluates [1] - 172:8
event [6] - 18:22, 32:7, 33:22, 42:17, 43:10, 94:17
evidence [21] - 14:5, 15:18, 21:28, 22:3, 22:9, 30:29, 41:9, 45:15, 53:9, 60:19, 73:20, 112:16, 118:14, 121:28, 153:23, 162:3, 163:1, 186:19, 188:3, 189:1, 201:3
evidentiary [3] - 30:17, 30:19, 174:4
ex [4] - 13:17, 51:9, 71:9, 86:9
exactly [1] - 116:23
examination [1] - 35:25
examine [2] - 14:11, 128:13
examined [1] - 8:17
example [16] - 19:1, 21:28, 35:27, 38:23, 55:25, 113:12, 122:16, 162:17, 163:21, 165:4, 165:20, 169:21, 183:3, 183:10, 184:4, 184:9
exceeds [1] - 105:8
except [9] - 36:9, 80:21, 81:20, 98:29, 116:15, 117:4, 119:14, 119:22, 125:26
Except [3] - 82:28, 105:3, 152:23
exception [8] - 37:17, 57:9, 121:18, 121:20, 122:12, 122:15, 123:21, 145:14
exceptions [10] - 9:23, 25:26, 79:20, 80:5, 106:9, 118:11, 119:19, 119:26, 119:28, 140:22
excess [1] - 153:20
excluding [1] - 11:26
exclusive [8] - 80:23, 82:25, 83:1, 110:17, 110:22, 142:26, 142:27, 143:8
Exclusive [2] - 143:5, 143:7
exclusively [1] - 198:26
excursion [1] - 200:26
executes [1] - 98:28
executive [6] - 10:13, 26:8, 26:10, 26:13, 118:20, 159:24
Executive [11] - 26:4, 36:4, 69:22, 69:26, 118:19, 132:8, 164:10, 170:19, 191:24, 198:13, 198:16
exegesis [1] - 192:23
exempt [5] - 36:8, 117:3, 117:17, 117:25, 164:8
exempted [2] - 36:3, 118:16
exemption [5] - 35:29, 117:16, 118:15, 122:17, 122:24
exemptions [8] - 32:1, 36:11, 115:3, 116:26, 116:29, 117:22, 128:16, 140:22
Exemptions [1] - 116:24
Exemptions' [1] - 116:25
exercise [5] - 9:12, 163:10, 165:3, 169:15, 169:28
exercises [2] - 190:2, 194:29
exist [3] - 27:17, 69:11, 151:24
exist.. [2] - 179:11, 181:21
existed [1] - 182:23
existence [2] - 28:27, 169:17
existing [3] - 25:15, 32:17, 35:3
exists [2] - 123:5, 133:11
expand [1] - 135:16
expansion [1] - 159:1
expect [2] - 35:3, 35:11
expenditure [1] - 168:10
expenditures [1] - 159:12
experienced [1] - 171:14
expert [5] - 14:16, 118:13, 156:10, 175:17, 200:29
expertise [1] - 85:22
experts [23] - 10:18, 14:20, 39:7, 44:13, 46:12, 53:9, 64:22, 73:20, 94:16, 114:2, 114:15, 121:13, 121:17, 121:29, 130:26, 154:19, 154:21, 155:3, 155:18, 175:3, 175:12, 175:15, 184:26
experts' [3] - 6:17, 121:23, 154:29
expired [1] - 174:21
explain [8] - 21:5, 45:20, 46:7, 46:10, 94:28, 194:10, 200:21, 200:27
explained [4] -

112:12, 158:5, 165:8, 182:20
explaining [1] - 22:23
explains [1] - 7:28
explicit [1] - 94:22
explicitly [1] - 93:9
exporter [1] - 42:11
express [2] - 80:22, 81:1
expressed [2] - 114:14, 133:9
expressed'.. [1] - 91:6
expresses [1] - 7:12
expression [1] - 100:2
expressly [6] - 151:16, 152:23, 156:9, 161:29, 190:28, 191:8
extend [3] - 148:3, 194:25, 201:11
extended [4] - 11:17, 33:20, 35:12, 139:24
extending [1] - 40:17
extends [3] - 32:17, 147:27, 192:17
extension [3] - 12:29, 31:8, 140:10
extensive [1] - 136:8
extent [23] - 6:21, 7:6, 11:18, 14:6, 15:29, 16:6, 17:8, 18:29, 25:6, 26:21, 29:7, 32:5, 33:8, 36:11, 42:25, 55:5, 55:11, 100:8, 118:18, 140:21, 153:6, 153:27, 155:20
external [2] - 123:8, 123:14
extracting [1] - 185:7
extraterritorial [1] - 190:8
extremely [3] - 64:23, 94:18, 201:8

F

F-I-K-R-E [1] - 111:4
F.3d [1] - 157:6
FAA [6] - 131:11, 131:17, 131:22, 132:2, 132:6, 148:16
FAA's [1] - 131:20
face [5] - 33:12, 38:3, 130:6, 148:21, 169:5
Facebook [7] - 5:6,

7:17, 9:1, 39:2, 39:3, 40:27
FACEBOOK [1] - 1:12
Facebook's [1] - 41:9
faced [1] - 186:22
faces [1] - 143:13
facilities [4] - 75:9, 76:14, 76:27, 87:2
facility [2] - 105:6, 105:9
fact [59] - 5:20, 9:9, 9:15, 17:14, 18:5, 19:24, 21:29, 23:9, 27:29, 30:9, 30:28, 44:12, 48:5, 53:6, 75:6, 75:7, 75:16, 78:6, 79:24, 86:23, 88:3, 97:17, 99:4, 126:22, 147:21, 152:14, 155:9, 160:13, 160:20, 161:19, 161:24, 167:10, 176:14, 178:3, 178:6, 178:9, 178:12, 178:18, 178:24, 179:3, 179:8, 179:18, 179:22, 180:5, 180:19, 181:4, 181:17, 182:5, 182:27, 183:5, 183:15, 183:23, 184:23, 185:27, 186:2, 187:10, 200:11, 200:13
fact'.. [1] - 160:28
facto [1] - 182:18
facto' [3] - 179:11, 181:9, 181:20
factors [1] - 50:9
facts [7] - 86:14, 153:27, 153:28, 163:3, 169:20, 184:29, 200:12
facts'.. [1] - 163:2
factual [4] - 16:1, 30:17, 169:1, 185:4
factually [1] - 172:1
fail [2] - 91:1, 162:3
failed [10] - 131:9, 150:29, 157:16, 157:18, 168:21, 177:28, 178:11, 179:13, 184:14, 188:6
fails [6] - 125:4, 126:7, 126:25, 160:24, 177:15, 184:4
failure [2] - 152:19, 162:5

faint [1] - 88:26
Fair [1] - 177:11
fair [1] - 154:28
fairly [16] - 28:10, 110:9, 157:19, 157:22, 160:5, 160:20, 161:25, 164:18, 166:14, 166:22, 168:5, 168:25, 170:27, 177:1, 178:18, 185:3
fairness [4] - 15:16, 33:26, 126:10
fall [2] - 38:5, 169:27
falls [1] - 25:25
false [3] - 132:3, 180:11, 183:28
familiar [3] - 103:10, 150:16, 154:9
fanciful [1] - 168:17
far [8] - 36:20, 37:14, 42:26, 60:13, 85:24, 100:17, 133:25, 176:10
fares [1] - 166:20
favor [3] - 132:24, 133:11, 157:2
favour [4] - 42:9, 42:16, 86:24, 133:16
favourable [4] - 28:16, 92:4, 160:6, 178:20
FB [1] - 42:23
FB-I [1] - 42:23
FBI [5] - 50:5, 89:23, 93:29, 95:18, 111:2
FBI's [1] - 111:8
FCRA [1] - 177:11
FCRA's [2] - 177:29, 184:2
fear [14] - 30:2, 161:1, 163:6, 167:11, 167:17, 168:11, 168:16, 169:8, 169:9, 170:4, 170:21, 170:29, 174:25
feared [2] - 157:17, 157:19
fears [2] - 29:29, 168:3
feasible [2] - 199:12, 199:16
February [7] - 10:7, 11:24, 12:20, 13:24, 31:28, 32:13, 142:6
FEBRUARY [3] - 1:18, 5:2, 202:4
federal [19] - 11:22, 16:9, 23:29, 25:16, 30:14, 32:5, 32:21,

32:27, 33:6, 89:5, 141:15, 145:24, 145:27, 158:3, 158:8, 162:26, 165:6, 177:27, 178:15
Federal [27] - 30:13, 30:23, 36:28, 37:3, 37:4, 38:15, 39:22, 62:12, 83:13, 83:17, 86:12, 89:23, 91:15, 93:15, 97:12, 101:5, 102:2, 130:18, 131:10, 136:26, 138:19, 151:10, 154:20, 158:28, 188:12, 189:22, 196:18
federal-court [1] - 158:8
fees [4] - 79:19, 128:2, 128:23, 129:18
feet [1] - 53:6
few [7] - 16:14, 48:1, 90:29, 92:25, 173:15, 177:4, 193:18
fewer [3] - 83:27, 84:15, 85:6
fields [1] - 159:5
Fifth [10] - 188:10, 188:18, 189:3, 189:10, 190:9, 190:16, 191:12, 192:16, 195:4, 195:11
fifth [1] - 166:6
Fikre [1] - 111:1
file [2] - 74:2, 77:20
filed [4] - 42:22, 77:28, 132:5, 177:26
files [1] - 119:1
files' [1] - 119:4
fill [1] - 41:26
final [12] - 44:28, 45:2, 48:21, 48:22, 150:12, 150:13, 151:29, 152:12, 152:14, 152:24, 186:10
Finally [1] - 174:10
finally [6] - 13:24, 93:26, 94:3, 95:28, 146:27, 197:12
Financial [2] - 22:18, 25:11
financial [3] - 25:12, 130:13, 139:17
findings [5] - 40:21, 44:12, 86:7, 153:15
fine [2] - 105:26, 107:26
fined [1] - 132:4

finger [1] - 139:26
finish [2] - 201:16, 201:19
finished [3] - 95:29, 96:2, 200:26
First [8] - 86:27, 102:23, 161:27, 169:16, 169:28, 172:1, 181:9, 192:25
first [46] - 5:10, 7:5, 10:22, 23:28, 38:20, 41:23, 46:14, 46:15, 47:1, 50:12, 57:25, 58:3, 58:17, 59:9, 72:1, 75:22, 79:23, 86:20, 88:29, 93:18, 96:21, 102:13, 106:21, 114:25, 115:2, 115:15, 116:9, 116:10, 116:27, 117:19, 119:7, 120:1, 120:5, 121:12, 125:11, 134:6, 134:9, 134:23, 139:10, 143:3, 149:1, 156:7, 156:20, 168:21, 176:26, 192:6
firstly [3] - 87:20, 104:27, 140:26
FISA [31] - 20:1, 21:17, 27:18, 29:16, 47:6, 78:23, 78:24, 78:25, 89:9, 89:22, 90:23, 91:11, 92:13, 93:1, 108:5, 108:6, 108:8, 108:12, 113:1, 113:17, 113:23, 113:26, 156:25, 157:20, 157:22, 157:27, 162:23, 163:20, 163:23, 164:8, 174:21
FISA's [1] - 90:2
FISA-exempt [1] - 164:8
FISC [9] - 62:28, 67:10, 84:24, 85:29, 97:2, 100:16, 174:13, 175:1, 197:19
FISC's [1] - 162:7
fit [2] - 23:4, 130:26
FITZGERALD [1] - 2:21
five [6] - 5:11, 5:12, 45:21, 92:10, 122:11, 199:21
fixed [1] - 129:20
flow [2] - 139:18, 171:8
flowed [1] - 50:2

flowing [2] - 69:18, 105:21
flows [3] - 53:2, 53:10, 147:12
fly [1] - 111:9
fly' [1] - 111:8
focus [1] - 55:10
focussed [1] - 24:22
focussing [1] - 41:1
following [12] - 1:23, 17:16, 23:21, 27:25, 33:17, 44:29, 71:24, 87:10, 92:23, 155:2, 198:10, 201:20
Following [1] - 187:28
follows [7] - 12:21, 32:28, 36:13, 40:18, 42:15, 89:28, 124:16
FOLLOWS [2] - 5:1, 110:2
foot [4] - 130:16, 142:13, 175:4, 200:15
footnote [2] - 90:5, 90:10
FOR [4] - 2:19, 2:25, 2:29, 3:1
forbids [1] - 151:17
force [4] - 10:14, 26:15, 158:26, 197:5
Forces [1] - 159:15
forces [1] - 191:19
foreclose [1] - 36:1
foreclosed [1] - 170:23
foregoing [1] - 154:2
foreign [75] - 13:16, 29:18, 38:21, 39:23, 44:13, 51:28, 53:29, 59:23, 60:5, 60:10, 63:17, 63:20, 63:25, 64:5, 64:8, 64:11, 64:12, 64:14, 64:15, 64:19, 64:24, 64:26, 66:24, 75:6, 79:7, 79:8, 86:17, 86:19, 86:26, 87:4, 87:5, 98:12, 98:27, 101:25, 102:8, 102:18, 103:14, 118:22, 144:25, 144:26, 147:6, 147:8, 159:5, 159:21, 160:22, 162:11, 162:16, 163:4, 163:14, 164:4, 164:5, 164:6, 164:15, 164:27, 166:3, 166:6, 166:7, 166:9, 173:4, 173:12, 173:23, 174:7, 188:23, 189:27, 191:18, 191:23, 194:26, 196:16, 198:27, 199:2, 199:6
Foreign [31] - 16:19, 16:23, 17:13, 18:11, 31:15, 46:16, 49:7, 49:29, 50:9, 51:3, 52:8, 57:2, 57:19, 59:2, 63:6, 70:23, 70:24, 74:2, 77:22, 83:22, 89:8, 101:22, 103:22, 156:24, 161:7, 164:25, 165:16, 166:2, 172:7, 172:13, 174:18
forget [1] - 73:21
forgot [1] - 197:15
forgotten [1] - 197:23
form [25] - 13:22, 14:11, 16:15, 50:28, 50:29, 54:3, 66:20, 71:7, 71:14, 73:12, 80:4, 85:15, 92:8, 97:24, 100:13, 105:28, 125:26, 129:27, 130:10, 130:13, 143:19, 152:27, 200:2, 200:14, 201:5
form' [1] - 22:4
formed [5] - 7:15, 8:16, 40:25, 42:20, 44:19
forms [7] - 16:10, 16:29, 41:10, 51:10, 52:17, 82:11, 131:4
formula [1] - 123:13
formulation [1] - 112:12
forth [22] - 8:23, 47:4, 49:27, 50:5, 77:4, 81:21, 84:20, 108:4, 128:16, 131:1, 131:4, 142:27, 143:8, 144:17, 148:17, 151:22, 156:2, 163:1, 163:2, 185:11, 192:12, 200:9
forthwith [1] - 8:15
forward [1] - 43:27
Foundation [3] - 88:15, 88:19, 89:13
foundation [1] - 89:3
foundation's [1] - 89:4
founded [2] - 43:16, 43:29
four [7] - 10:21, 89:26, 122:11, 124:26, 139:28, 140:28, 199:22
fourth [3] - 55:17, 72:25, 187:16
Fourth [39] - 49:18, 49:20, 49:25, 55:20, 55:28, 63:14, 68:23, 68:27, 89:7, 161:10, 165:27, 166:1, 172:12, 173:5, 173:8, 173:10, 173:18, 173:24, 187:14, 188:3, 188:15, 188:19, 188:21, 188:27, 189:2, 189:7, 189:19, 190:29, 191:4, 191:10, 191:22, 192:6, 192:7, 192:24, 193:15, 194:25, 195:13, 196:15, 197:12
fragmented [2] - 15:28, 17:7
framed [1] - 184:17
Framers' [1] - 189:25
Framework [1] - 14:24
Fraud [4] - 22:16, 23:24, 24:1, 154:16
free [3] - 21:23, 22:7, 86:28
free-standing [2] - 21:23, 22:7
Freedom [9] - 10:29, 11:7, 13:9, 13:15, 25:14, 25:17, 85:5, 103:17, 197:18
FREEDOM [1] - 11:3
freedoms [2] - 9:11, 43:1
frequently [2] - 52:7, 139:16
Friday [1] - 201:3
Friend's [1] - 15:18
front [1] - 73:22
fruits [1] - 170:4
frustrating [1] - 136:2
FRY [1] - 2:26
Fulfilling [1] - 11:5
full [4] - 26:21, 51:4, 82:19, 103:18
fully [3] - 184:14, 186:8, 188:28
functio[n] [1] - 196:27
function [2] - 26:11, 117:9
functions [1] - 189:2

G

fundamental [8] - 9:11, 28:28, 42:29, 119:21, 155:17, 158:6, 167:19, 189:4
fundamentals [1] - 155:19
furnish [1] - 125:27
furnished [1] - 77:11
furthermore [1] - 142:25
Furthermore [2] - 134:26, 160:29
future [13] - 6:24, 29:19, 30:1, 157:16, 157:18, 160:14, 160:24, 166:14, 167:11, 168:3, 170:5, 170:10, 174:24
g [2] - 69:9, 70:26
g(1) [1] - 141:14
g(1) [2] - 124:20, 142:11
g(1)(A) [1] - 127:19
g(1)(B) [1] - 128:7
g(1)(C) [1] - 126:5
g(1)(C) [1] - 128:26
g(4)(A) [1] - 137:6
g(l)(C) [1] - 126:7
gain [1] - 125:21
Gallagher [7] - 53:5, 75:15, 78:9, 95:10, 175:22, 200:6, 201:22
GALLAGHER [6] - 2:9, 175:24, 175:28, 176:5, 176:12, 201:27
Gallagher's [1] - 75:19
gap [1] - 41:26
gaps [1] - 35:16
Garda [1] - 169:21
gather [2] - 140:4, 177:21
gathering [4] - 159:5, 159:17, 159:22, 169:18
Gellman [1] - 122:23
gender [1] - 198:25
General [26] - 32:28, 37:6, 52:13, 53:25, 56:29, 59:15, 61:2, 65:11, 66:3, 66:22, 70:29, 75:25, 76:8, 77:9, 83:14, 86:3, 86:13, 116:23, 144:22, 145:2, 145:6, 145:17, 145:25, 145:29, 146:20, 163:9
general [25] - 15:24, 16:8, 26:24, 27:3, 40:7, 48:11, 56:28, 69:3, 79:4, 88:7, 116:29, 117:2, 117:16, 117:24, 135:4, 135:5, 138:15, 138:20, 138:23, 143:13, 143:21, 147:29, 180:9, 183:25, 199:28
generalities [1] - 166:28
generally [4] - 20:5, 49:14, 85:16, 112:2
generated [1] - 177:25
Gerard [1] - 157:4
GILMORE [1] - 3:2
given [12] - 14:3, 21:22, 26:11, 45:6, 48:3, 77:15, 78:12, 78:13, 99:18, 128:9, 185:4, 192:5
Given [1] - 40:16
global [3] - 193:21, 194:6, 194:12
globe [1] - 197:3
GOODBODY [1] - 2:31
Gorsky's [1] - 201:2
governed [2] - 164:10, 194:24
Governing [1] - 198:6
government [34] - 11:25, 18:15, 18:22, 22:13, 23:29, 32:3, 32:22, 42:13, 73:26, 74:10, 75:8, 76:6, 79:28, 89:21, 90:2, 93:23, 95:21, 105:28, 111:25, 112:25, 114:5, 114:11, 116:13, 116:14, 133:17, 149:8, 158:7, 159:24, 159:27, 162:20, 167:12
Government [40] - 14:22, 74:2, 76:13, 88:3, 88:11, 132:4, 132:14, 132:20, 133:13, 137:12, 137:14, 138:19, 158:28, 161:1, 161:4, 161:11, 161:14, 161:27, 162:7, 162:10, 163:16, 163:18, 163:21,

164:5, 164:8, 164:25,
165:16, 166:1, 166:4,
166:6, 172:18, 174:7,
174:11, 187:23,
188:13, 189:22,
190:2, 194:29,
196:26, 197:4

Government' [1] -
92:4

government'.. [1] -
162:26

Government's [8] -
132:24, 133:5, 161:8,
165:21, 165:26,
170:28, 172:9, 189:23

government's [4] -
89:6, 89:11, 91:12,
171:27

Government's.. [1] -
162:14

governmental [11] -
25:8, 94:9, 114:7,
123:27, 165:18,
170:2, 171:15,
188:29, 190:5,
193:25, 194:16

governments [1] -
154:20

governs [1] - 151:22

GRAINNE [1] - 3:2

GRAND [1] - 2:27

grant [4] - 77:29,
84:18, 100:23, 151:15

Grant [1] - 84:4

granted [7] - 32:10,
74:13, 89:16, 157:2,
180:3, 183:14, 188:2

granting [2] - 71:8,
72:17

grants [4] - 66:28,
151:16, 179:23,
182:28

grave [1] - 64:4

great [3] - 106:10,
108:27, 199:24

greater [2] - 6:21,
171:7

greatest [1] - 100:8

greatly [1] - 37:26

ground [1] - 151:3

grounded [1] - 182:9

grounds [7] - 42:20,
90:27, 150:14,
150:15, 151:15,
154:9, 173:26

group [1] - 183:20

guarantee [2] - 16:2,
137:13

guaranteed [1] -
188:18

guesswork [1] -
165:2

guidelines [2] - 63:9,
63:12

guilty [3] - 80:19,
98:25, 132:4

H

habeas [1] - 165:6

hacking [1] - 82:14

half [1] - 54:19

halfway [9] - 59:12,
63:28, 65:7, 73:27,
84:3, 92:10, 100:20,
192:20, 197:2

hand [34] - 54:19,
59:12, 60:20, 61:17,
62:5, 63:28, 64:29,
65:7, 71:21, 73:28,
84:2, 84:26, 88:27,
89:27, 92:10, 108:16,
111:27, 115:12,
115:18, 116:3, 119:9,
120:16, 120:24,
120:29, 123:23,
124:15, 124:19,
127:14, 149:11,
151:26, 158:1,
183:26, 183:29, 198:2

HANDED [1] -
115:21

handed [1] - 45:25

handling [2] - 178:7,
181:13

hang [2] - 116:20,
149:21

happily [3] - 101:22,
154:26, 155:5

happy [2] - 46:9,
74:25

Haramain [4] -
88:14, 93:21, 95:21,
95:23

Haramain's [1] -
95:18

hard [3] - 46:3,
107:7, 155:14

harm [33] - 23:21,
30:9, 61:3, 130:12,
130:13, 130:14,
133:26, 133:28,
134:23, 135:15,
137:24, 138:10,
139:5, 143:21,
167:28, 167:29,
168:2, 168:4, 170:9,
174:27, 179:17,
179:27, 180:6, 182:4,

182:10, 182:11,
183:4, 183:8, 183:17,
184:3, 184:8, 184:9,
184:12

harm' [1] - 30:4

harm'.. [1] - 170:10

harmful [1] - 167:12

harms [6] - 133:6,
167:11, 179:20,
182:14, 182:26,
183:11

HAYES [1] - 2:11

head [11] - 37:18,
89:1, 116:29, 117:17,
117:23, 124:1, 124:9,
146:2, 156:19, 177:4,
177:9

head-note [4] - 89:1,
156:19, 177:4, 177:9

headed [8] - 56:15,
70:4, 75:21, 78:29,
98:9, 119:10, 124:16,
150:3

heading [5] - 54:20,
84:3, 84:9, 89:27,
116:23

headline [1] -
130:24

Hear [1] - 84:4

hear [3] - 84:18,
85:13, 100:23

HEARD [1] - 1:17

heard [1] - 12:7

hearing [5] - 5:5, 6:5,
95:23, 153:25, 157:13

HEARING [4] - 1:17,
5:1, 110:1, 202:3

heavily [1] - 73:15

Hedges [1] - 162:18

held [28] - 21:11,
23:29, 25:23, 29:28,
32:3, 40:13, 76:3,
89:19, 95:28, 116:13,
131:5, 132:8, 133:2,
154:19, 157:9,
157:15, 167:8,
169:25, 171:10,
171:24, 173:16,
178:8, 188:8, 190:4,
193:23, 194:14,
195:20

Held [2] - 178:11,
188:21

help [3] - 6:16,
44:14, 44:15

helpful [3] - 122:7,
157:26, 157:28

herein [3] - 36:15,
94:10, 151:11

herself [4] - 7:29,

41:23, 41:24, 76:24

HIGH [1] - 1:2

high [1] - 10:24

highly [2] - 161:1,
161:16

himself [2] - 76:24,
174:1

hinged [1] - 165:5

hire [1] - 126:20

historical [2] - 182:9,
192:19

history [6] - 8:22,
45:9, 104:15, 179:18,
182:5, 189:19

HIV [6] - 130:28,
131:3, 131:10,
131:13, 131:16, 132:1

hmm [17] - 5:15,
5:26, 6:19, 19:16,
21:7, 23:7, 29:22,
34:5, 47:7, 47:14,
52:29, 54:8, 55:8,
110:7, 129:1, 140:4,
140:18

hold [5] - 125:8,
132:24, 136:29,
153:14, 174:23

holding [4] - 165:7,
170:18, 172:5, 178:2

holds [1] - 171:12

home [1] - 17:6

Homeland [1] -
144:24

hope [1] - 201:9

hopefully [1] -
201:19

hoping [1] - 200:25

hostile [1] - 64:4

hours [3] - 60:28,
61:5, 61:25

HOUSE [1] - 2:11

huge [1] - 28:5

human [2] - 156:22,
164:9

HYLAND [1] - 2:9

Hyland [2] - 6:6, 6:7

hypothetical [2] -
28:3, 168:3

hypothetical' [1] -
178:28

hypothetical'.. [1] -
180:23

I

i [1] - 70:9

i)(3) [2] - 53:24, 54:18

i)(3) [1] - 54:15

i.e [3] - 28:9, 72:6,

179:6

i]t [1] - 165:8

idea [1] - 109:5

ideas [1] - 133:22

identical [1] - 93:12

identified [11] - 7:2,
8:29, 21:1, 26:24,
30:18, 33:10, 49:4,
155:5, 180:6, 183:18,
185:19

identifier [1] - 100:5

identifies [4] - 9:3,
60:8, 100:4, 137:29

identify [6] - 7:9,
20:21, 131:21, 155:4,
179:20, 182:14

identifying [3] - 7:1,
61:24, 182:25

identity [1] - 60:9

ignorance [1] - 74:24

ignore [1] - 46:1

ii [3] - 51:18, 149:19,
158:1

ii [3] - 58:20, 63:4,
63:13

iii [24] - 26:29, 27:3,
51:4, 51:7, 51:21,
51:25, 158:3, 158:17,
160:3, 160:10, 161:6,
167:20, 168:10,
174:23, 178:4,
178:13, 179:21,
179:24, 180:13,
182:15, 183:1,
183:23, 184:1, 185:13

iii [2] - 63:7, 63:13

ill.. [1] - 183:6

illegal [3] - 170:21,
188:15, 191:1

illuminates [1] -
93:10

illustrated [1] - 29:11

illustrating [1] -
156:5

imagine [1] - 184:10

immediate [1] - 6:24

immediately [3] -
76:13, 76:25, 90:10

imminence [1] -
160:7

imminent [7] - 28:3,
30:4, 160:4, 163:14,
174:27, 178:27,
180:22

imminent.. [1] -
168:15

imminently [3] -
161:28, 164:15,
164:17

immune [2] - 24:1,

154:20
Immunity [1] - 89:28
immunity [33] -
21:10, 39:19, 88:2,
89:21, 90:2, 90:6,
90:16, 91:5, 91:25,
91:29, 92:7, 92:9,
92:14, 92:16, 92:18,
93:6, 93:9, 94:14,
94:24, 94:26, 112:6,
132:22, 132:23,
133:5, 133:8, 133:11,
135:16, 136:3, 136:8,
148:18, 148:20,
151:6, 153:19
impact [3] - 15:28,
39:29, 126:17
impede [1] - 145:8
impending [8] - 30:2,
157:17, 160:13,
160:28, 166:14,
168:1, 169:6, 174:25
impending'.. [1] -
160:11
impending'.. [2] -
161:18, 168:4
implementation [4] -
26:10, 27:10, 56:27,
199:27
implicates [1] -
39:19
implications [1] -
147:24
implied [2] - 91:4,
91:6
impliedly [1] -
151:17
implies [1] - 38:4
import [1] - 106:10
importance [5] -
35:24, 52:15, 60:11,
86:27, 159:19
important [26] -
11:10, 12:23, 13:5,
15:10, 15:15, 18:28,
21:15, 22:21, 31:22,
32:26, 33:15, 37:16,
41:6, 47:8, 48:1,
59:21, 95:6, 106:20,
106:21, 182:6,
182:16, 185:17,
189:17, 197:2,
200:10, 200:12
importantly [3] -
35:1, 42:11, 80:11
Importantly [2] -
12:28, 40:2
importer [1] - 42:11
impose [1] - 116:14
imposed [3] -
106:27, 191:29, 197:7
imposes [2] -
177:14, 188:12
impossible [1] -
187:7
imprisonment [1] -
105:26
improperly [3] -
128:11, 167:14,
167:19
impulses [1] - 99:29
in-person [1] - 167:1
inability [1] - 183:21
inaccuracies [1] -
184:8
inaccuracy [1] -
127:20
inaccurate [6] - 34:8,
125:9, 126:16,
142:12, 142:13,
177:26
inaccurately [1] -
129:3
inadequate [1] -
182:19
inadmissible [1] -
27:20
inadvertently [3] -
5:17, 6:2, 58:13
inappropriate [1] -
112:12
Inc [3] - 39:2, 39:3,
177:19
incentive [1] -
168:26
incident [2] - 191:28,
197:7
incidentally [1] -
166:10
include [8] - 17:22,
31:19, 31:21, 93:2,
114:7, 133:26,
135:26, 135:28
includes [4] - 65:2,
107:13, 132:28,
152:17
including [25] -
20:25, 22:14, 25:16,
25:26, 27:19, 32:10,
32:19, 33:16, 37:14,
38:1, 85:12, 102:6,
117:2, 117:11,
117:24, 120:25,
121:9, 140:22,
141:21, 146:28,
164:3, 172:10,
177:23, 199:15, 201:1
incoming [2] - 20:20,
99:29
incompatible [4] -
7:22, 15:7, 28:19,
29:10
incomplete [1] -
184:17
incomplete'.. [1] -
178:13
inconceivable [1] -
135:11
inconsistent [1] -
160:26
incorporated [1] -
92:19
incorporation [1] -
142:19
incorrect [3] - 172:1,
184:10, 184:11
incorrectly [1] -
171:5
increased [1] - 13:12
incrimination [1] -
189:4
incurred [9] - 40:15,
40:16, 138:20,
157:21, 167:27,
168:19, 169:7, 171:6
incurring [2] - 30:3,
174:26
indeed [5] - 43:20,
56:11, 111:10,
164:15, 173:10
Indeed [4] - 162:6,
174:17, 190:7, 195:3
independence [1] -
51:6
independent [7] -
14:11, 14:16, 28:11,
165:2, 165:15, 179:4,
181:6
index [5] - 46:14,
78:21, 96:12, 104:7,
149:27
INDEX [1] - 4:1
indicate [3] - 39:16,
47:3, 190:25
indicates [2] - 61:2,
138:14
indication [1] -
189:24
indicted [1] - 132:3
indirectly [2] - 38:23,
39:24
indispensable [1] -
151:4
individual [38] -
18:25, 21:12, 21:25,
25:20, 26:16, 27:25,
30:29, 32:9, 33:24,
33:28, 34:19, 67:11,
91:19, 94:4, 94:6,
94:8, 94:11, 95:19,
119:16, 119:24,
125:14, 125:21,
125:27, 126:8,
126:12, 126:14,
126:18, 126:28,
127:7, 129:14,
129:16, 132:16,
138:20, 140:23,
141:2, 147:16, 179:8,
180:26
individual' [1] - 34:1
individual'.. [1] -
170:7
individual's [8] -
25:17, 29:9, 122:18,
125:3, 125:29,
127:21, 170:2, 170:3
individual.. [1] -
177:17
individualised [1] -
181:14
individualized [1] -
178:8
individuals [17] -
9:12, 17:24, 18:14,
18:20, 25:22, 27:19,
32:7, 85:7, 85:10,
85:11, 91:11, 123:6,
131:22, 136:25,
156:25, 162:11,
177:22
individuals" [2] -
115:13, 116:6
infer [3] - 86:25,
94:23, 135:5
inflicted [1] - 170:27
inflicting [1] - 168:2
informal [1] - 175:7
information [98] -
17:26, 17:28, 18:17,
18:22, 18:23, 19:5,
20:4, 20:9, 21:20,
25:2, 25:12, 25:22,
25:25, 25:27, 28:29,
32:3, 32:6, 38:3, 54:1,
58:11, 58:14, 59:19,
59:24, 60:5, 60:6,
60:11, 60:14, 60:15,
60:19, 61:2, 61:26,
62:5, 63:17, 63:21,
64:1, 64:14, 64:26,
76:11, 76:14, 76:26,
79:11, 79:29, 80:3,
80:12, 80:25, 80:27,
91:13, 93:15, 93:18,
93:20, 93:22, 93:24,
97:7, 98:13, 98:15,
98:28, 100:9, 101:2,
101:3, 101:4, 102:8,
102:18, 103:12,
103:14, 103:20,
105:19, 116:15,
118:19, 122:18,
123:4, 123:14, 124:7,
125:22, 131:19,
131:26, 132:1,
132:18, 145:3, 164:6,
165:24, 172:19,
173:2, 175:12,
177:22, 177:26,
178:7, 180:11,
181:14, 183:21,
183:28, 184:6, 193:8,
199:3, 199:7, 199:14,
199:23
Information [4] -
25:14, 25:18, 62:9,
97:10
INFORMATION [1] -
3:1
informing [1] - 13:6
initial [3] - 92:14,
160:24, 171:11
initatives [1] - 12:23
injunction [1] -
156:28
injunctive [2] -
23:25, 151:10
injuries [17] -
166:21, 167:3, 167:5,
167:10, 168:5,
168:24, 170:27,
171:6, 171:8, 171:9,
181:9, 181:28, 182:1,
182:18, 182:21
injury [51] - 27:29,
28:9, 28:15, 29:24,
30:2, 138:6, 157:16,
157:18, 160:3, 160:9,
160:10, 160:12,
160:13, 160:19,
160:27, 160:28,
161:17, 161:19,
161:24, 164:18,
166:13, 174:24,
178:3, 178:9, 178:12,
178:17, 178:24,
179:3, 179:7, 179:8,
179:10, 179:16,
179:18, 179:22,
179:25, 180:5,
180:19, 180:25,
181:3, 181:4, 181:17,
181:20, 182:5,
182:27, 183:1, 183:5,
183:15, 183:22,
184:23, 185:1
injury" [1] - 180:28
injury' [1] - 160:14
injury-in-fact [6] -

178:12, 178:24,
179:3, 179:22,
182:27, 183:5
injury.. [1] - 179:16
inoperative [1] -
152:29
inquiry [1] - 158:25
INS [2] - 188:14,
190:26
insofar [7] - 19:26,
43:6, 44:15, 60:14,
113:1, 154:22, 187:15
install [1] - 51:22
installation [2] -
99:24, 100:24
instance [4] - 13:9,
23:28, 166:26, 168:28
instances [1] -
183:13
Instead [2] - 111:29,
162:14
instead [3] - 92:18,
134:24, 137:29
Instructed [3] - 2:6,
2:11, 2:31
instructed [4] - 2:16,
2:21, 2:26, 3:3
instructive [3] -
179:19, 182:9, 182:16
instrument [1] -
99:26
instrumental [1] -
13:6
instrumentality [2] -
123:26, 124:1
insufficient [1] -
169:10
Insular [4] - 190:3,
193:23, 194:14,
194:27
insulates [1] - 172:5
insuperable [2] -
185:25, 186:1
intangible [7] -
179:17, 179:20,
182:1, 182:4, 182:10,
182:14, 182:25
integral [1] - 198:19
integrated [1] -
47:19
integration [2] -
37:28, 147:1
intelligence [48] -
10:25, 12:26, 25:23,
26:3, 26:5, 26:22,
41:12, 49:26, 51:28,
54:1, 59:24, 60:5,
60:10, 63:17, 63:21,
63:25, 64:10, 64:11,
64:26, 66:24, 69:20,
85:15, 87:24, 98:27,
101:25, 102:8,
102:10, 102:18,
102:21, 103:14,
159:5, 159:17,
159:22, 164:6,
197:28, 198:9,
198:12, 198:21,
198:22, 198:26,
198:27, 199:6,
199:11, 199:13,
199:17, 199:20,
199:22, 199:24
Intelligence [40] -
16:19, 16:24, 17:14,
31:15, 46:16, 49:7,
50:9, 51:3, 52:9,
53:26, 57:1, 57:2,
57:19, 59:2, 63:6,
65:12, 66:4, 70:23,
70:24, 74:3, 75:26,
76:8, 77:10, 77:22,
83:23, 89:8, 101:22,
103:22, 117:7,
156:17, 156:24,
159:12, 161:7,
163:10, 164:25,
165:17, 166:2, 172:8,
172:13, 174:18
Intelligence" [1] -
198:7
intelligence-
gathering [1] - 159:17
intended [10] -
25:21, 37:25, 58:7,
65:19, 68:11, 78:16,
112:17, 134:20,
135:6, 135:27
intends [2] - 18:23,
172:18
intent [1] - 172:21
intention [2] - 19:15,
139:9
intentional [24] -
23:20, 24:23, 34:22,
58:6, 65:18, 72:8,
81:4, 87:22, 87:26,
101:18, 129:8,
129:12, 129:24,
129:26, 130:11,
137:8, 137:11,
137:19, 138:21,
138:26, 139:2, 141:9,
142:16, 143:15
intentionally [19] -
34:15, 58:11, 67:28,
68:2, 68:7, 68:10,
68:16, 80:19, 81:9,
82:9, 82:20, 98:24,
98:26, 105:5, 105:8,
131:18, 132:1,
132:14, 141:4
inter [1] - 29:28
interaction [1] -
113:23
intercept [2] - 76:2,
81:15
intercepted [5] -
24:25, 29:19, 105:22,
160:23, 193:7
intercepting [1] -
161:11
interception [10] -
54:10, 76:28, 82:26,
83:2, 164:16, 164:20,
167:4, 168:15,
168:16, 169:6
intercepts [1] -
161:14
interchangeably [1]
- 134:26
interest [1] - 28:1
interest' [2] - 178:26,
180:21
interesting [3] -
68:15, 74:28, 142:9
interestingly [1] -
173:29
interests [9] - 35:27,
36:5, 118:21, 134:3,
145:8, 154:12, 178:7,
181:13, 197:2
interfere [1] - 159:27
interference [8] -
16:4, 21:21, 25:20,
28:22, 28:27, 30:10,
42:18, 76:17
interference' [1] -
29:3
interferences [1] -
14:6
interlocutory [1] -
89:13
intermediate [1] -
152:10
internal [1] - 123:5
International [2] -
29:12, 156:11
international [11] -
29:27, 64:6, 64:7,
89:9, 102:10, 102:21,
162:19, 162:25,
189:27, 191:23,
196:16
Internet [1] - 23:18
internet [4] - 53:13,
76:3, 76:10, 76:22
interpret [1] - 153:8
interpretation [8] -
39:12, 92:3, 121:19,
133:12, 133:16,
135:14, 139:10,
147:22
interpretations [1] -
148:15
interpreted [4] -
24:11, 87:29, 91:10,
92:7
interpretive [1] -
92:2
interrelationship [1]
- 13:29
intersects [1] -
114:27
into.. [1] - 92:19
introduced [5] -
13:8, 13:15, 85:5,
104:24, 200:22
introduction [1] -
6:29
intrusion [1] -
188:29
invalid [2] - 5:22,
5:28
invalidity [1] - 43:22
invasion [4] - 28:1,
139:19, 178:26,
180:20
investigating [1] -
38:16
investigation [8] -
8:8, 14:26, 30:20,
40:5, 102:7, 102:11,
131:21, 131:29
Investigation [2] -
89:23, 102:3
investigations [2] -
12:3, 25:28
investigative [4] -
82:2, 82:10, 99:2,
169:17
investigatory [1] -
118:2
invite [1] - 167:22
invoke [9] - 19:19,
151:6, 152:5, 161:4,
173:10, 173:18,
187:15, 190:15,
193:14
invoked [2] - 21:23,
55:29
invoking [3] - 19:18,
162:26, 178:15
involuntarily [1] -
173:15
involuntary [1] -
190:24
involve [5] - 19:21,
41:14, 113:5, 121:19,
128:28
involved [1] - 170:1
involving [2] - 124:8,
156:15
IRA [1] - 36:25
IRELAND [1] - 1:12
Ireland [5] - 5:6,
39:2, 156:2, 169:21,
185:10
irrational [1] -
168:17
irrelevant [1] -
172:15
irrespective [1] -
155:24
is' [1] - 187:2
Islamic [3] - 88:15,
88:18, 89:3
ISP [1] - 100:6
issuance [3] - 53:23,
54:14, 86:4
issue [21] - 7:5,
26:25, 30:28, 40:8,
45:15, 87:14, 90:1,
94:3, 95:28, 114:8,
131:12, 136:19,
157:20, 157:23,
167:24, 175:19,
176:22, 185:24,
186:1, 186:5, 187:2
issued [6] - 26:9,
44:29, 45:8, 77:20,
174:20, 192:11
issues [5] - 8:22,
28:6, 90:18, 90:29,
201:17
items [2] - 102:7,
138:6
itself [33] - 19:12,
19:14, 22:22, 25:21,
35:8, 36:8, 36:22,
39:16, 48:9, 50:21,
55:25, 59:9, 66:27,
71:17, 78:7, 85:18,
91:2, 93:24, 104:17,
106:12, 106:22,
113:1, 113:28,
117:16, 130:2,
130:25, 139:11,
139:23, 141:8,
141:22, 142:17,
145:12, 148:5
iv [1] - 63:12
IV [1] - 51:27

J

JAMES [1] - 2:15
January [2] - 11:9,
12:25

job ^[1] - 126:20
jobs ^[1] - 138:18
JOHN ^[1] - 2:22
Johnson ^[1] - 195:7
joint ^[1] - 131:21
jointly ^[2] - 53:26, 85:6
journalist ^[1] - 162:18
JRA ^[13] - 32:17, 33:4, 33:12, 35:2, 35:6, 36:13, 36:14, 37:26, 39:19, 40:2, 40:11, 40:17, 40:21
judge ^[18] - 49:15, 73:29, 77:25, 77:26, 77:28, 78:1, 81:13, 83:18, 85:29, 86:9, 100:14, 100:22, 100:25, 103:2, 103:5, 110:5, 116:18, 175:14
Judge ^[227] - 5:7, 5:9, 5:16, 6:8, 7:12, 8:21, 10:9, 11:2, 11:10, 13:14, 14:19, 15:15, 16:13, 16:20, 19:11, 20:12, 21:4, 21:6, 21:27, 22:21, 23:14, 26:7, 27:2, 32:26, 35:8, 36:7, 36:17, 41:1, 41:21, 44:6, 44:25, 45:6, 45:18, 45:21, 46:1, 46:7, 49:10, 50:13, 50:14, 52:23, 52:25, 52:26, 54:3, 55:20, 56:14, 56:20, 58:27, 59:7, 61:9, 61:28, 63:22, 65:6, 67:3, 67:8, 68:15, 70:12, 73:4, 73:20, 74:16, 75:13, 75:17, 75:29, 78:18, 79:28, 81:11, 81:18, 82:22, 83:7, 83:10, 83:21, 84:25, 85:14, 85:28, 87:13, 88:13, 88:22, 88:26, 89:19, 89:26, 90:5, 91:16, 92:9, 92:21, 93:4, 93:26, 94:13, 94:21, 94:28, 95:11, 96:4, 96:17, 97:22, 98:6, 99:5, 99:11, 100:2, 100:15, 101:22, 103:16, 103:23, 104:6, 104:12, 104:16, 104:27, 105:16, 105:25, 106:11, 106:17, 107:7, 108:2,

108:12, 109:5, 110:5, 110:29, 111:19, 112:29, 114:1, 114:17, 114:25, 115:5, 115:20, 115:23, 115:27, 116:2, 116:10, 116:11, 119:8, 120:15, 121:4, 121:22, 122:4, 122:9, 123:21, 124:13, 124:25, 130:4, 130:18, 130:20, 130:23, 130:28, 132:12, 134:12, 136:11, 137:3, 137:17, 139:1, 139:23, 139:26, 140:10, 142:4, 143:4, 144:10, 146:27, 147:26, 148:25, 149:1, 149:6, 149:14, 149:19, 149:28, 150:5, 150:9, 151:26, 152:15, 153:3, 154:13, 154:24, 154:28, 155:1, 155:24, 156:6, 156:20, 157:5, 157:11, 157:25, 159:19, 163:26, 168:11, 169:1, 170:16, 171:3, 171:20, 172:25, 173:7, 175:1, 175:13, 175:26, 175:29, 176:2, 176:3, 176:13, 176:20, 176:21, 176:24, 176:27, 176:28, 177:3, 177:8, 180:16, 184:25, 186:5, 186:19, 187:17, 187:21, 192:4, 192:7, 193:4, 193:18, 194:3, 194:9, 194:10, 194:21, 195:16, 196:11, 197:11, 197:12, 197:14, 197:24, 197:25, 200:17, 200:21, 200:26, 201:13, 201:17, 201:27, 201:28, 202:1
judge,)(2 ^[1] - 118:4
Judge.. ^[1] - 79:3
judges ^[12] - 51:4, 83:26, 84:14, 85:2, 85:9, 85:10, 85:18, 95:1, 95:2, 95:4, 100:27, 161:6
Judges" ^[1] - 84:10

judgment ^[21] - 8:1, 10:4, 24:11, 24:13, 28:25, 29:21, 41:3, 43:25, 49:22, 89:16, 91:2, 94:19, 151:8, 157:2, 157:26, 162:28, 165:3, 177:5, 179:18, 182:5, 182:15
judicial ^[35] - 13:11, 15:20, 18:25, 21:25, 27:16, 41:10, 48:20, 48:23, 48:24, 69:29, 70:8, 70:16, 70:19, 71:7, 83:27, 84:15, 110:27, 146:25, 148:15, 150:10, 150:13, 150:17, 150:26, 151:12, 152:2, 152:7, 154:10, 158:19, 159:2, 165:9, 171:28, 172:6, 172:20, 178:20
Judicial ^[29] - 11:10, 11:17, 12:6, 13:25, 31:3, 31:6, 31:9, 31:24, 32:13, 36:19, 36:23, 48:12, 70:4, 70:16, 75:21, 114:18, 114:26, 115:15, 115:26, 139:24, 139:29, 141:18, 142:20, 142:25, 143:4, 143:29, 146:7, 147:27, 197:19
Judiciary ^[1] - 159:3
judiciary's ^[1] - 158:6
June ^[3] - 12:1, 13:9, 85:4
jurisdiction ^[18] - 8:18, 14:15, 27:5, 43:20, 70:25, 74:6, 77:23, 82:6, 83:18, 84:17, 90:7, 123:27, 127:10, 153:20, 158:4, 158:8, 162:27, 178:15
jurisdictional ^[1] - 90:29
jurisprudence ^[5] - 155:10, 156:1, 169:13, 185:8, 185:13
JUSTICE ^[136] - 1:17, 5:4, 5:8, 5:15, 5:26, 6:1, 6:4, 6:7, 6:19, 6:25, 12:15, 12:18, 19:16, 21:7, 23:7, 23:12, 29:22, 31:11, 31:19, 31:23, 34:5, 39:1, 45:24, 45:29,

46:4, 47:7, 47:14, 47:24, 47:27, 50:18, 52:29, 54:8, 54:16, 55:8, 56:18, 56:21, 56:24, 58:19, 61:13, 62:1, 62:3, 63:29, 74:15, 78:23, 78:26, 83:28, 84:1, 84:5, 84:8, 84:11, 87:16, 87:19, 88:16, 88:23, 88:28, 90:9, 90:12, 95:13, 95:29, 96:9, 97:26, 97:28, 98:2, 98:5, 99:13, 99:15, 104:13, 106:13, 106:15, 107:9, 107:13, 107:15, 107:20, 107:22, 107:26, 108:5, 108:17, 108:22, 108:26, 109:2, 110:4, 110:7, 111:3, 111:5, 115:7, 115:10, 115:14, 115:18, 115:22, 115:25, 115:28, 116:4, 116:7, 116:20, 120:4, 120:6, 120:27, 121:2, 121:5, 121:25, 122:1, 122:10, 124:17, 124:21, 124:24, 129:1, 140:2, 140:18, 143:1, 143:5, 149:4, 149:7, 149:11, 149:15, 149:21, 149:24, 149:26, 150:4, 150:7, 163:25, 163:27, 175:21, 175:27, 176:1, 176:7, 176:17, 176:25, 193:26, 193:29, 194:4, 197:26, 198:4, 200:24, 201:21, 201:24, 201:29
Justice ^[20] - 8:9, 45:10, 51:5, 83:25, 84:12, 100:22, 136:22, 146:1, 156:1, 157:9, 157:15, 167:24, 180:16, 182:20, 185:14, 186:12, 192:5, 192:14, 196:9, 196:23
Justice's ^[2] - 36:21, 142:5
justiciable ^[1] - 27:7
justify ^[2] - 122:17, 188:6

K

keep ^[4] - 17:11, 96:11, 107:7, 139:26
keeping ^[2] - 158:24, 187:13
Keith ^[1] - 49:14
KELLEY ^[1] - 2:25
Kennedy's ^[1] - 182:20
kept ^[1] - 118:21
key ^[2] - 81:3, 90:1
KIERAN ^[1] - 2:10
kind ^[1] - 30:25
kinds ^[2] - 171:5, 171:9
Kingdom ^[1] - 145:14
KINGSTON ^[1] - 2:20
knowing ^[5] - 19:6, 80:26, 112:3, 112:7, 112:23
knowingly ^[1] - 106:7
knowledge ^[2] - 162:13, 170:2
known ^[9] - 10:23, 46:21, 58:8, 65:20, 67:28, 68:5, 68:12, 101:27, 196:19
knows ^[1] - 133:21

L

labor ^[1] - 156:22
lack ^[3] - 159:2, 170:11, 174:23
lacked ^[6] - 29:28, 159:10, 159:14, 159:16, 165:7, 170:18
laid ^[4] - 12:27, 155:12, 185:13, 185:14
Laidlaw ^[1] - 171:11
Laird ^[3] - 169:9, 169:15, 170:10
Laird.. ^[1] - 159:16
language ^[3] - 39:20, 154:7, 192:19
large ^[1] - 16:22
largely ^[1] - 165:5
last ^[12] - 11:23, 47:29, 92:11, 93:26, 101:21, 107:23, 107:24, 126:25, 153:3, 171:21, 176:5
lasts ^[1] - 57:8
late ^[1] - 176:5

latter [1] - 64:23
launched [2] - 12:23, 131:20
law [74] - 6:11, 6:14, 10:14, 10:17, 13:25, 14:10, 14:17, 15:13, 15:23, 17:1, 25:27, 26:15, 27:24, 27:27, 28:5, 28:19, 28:20, 29:8, 29:10, 32:14, 40:9, 43:18, 44:10, 44:13, 45:22, 53:22, 56:1, 80:21, 80:26, 81:19, 82:1, 82:9, 82:16, 87:23, 89:9, 92:6, 94:16, 98:26, 99:2, 112:14, 112:18, 117:20, 118:2, 122:14, 123:10, 123:28, 124:1, 124:4, 124:8, 134:7, 135:1, 135:20, 138:5, 138:7, 139:11, 144:5, 144:8, 150:16, 153:8, 153:17, 153:22, 158:17, 168:8, 171:19, 183:10, 183:12, 185:24, 186:23, 191:17, 197:17, 200:29, 201:1
law' [1] - 182:19
law's [1] - 123:16
lawful [1] - 62:8
lawfully [3] - 19:28, 20:6, 31:12
lawfulness [2] - 172:22, 174:12
laws [4] - 117:10, 139:16, 196:28
lawsuit [1] - 182:12
lawsuits [1] - 112:7
lawyers [3] - 13:19, 30:16, 74:15
layout [2] - 17:17, 149:18
lead [2] - 136:1, 165:10
leader [1] - 187:25
leaks [1] - 76:5
learning [1] - 133:23
least [16] - 40:27, 68:16, 78:16, 83:26, 84:14, 94:25, 95:12, 104:20, 114:8, 119:2, 134:6, 136:25, 140:26, 174:6, 200:11, 201:11
leave [5] - 70:12, 70:13, 94:7, 148:25, 148:26

leaving [1] - 27:1
led [2] - 12:24, 131:29
LEE [1] - 2:6
leeway [1] - 90:26
left [20] - 50:14, 59:12, 61:17, 62:5, 73:28, 84:2, 84:26, 89:27, 102:27, 108:16, 116:21, 116:22, 119:9, 120:16, 123:8, 123:23, 124:15, 124:19, 138:23, 142:23
left-hand [13] - 59:12, 61:17, 62:5, 73:28, 84:2, 84:26, 89:27, 108:16, 119:9, 120:16, 123:23, 124:15, 124:19
legal [19] - 7:18, 12:24, 15:1, 15:2, 22:12, 26:2, 33:9, 43:9, 43:26, 44:20, 133:20, 133:24, 150:23, 151:1, 151:14, 156:22, 190:24, 201:17, 201:18
legality [3] - 18:21, 21:19, 170:19
legally [5] - 28:1, 171:29, 178:26, 180:20, 182:17
legislation [18] - 11:12, 23:27, 24:4, 24:7, 44:9, 48:8, 48:9, 48:11, 85:24, 96:4, 114:24, 116:11, 123:8, 123:15, 157:28, 192:2, 197:9, 200:3
Legislative [1] - 191:24
legislative [2] - 22:28, 104:15
legitimate [1] - 49:27
legitimise [2] - 43:6, 43:14
length [1] - 24:14
less [5] - 49:1, 49:2, 53:6, 79:16, 129:16
lesser [1] - 6:21
letter [2] - 47:1, 121:1
level [8] - 10:24, 41:27, 102:4, 106:27, 148:3, 155:11, 173:12, 187:11

levels [1] - 186:16
liabilities [1] - 51:13
liability [18] - 19:13, 51:14, 78:21, 87:15, 89:22, 90:3, 92:29, 93:8, 93:10, 93:17, 93:28, 94:4, 98:7, 101:11, 112:2, 112:13, 133:5, 177:14
Liability [3] - 79:1, 93:11, 98:10
liable [8] - 21:11, 89:24, 91:19, 93:14, 99:4, 114:12, 129:13, 138:19
libel [1] - 134:8
liberties [1] - 198:19
Liberties [1] - 85:12
liberty [1] - 45:13
licence [2] - 131:1, 152:18
licensed [2] - 131:9, 131:24
life [3] - 28:28, 29:1, 99:19
light [6] - 14:3, 59:15, 90:16, 92:2, 162:21, 194:27
likelihood [3] - 29:18, 160:21, 167:3
likelihood' [1] - 160:26
likely [5] - 28:14, 30:18, 43:5, 171:8, 178:19
likewise [1] - 36:11
limit [6] - 29:9, 34:26, 36:26, 100:7, 123:5, 151:21
limitation [6] - 21:8, 62:11, 68:20, 90:6, 141:24, 158:7
limitations [19] - 15:28, 18:29, 23:28, 25:24, 33:8, 33:16, 35:3, 35:9, 63:11, 65:1, 67:22, 69:11, 69:14, 123:17, 140:22, 144:16, 151:12, 153:21, 199:19
Limitations" [1] - 67:7
limited [11] - 19:23, 24:15, 27:18, 32:11, 34:16, 37:16, 42:25, 57:28, 65:15, 134:16, 135:15
limits [3] - 32:5, 122:28, 158:3

line [1] - 99:23
lines [1] - 122:11
link [1] - 161:20
list [3] - 111:8, 111:11, 142:3
litigant [1] - 165:9
litigated [1] - 95:17
litigation [1] - 128:2
live [2] - 196:25, 196:28
loaded [1] - 133:15
loaned [1] - 3:9
loath [1] - 159:26
located [13] - 38:4, 53:29, 57:29, 58:9, 65:16, 65:21, 67:29, 68:3, 68:8, 68:12, 68:18, 156:27, 188:23
logic [3] - 118:27, 119:2, 119:5
logical [1] - 115:27
logically [1] - 46:25
long-term [1] - 131:15
look [45] - 16:16, 17:16, 32:25, 35:16, 36:7, 44:10, 45:18, 46:14, 48:15, 49:23, 50:12, 51:15, 53:17, 55:20, 56:10, 59:5, 61:16, 63:21, 70:1, 70:2, 78:18, 80:15, 88:14, 96:13, 100:19, 104:27, 105:1, 106:17, 113:18, 114:25, 116:26, 116:27, 130:19, 136:9, 139:28, 146:17, 149:26, 150:19, 151:26, 156:19, 157:29, 184:29, 186:12, 198:1
looked [15] - 7:3, 66:7, 66:9, 87:11, 92:21, 96:25, 98:8, 101:9, 108:4, 108:8, 108:11, 113:20, 129:25, 139:21, 179:29
looking [21] - 21:4, 46:2, 48:8, 48:11, 48:18, 51:19, 71:14, 78:20, 83:6, 90:24, 91:23, 110:6, 115:1, 132:12, 137:7, 149:17, 154:29, 156:12, 193:29, 197:24
looks [8] - 55:1, 66:26, 72:1, 72:13,

75:2, 78:4, 149:16, 185:9
loophole [1] - 123:9
Lopez [2] - 188:14, 190:27
Lopez-Mendoza.. [2] - 188:14, 190:27
loss [9] - 24:3, 24:8, 24:15, 40:16, 40:19, 134:17, 134:18, 135:7, 135:13
loss' [1] - 23:26
lost [6] - 20:23, 63:24, 79:3, 107:10, 123:18, 131:1
lower [1] - 168:9
LTD [1] - 1:12
Ltd [1] - 5:6
Luddite [1] - 46:5
Lujan [3] - 178:22, 179:1, 182:16
LUNCHEON [2] - 109:8, 110:1
Lynch [1] - 157:5

M

magistrate [2] - 100:21, 103:5
mail [3] - 53:5, 53:6, 166:27
mails [1] - 193:5
maintain [8] - 27:27, 33:23, 77:8, 77:12, 118:17, 126:7, 171:5, 171:27
maintained [8] - 34:4, 115:13, 116:5, 117:7, 117:8, 117:19, 118:7, 129:3
maintaining [3] - 118:6, 122:29, 126:16
maintains [3] - 120:2, 120:8, 124:3
majority [1] - 188:14
makers [1] - 165:3
Malone [3] - 1:21, 3:8, 3:10
MALONE [1] - 1:31
managed [1] - 45:10
management [1] - 132:8
mandate [1] - 163:5
mandated [1] - 26:28
mandates [1] - 165:16
mandatory [1] - 151:9
manner [13] - 3:9,

7:22, 15:7, 29:10,
33:7, 60:7, 68:22,
76:15, 76:28, 93:16,
129:8, 137:18, 140:20
manufacture [3] -
30:3, 168:2, 174:26
margin [1] - 97:23
markedly [1] -
155:28
MARY'S [1] - 3:4
MASON [1] - 2:11
mass [1] - 64:7
material [8] - 8:23,
8:24, 15:29, 18:29,
98:13, 118:2, 118:3,
184:8
materially [1] - 145:8
materials [2] - 14:23,
45:22
matter [22] - 5:5, 8:3,
27:24, 28:20, 28:29,
35:19, 35:20, 43:18,
46:11, 58:13, 82:19,
90:7, 127:24, 128:13,
130:25, 139:11,
144:8, 160:24,
171:12, 185:24,
185:27, 186:24
matters [12] - 5:10,
10:8, 10:17, 14:16,
37:7, 52:14, 57:21,
84:24, 96:18, 113:1,
118:13, 127:10
MAURICE [1] - 2:25
MAXIMILLIAN [1] -
1:14
maximum [1] -
177:13
McCANN [1] - 2:21
McCullough [4] -
2:14, 175:23, 201:23,
201:24
McGovern [1] - 45:10
McGRANE [1] - 3:3
McGRATH [1] - 3:3
McKay [1] - 162:22
McKay's [1] - 168:28
McKeown [1] - 89:19
me' [2] - 119:1, 128:9
mean [9] - 95:13,
130:1, 134:21, 135:7,
135:20, 179:26,
182:26, 183:8, 186:29
meaning [15] -
21:27, 37:4, 38:12,
48:22, 111:8, 111:17,
112:14, 112:18,
129:26, 131:6,
133:24, 150:25,
153:9, 181:22, 185:29
meaningful [2] -
16:16, 171:28
meanings [1] - 99:18
means [18] - 21:10,
25:15, 79:5, 80:23,
82:25, 83:1, 99:22,
107:4, 110:26,
112:27, 119:13,
120:17, 135:22,
146:29, 147:14,
172:5, 175:10, 192:23
meant [4] - 74:17,
121:22, 181:22,
197:14
meanwhile [1] -
152:29
measure.. [1] -
183:12
measures [3] -
29:26, 166:18, 166:24
mechanism [3] -
21:23, 75:29, 113:2
mechanisms [3] -
15:12, 15:25, 27:13
media [1] - 156:22
medical [2] - 131:12,
132:18
medically [1] -
131:22
Meese.. [1] - 171:11
meet [13] - 9:25,
37:29, 58:22, 62:28,
63:1, 66:5, 72:14,
78:1, 144:27, 179:15,
179:20, 182:14,
184:20
meeting [3] - 155:3,
175:4, 176:8
meets [2] - 90:19,
148:13
member [1] - 147:2
Member [1] - 11:26
Members [2] -
159:15, 191:24
members [1] - 85:12
membership [1] -
159:15
Mendoza.. [2] -
188:14, 190:27
mental [8] - 91:27,
111:29, 132:18,
132:28, 133:3,
135:24, 135:26,
135:28
mentioned [8] -
10:12, 13:16, 16:20,
26:8, 41:8, 81:10,
110:12, 138:14
mercifully [1] - 140:9
mere [4] - 86:23,
161:21, 162:29,
169:16
merely [4] - 28:14,
162:15, 168:2, 170:1
merits [1] - 158:26
merits' [1] - 90:27
met [1] - 186:14
meta [1] - 193:8
meta-data [1] - 193:8
method [2] - 110:22,
161:5
methods [2] -
163:17, 163:18
Mexican [6] - 173:14,
187:19, 187:24,
187:26, 187:29, 188:1
Mexico [1] - 188:27
MICHAEL [138] - 2:4,
2:29, 4:5, 5:7, 5:9,
5:16, 5:27, 6:2, 6:8,
6:20, 6:26, 12:17,
12:19, 19:17, 21:8,
23:8, 23:14, 29:23,
31:14, 31:21, 31:24,
34:6, 39:4, 45:26,
46:1, 46:5, 47:8,
47:15, 47:26, 47:28,
50:19, 53:1, 54:9,
54:17, 55:9, 56:20,
56:23, 56:26, 58:20,
61:14, 62:2, 62:4,
64:1, 74:16, 78:24,
78:27, 83:29, 84:2,
84:7, 84:9, 84:12,
87:18, 87:20, 88:18,
88:24, 88:29, 90:10,
90:13, 95:14, 96:2,
96:11, 97:27, 97:29,
98:3, 98:6, 99:14,
99:16, 104:14,
106:14, 106:16,
107:11, 107:14,
107:18, 107:21,
107:23, 107:28,
108:6, 108:18,
108:23, 108:28,
109:4, 110:5, 110:8,
111:4, 111:6, 115:9,
115:11, 115:17,
115:20, 115:23,
115:26, 116:1, 116:5,
116:8, 116:22, 120:5,
120:7, 120:29, 121:3,
121:7, 121:27, 122:2,
122:11, 124:19,
124:22, 124:25,
129:2, 140:4, 140:19,
143:3, 143:7, 149:6,
149:10, 149:13,
149:18, 149:23,
149:25, 149:28,
150:5, 150:8, 163:26,
163:29, 175:25,
176:2, 176:13,
176:18, 176:21,
176:26, 193:28,
194:2, 194:8, 197:27,
198:5, 200:25,
201:23, 201:26,
201:28, 202:1
middle [5] - 12:5,
90:12, 90:13, 116:20,
116:22
might [29] - 17:7,
36:17, 47:2, 49:23,
53:4, 53:6, 55:6,
60:15, 63:21, 67:11,
86:25, 88:13, 97:22,
138:2, 155:23,
155:26, 170:5,
170:14, 172:28,
173:4, 173:23, 191:7,
191:19, 191:21,
191:26, 196:14,
197:15, 200:23
miles [1] - 84:16
military [1] - 188:9
mind [4] - 17:11,
96:12, 115:28, 184:9
minds [1] - 122:13
minimisation [29] -
54:26, 55:4, 55:13,
56:12, 58:20, 58:22,
59:5, 59:10, 62:22,
63:2, 63:3, 65:4,
65:29, 70:14, 71:2,
71:12, 72:12, 72:14,
96:23, 97:18, 103:6,
103:9, 104:2, 108:3,
113:6, 165:18,
172:10, 172:11, 200:6
minimise [5] - 55:5,
59:29, 60:13, 103:11,
165:22
minimises [1] -
59:27
minimization [10] -
20:29, 62:7, 62:14,
62:29, 66:4, 66:5,
69:6, 72:23, 97:15,
165:27
minimize [2] - 20:2,
59:17
minimum [9] - 76:17,
134:6, 136:18,
136:20, 136:29,
137:9, 137:13,
179:20, 182:15
minimum' [1] -
178:17
minute [1] - 48:5
minutes [1] - 197:16
misplaced [2] -
190:13, 190:27
missing [1] - 194:2
missions [1] -
198:28
misspoke [1] - 6:2
mistake [1] - 81:7
modern [1] - 35:10
modified [2] - 13:10,
86:10
modify [2] - 74:7,
77:21
moment [16] - 17:18,
23:5, 36:17, 50:17,
56:18, 66:7, 66:9,
81:14, 83:7, 84:5,
88:23, 93:3, 115:7,
134:14, 143:27,
173:19
moments [2] - 48:1,
92:25
monetary [2] - 138:9,
139:6
money [4] - 17:25,
17:27, 133:13, 150:28
monitored [2] -
162:4, 162:25
monitoring [1] -
173:25
Monitoring [1] - 11:6
Monsanto [1] - 160:6
Monsanto.. [1] -
171:11
months [1] - 67:12
Moreover [2] -
161:18, 163:4
moreover [2] -
15:29, 20:7
morning [3] - 5:4,
141:19, 175:2
most [11] - 17:11,
31:29, 49:4, 74:19,
75:1, 91:8, 92:4,
123:7, 123:8, 156:7,
163:5
motion [2] - 89:11,
188:2
motions [1] - 21:17
move [7] - 8:26,
75:14, 89:26, 92:9,
114:17, 137:3, 195:16
moves [1] - 41:21
MR [151] - 2:4, 2:4,
2:9, 2:10, 2:14, 2:15,
2:15, 2:25, 2:29, 3:1,
4:5, 5:7, 5:9, 5:16,
5:27, 6:2, 6:8, 6:20,
6:26, 12:17, 12:19,

19:17, 21:8, 23:8,
23:14, 29:23, 31:14,
31:21, 31:24, 34:6,
39:4, 45:26, 46:1,
46:5, 47:8, 47:15,
47:26, 47:28, 50:19,
53:1, 54:9, 54:17,
55:9, 56:20, 56:23,
56:26, 58:20, 61:14,
62:2, 62:4, 64:1,
74:16, 78:24, 78:27,
83:29, 84:2, 84:7,
84:9, 84:12, 87:18,
87:20, 88:18, 88:24,
88:29, 90:10, 90:13,
95:14, 96:2, 96:11,
97:27, 97:29, 98:3,
98:6, 99:14, 99:16,
104:14, 106:14,
106:16, 107:11,
107:14, 107:18,
107:21, 107:23,
107:28, 108:6,
108:18, 108:23,
108:28, 109:4, 110:5,
110:8, 111:4, 111:6,
115:9, 115:11,
115:17, 115:20,
115:23, 115:26,
116:1, 116:5, 116:8,
116:22, 120:5, 120:7,
120:29, 121:3, 121:7,
121:27, 122:2,
122:11, 124:19,
124:22, 124:25,
129:2, 140:4, 140:19,
143:3, 143:7, 149:6,
149:10, 149:13,
149:18, 149:23,
149:25, 149:28,
150:5, 150:8, 163:26,
163:29, 175:24,
175:25, 175:28,
176:2, 176:5, 176:12,
176:13, 176:18,
176:21, 176:26,
193:28, 194:2, 194:8,
197:27, 198:5,
200:25, 201:23,
201:26, 201:27,
201:28, 202:1
MS ^[146] - 1:17, 2:5,
2:9, 2:19, 2:20, 2:25,
2:30, 3:2, 5:4, 5:8,
5:15, 5:26, 6:1, 6:4,
6:6, 6:7, 6:19, 6:25,
12:15, 12:18, 19:16,
21:7, 23:7, 23:12,
29:22, 31:11, 31:19,
31:23, 34:5, 39:1,
45:24, 45:29, 46:4,

47:7, 47:14, 47:24,
47:27, 50:18, 52:29,
54:8, 54:16, 55:8,
56:18, 56:21, 56:24,
58:19, 61:13, 62:1,
62:3, 63:29, 74:15,
78:23, 78:26, 83:28,
84:1, 84:5, 84:8,
84:11, 87:16, 87:19,
88:16, 88:23, 88:28,
90:9, 90:12, 95:13,
95:29, 96:9, 97:26,
97:28, 98:2, 98:5,
99:13, 99:15, 104:13,
106:13, 106:15,
107:9, 107:13,
107:15, 107:20,
107:22, 107:26,
108:5, 108:17,
108:22, 108:26,
109:2, 110:4, 110:7,
111:3, 111:5, 115:7,
115:10, 115:14,
115:18, 115:22,
115:25, 115:28,
116:4, 116:7, 116:20,
120:4, 120:6, 120:27,
121:2, 121:5, 121:25,
122:1, 122:10,
124:17, 124:21,
124:24, 129:1, 140:2,
140:18, 143:1, 143:5,
149:4, 149:7, 149:11,
149:15, 149:21,
149:24, 149:26,
150:4, 150:7, 163:25,
163:27, 175:14,
175:21, 175:27,
176:1, 176:7, 176:17,
176:20, 176:25,
193:26, 193:29,
194:4, 197:26, 198:4,
200:24, 201:21,
201:24, 201:29
Mueller ^[5] - 94:4,
94:8, 95:19, 95:22,
95:24
Mueller's ^[1] - 94:4
MURRAY ^[1] - 2:4
must ^[39] - 3:9, 9:29,
11:29, 20:8, 24:3,
27:25, 37:29, 40:14,
81:9, 91:6, 98:24,
132:23, 133:8,
133:29, 134:17,
135:27, 136:28,
137:1, 160:3, 160:12,
160:27, 161:18,
161:24, 162:29,
165:16, 165:20,
165:25, 172:21,

175:28, 179:8,
180:19, 181:4,
181:17, 181:20,
181:21, 186:26,
191:29, 196:26, 197:7
muster ^[1] - 138:12

N

njo ^[1] - 158:5
name ^[4] - 49:15,
131:28, 151:11,
156:15
named ^[2] - 1:26,
151:7
namely ^[4] - 90:19,
162:11, 166:17,
184:18
names ^[1] - 131:24
Narcotics ^[1] -
196:19
narcotics ^[1] -
187:25
narrow ^[1] - 39:28
narrowed ^[1] - 37:26
narrowly ^[1] - 133:27
nation ^[1] - 196:26
nation-states ^[1] -
196:26
National ^[16] - 35:28,
36:21, 50:27, 53:25,
57:1, 65:12, 65:24,
66:4, 66:21, 69:15,
75:26, 76:7, 77:9,
141:22, 156:17, 163:9
national ^[25] - 5:20,
5:23, 5:27, 7:22, 15:6,
22:15, 25:23, 25:26,
35:26, 36:5, 42:19,
43:20, 43:26, 43:27,
43:29, 50:21, 64:17,
73:15, 77:3, 118:21,
145:8, 189:13,
192:28, 198:28, 199:4
nations ^[1] - 194:26
nations' ^[1] -
196:28
nations.. ^[1] - 164:7
natural ^[2] - 19:26,
147:16
nature ^[13] - 8:11,
14:6, 15:20, 18:29,
29:29, 49:13, 94:9,
130:13, 136:7, 136:8,
139:15, 139:18
near ^[1] - 64:28
nearly ^[1] - 82:10
necessarily ^[13] -
9:25, 19:20, 26:16,

34:26, 36:13, 41:13,
41:17, 94:23, 95:4,
162:9, 163:7, 181:27,
187:4
necessary ^[22] -
14:10, 19:7, 28:20,
33:25, 41:27, 49:26,
57:12, 60:10, 64:2,
64:16, 76:14, 76:26,
76:27, 86:7, 98:23,
126:9, 145:19, 153:6,
154:22, 181:3, 193:4,
193:11
need ^[31] - 31:7,
44:24, 45:21, 45:22,
56:10, 59:22, 61:21,
75:4, 78:9, 81:14,
83:9, 85:23, 90:17,
97:5, 101:23, 103:13,
104:29, 110:28,
120:2, 120:8, 123:1,
134:18, 154:25,
164:18, 169:2,
179:16, 180:5,
183:16, 194:20,
200:20, 201:18
needn't ^[1] - 95:24
negligent ^[1] - 81:8
NESSA ^[1] - 2:30
network ^[1] - 64:11
never ^[2] - 80:7,
95:21
nevertheless ^[1] -
182:2
new ^[6] - 13:4, 45:24,
74:17, 84:25, 151:23
New ^[1] - 157:1
newest ^[1] - 31:6
next ^[11] - 16:14,
45:16, 75:14, 92:18,
102:27, 150:4,
160:17, 169:3, 171:3,
171:20, 194:9
night ^[1] - 176:6
Ninth ^[14] - 88:24,
94:25, 132:26,
135:10, 178:4,
178:11, 179:3,
179:13, 180:8, 181:5,
181:7, 184:14,
184:22, 192:26
Nixon ^[1] - 50:4
nobody ^[2] - 74:8,
74:14
nomenclature ^[1] -
46:28
nominated ^[1] -
13:19
non ^[57] - 10:26,
11:19, 13:1, 15:20,

20:29, 21:1, 25:15,
27:17, 30:4, 31:8,
32:19, 33:20, 34:14,
34:28, 35:6, 36:13,
36:27, 40:11, 40:18,
41:10, 52:18, 53:3,
53:11, 53:12, 55:22,
55:24, 59:19, 59:29,
60:4, 60:16, 61:6,
62:24, 63:3, 67:20,
69:13, 81:16, 96:28,
102:20, 103:11,
104:3, 106:28, 113:7,
113:8, 130:5, 130:14,
139:24, 141:28,
143:18, 146:16,
147:28, 161:2,
165:23, 168:11,
174:27, 187:15, 200:5
non-Americans ^[1] -
13:1
non-compliance ^[2] -
20:29, 21:1
non-economic ^[1] -
130:14
non-imminent ^[2] -
30:4, 174:27
non-judicial ^[2] -
15:20, 41:10
non-paranoid ^[1] -
168:11
non-pecuniary ^[1] -
143:18
non-publicly ^[4] -
59:19, 60:4, 103:11,
165:23
non-reviewable ^[1] -
146:16
non-US ^[42] - 10:26,
11:19, 25:15, 27:17,
31:8, 32:19, 33:20,
34:14, 34:28, 35:6,
36:13, 36:27, 40:11,
40:18, 52:18, 53:3,
53:11, 53:12, 55:22,
55:24, 59:29, 60:16,
61:6, 62:24, 63:3,
67:20, 69:13, 81:16,
96:28, 102:20, 104:3,
106:28, 113:7, 113:8,
130:5, 139:24,
141:28, 147:28,
161:2, 187:15, 200:5
none ^[4] - 163:19,
169:29, 171:12,
182:23
None ^[1] - 136:2
nonetheless ^[4] -
49:25, 129:5, 155:17,
200:12

nonpecuniary [4] - 132:25, 133:26, 134:18, 136:1
nonresident [1] - 188:23
normal [2] - 79:20, 100:17
NORTH [2] - 2:31, 2:32
Northern [2] - 89:10, 89:15
Norton [1] - 90:8
Notably [1] - 112:9
notably [1] - 33:21
note [22] - 14:21, 15:10, 15:15, 27:9, 30:12, 32:13, 37:16, 41:1, 46:28, 73:21, 74:28, 89:1, 97:23, 106:21, 114:1, 115:2, 156:19, 167:22, 175:4, 177:4, 177:9
noted [8] - 34:24, 39:14, 94:4, 114:19, 122:16, 168:11, 181:7, 181:10
notes [1] - 1:25
Nothing [1] - 151:11
nothing [4] - 95:19, 121:7, 137:9, 150:20
notice [6] - 81:18, 110:13, 117:2, 117:25, 172:21, 184:5
notification [3] - 79:25, 80:6, 172:26
noting [1] - 112:13
notwithstanding [3] - 14:29, 53:22, 60:22
novo [3] - 127:24, 128:13, 153:28
now-expired [1] - 174:21
NSA [8] - 36:3, 36:8, 37:8, 37:14, 118:15, 118:26, 141:21, 146:9
nuances [1] - 155:20
number [23] - 10:24, 11:25, 15:12, 16:28, 17:20, 18:28, 23:27, 33:15, 34:16, 47:1, 57:21, 73:24, 96:18, 100:6, 100:7, 111:12, 118:11, 120:4, 141:20, 144:23, 148:9, 156:14, 201:17
numbering [1] - 84:6
numbers [11] - 16:29, 17:12, 20:16, 47:26, 50:14, 50:16, 73:21, 88:26, 194:1,

194:5
numerals [1] - 47:24
numerous [1] - 163:18

O

O'DWYER [1] - 3:1
O'SULLIVAN [1] - 2:15
oath [2] - 57:4, 83:17
Obama [4] - 12:25, 13:26, 88:15, 88:19
object [1] - 76:27
objected [1] - 123:6
objecting [1] - 22:8
objection [2] - 139:19, 175:24
objectionable [1] - 97:19
objections [3] - 41:3, 42:4, 43:28
objective [4] - 19:9, 111:26, 112:26, 170:9
objectively [2] - 29:17, 160:21
objectives [2] - 72:6, 200:9
obligation [6] - 76:25, 79:26, 80:6, 106:24, 172:26, 186:23
obligations [1] - 191:3
observance [1] - 153:22
observations [2] - 179:5, 181:15
observed [5] - 10:25, 20:8, 27:12, 28:24, 188:16
obstacle [1] - 130:8
obstacles [2] - 130:6, 144:3
obtain [12] - 25:22, 33:7, 59:23, 63:17, 102:8, 140:20, 140:23, 164:5, 165:6, 165:16, 166:1, 183:21
obtained [10] - 18:17, 18:23, 21:18, 79:11, 80:25, 80:27, 98:15, 131:22, 172:19, 187:23
obtaining [4] - 8:9, 63:20, 98:27, 102:18
obtains [2] - 105:10, 197:1
obvious [3] - 17:11,

79:4, 105:17
obviously [25] - 12:12, 30:28, 30:29, 44:15, 45:1, 73:14, 73:19, 74:8, 75:1, 79:26, 95:2, 100:26, 113:24, 117:19, 118:26, 120:8, 122:4, 129:24, 129:27, 130:2, 139:12, 152:4, 176:10, 186:29, 201:1
occasionally [1] - 134:26
occasions [1] - 131:18
occur [2] - 164:17, 197:6
occurred [4] - 10:8, 24:6, 188:27, 197:17
occurring [1] - 108:28
October [1] - 43:25
odd [2] - 188:17, 194:10
odds [1] - 137:21
OF [1] - 2:19
of [1] - 177:13
offence [7] - 19:13, 19:20, 24:6, 98:22, 98:26, 105:1, 106:23
offences [1] - 104:28
offend [1] - 43:5
offense [1] - 80:19
offenses [1] - 38:17
offer [2] - 9:9, 162:3
officer [10] - 82:2, 82:9, 82:10, 83:13, 83:17, 86:12, 87:23, 99:2, 150:29, 151:10
officers [8] - 21:12, 62:12, 93:15, 97:13, 101:5, 120:1, 122:29, 151:11
official [9] - 23:21, 66:17, 82:3, 87:24, 94:10, 94:15, 99:3, 111:22, 151:1
officials [8] - 18:15, 22:13, 24:1, 82:16, 114:12, 187:29, 188:10
often [5] - 52:1, 67:18, 135:20, 159:2, 196:19
older [1] - 163:22
oldest [1] - 31:5
ON [2] - 1:18, 5:1
once [5] - 14:7, 31:25, 38:13, 71:5, 76:21

one [66] - 11:11, 11:28, 13:28, 14:19, 22:21, 31:6, 39:7, 48:1, 48:12, 66:7, 68:15, 69:19, 75:1, 75:2, 79:19, 81:14, 85:14, 88:16, 91:1, 92:21, 93:3, 98:8, 101:8, 101:13, 104:20, 111:14, 113:14, 119:5, 119:26, 120:1, 120:5, 121:12, 121:16, 121:19, 121:23, 126:25, 128:7, 129:2, 130:17, 140:29, 142:11, 154:14, 154:18, 155:9, 155:11, 155:26, 158:27, 162:24, 168:14, 168:15, 172:2, 175:5, 176:21, 180:6, 183:17, 183:26, 184:2, 184:28, 185:9, 185:17, 185:25, 187:5, 194:4, 197:24, 200:11
ONE [1] - 2:21
ones [2] - 45:24, 112:4
ongoing [5] - 14:26, 166:21, 167:3, 167:5, 168:4
Online [1] - 11:6
open [14] - 6:9, 6:21, 10:4, 10:9, 16:15, 33:13, 33:21, 114:8, 130:24, 194:27, 201:8, 201:9, 201:12
opened [8] - 8:1, 10:5, 29:5, 130:17, 156:3, 174:15, 197:21, 201:4
opening [2] - 111:20, 201:16
operate [7] - 16:10, 21:10, 21:15, 29:8, 36:26, 40:19, 131:13
operated [2] - 13:17, 51:8
operates [5] - 34:26, 40:17, 175:10, 177:20, 188:13
operating [1] - 150:6
operation [1] - 115:3
operations [4] - 52:27, 52:28, 191:17, 191:18
opinion [9] - 89:28,

130:25, 137:3, 147:12, 171:21, 177:6, 180:16, 192:5, 193:19
opinions [1] - 13:22
opportunities [2] - 33:27, 126:11
opportunity [5] - 8:19, 14:5, 30:19, 176:4, 176:14
opposed [3] - 20:6, 28:14, 55:11
opt [3] - 37:22, 143:28, 146:6
optimistic [1] - 21:6
options [2] - 155:25, 155:26
oral [1] - 83:3
order [37] - 12:24, 15:1, 24:3, 26:12, 26:13, 27:26, 28:23, 53:23, 54:15, 56:4, 61:1, 63:23, 72:17, 72:27, 73:7, 73:8, 73:10, 74:4, 76:23, 80:14, 82:5, 83:15, 86:4, 86:5, 86:9, 102:5, 102:16, 102:26, 118:20, 127:21, 128:10, 130:1, 138:6, 140:27, 152:18, 152:26, 157:12
Order [8] - 26:4, 36:4, 69:22, 69:26, 118:19, 164:10, 170:19, 198:13
Orders [1] - 198:16
orders [7] - 10:13, 10:14, 26:8, 26:9, 84:18, 100:23
orders" [1] - 54:20
Orders" [1] - 84:4
ordinary [3] - 27:22, 144:7, 152:8
Oregon [1] - 111:16
organisation [2] - 37:28, 89:4
organisations [2] - 144:26, 149:8
organised [2] - 16:26, 63:23
organization [3] - 147:1, 147:2, 187:25
organizations [1] - 156:23
orientation [1] - 198:25
orientations [1] - 13:4

original [9] - 8:24, 11:11, 17:13, 19:20, 46:25, 52:5, 52:20, 76:4, 97:24
originally [10] - 22:24, 46:21, 47:18, 51:9, 74:10, 78:5, 104:16, 104:23, 130:3, 149:3
originates [1] - 53:11
originating [1] - 38:20
origins [1] - 114:23
os [1] - 39:1
otherwise [21] - 42:20, 44:4, 78:2, 101:27, 135:15, 138:2, 146:8, 151:24, 152:23, 152:24, 152:28, 153:17, 153:24, 154:13, 167:18, 168:8, 171:8, 171:25, 189:14, 192:28, 193:7
ourselves [1] - 78:9
out' [1] - 71:3
outgoing [1] - 20:14
outline [1] - 65:24
outlined [7] - 26:20, 30:7, 40:24, 42:6, 101:17, 155:29, 156:1
outlines [1] - 6:29
outside [25] - 23:20, 52:16, 52:18, 52:22, 53:4, 53:18, 53:29, 55:26, 57:29, 58:4, 58:15, 65:16, 66:25, 68:3, 68:8, 68:19, 68:28, 69:13, 69:21, 81:16, 103:25, 156:27, 189:23, 195:4, 196:28
over-shadowed [1] - 95:20
overall [2] - 21:16, 124:23
overarching [5] - 26:25, 110:10, 148:22, 154:24, 185:22
overcomes [1] - 136:3
overly [1] - 24:14
Oversight [1] - 85:13
oversight [7] - 13:11, 41:10, 41:12, 41:15, 41:16, 52:12, 85:15
overwhelm [1] - 123:16
own [14] - 14:11,

37:22, 79:21, 82:14, 92:13, 101:16, 115:4, 121:23, 125:24, 154:10, 164:16, 166:9, 186:5, 189:21
owned [1] - 188:22

P

packed [1] - 106:17
PAGE [1] - 4:3
page [138] - 5:18, 7:12, 8:7, 8:26, 48:13, 50:14, 50:16, 52:25, 54:18, 56:14, 56:15, 56:21, 56:23, 59:7, 59:9, 61:13, 61:14, 61:18, 61:29, 62:26, 63:26, 64:28, 65:6, 66:13, 70:2, 70:11, 70:13, 70:20, 73:4, 73:27, 75:15, 75:19, 75:20, 78:22, 78:25, 82:22, 83:11, 83:28, 83:29, 84:3, 84:26, 86:3, 87:16, 87:18, 88:26, 88:29, 89:26, 92:9, 93:27, 93:29, 95:13, 95:14, 95:15, 96:6, 96:9, 96:16, 97:4, 97:6, 98:7, 99:12, 99:14, 100:19, 100:21, 101:2, 101:28, 102:27, 103:8, 103:16, 104:14, 105:1, 105:26, 106:12, 108:14, 110:13, 110:14, 111:18, 115:5, 115:12, 115:15, 116:2, 116:10, 116:19, 116:24, 119:9, 120:14, 120:15, 120:17, 120:24, 120:28, 120:29, 122:6, 123:22, 124:13, 124:15, 124:19, 125:17, 127:14, 137:3, 137:4, 137:17, 139:27, 143:1, 143:3, 146:17, 149:8, 149:9, 149:15, 150:4, 150:5, 153:3, 157:29, 170:13, 171:20, 171:21, 180:17, 187:21, 192:4, 192:7, 192:21, 193:18, 193:27, 194:4, 194:9, 194:21,

195:9, 195:16, 195:17, 196:11, 196:23, 198:2, 198:5, 199:21, 199:25
pages [7] - 16:14, 56:23, 177:4, 193:18, 194:2, 198:3, 201:11
panel [1] - 167:1
panel's [1] - 168:12
papers [2] - 12:16, 102:6
paragraph [29] - 8:1, 8:12, 9:15, 10:3, 10:7, 12:14, 28:24, 34:24, 63:28, 70:6, 70:15, 73:27, 77:20, 92:11, 95:11, 95:13, 101:29, 102:2, 120:15, 122:6, 128:25, 129:6, 142:10, 142:11, 152:16, 169:3, 171:3, 180:17, 196:3
paragraphs [2] - 60:22, 124:26
parallel [4] - 12:23, 134:19, 142:19, 144:4
paranoid [2] - 167:18, 168:11
pardon [6] - 6:7, 61:15, 75:14, 106:15, 176:24, 176:27
parent [1] - 131:20
Parliament [1] - 10:7
part [23] - 6:11, 10:16, 17:6, 47:20, 88:21, 89:16, 101:21, 104:18, 104:23, 107:16, 113:18, 117:4, 136:11, 152:17, 171:16, 173:27, 174:1, 189:13, 189:15, 189:17, 192:28, 193:1, 193:12
parte [3] - 13:18, 51:9, 86:9
participate [1] - 13:20
particular [59] - 7:9, 8:7, 16:1, 17:1, 20:17, 20:20, 26:13, 27:1, 32:8, 32:29, 35:24, 40:9, 40:20, 51:29, 52:14, 54:11, 57:10, 59:16, 64:23, 66:26, 67:13, 68:4, 68:20, 75:9, 78:6, 78:19, 80:5, 80:9, 88:1, 88:8, 99:11, 102:16, 103:10, 106:23,

108:11, 113:3, 117:18, 118:14, 119:28, 122:5, 124:3, 124:13, 127:16, 134:1, 138:5, 139:17, 144:29, 146:12, 148:28, 150:11, 161:13, 165:10, 167:23, 173:13, 183:25, 184:18, 184:27, 187:5, 200:9
Particularisation [1] - 181:3
particularised [2] - 28:2, 160:4
particularization [4] - 179:10, 181:16, 181:25, 184:16
particularized' [2] - 178:27, 180:22
particularized.. [2] - 179:9, 181:18
particularly [6] - 10:26, 22:21, 35:10, 159:21, 159:26, 201:7
parties [6] - 10:16, 44:20, 68:27, 144:23, 161:13, 161:29
partly [1] - 49:10
partners [1] - 199:5
parts [2] - 154:3, 189:8
party [7] - 3:10, 28:12, 60:26, 151:4, 154:4, 162:26, 162:28
pass [1] - 138:12
passage [3] - 111:18, 111:19, 121:23
passed [5] - 10:29, 11:9, 13:9, 13:24, 16:21
passing [1] - 193:6
past [1] - 165:1
Patriot [3] - 48:4, 48:6, 85:5
PATRIOT [3] - 11:1, 11:2, 92:14
Paul [1] - 122:16
pause [7] - 13:14, 19:11, 26:7, 35:8, 55:1, 75:29, 193:3
pecuniary [8] - 40:16, 40:19, 133:28, 134:16, 134:23, 135:7, 135:15, 143:18
pen [11] - 20:9, 20:12, 51:21, 99:8, 99:17, 99:24, 99:27, 100:10, 100:24,

108:9, 139:26
pending [2] - 7:16, 44:19
people [15] - 46:22, 58:4, 58:12, 66:25, 86:25, 103:25, 103:27, 103:29, 116:15, 119:3, 120:8, 145:18, 172:27, 189:20, 193:13
people' [7] - 188:4, 189:7, 189:12, 191:7, 192:17, 192:24, 195:14
people'.. [1] - 181:12
peoples' [1] - 102:23
per [2] - 79:17, 134:8
perfectly [1] - 77:1
performance [2] - 120:3, 123:2
performs [1] - 117:9
perhaps [32] - 17:4, 17:5, 35:11, 39:10, 49:1, 49:23, 62:18, 68:15, 74:28, 94:13, 96:16, 100:29, 101:9, 105:17, 111:18, 115:26, 118:25, 119:27, 122:7, 127:1, 136:6, 140:6, 143:20, 146:13, 154:8, 155:6, 155:22, 157:28, 159:19, 169:2, 181:28, 200:23
period [2] - 53:26, 169:23
permanent [3] - 19:28, 20:6, 33:9
permission [2] - 3:10, 51:20
permission' [1] - 122:19
permit [2] - 116:12, 125:23
permits [1] - 145:4
permitted [3] - 115:4, 183:10, 183:12
permitting [1] - 159:11
person [78] - 23:26, 24:28, 29:1, 34:10, 55:24, 55:29, 58:14, 60:8, 60:15, 60:16, 60:26, 61:3, 61:5, 61:6, 62:11, 62:14, 62:21, 64:2, 64:16, 67:28, 68:2, 68:5, 68:7, 69:13, 74:11, 78:14, 79:1, 79:2, 79:7, 79:12, 79:14,

79:26, 80:3, 80:7,
80:19, 81:4, 86:18,
97:12, 97:14, 97:20,
98:12, 98:18, 98:24,
98:25, 99:11, 99:22,
100:4, 102:9, 102:12,
102:19, 106:18,
106:28, 113:7,
119:14, 125:24,
137:29, 140:14,
141:29, 142:28,
143:9, 144:11,
144:12, 144:15,
144:17, 147:13,
147:16, 150:23,
164:4, 167:1, 172:22,
173:13, 177:15,
182:28, 182:29,
193:10
person^[6] - 19:26,
19:29, 90:20, 99:22,
146:28, 147:14
person's^[3] - 60:9,
125:29
personal^[20] - 14:8,
16:4, 21:22, 22:14,
25:17, 25:20, 43:7,
43:14, 93:28, 100:5,
122:28, 123:3,
123:14, 145:5, 145:7,
177:22, 179:7,
180:26, 181:13,
199:23
personal'^[1] - 94:11
persons^[69] - 10:27,
11:13, 11:16, 11:19,
19:26, 20:10, 20:25,
25:15, 27:17, 27:20,
31:8, 31:10, 31:11,
31:12, 31:15, 32:29,
52:16, 52:18, 52:22,
53:3, 53:4, 53:11,
53:12, 53:18, 53:19,
53:28, 55:5, 57:28,
59:20, 59:22, 59:27,
59:29, 61:24, 61:26,
62:23, 62:24, 63:3,
65:15, 67:20, 72:7,
81:11, 81:16, 82:13,
83:9, 86:2, 96:27,
96:28, 97:18, 101:6,
101:8, 102:20,
103:13, 104:3, 104:4,
113:8, 130:4, 130:6,
131:13, 147:21,
161:2, 162:1, 163:22,
187:15, 189:12,
192:27, 198:24,
200:13
persons'^[1] - 156:26
persons'^[1] -
165:25
perspective^[5] -
15:27, 16:8, 25:19,
26:24, 147:9
persuasive^[1] -
112:16
pertaining^[2] -
117:10, 125:22
pertains^[1] - 119:16
petition^[7] - 74:2,
74:6, 77:21, 77:23,
77:28, 77:29, 157:11
petitioned^[1] - 157:6
Petitioner^[1] -
177:19
PHILIP^[1] - 2:6
phone^[4] - 20:17,
20:20, 51:23, 166:27
photocopied^[1] -
3:9
phrase^[2] - 59:21,
189:7
physical^[15] - 51:18,
58:25, 61:11, 61:12,
61:16, 61:19, 66:10,
72:16, 96:14, 96:26,
97:10, 98:14, 98:16,
98:28, 108:7
physically^[1] -
51:19
pick^[1] - 91:1
piece^[13] - 21:28,
22:3, 48:8, 48:11,
67:11, 67:13, 71:16,
103:16, 103:19,
114:23, 116:11,
157:27, 200:3
pieces^[2] - 11:11,
48:9
pilot^[3] - 130:28,
131:9, 132:2
pilots^[2] - 131:24,
131:26
place^[16] - 16:25,
18:9, 20:23, 22:6,
57:17, 66:14, 66:20,
66:24, 67:1, 67:26,
69:21, 93:18, 104:21,
155:3, 191:7, 192:12
placed^[1] - 16:28
placement^[1] -
111:11
places^[2] - 75:10,
87:2
plainly^[2] - 180:10,
183:27
PLAINTIFF^[2] - 1:7,
2:4
plaintiff^[17] - 19:3,
111:24, 137:7,
137:23, 159:10,
165:7, 168:8, 178:15,
178:25, 179:7,
179:21, 180:5,
180:19, 180:26,
180:27, 182:26,
183:16
Plaintiff^[3] - 111:27,
111:29, 112:5
plaintiffs'^[1] - 165:4
plaintiffs^[20] - 24:3,
29:14, 29:28, 89:17,
94:5, 134:5, 134:8,
135:23, 136:28,
157:3, 157:16,
157:18, 157:21,
158:14, 159:14,
159:16, 169:15,
170:10, 170:18,
171:13
plaintiffs'^[1] - 29:16
plan^[1] - 6:20
plane^[1] - 168:13
planning^[2] - 55:2,
198:20
plausibility^[1] -
134:27
plausible^[3] -
133:12, 133:16,
135:11
plausibly^[1] -
111:25
play^[1] - 182:6
pleaded^[4] - 132:4,
134:17, 134:19, 178:3
plunged^[1] - 191:25
plus^[2] - 48:13,
137:23
Plyer^[1] - 195:23
point^[23] - 6:5,
15:15, 27:3, 31:22,
35:24, 38:6, 41:16,
41:22, 58:3, 81:3,
88:7, 96:28, 96:29,
106:20, 106:21,
110:9, 114:1, 130:5,
136:16, 147:23,
160:23, 187:5, 187:15
pointed^[1] - 185:22
pointing^[1] - 112:15
points^[5] - 23:22,
99:5, 121:12, 154:18,
185:17
police^[2] - 117:11,
187:27
policies^[1] - 145:7
policy^[3] - 10:23,
118:22, 171:15
Policy^[6] - 12:27,
197:21, 197:28,
200:2, 200:10, 200:15
political^[6] - 123:15,
158:20, 159:4,
191:29, 197:4, 197:8
portion^[4] - 8:17,
124:3, 125:26, 128:15
Porto^[1] - 190:7
posed^[2] - 41:23,
41:24
position^[6] - 40:7,
80:8, 94:24, 180:7,
184:21, 187:10
positioned^[2] -
179:19, 182:14
positions^[1] - 175:5
possession^[1] -
38:9
possibilities^[3] -
27:16, 161:16, 166:12
possibility^[9] -
17:24, 18:14, 18:20,
21:18, 43:8, 45:3,
87:14, 134:20, 175:9
possible^[8] - 8:19,
26:19, 60:13, 160:14,
165:8, 173:24,
175:20, 177:13
possibly^[1] - 156:7
post^[1] - 71:9
postdate^[1] - 12:12
potential^[5] - 64:4,
121:17, 122:14,
124:28, 166:13
power^[27] - 36:8,
64:5, 64:8, 64:9,
64:11, 64:12, 64:14,
75:6, 79:7, 79:8,
86:17, 86:19, 86:26,
87:4, 87:5, 100:23,
151:13, 153:18,
164:4, 182:21, 190:2,
190:7, 194:17, 195:1
power'^[1] - 159:2
power'^[2] - 98:12,
164:5
powers^[5] - 26:5,
158:18, 158:19,
159:25, 192:26
PPD^[2] - 10:24,
26:12
practical^[5] - 32:16,
37:25, 96:24, 100:8,
122:13
practice^[1] - 182:9
practices^[1] -
162:14
pre^[1] - 27:13
preamble^[1] -
192:20
precedent^[1] -
134:25
precise^[1] - 133:24
precisely^[3] - 26:14,
30:25, 92:8
preclude^[1] - 30:24
precluding^[1] -
135:29
precondition^[1] -
40:20
prejudicial^[1] -
154:5
preliminary^[3] - 5:9,
44:2, 152:10
premises^[3] - 51:20,
98:13, 188:6
Presbyterian^[1] -
170:15
presence^[2] - 126:1,
190:24
present^[11] -
118:12, 167:10,
167:16, 168:24,
170:9, 173:15, 174:5,
174:6, 184:8, 185:25,
186:1
presented^[3] -
144:4, 152:25, 153:7
presently^[1] - 40:4
preserve^[1] - 62:17
President^[6] -
12:25, 13:26, 26:10,
26:11, 118:8, 199:26
presidential^[3] -
10:12, 10:23, 26:12
Presidential^[8] -
12:27, 197:21,
197:28, 198:14,
198:17, 200:2,
200:10, 200:15
presiding^[4] - 77:25,
85:2, 85:9, 85:10
pressures^[1] -
123:15
presumably^[2] -
82:10, 191:3
presume^[1] - 175:27
presume'^[1] -
175:23
presumed^[3] -
135:23, 138:9, 138:24
presumption^[1] -
136:7
pretend^[1] - 26:14
prevail^[1] - 196:13
prevent^[5] - 58:6,
65:18, 72:8, 117:11,
158:18
preventing^[1] -
38:16

prevention [1] - 145:1
prevents [1] - 105:10
previous [7] - 56:15, 56:21, 65:6, 98:21, 182:1, 190:22, 196:5
previously [8] - 13:17, 33:14, 96:25, 108:29, 138:14, 174:19, 181:7, 182:19
price [1] - 168:13
primarily [1] - 45:20
primary [1] - 63:19
principal [1] - 117:9
principle [6] - 27:16, 69:19, 92:6, 92:7, 119:21, 158:5
Principles [1] - 198:6
principles [17] - 10:24, 49:17, 56:2, 75:2, 155:12, 155:17, 156:6, 158:18, 180:9, 183:26, 185:2, 185:7, 198:1, 198:10, 200:7, 200:28, 201:18
prioritised [2] - 13:3, 199:17
prism [1] - 52:28
privacy [14] - 9:11, 11:12, 12:29, 30:23, 38:2, 42:29, 122:14, 134:4, 135:2, 138:3, 138:8, 139:15, 139:19, 200:4
PRIVACY [1] - 3:1
Privacy [81] - 11:13, 11:16, 11:19, 12:2, 12:6, 13:7, 13:28, 14:24, 22:17, 22:18, 22:20, 22:26, 22:29, 24:20, 25:11, 27:13, 31:3, 31:4, 31:9, 31:16, 32:1, 32:19, 32:22, 33:10, 33:20, 35:5, 35:8, 35:12, 36:2, 38:12, 40:14, 40:17, 47:10, 47:20, 48:14, 85:12, 91:10, 91:18, 91:22, 91:23, 104:8, 104:19, 107:17, 114:18, 114:22, 114:25, 115:3, 115:4, 116:9, 122:28, 123:18, 131:7, 132:6, 133:2, 133:19, 134:3, 134:22, 134:28, 135:9, 135:22, 136:26, 138:13, 138:17, 139:11, 139:23, 139:27, 140:10, 141:1, 141:8, 142:18, 143:25, 143:27, 143:28, 144:11, 144:17, 147:28, 148:5, 148:10, 198:19, 200:21
private [13] - 13:21, 28:28, 29:1, 32:7, 38:4, 38:7, 38:14, 38:21, 38:24, 38:29, 39:23, 39:24, 199:2
privilege [4] - 89:12, 118:7, 153:18, 189:3
privileged [2] - 62:7, 62:17
probability [1] - 165:5
probable [5] - 75:1, 75:4, 86:15, 164:3, 192:11
probation [1] - 132:5
problem [6] - 15:22, 143:17, 148:22, 154:24, 176:27
problematic [1] - 38:18
problems [7] - 143:12, 143:13, 143:14, 143:15, 143:16, 148:21, 185:21
procedural [11] - 45:9, 123:19, 152:10, 179:14, 180:3, 180:13, 183:4, 183:13, 184:2, 184:3, 184:19
Procedure [5] - 30:13, 30:24, 48:19, 108:29, 149:2
procedure [18] - 9:28, 30:15, 32:29, 61:10, 65:23, 65:27, 65:29, 66:20, 67:9, 73:18, 74:21, 75:13, 76:7, 78:17, 100:17, 101:17, 153:22, 175:7
Procedure" [1] - 149:20
procedures [98] - 20:29, 49:24, 52:15, 53:17, 54:6, 54:26, 55:3, 55:4, 55:16, 56:8, 56:12, 57:17, 58:21, 58:22, 59:6, 59:11, 59:14, 59:26, 59:28, 60:4, 60:18, 60:24, 61:6, 62:7, 62:15, 62:22, 62:29, 63:2, 63:3, 63:12, 65:2, 65:4, 65:13, 65:23, 65:26, 66:5, 66:6, 66:14, 66:23, 66:25, 69:6, 69:29, 70:3, 70:6, 70:8, 70:14, 70:19, 71:3, 71:5, 71:6, 71:13, 71:14, 71:17, 71:18, 71:19, 72:3, 72:4, 72:12, 72:13, 72:14, 72:23, 73:1, 77:8, 77:25, 78:5, 78:7, 81:5, 81:10, 82:29, 84:20, 87:10, 96:23, 97:5, 97:15, 97:18, 100:29, 103:6, 103:9, 103:26, 104:2, 108:3, 113:6, 113:8, 113:9, 161:9, 165:18, 165:21, 165:27, 172:9, 172:10, 172:11, 177:13, 180:11, 183:28, 189:11, 193:10
Procedures" [1] - 65:8
procedures' [3] - 20:2, 20:4, 61:19
proceed [1] - 94:6
proceeding [2] - 50:4, 173:1
PROCEEDING [1] - 4:3
proceedings [9] - 8:2, 8:15, 18:25, 21:25, 22:10, 43:26, 44:29, 45:7, 172:20
process [5] - 13:6, 26:3, 123:4, 158:19, 199:21
processed [3] - 7:21, 15:5, 69:25
proclamation [1] - 198:13
proclamations [2] - 86:24, 198:16
produce [5] - 59:23, 76:16, 103:13, 113:13, 128:21
produced [5] - 21:29, 129:21, 170:21, 175:3, 176:5
product [1] - 169:8
production [4] - 51:29, 101:26, 102:5, 128:10
Prof [5] - 118:14, 118:23, 121:28, 122:7, 201:7
professional [1] - 167:10
profile [1] - 177:26
program [1] - 89:6
program) [1] - 159:17
programmes [1] - 13:11
programs [1] - 164:9
progress [1] - 199:27
prohibit [2] - 59:18, 165:22
prohibited [2] - 80:16, 80:18
prohibition [5] - 49:19, 106:23, 119:20, 169:28, 192:10
prohibitions [2] - 106:3, 116:14
prohibits [1] - 68:16
proliferation [1] - 64:7
prompted [1] - 49:29
promulgate [2] - 117:1, 117:23
promulgated [1] - 126:27
pronouncement [1] - 91:9
pronouncing [3] - 111:1, 173:6, 176:29
proof [3] - 137:9, 137:24, 138:1
proper [1] - 158:6
properly [4] - 22:4, 36:3, 118:19, 178:3
property [2] - 98:13, 188:22
propose [1] - 172:28
proposed [5] - 27:11, 92:15, 92:17, 161:8, 165:19
proposes [1] - 79:29
proposing [2] - 8:26, 71:3
proposition [4] - 147:26, 147:29, 148:2, 190:14
prosecuting [2] - 38:17, 145:2
prosecution [4] - 80:1, 81:29, 105:29, 106:1
prospective [1] - 177:24
protect [11] - 29:26, 36:4, 64:3, 76:16, 76:29, 102:9, 102:20, 113:8, 166:24, 189:20, 199:4
protected [12] - 14:7, 14:9, 20:1, 28:1, 86:20, 102:13, 134:4, 170:23, 178:26, 180:21, 192:24, 193:13
protecting [2] - 11:12, 104:3
Protection [4] - 5:5, 12:2, 138:17, 198:6
PROTECTION [1] - 1:7
protection [25] - 7:4, 7:7, 9:6, 9:7, 9:10, 14:13, 19:25, 21:24, 41:28, 42:29, 62:23, 86:28, 139:16, 148:12, 185:27, 186:9, 186:14, 187:11, 187:16, 188:19, 190:16, 191:8, 191:11
protection' [1] - 187:3
protections [13] - 9:18, 12:29, 38:2, 42:23, 147:28, 148:4, 173:11, 188:11, 190:19, 191:4, 193:15, 194:25, 195:27
protective [1] - 118:8
protects [2] - 91:11, 188:4
prove [11] - 40:14, 40:19, 106:26, 134:6, 134:9, 136:17, 136:19, 136:28, 137:13, 165:9, 183:12
proved [2] - 134:17, 134:19
proven [3] - 135:7, 135:15, 135:24
proverbial [2] - 121:18, 122:15
provide [14] - 7:6, 9:19, 25:19, 57:1, 57:11, 73:8, 76:10, 76:13, 76:26, 106:20, 172:21, 173:26, 177:22, 184:5
Provided [2] - 86:17, 151:9
provided [22] - 7:8, 12:28, 38:22, 42:23, 46:18, 69:29, 74:22, 81:27, 82:28, 102:11,

105:3, 105:7, 105:13, 124:12, 127:4, 131:23, 131:25, 138:7, 153:25, 175:16, 186:16
provider [11] - 53:13, 75:27, 76:3, 76:9, 76:10, 76:18, 76:22, 77:12, 77:19, 174:10, 174:17
provides [19] - 17:20, 33:4, 38:11, 51:16, 67:19, 70:12, 70:16, 78:29, 100:13, 110:14, 124:16, 127:2, 132:22, 141:9, 144:21, 150:9, 150:11, 152:28, 161:29
providing [5] - 49:24, 76:18, 106:6, 118:8, 182:12
province [1] - 159:23
provision [33] - 13:15, 18:10, 19:14, 21:9, 42:15, 53:22, 70:13, 77:14, 84:25, 85:24, 89:22, 90:3, 91:10, 97:7, 100:18, 101:19, 110:23, 118:16, 118:25, 126:26, 127:3, 134:5, 136:16, 138:13, 156:24, 156:29, 157:20, 157:22, 190:1, 193:24, 194:15, 194:28, 199:26
provisional [1] - 7:28
provisions [53] - 6:13, 6:14, 6:18, 16:14, 16:17, 18:28, 20:8, 21:1, 24:22, 27:2, 32:8, 33:10, 34:17, 44:11, 45:19, 46:7, 49:4, 50:26, 80:2, 81:13, 83:6, 84:22, 87:29, 89:8, 90:23, 98:25, 101:7, 110:12, 112:8, 113:26, 113:27, 115:1, 117:29, 127:10, 127:18, 128:6, 128:26, 131:7, 138:21, 141:1, 148:27, 153:9, 154:14, 154:18, 163:23, 176:18, 185:20, 186:7, 190:5, 192:20, 197:13, 199:28, 200:28
proviso [1] - 118:6
prudential [1] - 90:17
public [6] - 38:13, 42:14, 42:19, 43:10, 183:22, 199:15
publicly [7] - 59:19, 60:4, 83:25, 84:13, 100:22, 103:11, 165:23
publish [1] - 146:20
published [2] - 16:21, 27:10
publishing [1] - 13:22
punished [1] - 105:13
punishment [1] - 105:25
punitive [1] - 79:18
purport [2] - 42:14, 43:6
purported [2] - 22:15, 170:28
purportedly [6] - 30:2, 42:2, 42:23, 157:17, 157:19, 174:25
purports [3] - 33:12, 179:23, 182:28
purpose [34] - 36:18, 41:7, 44:3, 45:8, 45:21, 59:16, 60:27, 63:16, 63:19, 68:4, 87:9, 93:11, 98:27, 100:9, 100:27, 116:12, 120:9, 120:19, 120:20, 120:26, 121:9, 121:14, 121:15, 123:12, 124:10, 136:2, 144:14, 145:4, 158:24, 160:8, 189:20, 198:22, 198:28, 199:6
purposes [20] - 7:22, 15:6, 22:15, 38:16, 42:12, 49:26, 49:27, 51:28, 62:8, 73:16, 77:4, 96:24, 101:25, 118:3, 118:12, 121:16, 145:5, 152:24, 160:10, 198:29
pursuant [21] - 22:15, 24:27, 36:4, 56:6, 60:24, 62:10, 67:1, 69:22, 70:9, 72:29, 77:20, 82:4, 82:18, 85:9, 86:8, 97:11, 111:14, 119:14, 119:23, 174:20, 175:7
pursue [2] - 29:15, 43:9
pursued [2] - 30:15, 95:22
pursuing [2] - 21:12, 144:17
purview [2] - 110:18, 118:17
put [7] - 35:13, 43:27, 105:21, 111:8, 134:28, 139:10, 163:8
puts [2] - 104:20, 155:10

Q

qualification [1] - 32:26
qualifications [6] - 33:27, 61:23, 66:18, 84:23, 85:22, 126:11
qualify [2] - 39:25, 136:28
quality [1] - 133:29
quarters [4] - 61:18, 100:20, 124:14, 195:8
QUAY [2] - 2:22, 2:31
questionable [1] - 21:13
questions [4] - 9:4, 39:9, 153:8, 186:17
quicker [2] - 115:22, 149:12
QUIGLEY [1] - 2:16
quite [16] - 46:7, 46:8, 56:18, 120:27, 124:17, 129:25, 133:15, 139:1, 155:12, 175:10, 177:3, 179:9, 181:24, 187:2, 187:10, 196:29
quod [1] - 134:8
quote [1] - 10:3
quotes [3] - 12:19, 122:26, 192:6

R

race [1] - 198:24
Raggi [1] - 168:11
raise [1] - 147:10
raised [2] - 41:3, 147:23
raises [1] - 135:19
raise [6] - 32:1, 32:10, 50:23, 121:16, 144:3, 155:25
ranges [1] - 155:25
rank [1] - 102:4
rather [15] - 21:24, 25:21, 45:28, 71:16, 88:26, 90:13, 94:10, 105:23, 130:13, 140:26, 143:20, 161:5, 163:17, 166:28, 181:14
Rather [1] - 95:22
Ratzlaf [1] - 111:22
reach [3] - 93:12, 164:7, 192:17
reached [3] - 7:28, 94:3, 95:28
reaching [2] - 137:23, 158:26
reaction [1] - 167:28
read [12] - 44:25, 61:21, 95:10, 95:27, 111:19, 135:12, 149:5, 177:4, 187:21, 197:29, 200:7
readily [1] - 184:9
reading [8] - 38:3, 39:7, 39:14, 39:28, 40:2, 135:9, 137:18, 194:7
real [2] - 179:27, 183:8
reality [2] - 21:21, 104:9
really [11] - 69:23, 73:12, 99:5, 154:27, 155:18, 156:5, 185:25, 186:26, 187:1, 187:9, 192:8
reason [12] - 80:27, 101:10, 115:23, 125:10, 142:22, 146:8, 150:2, 168:24, 172:3, 183:3, 193:4, 193:12
reason' [1] - 91:2
reasonable [15] - 29:17, 30:19, 35:3, 79:19, 128:1, 128:23, 129:18, 135:5, 160:21, 160:25, 167:11, 167:27, 171:7, 177:12, 191:26
reasonableness [1] - 167:8
reasonably [15] - 24:6, 53:28, 57:20, 57:29, 59:15, 65:13, 65:16, 68:2, 68:5, 68:8, 72:5, 72:7, 100:8, 137:24, 156:26
reasoned [1] - 73:12
reasoning [1] - 168:12
reasons [6] - 40:24, 48:14, 73:9, 74:7, 170:13, 170:26
reasons.. [1] - 181:9
recap [1] - 112:22
receipt [2] - 7:16, 44:19
receive [3] - 138:6, 190:19, 195:27
received [3] - 14:21, 131:15, 131:27
receiving [1] - 77:19
recent [3] - 74:20, 91:8, 177:1
recently [8] - 27:10, 37:13, 73:13, 141:20, 142:6, 145:12, 176:9
recently-published [1] - 27:10
recipients [4] - 58:8, 65:20, 68:11, 68:18
reckless [4] - 19:7, 112:4, 112:8, 112:23
recognised [1] - 51:6
recognize [1] - 181:29
recommended [1] - 85:11
recommends [2] - 11:19, 17:20
reconcilable [1] - 30:6
reconsideration [1] - 152:27
record [39] - 33:23, 33:29, 34:8, 34:16, 38:13, 38:20, 38:27, 39:4, 39:8, 39:13, 39:21, 73:9, 119:12, 119:16, 119:17, 120:2, 120:3, 120:18, 120:19, 123:12, 124:3, 124:5, 125:3, 125:8, 125:25, 125:29, 126:7, 126:13, 126:16, 126:21, 127:20, 127:22, 127:26, 129:3, 129:20, 142:12, 142:13, 153:25, 154:3
record' [6] - 36:29, 38:11, 38:25, 39:14, 39:26, 39:29
records [43] - 25:16, 32:3, 32:4, 34:3, 36:3,

36:9, 51:28, 52:3,
77:10, 101:25, 102:6,
106:5, 115:13, 116:5,
116:13, 117:3, 117:5,
117:18, 117:19,
117:26, 117:27,
118:17, 118:27,
119:13, 119:22,
120:8, 120:25, 121:8,
125:18, 125:22,
126:3, 128:8, 128:10,
128:11, 128:14,
128:15, 128:22,
131:3, 132:8, 140:14,
140:23, 141:26,
141:27
records' [1] - 33:5
recourse [3] - 21:17,
22:12, 25:20
recover [8] - 25:2,
79:15, 134:5, 134:9,
135:24, 138:1, 138:4,
139:4
recovery [9] -
132:25, 134:22,
135:1, 135:23,
137:12, 137:22,
138:6, 138:27, 183:10
recovery' [1] -
137:18
redacted [2] - 13:22,
73:14
redress [11] - 15:11,
27:12, 27:16, 28:23,
40:28, 41:2, 41:14,
44:8, 185:27, 185:28,
186:16
Redress [25] - 11:10,
11:17, 12:6, 13:25,
31:4, 31:6, 31:9,
31:25, 32:14, 36:23,
48:13, 114:18,
114:26, 115:15,
115:27, 139:25,
140:1, 141:19,
142:20, 142:25,
143:4, 144:1, 146:7,
147:27, 197:20
redressable [1] -
160:6
redressed [2] -
28:15, 178:19
reduce [1] - 117:11
refer [28] - 6:17,
9:26, 46:22, 47:9,
85:23, 88:21, 122:8,
134:13, 136:12,
140:26, 140:28,
141:3, 148:28,
154:28, 156:6,
170:14, 171:21,
173:29, 176:21,
177:5, 181:1, 183:20,
187:13, 187:14,
187:17, 197:12,
197:22, 201:18
reference [25] - 7:1,
8:4, 10:12, 15:23,
18:2, 41:8, 44:2,
44:26, 61:9, 81:18,
101:16, 113:16,
120:22, 121:3,
121:14, 127:27,
138:1, 138:4, 138:10,
142:9, 170:15,
175:11, 175:15,
197:20, 200:8
referenced [2] -
101:14, 136:12
references [4] -
47:23, 52:7, 108:19,
187:4
References [1] -
108:15
referencing [2] -
113:25, 142:19
referred [34] - 6:14,
11:1, 11:7, 12:7,
14:29, 16:22, 16:23,
31:17, 36:17, 48:28,
51:2, 52:2, 52:27,
56:29, 63:12, 67:5,
67:18, 92:22, 97:23,
112:9, 113:9, 113:14,
118:22, 130:17,
139:20, 154:15,
156:8, 156:10,
172:25, 186:7,
186:26, 187:19,
197:18, 197:19
referring [6] - 7:9,
99:10, 107:27,
113:27, 179:1, 197:16
refers [18] - 9:15,
10:5, 18:4, 45:3,
51:14, 51:28, 59:10,
60:18, 132:11,
144:10, 147:5,
164:12, 179:29,
189:12, 192:27,
196:9, 196:18, 200:6
refining [1] - 199:21
reflecting [1] - 86:27
reflection [1] - 97:17
refocussing [1] -
13:1
reform [1] - 13:6
reforms [2] - 12:25,
12:28
refusal [1] - 134:29
refused [5] - 73:19,
73:25, 74:12, 126:4
refuses [1] - 125:14
regard [6] - 6:3,
10:26, 14:15, 15:10,
27:9, 33:4
regarded [1] -
182:12
regarding [4] -
30:22, 38:2, 52:15,
165:19
regardless [1] -
184:6
regards [1] - 9:12
regime [1] - 196:29
regional [2] - 37:28,
147:1
register [6] - 99:17,
99:24, 99:27, 100:10,
100:24, 108:9
registers [4] - 20:9,
20:13, 51:21, 99:8
REGISTRAR [1] - 5:5
regular [2] - 47:26,
47:27
regulate [1] - 171:15
regulating [1] -
189:11
regulations [1] -
35:28
rehearing [1] - 157:5
Rehnquist [2] -
192:6, 192:14
Reid [1] - 188:8
Reid.. [1] - 190:13
reiterated [2] -
91:28, 160:12
reiterates [1] - 8:10
rejected [1] - 195:3
rejected.. [1] -
190:11
rejection [1] - 93:5
rejoinder [1] -
138:12
related [4] - 38:23,
39:24, 159:1, 188:18
relates [4] - 13:28,
61:5, 64:1, 64:15
relating [4] - 28:29,
33:26, 126:10, 170:19
relation [28] - 5:24,
8:17, 26:17, 27:12,
31:28, 40:10, 50:7,
52:21, 55:13, 61:6,
62:20, 67:16, 70:14,
74:8, 86:2, 88:4,
105:28, 112:29,
117:14, 118:28,
131:3, 141:10,
148:19, 155:10,
185:22, 186:11,
187:6, 197:11
relationship [1] -
182:11
relatively [4] - 177:5,
185:1, 190:10, 195:12
relaxed [1] - 167:7
released [2] - 73:13,
73:14
relevance [2] - 38:6,
126:8
relevant [22] - 6:13,
6:15, 13:18, 23:22,
25:22, 30:12, 31:26,
33:24, 35:29, 37:19,
41:7, 41:17, 44:9,
53:13, 56:2, 105:29,
106:11, 146:2,
150:25, 153:8, 167:4,
178:24
reliance [4] - 9:2,
91:4, 190:13, 190:26
relied [4] - 7:8,
43:13, 132:21, 185:18
relief [10] - 16:10,
23:25, 148:25,
150:27, 151:2,
151:14, 151:15,
151:17, 152:18, 165:6
reliefs [1] - 32:10
relies [3] - 6:11,
161:16, 195:19
religion [1] - 198:25
reluctance [1] -
165:13
reluctant [1] - 165:1
rely [1] - 86:26
Relying [1] - 188:13
relying [2] - 102:24,
111:22
remain [1] - 147:24
remains [2] - 15:1,
45:15
remand [1] - 89:14
remanded [1] - 89:14
remedial [5] - 15:12,
15:24, 25:18, 134:5,
136:2
Remedies [3] -
124:16, 143:6, 143:7
remedies [46] -
11:16, 15:19, 15:27,
16:6, 17:20, 18:6,
23:6, 26:1, 26:20,
32:18, 32:27, 33:7,
33:13, 33:15, 33:19,
34:13, 35:4, 35:5,
35:9, 35:15, 35:25,
36:2, 36:12, 36:26,
40:1, 40:17, 40:20,
41:10, 41:18, 43:9,
44:8, 48:2, 113:19,
124:12, 127:15,
140:11, 140:20,
142:26, 142:27,
142:28, 143:8, 143:9,
148:7, 148:9, 150:17,
185:28
remedy [43] - 7:18,
15:2, 16:3, 18:10,
18:11, 19:19, 21:21,
22:7, 23:25, 29:9,
34:9, 34:10, 34:27,
40:3, 40:11, 42:5,
42:10, 42:17, 42:27,
44:21, 48:4, 48:20,
78:27, 79:23, 106:25,
106:29, 110:17,
113:15, 127:26,
128:20, 129:20,
141:28, 142:20,
142:21, 144:17,
151:20, 151:21,
151:23, 152:2, 152:4,
152:7, 191:22, 196:15
remember [3] -
70:28, 78:19, 174:29
remote [1] - 23:17
removed [1] - 145:16
renders [1] - 93:14
renewed [1] - 131:17
repackaged [1] -
168:21
repeat [1] - 185:7
repeatedly [1] -
160:11
repetitive [1] - 96:17
report [12] - 50:7,
52:13, 85:17, 118:23,
122:3, 122:7, 155:2,
175:15, 175:18,
201:2, 201:4, 201:7
Reporting [1] -
177:11
reporting [3] -
177:12, 177:19, 184:4
reports [15] - 6:17,
6:21, 14:20, 85:16,
114:3, 114:15,
121:23, 122:4,
154:29, 156:10,
175:17, 199:26,
201:1, 201:7, 201:13
reports.. [1] - 177:14
reproduced [1] - 3:9
request [10] -
119:15, 119:23,
124:2, 125:3, 125:14,
125:18, 125:21,
125:24, 126:3, 127:22

requested [3] - 86:10, 128:22, 159:4
requests [1] - 125:19
require [9] - 36:29, 60:4, 60:25, 67:10, 91:29, 125:27, 138:5, 165:2, 197:4
required [16] - 30:8, 54:6, 54:25, 56:11, 62:15, 71:28, 72:22, 97:15, 118:20, 124:10, 131:12, 142:17, 152:23, 153:22, 178:4, 184:5
requirement [43] - 19:11, 19:19, 19:21, 24:7, 25:4, 27:4, 27:6, 34:24, 40:18, 40:22, 55:17, 56:16, 58:18, 65:10, 90:20, 98:24, 106:22, 110:10, 112:5, 141:7, 141:9, 160:27, 161:17, 161:24, 164:22, 173:10, 177:16, 178:12, 178:24, 179:4, 179:6, 179:15, 179:22, 179:27, 181:6, 182:8, 182:27, 183:5, 183:9, 184:21, 192:10
Requirement [2] - 66:2, 73:5
requirement' [1] - 158:13
requirements [33] - 16:9, 24:10, 26:27, 27:26, 28:18, 29:7, 34:21, 37:29, 42:6, 54:28, 55:10, 55:12, 57:15, 62:26, 63:14, 67:5, 72:25, 78:2, 117:2, 117:24, 132:7, 132:15, 146:11, 155:27, 155:29, 159:1, 164:2, 167:20, 177:29, 179:21, 182:15, 184:3, 185:12
requirements' [1] - 66:26
requires [14] - 19:3, 101:18, 111:24, 113:4, 135:17, 137:22, 152:28, 166:23, 177:11, 178:25, 179:10, 179:25, 180:27, 183:1
requiring [3] - 102:5, 168:14, 168:15
Reserve [1] - 159:15
reserved [1] - 192:26
reside [1] - 84:15
residence' [1] - 19:29
residence) [1] - 20:7
residences [1] - 188:1
resident [2] - 33:9, 187:24
residents [1] - 20:27
resolved [1] - 95:7
respect [35] - 9:10, 28:28, 33:4, 36:3, 44:11, 44:15, 46:6, 53:3, 56:1, 58:21, 59:11, 60:23, 61:19, 64:14, 75:24, 82:20, 96:26, 102:24, 110:21, 120:18, 129:11, 140:13, 140:23, 141:3, 142:10, 142:15, 144:11, 146:23, 157:29, 159:28, 177:16, 194:23, 195:13, 200:4
respect' [1] - 125:9
respectfully [5] - 185:23, 186:7, 186:21, 187:7, 187:8
respectively [1] - 79:9
respects [7] - 38:18, 46:8, 87:7, 96:18, 111:12, 155:28, 186:21
respond [1] - 138:2
Respondent [4] - 131:9, 135:19, 190:22, 196:5
respondent [10] - 3:10, 131:14, 132:16, 135:11, 168:28, 177:24, 187:24, 188:17, 191:5, 196:13
Respondent's [2] - 131:28, 190:13
respondent's [2] - 191:9, 194:24
Respondents [6] - 160:19, 163:2, 166:20, 166:25, 171:5, 171:24
respondents [31] - 161:13, 161:19, 161:23, 161:28, 162:1, 162:3, 162:6, 162:13, 162:15, 163:6, 163:8, 163:13, 163:15, 164:14, 164:19, 164:24, 164:28, 166:8, 167:2, 167:15, 167:29, 168:1, 168:5, 168:12, 168:18, 169:5, 170:11, 172:2, 172:13, 174:5, 174:23
Respondents' [3] - 166:17, 167:26, 171:29
respondents' [16] - 160:29, 161:12, 161:15, 162:9, 163:7, 164:27, 166:3, 166:5, 166:7, 166:12, 167:5, 168:21, 168:24, 170:14, 170:26, 171:7
responding [1] - 24:6
response [2] - 168:19, 197:5
rest [4] - 67:6, 134:29, 162:29, 165:14
restrain [1] - 189:22
restraints [1] - 103:28
restrict [1] - 36:12
restricted [1] - 101:12
restriction [2] - 123:17, 130:2
restrictions [4] - 33:16, 148:6, 191:27, 197:6
restrictive [4] - 87:29, 136:7, 139:13, 159:20
restrictively [1] - 92:8
restricts [1] - 27:21
rests [2] - 160:29, 162:9
result [10] - 28:11, 28:21, 30:9, 40:2, 66:28, 138:20, 142:14, 165:10, 184:3, 191:19
resulted [2] - 129:3, 171:14
results [3] - 126:18, 129:5, 136:1
RESUMED [2] - 5:1, 110:1
retain [1] - 61:4
retained [1] - 60:28
retaining [1] - 61:25
retention [3] - 20:3, 59:18, 165:22
retrial [1] - 165:7
revealed [1] - 50:3
reverse [2] - 140:27, 174:29
reversed [4] - 89:14, 140:5, 157:25, 178:4
reversed.. [1] - 157:5
Reversing [1] - 132:26
Review [9] - 36:19, 70:16, 74:3, 75:21, 84:8, 150:3, 150:20, 153:4, 174:18
review [40] - 32:4, 48:20, 48:23, 48:24, 69:29, 70:9, 70:17, 70:19, 70:23, 70:25, 71:7, 71:9, 71:23, 71:24, 73:28, 74:3, 74:29, 75:1, 75:5, 75:6, 77:23, 77:26, 125:4, 125:25, 146:25, 150:10, 150:14, 150:17, 150:26, 151:12, 152:2, 152:7, 152:12, 154:3, 154:10, 157:28, 159:4, 172:6
Review" [1] - 70:4
review'.. [1] - 171:29
Reviewable [1] - 151:27
reviewable [3] - 146:16, 151:29, 152:11
reviewed [1] - 153:25
reviewing [3] - 153:7, 153:11, 153:28
reviews [1] - 71:11
revoked [1] - 132:2
Richards [1] - 121:28
Richards' [2] - 122:2, 122:7
Richardson [1] - 159:8
Rico.. [1] - 190:7
right-hand [8] - 54:19, 88:27, 115:12, 116:3, 120:24, 120:29, 127:14, 198:2
rights [40] - 7:5, 9:7, 9:11, 9:13, 10:16, 10:26, 11:13, 14:7, 14:9, 14:13, 22:1, 30:23, 31:10, 32:17, 33:27, 35:21, 35:22, 42:29, 43:11, 102:23, 111:12, 126:11, 126:18, 144:16, 156:22, 169:16, 169:29, 173:19, 181:11, 181:12, 188:16, 188:18, 190:9, 190:18, 192:26, 195:4, 195:21, 200:4, 200:6, 200:13
Rights [4] - 11:5, 156:2, 169:20, 185:10
rights' [1] - 178:6
rigorous [1] - 158:25
rise [3] - 10:15, 171:1, 182:22
risk [11] - 7:20, 15:5, 166:22, 167:28, 179:15, 179:27, 180:12, 183:8, 183:29, 184:8, 184:20
RIVERSIDE [1] - 2:21
Robert [1] - 122:23
Robins [8] - 176:29, 177:25, 178:8, 180:12, 181:10, 183:3, 183:29, 184:22
Robins' [4] - 178:2, 178:5, 178:6, 181:8
Robins's [1] - 181:13
ROGERSON'S [1] - 2:22
role [4] - 5:23, 158:6, 172:15, 182:25
roles [1] - 182:6
Roman [1] - 47:24
routed [1] - 53:7
routine [7] - 120:10, 120:14, 120:24, 121:8, 121:13, 122:5, 122:23
RUDDEN [1] - 2:16
rule [12] - 30:14, 79:20, 121:18, 122:15, 126:26, 127:3, 152:18, 152:28, 154:4, 191:14, 191:16, 191:20
Rule [1] - 30:15
rules [4] - 85:9, 117:1, 117:23, 144:7
Rules [2] - 30:13, 30:24
ruling [3] - 8:9, 44:3, 152:11
ruling' [1] - 160:6
rulings [1] - 172:14

S

- sabotage** [1] - 64:6
safeguard [1] - 21:15
safeguarding [1] - 199:23
safeguards [6] - 9:10, 9:19, 14:9, 42:1, 42:28, 161:9
sake [2] - 14:20, 156:5
SAME [1] - 115:20
sanction [3] - 105:27, 105:28, 152:18
satisfied [6] - 71:5, 110:24, 137:19, 145:21, 155:24, 183:23
satisfies [3] - 66:27, 164:2, 182:27
satisfy [12] - 27:25, 88:4, 161:9, 161:17, 161:24, 164:21, 179:22, 179:27, 180:12, 183:5, 183:9, 184:1
SC [10] - 2:4, 2:4, 2:9, 2:9, 2:14, 2:15, 2:19, 2:25, 2:29, 3:1
scandal [1] - 50:1
scattered [1] - 67:6
SCC [11] - 8:10, 9:9, 9:18, 42:3, 42:12, 42:25, 43:4, 43:13, 43:19, 43:28, 44:4
SCCs [3] - 7:10, 9:2, 9:29
scheme [3] - 21:16, 93:20, 172:7
schemes [1] - 35:29
Schlesinger.. [1] - 159:14
scholarly [1] - 122:13
SCHREMS [1] - 1:14
Schrems [13] - 8:1, 10:3, 14:4, 24:11, 24:13, 28:25, 30:7, 40:22, 41:4, 42:7, 139:20, 156:2, 185:10
Schwartz [1] - 122:16
Scope [1] - 153:4
scope [11] - 16:2, 37:9, 37:17, 37:25, 91:25, 91:29, 100:8, 102:16, 102:17, 118:3, 135:16
Scott [2] - 162:22, 168:28
scrutinised [1] - 139:21
sea [1] - 191:25
seal [1] - 57:4
SEAN [1] - 2:15
search [13] - 49:19, 51:19, 61:19, 82:5, 82:18, 87:25, 97:10, 98:14, 98:16, 98:28, 177:20, 188:21, 192:9
searched [2] - 187:29, 192:12
searches [20] - 51:18, 52:8, 52:21, 54:10, 58:25, 61:11, 61:12, 61:16, 66:10, 72:16, 81:11, 96:14, 96:26, 108:7, 177:21, 188:4, 188:5, 191:26, 191:28, 197:6
searching [2] - 53:1, 188:6
Second [10] - 157:4, 160:25, 163:13, 167:1, 167:8, 167:14, 168:12, 172:5, 181:12, 192:25
second [14] - 5:16, 27:2, 39:12, 41:24, 47:8, 48:8, 49:29, 54:24, 93:26, 123:21, 146:17, 149:21, 161:20, 180:17
secondly [7] - 7:6, 10:29, 47:8, 80:11, 114:10, 117:20, 148:5
secrecy [2] - 76:16, 76:29
secret [4] - 51:9, 77:2, 78:13, 118:21
Secretary [3] - 144:23, 144:24
secrets [2] - 89:12, 199:3
Section [92] - 58:3, 58:23, 61:29, 62:28, 63:19, 66:29, 67:18, 69:12, 69:13, 75:4, 75:13, 78:17, 78:20, 80:13, 80:14, 80:15, 80:16, 81:14, 81:21, 81:22, 81:24, 82:22, 83:10, 83:21, 84:2, 85:18, 85:28, 87:9, 87:10, 87:13, 90:20, 92:16, 92:17, 92:19, 92:24, 92:29, 93:1, 93:2, 93:6, 93:8, 93:9, 93:13, 93:16, 96:15, 97:3, 97:22, 97:24, 99:18, 100:13, 100:19, 101:14, 101:17, 101:26, 101:27, 102:16, 103:24, 104:22, 105:1, 106:3, 106:12, 107:18, 108:2, 108:7, 108:9, 115:5, 116:2, 116:18, 117:29, 119:8, 132:11, 141:5, 141:14, 149:23, 151:26, 152:17, 152:21, 153:4, 160:20, 160:23, 161:5, 161:9, 161:22, 161:25, 161:29, 162:2, 162:5, 163:23, 165:15, 166:3, 193:9, 199:27
section [139] - 8:12, 16:29, 17:12, 17:16, 18:3, 18:4, 18:9, 19:3, 19:12, 19:18, 19:23, 19:24, 20:7, 20:26, 20:28, 21:2, 21:9, 21:11, 21:20, 23:5, 23:8, 24:27, 46:20, 46:21, 46:22, 46:23, 46:24, 46:25, 46:26, 47:2, 51:14, 51:15, 52:1, 52:2, 52:4, 52:5, 52:7, 52:10, 52:19, 52:20, 52:23, 52:26, 53:17, 59:8, 60:7, 60:24, 62:3, 63:27, 66:6, 66:8, 67:6, 67:18, 70:1, 74:29, 75:17, 78:2, 79:8, 79:13, 80:9, 80:24, 82:1, 83:18, 83:22, 86:8, 94:22, 94:23, 98:17, 98:21, 98:22, 101:3, 101:7, 101:10, 101:11, 101:16, 101:18, 102:29, 103:2, 105:3, 105:14, 106:17, 106:22, 107:4, 107:23, 107:24, 110:6, 110:13, 110:19, 110:22, 111:14, 111:24, 112:5, 112:9, 112:20, 113:10, 113:13, 113:14, 113:15, 113:16, 113:17, 113:18, 115:11, 117:4, 118:4, 120:11, 120:12, 122:8, 124:23, 125:2, 126:26, 127:3, 127:19, 128:7, 128:17, 137:4, 138:16, 140:10, 140:27, 141:3, 142:26, 142:29, 149:8, 149:29, 150:3, 150:19, 150:20, 150:21, 152:25, 153:3, 158:1, 160:17, 171:21, 198:6, 199:20, 199:22, 201:10
Sections [2] - 104:11, 108:1
sections [34] - 17:4, 17:17, 18:8, 19:13, 21:4, 36:7, 46:18, 47:12, 47:15, 47:17, 47:29, 48:3, 59:6, 79:28, 88:1, 92:23, 93:12, 96:21, 101:9, 101:13, 103:24, 106:20, 108:10, 108:11, 108:19, 108:20, 113:3, 113:14, 117:3, 117:25, 138:22, 144:18, 153:24, 201:10
sectors [1] - 199:8
secure [2] - 28:23, 168:9
Security [9] - 35:28, 36:21, 50:28, 65:25, 66:22, 69:15, 131:14, 141:22, 144:25
security [16] - 7:22, 15:6, 22:15, 25:27, 35:27, 36:5, 38:9, 42:19, 64:17, 73:16, 77:4, 77:8, 85:22, 145:8, 159:22, 199:4
See [1] - 190:7
see [73] - 6:10, 17:13, 18:2, 18:9, 32:25, 36:7, 46:16, 46:20, 46:23, 47:23, 48:28, 50:13, 50:19, 51:13, 52:1, 52:7, 54:14, 54:18, 55:20, 56:10, 61:22, 65:3, 65:6, 70:3, 70:14, 73:4, 73:27, 83:22, 84:25, 88:25, 90:5, 96:6, 96:12, 96:21, 98:22, 100:3, 100:18, 101:14, 101:18, 102:26, 103:17, 103:23, 104:7, 108:15, 114:26, 115:11, 115:19, 116:18, 116:23, 118:26, 119:1, 119:4, 119:5, 120:15, 120:22, 121:1, 122:9, 124:25, 130:11, 130:26, 139:28, 140:9, 142:25, 143:27, 148:29, 149:1, 173:5, 175:25, 184:28, 194:8, 194:9, 197:27, 198:2
seek [7] - 18:21, 22:12, 25:15, 94:5, 163:16, 164:25, 167:29
seeking [5] - 40:13, 100:10, 106:29, 150:27, 156:23
seem [8] - 68:19, 81:24, 82:8, 96:27, 114:13, 147:6, 159:20, 195:13
seemingly [1] - 61:7
sees [1] - 72:2
seized [2] - 188:1, 189:1
seizure [3] - 49:19, 188:22, 192:9
seizures [5] - 188:5, 191:20, 191:27, 191:28, 197:6
select [1] - 189:8
selection [1] - 100:3
self [2] - 170:27, 189:4
self-incrimination [1] - 189:4
self-inflicted [1] - 170:27
semi [1] - 52:13
semi-annual [1] - 52:13
send [1] - 53:4
sender [4] - 58:7, 65:19, 68:11, 68:18
sending [1] - 193:5
sense [12] - 6:16, 19:6, 41:22, 41:26, 43:22, 51:4, 53:2, 133:15, 138:3, 140:7, 155:12, 155:15
sensitive [1] - 29:1
sent [1] - 53:11
sentenced [1] - 132:5
sentences [1] - 196:10
separate [2] -

104:21, 124:27
separation [2] - 158:18, 159:25
separation-of-powers [1] - 158:18
series [4] - 119:7, 148:6, 150:14, 195:19
serious [2] - 61:3, 138:14
serve [4] - 49:25, 85:8, 161:6
served [1] - 78:13
servers [1] - 76:6
serves [3] - 76:24, 134:3, 158:18
service [14] - 53:13, 64:11, 75:27, 76:3, 76:9, 76:10, 76:18, 76:22, 77:12, 77:19, 105:7, 106:8, 174:10, 174:17
Services [3] - 1:22, 3:9, 3:10
services [4] - 76:17, 106:6, 118:8, 164:6
SERVICES [1] - 1:32
Serwin [2] - 14:19, 121:28
set [34] - 8:21, 8:22, 15:22, 17:1, 40:7, 41:12, 42:3, 50:6, 51:1, 54:4, 54:5, 61:20, 67:22, 72:6, 74:10, 77:21, 78:7, 84:20, 85:14, 97:5, 100:29, 105:25, 106:9, 119:19, 128:16, 132:7, 142:27, 143:8, 146:11, 153:14, 162:29, 163:2, 174:21, 198:1
sets [10] - 10:24, 44:18, 44:24, 44:25, 66:17, 72:5, 77:25, 83:22, 84:22, 85:21
setting [1] - 84:24
seven [10] - 57:12, 83:26, 84:14, 93:27, 93:29, 95:11, 95:13, 95:14, 95:15, 180:17
several [2] - 131:17, 135:19
sexual [1] - 198:25
shadowed [1] - 95:20
shall [54] - 56:4, 57:1, 57:16, 59:14, 60:7, 60:26, 65:12, 66:4, 68:22, 69:4, 70:8, 70:24, 71:24, 72:27, 73:8, 77:22, 79:13, 79:15, 83:1, 83:16, 83:25, 84:13, 84:15, 84:16, 84:17, 85:3, 85:8, 86:9, 91:18, 98:17, 103:1, 105:12, 110:17, 119:12, 127:9, 128:12, 129:13, 144:15, 145:29, 146:20, 146:24, 151:2, 151:10, 153:7, 153:11, 154:2, 154:4, 198:9, 198:12, 198:19, 198:21, 198:26, 199:11, 199:13
shape [3] - 22:4, 130:9, 201:5
share [7] - 8:4, 32:6, 44:7, 186:8, 186:20, 186:25, 186:29
shared [2] - 38:2, 145:3
shares [1] - 44:1
sharing [2] - 123:3, 175:19
Shield [5] - 12:6, 13:7, 14:24, 27:13, 200:22
Shield' [1] - 27:11
short [8] - 88:21, 99:20, 111:18, 140:9, 153:21, 169:27, 177:5, 177:6
should've [1] - 75:17
show [31] - 24:16, 27:21, 55:12, 65:26, 80:13, 87:8, 87:21, 112:24, 127:4, 129:11, 129:12, 129:23, 130:12, 134:23, 138:5, 139:1, 139:2, 139:4, 139:17, 141:1, 141:8, 142:15, 142:16, 143:19, 159:19, 164:16, 164:18, 164:24, 173:11, 178:25, 180:19
showing [7] - 110:11, 113:4, 143:15, 143:16, 143:17, 168:14, 168:16
shown [1] - 34:18
shows [3] - 127:1, 161:23, 189:19
sic [2] - 36:19, 114:24
side [2] - 79:21, 137:15
sideshow [1] - 95:20
signal [2] - 197:28, 200:1
signals [9] - 12:26, 198:12, 198:20, 198:22, 199:13, 199:16, 199:20, 199:22, 199:24
Signals [4] - 198:7, 198:9, 198:25, 199:11
signature [1] - 147:17
signed [3] - 12:1, 13:25, 32:14
significance [1] - 146:13
significant [11] - 12:24, 21:8, 63:16, 68:26, 123:3, 148:9, 155:28, 185:15, 190:23, 191:14, 196:6
similar [17] - 6:5, 27:6, 48:23, 51:23, 61:20, 93:12, 96:18, 97:6, 98:7, 101:3, 101:28, 134:3, 135:26, 150:10, 150:15, 154:8, 168:26
Similarly [3] - 162:22, 182:19, 190:17
similarly [6] - 46:23, 60:2, 61:9, 72:12, 136:11, 147:12
simple [2] - 20:14, 155:11
simplistic [1] - 105:21
Simply [1] - 163:8
simply [12] - 26:19, 46:26, 76:23, 142:23, 147:23, 155:13, 168:10, 169:7, 169:22, 171:13, 187:6, 187:9
simultaneously [1] - 73:8
SIR [1] - 2:22
situation [7] - 16:3, 35:10, 40:3, 41:26, 174:5, 185:4, 191:5
Situations [1] - 197:1
situations [1] - 197:3
six [6] - 13:19, 74:15, 74:24, 85:7, 104:13, 104:14
Six [1] - 196:18
Sixth [5] - 188:10, 188:18, 189:10, 190:16, 192:16
skip [2] - 158:11, 171:20
slander [1] - 134:8
slight [1] - 185:1
slightly [2] - 78:8, 106:16
slotted [2] - 50:20, 84:27
slow [1] - 159:26
small [6] - 73:24, 84:6, 84:7, 124:21, 124:22, 136:11
SMITH [1] - 2:25
smuggles [1] - 187:25
Snowden [1] - 76:5
Social [1] - 131:14
societal [1] - 191:3
Software [1] - 2:25
solely [5] - 86:19, 102:12, 102:24, 159:13, 188:27
SOLICITORS [2] - 2:6, 2:26
sometime [1] - 201:20
sometimes [16] - 12:7, 17:4, 17:7, 19:15, 46:24, 47:23, 73:15, 95:1, 95:5, 97:23, 101:25, 133:25, 147:26, 155:13, 155:14, 166:26
somewhat [3] - 17:5, 101:28, 160:7
somewhere [3] - 105:19, 105:23, 142:3
soon [1] - 175:20
sorry [49] - 12:15, 20:23, 21:5, 23:4, 46:5, 47:12, 56:20, 56:23, 56:24, 58:17, 58:26, 61:14, 63:26, 70:12, 75:14, 75:15, 83:28, 83:29, 84:1, 84:5, 85:5, 85:7, 87:16, 87:18, 90:9, 95:10, 96:2, 96:3, 96:9, 101:1, 107:9, 107:20, 120:5, 120:27, 121:5, 121:22, 124:17, 124:21, 143:1, 143:3, 148:26, 149:4, 149:10, 152:15, 163:29, 170:14, 176:23, 187:14, 193:26
Sorry [1] - 79:3
sort [6] - 52:4, 75:3, 80:1, 150:15, 151:20, 200:15
sought [10] - 14:15, 29:15, 89:13, 100:9, 124:5, 151:17, 162:7, 180:10, 183:27, 189:1
source [2] - 8:24, 85:11
sources [1] - 199:15
Souter [1] - 136:22
SOUTH [1] - 2:11
Southern [1] - 157:1
sovereign [32] - 21:10, 39:19, 88:2, 89:21, 90:2, 90:6, 90:16, 91:5, 91:28, 92:7, 92:14, 92:15, 92:18, 93:8, 94:14, 94:24, 94:26, 112:6, 132:22, 132:23, 133:5, 133:8, 135:16, 136:3, 136:8, 148:18, 148:20, 151:6, 190:6, 194:17, 195:5, 196:27
speaking [1] - 10:16
speaks [2] - 190:9, 195:11
special [4] - 134:28, 135:2, 135:7, 143:19
specially [3] - 51:1, 103:5, 134:17
species [1] - 26:13
specific [27] - 15:24, 15:27, 16:13, 23:16, 24:8, 30:28, 31:14, 46:18, 55:23, 59:14, 71:16, 75:9, 100:2, 100:5, 103:27, 117:22, 123:7, 123:22, 138:10, 140:16, 152:4, 152:5, 152:6, 163:1, 163:3, 170:9
Specific [1] - 116:25
Specifically [1] - 132:16
specifically [12] - 30:18, 31:18, 40:12, 52:2, 52:21, 70:7, 100:4, 100:26, 110:12, 111:17, 112:10, 200:29
specifics [1] - 166:29
specified [4] - 18:8,

110:11, 117:3, 117:27
specifics [1] - 48:20
specify [2] - 75:8, 151:10
specifying [1] - 124:3
spectrum [1] - 177:21
speculate [6] - 162:15, 163:8, 163:15, 164:19, 164:28, 166:8
speculation [2] - 161:21, 165:14
speculative [6] - 28:15, 160:10, 161:1, 161:27, 166:12, 168:20
speculative' [1] - 29:29
speech [1] - 86:28
speeches [1] - 86:23
spell [2] - 88:16, 111:3
spend [1] - 104:29
spent [1] - 144:5
split [1] - 24:2
Spokeo [5] - 176:29, 177:19, 177:25, 177:27, 181:10
Spokeo-generated [1] - 177:25
sprang [1] - 67:4
spread [1] - 17:7
spreadsheet [2] - 131:26, 131:28
SQUARE [1] - 2:27
SSA [5] - 131:15, 131:21, 131:24, 132:6
stage [2] - 31:25, 162:28
stand [3] - 37:7, 94:18, 155:17
standard [19] - 7:10, 7:26, 9:25, 10:1, 41:25, 42:2, 42:8, 42:24, 75:2, 91:28, 111:28, 112:3, 112:19, 112:22, 112:23, 112:24, 123:2, 160:26, 168:9
standard.. [1] - 167:8
standards [2] - 9:26, 77:26
standing [68] - 21:23, 22:7, 27:3, 29:28, 30:3, 40:9, 88:7, 90:18, 90:19, 143:14, 144:7, 148:22, 148:23, 154:25, 155:8, 155:11, 155:29, 158:15, 158:17, 158:25, 158:29, 159:3, 159:10, 159:14, 159:16, 159:21, 160:3, 161:15, 162:6, 162:27, 165:1, 165:5, 165:8, 165:14, 166:18, 167:7, 167:15, 167:26, 168:2, 168:10, 168:14, 169:10, 170:11, 170:18, 171:1, 171:10, 171:13, 171:25, 172:2, 172:3, 172:16, 173:27, 174:4, 174:23, 174:26, 176:22, 178:13, 178:17, 179:24, 180:27, 182:7, 183:1, 184:16, 184:25, 184:27, 185:23, 185:24, 186:1
standing'.. [2] - 170:24, 172:3
standing.. [1] - 168:22
stands [3] - 11:3, 11:4, 190:14
stark [2] - 139:1, 171:18
start [6] - 49:7, 52:23, 56:29, 114:25, 136:22, 143:28
started [1] - 59:9
starting [1] - 6:25
starts [2] - 16:19, 59:9
state [4] - 15:6, 89:12, 105:29, 111:29
State [2] - 7:21, 144:23
stateable [1] - 24:4
Statement [1] - 73:5
statement [5] - 21:6, 73:9, 82:25, 125:28, 175:11
statements [3] - 132:3, 167:23, 201:21
States [131] - 11:12, 11:26, 19:25, 19:28, 49:12, 52:16, 52:19, 53:7, 53:10, 53:15, 53:18, 53:19, 53:29, 55:18, 55:21, 55:22, 55:25, 55:26, 55:27, 58:1, 59:20, 59:21, 59:23, 60:8, 60:26, 61:23, 61:24, 61:26, 62:11, 62:13, 64:2, 64:3, 64:16, 64:18, 64:20, 64:24, 65:17, 65:21, 68:1, 68:3, 68:6, 68:7, 68:9, 68:13, 69:19, 69:21, 72:26, 79:20, 81:16, 83:25, 84:13, 84:14, 84:20, 86:18, 86:29, 89:4, 89:10, 89:15, 91:18, 92:29, 93:14, 93:22, 94:29, 97:12, 97:14, 98:15, 100:21, 101:6, 102:9, 102:12, 102:19, 103:12, 108:23, 108:24, 110:16, 110:18, 111:10, 111:15, 111:22, 118:9, 123:28, 127:9, 128:1, 129:13, 136:24, 147:7, 147:8, 147:9, 147:19, 147:20, 148:13, 150:27, 151:3, 151:4, 151:7, 151:9, 155:11, 156:26, 156:27, 157:1, 157:3, 165:24, 173:5, 173:13, 173:15, 173:18, 185:13, 187:18, 188:9, 188:15, 188:22, 189:21, 189:24, 189:26, 190:6, 190:15, 190:24, 191:1, 191:15, 193:6, 193:11, 193:13, 194:16, 194:29, 195:5, 195:28, 196:7, 198:21, 199:4, 199:13
states [4] - 89:28, 95:3, 162:18, 196:26
STATES [1] - 2:19
States' [1] - 112:6
stating [1] - 150:28
stationed [1] - 190:15
status [5] - 45:12, 45:13, 131:16, 132:1, 182:17
statute [20] - 35:11, 98:29, 110:26, 112:14, 133:12, 150:25, 151:16, 151:19, 151:22, 151:29, 152:5, 152:23, 153:26, 154:21, 159:11, 179:23, 180:3, 182:28, 183:14, 198:13
statutes [6] - 16:22, 50:23, 112:11, 135:26, 154:26, 198:16
statutory [50] - 6:13, 16:13, 16:17, 21:16, 22:28, 27:1, 32:2, 35:29, 39:20, 40:14, 44:11, 45:19, 46:7, 49:4, 69:11, 76:25, 79:19, 80:2, 80:22, 81:1, 88:8, 90:18, 90:23, 92:2, 110:12, 112:1, 112:8, 113:2, 133:9, 135:17, 136:16, 136:29, 137:10, 138:15, 148:26, 153:9, 153:20, 153:21, 154:13, 176:18, 178:6, 179:26, 181:11, 182:28, 183:2, 185:19, 186:6, 197:13, 200:28
stemming [1] - 167:11
stenographer [1] - 151:24
stenographers [1] - 57:23
stenographic [1] - 1:25
Stenography [3] - 1:21, 3:9, 3:10
STENOGRAPHY [1] - 1:31
step [1] - 13:5
Stevens [1] - 196:23
Stevens' [1] - 196:9
still [22] - 13:21, 35:14, 38:24, 41:27, 46:22, 49:24, 53:12, 70:1, 78:23, 78:24, 102:26, 104:21, 129:5, 130:11, 135:24, 136:20, 139:3, 154:25, 155:27, 163:21, 164:17, 201:18
stipulates [1] - 20:7
storage [2] - 105:12, 106:8
store [3] - 103:19, 169:23, 176:17
stored [5] - 24:27, 105:19, 105:23, 107:22, 107:29
Stored [25] - 18:5, 18:6, 22:27, 23:1, 23:8, 24:21, 24:25, 24:29, 25:9, 47:11, 47:16, 47:28, 92:24, 104:9, 104:18, 104:23, 104:28, 105:18, 107:3, 107:19, 107:24, 110:8, 113:24, 113:27, 114:12
straightforward [1] - 110:10
Strand [2] - 8:29, 9:3
STREET [2] - 2:12, 2:17
strength [1] - 136:6
strengthened [1] - 13:11
Strengthening [1] - 11:4
stretched [1] - 160:8
strict [5] - 39:14, 148:18, 155:28, 184:29, 185:11
strictly [2] - 39:20, 132:23
striking [2] - 87:7, 101:1
stronger [1] - 174:3
structure [2] - 49:3, 50:12
Study [1] - 138:17
sub [3] - 58:17, 58:20, 60:2
subchapter [21] - 50:25, 51:18, 51:21, 51:24, 51:27, 52:12, 52:14, 61:15, 62:10, 62:15, 78:18, 83:16, 96:7, 96:14, 97:11, 97:15, 99:7, 99:25, 99:28, 101:24, 149:19
subject [48] - 8:25, 10:17, 11:28, 13:21, 14:28, 15:28, 16:5, 18:28, 24:17, 25:4, 31:16, 33:8, 33:15, 40:25, 42:18, 42:21, 48:6, 48:23, 49:17, 50:22, 56:17, 56:26, 69:14, 70:8, 74:18, 76:5, 79:24, 79:27, 81:23, 85:26, 90:7, 99:23, 99:27, 110:27, 117:29, 136:18, 136:24, 140:21, 144:6, 144:16, 146:24, 150:13,

152:2, 152:11,
153:24, 153:28,
162:20, 172:27
Subject [2] - 32:1,
102:2
subjected [4] -
78:28, 79:10, 98:14,
170:21
subjective [3] -
168:16, 170:7, 170:29
subjects [5] - 20:5,
20:26, 22:12, 42:10,
42:16
SUBMISSION [1] -
4:5
submission [1] -
69:8
Submission [1] -
83:13
submissions [7] -
7:16, 14:22, 14:28,
40:26, 42:22, 44:20,
175:29
submit [3] - 7:17,
44:20, 187:8
submitted [15] -
14:23, 40:26, 54:22,
57:18, 57:19, 58:29,
59:1, 63:5, 70:25,
71:11, 71:19, 71:26,
72:20, 86:14
subparagraph [11] -
56:17, 56:26, 70:3,
71:21, 77:29, 123:22,
128:4, 141:10,
142:18, 145:18,
147:14
subparagraphs [4] -
47:4, 141:12, 141:13,
143:24
subsection [90] -
37:6, 47:1, 47:2, 47:3,
53:20, 53:23, 53:24,
54:17, 54:23, 54:24,
56:7, 56:10, 56:14,
56:28, 57:5, 57:16,
57:28, 60:6, 61:17,
63:10, 63:11, 65:1,
65:5, 65:8, 65:15,
66:11, 67:4, 67:7,
67:23, 69:4, 69:9,
70:3, 70:9, 70:11,
70:15, 70:20, 70:26,
71:12, 71:26, 72:21,
73:1, 73:7, 74:4,
75:20, 75:25, 81:29,
82:28, 84:27, 96:22,
98:3, 100:19, 101:29,
103:8, 105:3, 105:13,
106:18, 110:14,
110:17, 116:18,
119:8, 120:11,
120:12, 124:14,
124:22, 125:2, 125:5,
125:15, 127:11,
127:13, 127:19,
128:6, 128:16,
128:26, 137:6,
140:13, 141:10,
142:11, 142:26,
142:27, 143:8,
143:10, 144:10,
144:15, 144:21,
145:23, 146:17,
147:3, 147:5
subsections [15] -
46:29, 54:27, 54:28,
55:17, 65:3, 69:7,
71:13, 72:24, 72:25,
85:3, 117:5, 117:27,
118:4, 128:28, 146:21
Subsequently [1] -
131:14
subsequently [2] -
6:15, 12:27
substance [5] - 8:15,
9:29, 106:10, 113:5,
116:27
substantial [5] -
85:17, 153:23,
190:21, 190:25,
195:29
substantially [1] -
162:5
substantive [3] -
115:1, 123:13, 188:12
substitute [1] - 170:8
substitution [1] -
23:13
succeed [2] -
161:11, 166:5
sue [4] - 18:14,
88:11, 172:2, 182:29
sue' [1] - 158:15
sued [1] - 114:5
suffer [1] - 167:16
suffered [12] - 23:26,
27:29, 29:2, 30:9,
130:9, 131:3, 139:5,
142:14, 167:9,
178:25, 180:20,
180:28
suffered [1] - 23:21
suffering [6] - 29:24,
137:10, 150:23,
166:21, 167:3, 168:5
suffice [1] - 24:7
sufficient [13] -
24:18, 26:21, 27:26,
143:22, 173:17,
179:15, 180:4, 181:4,
183:14, 183:22,
184:20, 189:14,
192:29
sufficient' [2] -
160:15, 185:2
sufficiently [1] - 16:2
suggest [1] - 171:24
suggested [1] -
49:22
suggesting [1] -
122:24
suggestion [1] -
171:29
suggests [4] -
134:19, 171:12,
189:12, 192:24
suit [15] - 20:26,
24:1, 32:21, 93:21,
93:23, 95:18, 127:18,
128:6, 128:25, 132:5,
151:16, 154:20,
179:24, 183:13,
196:20
SUITE [1] - 3:3
suits [1] - 159:23
suits [1] - 123:5
sum [2] - 91:20,
166:12
summarise [2] -
112:29, 154:17
summarised [1] -
156:13
summary [7] - 16:15,
89:16, 136:21, 157:2,
162:28, 201:10,
201:12
superior [1] - 152:29
supplied [1] - 3:9
support [6] - 14:24,
30:17, 30:19, 73:7,
171:10, 198:28
supported [1] -
66:16
supporting [1] - 57:3
suppose [5] - 10:21,
82:15, 87:7, 110:9,
121:12
supposed [4] -
55:10, 81:6, 119:22,
119:24
suppress [3] - 18:21,
21:18, 188:2
suppressing [1] -
198:23
suppression [1] -
21:20
Supreme [15] -
29:11, 29:27, 40:12,
91:8, 95:7, 112:2,
130:16, 130:23,
133:2, 136:21, 156:8,
157:9, 157:15, 177:1,
185:12
surprise [1] - 162:3
surrounding [1] -
88:9
surveillance [107] -
13:10, 13:16, 17:21,
18:16, 18:18, 18:21,
18:24, 21:19, 22:1,
22:6, 24:17, 26:5,
27:17, 49:16, 49:26,
50:3, 50:25, 50:29,
51:11, 52:17, 54:10,
55:3, 55:6, 59:11,
59:17, 60:23, 62:9,
63:20, 66:8, 66:24,
66:29, 67:11, 67:13,
67:17, 67:19, 67:26,
69:12, 69:16, 71:4,
71:16, 72:16, 75:5,
75:10, 76:2, 77:3,
78:19, 78:29, 79:10,
79:11, 79:25, 79:27,
80:20, 80:23, 80:26,
80:28, 81:7, 81:19,
82:4, 82:11, 82:14,
82:26, 83:2, 83:8,
83:16, 84:19, 86:1,
86:11, 86:16, 87:3,
89:6, 93:19, 96:7,
96:13, 96:29, 108:3,
113:17, 156:25,
156:29, 157:21,
161:6, 161:8, 161:22,
162:2, 162:8, 162:21,
163:6, 163:17,
163:19, 163:22,
164:9, 164:29, 166:7,
166:14, 166:20,
166:23, 166:26,
167:17, 169:7, 169:8,
170:20, 170:22,
170:29, 171:28,
172:27, 174:8,
174:12, 174:20
Surveillance [30] -
16:19, 16:24, 17:14,
18:11, 31:15, 46:17,
49:7, 50:1, 50:10,
51:3, 57:2, 57:20,
59:2, 63:6, 70:23,
70:24, 74:3, 77:22,
83:23, 89:9, 101:23,
103:22, 156:24,
161:7, 164:26,
165:17, 166:2, 172:8,
172:14, 174:18
surveillance' [1] -
80:4
surveillance.. [1] -
165:19
survey [1] - 81:15
suspected [1] -
118:28
sustain [1] - 128:17
sustained [1] -
129:16
swallows [2] -
121:18, 122:15
Swire's [1] - 201:7
syllabus [2] - 177:8,
187:21
symbolic [1] -
123:19
synonymous [1] -
181:27
system [14] - 11:20,
105:12, 117:3, 117:5,
117:26, 117:27,
118:18, 119:13,
119:22, 120:25,
121:8, 125:23, 158:7,
165:10
systems [1] - 118:16

T

Tab [21] - 6:26,
45:29, 46:16, 47:9,
49:8, 111:7, 114:19,
114:27, 115:6,
115:10, 115:11,
115:16, 115:24,
115:29, 122:3,
130:21, 134:13,
136:14, 140:2, 140:6,
149:1
tab [9] - 88:20,
104:13, 104:14,
156:11, 176:25,
176:28, 187:17,
197:24, 197:25
tablet [4] - 5:12,
5:14, 45:26, 46:2
tablets [1] - 5:10
tailored [2] - 199:12,
200:8
taken'' [1] - 133:23
taking.. [1] - 168:27
tal[k] [1] - 166:28
tangible [7] - 52:1,
52:3, 101:26, 102:6,
103:7, 113:13, 181:28
tantamount [1] -
168:20
Tap [6] - 104:10,
104:11, 104:16,

105:20, 107:6, 108:1
tap [1] - 99:8
Tapping [1] - 107:16
tapping [1] - 107:27
target [13] - 67:28,
68:2, 68:4, 68:7, 75:5,
75:7, 76:19, 86:16,
161:2, 161:28,
162:10, 163:11, 166:3
target's [1] - 173:25
targeted [4] - 13:3,
162:1, 163:4, 164:15
targeting [28] -
53:18, 53:28, 54:25,
55:9, 55:13, 56:11,
57:28, 65:4, 65:12,
65:15, 65:23, 65:27,
69:6, 70:2, 70:8, 71:2,
71:12, 72:7, 72:22,
93:19, 104:2, 113:6,
162:14, 163:14,
165:17, 165:26,
172:9, 172:11
Targeting [2] - 65:8,
72:3
targets [2] - 23:17,
55:6
technical [2] - 67:24,
164:9
technique [1] - 59:16
tedious [1] - 24:14
telecommunication
s [5] - 51:24, 53:14,
76:22, 106:6, 169:22
telephone [3] -
20:14, 99:23, 100:6
telephones [1] - 99:9
ten [1] - 199:25
tended [1] - 123:16
tension [1] - 137:20
Tenth [1] - 192:27
term [31] - 12:9,
38:11, 38:12, 39:12,
39:15, 63:22, 67:24,
99:22, 100:3, 112:14,
112:17, 120:17,
131:15, 132:21,
133:19, 133:20,
133:24, 133:25,
134:20, 135:6,
146:29, 147:13,
152:14, 152:15,
181:23, 189:8,
190:10, 195:12
term's [1] - 133:28
terms [51] - 20:14,
22:2, 24:15, 28:18,
32:16, 36:27, 36:28,
37:25, 39:28, 40:7,
42:7, 44:8, 44:11,
44:24, 46:3, 48:2,
50:2, 55:2, 61:20,
61:21, 62:19, 74:9,
79:5, 92:13, 99:17,
99:18, 101:16,
102:17, 102:23,
103:9, 104:1, 104:3,
105:22, 105:26,
115:4, 134:25, 139:5,
140:16, 141:25,
148:2, 148:6, 150:16,
153:10, 154:10,
155:7, 155:26,
185:21, 185:28,
196:20, 200:3, 200:7
TERRACE [1] - 2:6
territories [2] -
190:6, 194:23
territory [6] - 64:15,
189:24, 189:27,
190:20, 195:5, 195:28
terrorism [4] - 64:6,
77:3, 102:10, 102:21
terrorist [5] - 89:3,
89:6, 118:28, 118:29,
119:4
test [3] - 133:15,
148:13, 189:17
text [6] - 92:2,
103:18, 133:9,
135:17, 137:21,
192:16
Text [1] - 108:15
textbook [1] - 137:27
textual [1] - 192:23
than.. [1] - 79:16
thankfully [1] - 47:28
THE [8] - 1:2, 1:7,
2:14, 3:4, 5:1, 110:1,
202:3
themselves [8] -
16:17, 17:6, 29:25,
35:15, 41:13, 103:29,
143:28, 168:3
THEN [1] - 202:3
theories [2] - 165:2,
165:14
theory [4] - 161:15,
162:9, 165:4, 168:21
theory.. [1] - 162:6
thereabouts [1] -
11:14
Thereafter [1] -
131:16
thereafter [2] - 6:10,
6:20
thereby [2] - 105:10,
136:2
therefore [16] - 9:27,
16:23, 37:25, 40:24,
56:10, 63:1, 67:10,
97:19, 112:22,
112:29, 133:4,
138:24, 139:9,
159:24, 174:29,
181:24
therein [2] - 38:21,
151:2
thereof [6] - 117:8,
125:26, 128:15,
150:26, 150:29,
152:19
thereunder [1] -
126:27
they've [7] - 67:15,
74:6, 79:26, 81:5,
81:7, 81:8, 102:24
thinking [1] - 175:1
thinks [1] - 44:25
Third [1] - 164:24
third [3] - 28:12,
48:11, 120:16
thirds [2] - 123:23,
124:20
Thomas [1] - 177:25
thousands [1] -
73:22
threat [5] - 61:3,
166:26, 168:20,
169:5, 170:9
threatened [2] -
161:17, 180:28
threatening [1] -
197:1
three [21] - 10:21,
27:25, 49:3, 49:6,
53:5, 61:17, 67:12,
73:29, 100:20,
108:10, 108:11,
119:27, 124:14,
156:7, 176:27,
176:28, 187:17,
195:8, 197:23, 198:2,
199:20
three-judge [1] -
73:29
threshold [1] - 90:26
THURSDAY [1] -
202:3
ticket.. [1] - 168:13
tiered [1] - 19:24
timeliness [2] -
33:25, 126:9
title [22] - 17:15,
18:2, 18:12, 47:13,
49:14, 58:23, 60:24,
66:6, 66:9, 79:9,
79:13, 80:24, 80:29,
83:19, 86:9, 98:17,
105:17, 107:5,
117:25, 118:1,
138:22, 141:5
Title [10] - 17:15,
50:21, 50:23, 99:19,
108:20, 108:28,
109:1, 141:14, 149:7
title) [1] - 151:11
titles [3] - 16:26,
16:27, 108:25
to' [1] - 95:25
today [3] - 130:18,
172:5, 172:25
together [5] - 31:7,
48:16, 104:21, 148:8
tomorrow [7] - 6:22,
200:23, 200:24,
201:3, 201:14,
201:16, 201:29
took [2] - 131:2,
155:3
tools [1] - 92:3
top [15] - 8:7, 50:14,
60:20, 64:28, 71:21,
102:27, 119:9,
120:23, 120:28,
121:1, 127:14,
149:16, 192:7,
196:11, 198:2
topic [2] - 17:2,
124:27
topics [2] - 16:27,
17:5
tort [3] - 137:22,
138:3, 183:11
torts [3] - 134:4,
134:7, 138:9
total [1] - 113:2
towards [4] - 13:2,
115:12, 116:2, 137:4
trace [9] - 20:10,
20:19, 51:22, 99:17,
99:24, 99:27, 100:11,
100:25, 108:10
traceable [13] -
28:10, 157:19,
157:22, 160:5,
160:20, 161:25,
164:18, 166:15,
166:22, 168:6,
168:25, 170:27,
178:18
traceable' [3] -
164:22, 167:6, 167:7
track [2] - 20:13,
107:8
tracks [1] - 20:20
trade [1] - 199:3
traditional [2] - 92:2,
137:21
Traditionally [1] -
138:7
traditionally [2] -
26:9, 182:11
traffic [1] - 53:8
transcript [3] - 1:24,
5:18, 5:23
Transcripts [1] - 3:8
transfer [4] - 43:6,
43:14, 145:4, 145:7
transferred [11] -
7:20, 14:8, 14:14,
15:3, 15:4, 38:8,
38:13, 38:27, 39:21,
43:1, 186:26
transfers [1] - 38:7
transform [1] -
168:13
transmission [1] -
24:25
transmitted [1] -
69:17
transmitting [1] - 9:1
Transport [1] -
131:23
Transportation [2] -
131:20, 131:25
transported [1] -
187:27
trap [9] - 20:10,
20:19, 51:22, 99:17,
99:24, 99:27, 100:10,
100:25, 108:10
travel [2] - 31:6,
166:29
Treasury [1] - 144:24
treating [2] - 138:25,
191:10
treaty [2] - 192:1,
197:9
trepidation [1] - 6:12
trial [7] - 6:26, 21:27,
153:28, 172:29,
188:18, 189:2, 189:4
Trial [1] - 121:27
trial-related [1] -
188:18
tried [1] - 188:9
trivia [1] - 103:16
trouble [2] - 110:29,
111:20
true [6] - 35:17,
35:18, 148:2, 194:23,
195:11, 195:13
try [5] - 6:12, 6:20,
46:10, 60:13, 82:15
trying [4] - 7:1,
68:16, 81:15, 200:26
TSP [1] - 89:6
turn [11] - 38:8, 44:1,
82:22, 99:7, 101:18,

104:6, 108:14,
131:25, 154:24,
182:8, 200:29
turns [6] - 16:13,
31:3, 31:18, 74:25,
121:7, 146:12
two [41] - 5:9, 9:3,
14:20, 19:24, 22:22,
22:28, 34:21, 38:18,
47:11, 48:9, 48:15,
49:11, 56:23, 59:6,
72:15, 88:20, 93:11,
103:24, 104:9,
104:20, 104:21,
105:16, 117:18,
121:29, 123:23,
124:19, 128:28,
129:24, 150:6,
154:27, 156:7,
158:27, 176:22,
180:9, 181:9, 183:26,
186:3, 192:8, 194:1,
194:5
two-tiered [1] -
19:24
type [16] - 22:1,
48:20, 50:2, 61:10,
65:27, 71:9, 86:4,
87:24, 96:18, 98:7,
101:3, 117:20,
144:29, 167:24,
185:11
types [4] - 22:10,
23:17, 144:26, 154:9

U

U.S [6] - 12:26, 13:7,
13:10, 198:20, 199:8
UK [1] - 11:27
ultimate [3] - 44:6,
180:8, 184:22
ultimately [5] -
46:11, 95:7, 130:29,
131:1, 194:23
umbrella [1] - 12:8
unauthorised [3] -
18:16, 24:23, 24:26
unauthorized [1] -
18:17
unavailable [1] -
138:25
unavailing [1] -
167:28
uncertainty [2] -
25:6, 191:25
unclear [3] - 37:7,
114:4, 166:4
uncodified [1] -

138:16
unconsenting [5] -
59:20, 59:21, 61:23,
103:12, 165:24
unconstitutional [2]
- 29:16, 156:28
unconstitutional'..
[1] - 158:29
Under [3] - 93:20,
181:5, 191:20
under [181] - 9:28,
13:14, 14:9, 15:13,
18:10, 18:12, 19:3,
19:23, 19:29, 20:26,
20:28, 21:11, 23:19,
24:1, 24:4, 24:7,
26:11, 27:3, 27:18,
29:8, 30:13, 31:24,
32:18, 33:9, 33:20,
35:5, 35:6, 35:29,
36:2, 36:13, 40:1,
40:5, 40:9, 40:11,
40:14, 40:21, 43:11,
44:9, 50:4, 50:23,
51:2, 51:7, 52:8,
53:24, 54:6, 55:4,
56:7, 56:27, 57:4,
57:16, 57:27, 58:17,
58:22, 59:6, 62:27,
65:14, 66:6, 66:11,
67:23, 69:1, 69:4,
69:12, 70:2, 72:14,
73:1, 73:7, 74:4,
74:17, 74:29, 75:4,
75:24, 76:25, 77:8,
77:15, 77:28, 79:28,
80:15, 80:16, 80:20,
80:24, 80:25, 81:19,
81:29, 83:7, 83:16,
83:18, 84:20, 85:2,
85:5, 87:9, 87:14,
87:15, 87:24, 89:21,
89:26, 90:2, 91:22,
92:23, 93:1, 93:2,
93:11, 96:14, 97:3,
98:23, 98:26, 101:10,
102:27, 102:29,
104:28, 106:22,
108:8, 110:16,
112:20, 113:3,
113:13, 113:15,
113:22, 114:7, 115:4,
117:18, 118:19,
120:7, 120:12,
123:27, 124:13,
125:1, 125:15, 127:3,
127:10, 127:18,
128:6, 128:15,
128:25, 134:5, 134:8,
138:12, 139:29,

140:24, 141:7,
141:18, 141:25,
142:17, 142:28,
143:9, 143:27,
143:29, 144:5,
144:17, 144:18,
145:18, 146:7,
146:21, 148:4, 148:5,
151:1, 152:4, 154:21,
158:1, 159:25,
160:23, 161:4,
161:22, 162:2, 162:4,
162:17, 163:22,
164:20, 164:27,
166:3, 166:23, 167:4,
167:7, 168:12, 169:6,
170:28, 186:14,
190:9, 191:10, 193:9,
196:29
undermine [1] -
191:9
undermines [1] -
162:5
underscoring [1] -
136:6
understandable [2] -
77:2, 118:25
understandably [1] -
73:15
understood [2] -
133:26, 189:25
undertaken [4] -
52:18, 82:11, 166:19,
198:14
undoubtedly [1] -
41:15
unequivocally [5] -
91:6, 91:26, 133:3,
133:9, 135:13
unfit [1] - 131:22
unified [1] - 17:1
uninformative [1] -
49:13
Union [1] - 32:20
uniquely [1] - 159:23
UNITED [1] - 2:19
United [131] - 11:12,
19:27, 49:12, 52:16,
52:19, 53:7, 53:10,
53:15, 53:18, 53:19,
53:29, 55:18, 55:21,
55:22, 55:25, 55:26,
55:27, 57:29, 59:20,
59:21, 59:22, 60:8,
60:26, 61:23, 61:24,
61:26, 62:11, 62:13,
64:2, 64:3, 64:16,
64:17, 64:19, 64:24,
65:16, 65:21, 67:29,
68:3, 68:5, 68:7, 68:8,

68:13, 69:19, 69:21,
72:26, 79:20, 81:16,
83:25, 84:12, 84:14,
84:19, 86:18, 86:28,
89:4, 89:10, 89:15,
91:18, 92:29, 93:14,
93:22, 94:29, 97:11,
97:14, 98:14, 100:21,
101:6, 102:9, 102:12,
102:19, 103:12,
108:23, 108:24,
110:16, 110:18,
111:9, 111:15,
111:22, 112:6, 118:9,
123:28, 127:9, 128:1,
129:13, 136:24,
145:14, 147:7, 147:8,
147:9, 147:19,
147:20, 148:13,
150:27, 151:3, 151:4,
151:6, 151:9, 155:11,
156:27, 156:29,
157:3, 165:24,
170:15, 173:5,
173:13, 173:15,
173:17, 185:12,
187:18, 188:9,
188:15, 188:22,
189:20, 189:23,
189:26, 190:6,
190:15, 190:23,
191:1, 191:15, 193:6,
193:11, 193:13,
194:16, 194:29,
195:5, 195:28, 196:6,
198:21, 199:4, 199:13
Uniting [1] - 11:4
universal [2] -
190:10, 195:12
Unknown [1] -
196:18
unlawful [8] - 17:21,
19:5, 21:21, 22:13,
78:2, 93:16, 132:17,
153:14
unlawfully [4] -
17:26, 17:28, 21:18,
153:12
unless [9] - 60:9,
61:1, 78:8, 119:16,
129:11, 134:22,
139:4, 152:27
unlike [1] - 174:6
unlikely [1] - 201:16
unreasonable [4] -
49:19, 188:4, 188:29,
192:9
unreasonable'.. [2] -
167:18, 168:18
unreasonably [1] -

153:13
unsatisfactory [1] -
25:18
unsolicited [1] -
14:21
unsupported [1] -
153:23
unsurprisingly [1] -
155:7
UNTIL [1] - 202:3
unusual [1] - 186:22
unwarranted [1] -
153:27
up [21] - 17:7, 22:5,
33:13, 41:12, 47:12,
47:15, 50:6, 51:1,
53:11, 53:26, 74:10,
76:23, 83:22, 84:24,
85:14, 94:18, 95:3,
103:18, 104:11,
172:28, 175:1
update [2] - 197:17,
199:26
updated [2] - 47:19,
74:19
updates [2] - 10:8,
12:13
updating [1] - 200:20
upheld [1] - 123:7
upstream [1] - 52:28
urgent [1] - 57:9
Urquidez [3] - 173:6,
187:18, 195:19
US [231] - 5:12, 6:11,
6:14, 6:17, 7:3, 7:19,
7:20, 7:21, 9:2, 9:6,
10:15, 10:17, 10:26,
11:13, 11:16, 11:19,
11:24, 12:2, 12:24,
13:7, 13:9, 13:24,
14:8, 14:9, 14:12,
14:16, 14:22, 14:23,
15:1, 15:3, 15:4, 15:5,
15:11, 15:13, 16:9,
16:25, 17:15, 17:25,
17:27, 18:14, 18:22,
18:26, 20:10, 20:27,
21:11, 23:28, 25:1,
25:15, 26:2, 26:26,
26:29, 27:4, 27:17,
27:19, 27:24, 29:8,
29:11, 29:27, 30:14,
31:8, 31:10, 31:11,
31:12, 31:15, 31:17,
32:2, 32:14, 32:18,
32:19, 32:23, 33:9,
33:19, 33:20, 34:9,
34:14, 34:28, 35:4,
35:6, 35:17, 35:18,
35:20, 35:21, 35:22,

35:26, 36:2, 36:4,
36:13, 36:27, 37:5,
38:2, 38:4, 38:7, 38:9,
38:24, 38:29, 39:16,
39:19, 39:22, 39:25,
40:9, 40:11, 40:12,
40:18, 42:13, 42:14,
42:18, 43:2, 43:7,
43:9, 43:10, 43:14,
43:15, 44:9, 44:10,
44:13, 44:22, 45:19,
45:22, 46:11, 49:18,
50:13, 50:29, 51:8,
52:18, 52:22, 53:2,
53:3, 53:4, 53:11,
53:12, 55:22, 55:24,
58:4, 58:9, 58:12,
58:15, 59:27, 59:29,
60:15, 60:16, 61:5,
61:6, 62:20, 62:23,
62:24, 63:3, 66:25,
67:20, 68:18, 68:20,
68:28, 69:13, 69:24,
69:25, 72:8, 72:10,
81:11, 81:16, 83:8,
83:27, 86:2, 88:3,
88:11, 88:19, 88:25,
92:6, 94:16, 95:7,
96:27, 96:28, 97:18,
97:20, 98:28, 101:8,
102:20, 103:13,
103:25, 103:26,
103:27, 103:29,
104:3, 106:25,
106:28, 111:6, 113:7,
113:8, 114:5, 114:28,
116:12, 129:15,
130:4, 130:5, 130:6,
130:20, 136:13,
139:11, 139:12,
139:24, 141:24,
141:28, 143:12,
145:1, 145:4, 145:9,
147:28, 148:4, 148:7,
148:19, 161:2, 162:1,
176:16, 176:23,
177:1, 185:24,
187:15, 193:13,
197:17, 200:5,
200:28, 201:1
USA [5] - 10:29,
13:9, 103:17, 156:11,
197:18
USC [6] - 18:2,
90:20, 91:22, 93:13,
108:21, 108:22
use [3] - 93:20,
120:17, 123:10
useful [1] - 96:11
user [1] - 184:5

users [3] - 120:26,
121:9, 177:23
uses [5] - 80:25,
123:5, 123:7, 123:8
usual [2] - 165:13,
181:22
usurp [1] - 158:19
utilising [1] - 161:5
utility [2] - 21:12,
36:14

V

vague [2] - 123:2,
123:12
valid [5] - 5:29, 6:1,
54:7, 66:28, 67:15
validity [5] - 5:24,
8:10, 43:18, 44:1,
44:4
valuation [1] -
148:11
variety [3] - 177:23,
194:19, 195:23
various [27] - 11:22,
16:27, 18:7, 26:4,
41:11, 46:18, 48:3,
50:26, 51:10, 67:5,
72:15, 84:22, 88:4,
92:23, 103:26, 106:3,
110:11, 117:5,
117:26, 131:4,
145:19, 158:22,
173:14, 185:19,
185:21, 186:6, 196:2
verbatim [1] - 1:24
Verdugo [3] - 173:6,
187:18, 195:19
Verdugo-Urquidez
[3] - 173:6, 187:18,
195:19
version [3] - 92:14,
150:6, 168:21
versus [2] - 35:21,
111:2
VI [1] - 52:14
via [1] - 23:18
viable [2] - 173:4,
173:23
victim [2] - 138:3,
138:26
victims [4] - 134:22,
137:13, 138:7, 183:11
view [18] - 7:15,
7:28, 8:16, 14:11,
40:25, 42:1, 42:21,
42:27, 44:19, 121:19,
159:21, 187:5, 190:1,
193:21, 194:7,

194:12, 194:28, 197:3
views [3] - 10:18,
114:14, 159:22
vigorously [1] -
95:21
vindicate [2] -
179:24, 182:29
violate [1] - 196:28
violated [7] - 82:20,
98:25, 111:11, 132:6,
132:20, 178:5, 181:11
violates [2] - 132:14,
191:11
violation [53] - 19:5,
19:8, 23:27, 24:28,
25:5, 28:23, 32:7,
34:16, 79:12, 79:14,
80:13, 80:14, 81:4,
81:22, 81:25, 87:22,
98:16, 98:19, 101:19,
106:19, 106:26,
107:2, 107:11,
107:29, 110:11,
110:23, 111:26,
112:26, 113:4,
129:28, 130:10,
136:17, 136:26,
137:8, 137:10,
137:20, 138:16,
138:21, 138:27,
139:2, 141:5, 142:15,
143:16, 179:26,
180:3, 180:14, 183:2,
183:4, 183:13, 184:2,
188:26, 188:28
violation [1] - 19:9
violation.. [1] - 79:17
violations [18] -
30:23, 32:22, 89:7,
92:16, 93:1, 93:6,
112:3, 112:8, 112:23,
114:6, 114:12,
139:15, 169:26,
179:14, 184:19,
191:22, 196:15
virtually [1] - 122:17
virtue [3] - 130:10,
131:5, 142:18
vis-à-vis [4] - 63:3,
83:8, 103:25, 148:10
vital [1] - 103:19
vitality [1] - 123:18
Vladeck [1] - 118:14
Vladeck's [1] -
118:23
vollition [1] - 37:23
voluntarily [1] -
191:2
voluntary [4] - 106:4,
190:23, 191:6, 196:6

voters' [1] - 183:21

W

waive [3] - 89:21,
92:13, 133:4
waived [3] - 90:2,
93:9, 94:26
waiver [12] - 21:10,
88:2, 91:5, 91:10,
91:25, 92:1, 92:16,
92:18, 93:6, 133:8,
135:17
waivers [1] - 132:23
waives [1] - 112:6
WALL [2] - 2:31, 2:32
wants [6] - 8:25,
50:28, 76:21, 78:9,
95:10, 125:19
war [1] - 50:21
warrant [16] - 67:16,
75:3, 81:12, 81:15,
82:5, 82:18, 83:10,
87:9, 87:25, 97:3,
99:3, 100:15, 113:12,
187:23, 188:7, 192:11
warrantless [3] -
49:16, 50:3, 67:19
WAS [1] - 202:3
Watergate [1] - 50:1
waters [3] - 167:19,
191:24, 196:16
waters.. [1] - 189:28
way' [1] - 112:15
way'.. [1] - 179:8
way.. [1] - 180:26
ways [1] - 11:17
weak [1] - 123:16
weaker [1] - 194:26
weapons [1] - 64:7
website [3] - 36:21,
142:4, 142:5
WEDNESDAY [2] -
1:18, 5:1
Wednesday [1] -
201:19
week [2] - 45:16,
201:20
weigh [1] - 14:5
welcomed [1] - 13:4
well' [1] - 112:4
well-founded [1] -
43:29
whatsoever [1] -
42:16
whereas [2] - 31:9,
105:19
whereby [1] - 142:11
whilst [2] - 33:12,
112:22
Whitmore [1] - 165:4
whole [10] - 11:20,
50:1, 50:22, 95:10,
104:7, 107:14,
121:16, 152:17,
154:3, 155:15
wholly [1] - 16:16
wide [4] - 64:23,
121:13, 121:20,
177:21
width [1] - 141:29
Wilful [1] - 107:11
wilful [20] - 19:11,
19:18, 19:21, 23:20,
24:28, 34:21, 110:11,
110:23, 110:26,
112:27, 113:4, 129:8,
129:12, 129:24,
129:26, 130:11,
139:2, 141:9, 142:17,
143:16
wilfully [4] - 17:26,
17:28, 34:15, 34:26
wilfulness [3] -
19:14, 111:17, 111:23
wilful [10] - 106:19,
106:24, 106:26,
107:2, 107:28, 137:8,
137:11, 137:20,
138:21, 138:27
wilfully [4] - 132:14,
141:4, 177:15, 177:28
wilfulness [2] -
112:5, 112:19
WILLIAM [1] - 2:26
WILTON [1] - 2:6
wire [5] - 83:3, 99:8,
105:11, 105:21,
107:27
Wire [7] - 104:10,
104:11, 104:16,
105:19, 107:6,
107:16, 108:1
Wiretap [12] - 22:24,
22:29, 24:21, 24:24,
24:29, 25:8, 47:18,
47:22, 113:28, 114:2,
114:6
wish [2] - 7:17, 44:20
wishes [2] - 77:12,
185:26
with' [1] - 71:6
withheld [4] -
128:11, 128:15,
132:1, 153:12
withhold [1] - 25:24
withholding [2] -
128:10, 131:18
within' [1] - 38:14

wonder [1] - 175:19 160:14
wondering [1] -
 194:5
word [2] - 129:26,
 133:22
words [14] - 34:3, — [32] - 64:16, 65:13,
 37:22, 38:27, 55:10, 69:5, 80:19, 86:15,
 67:17, 67:25, 78:4, 99:22, 102:29, 103:1,
 103:18, 106:5, 105:4, 153:11,
 108:24, 129:25, 153:15, 160:10,
 168:1, 183:16, 189:9, 161:21, 161:23,
works [2] - 17:9, 162:11, 162:28,
 20:19, 163:5, 163:6, 164:15,
world [1] - 196:25, 164:17, 166:17,
worry [1] - 150:2, 166:20, 167:10,
worse [1] - 196:25, 167:11, 167:28,
writes [1] - 124:9, 170:10, 170:11,
writing [2] - 75:26, 171:6, 171:9, 172:10,
 83:17, 172:14, 172:15
written [8] - 3:10,
 57:3, 73:9, 119:15,
 119:23, 124:2, 125:28
Written [1] - 73:5
wrongdoing [1] -
 94:9
wrongful [4] - 25:2,
 25:3, 131:2, 137:23
wrote [1] - 181:12

Y

year [8] - 53:27,
 54:7, 54:12, 57:9,
 66:29, 67:15, 91:9,
 142:7
years [2] - 73:23,
 95:17
yesterday [17] - 5:17,
 7:3, 8:2, 8:24, 9:23,
 10:5, 10:12, 11:2,
 13:16, 16:20, 24:15,
 29:5, 41:9, 51:2,
 52:27, 144:6, 185:8
York.. [1] - 157:2

Z

zip [2] - 184:10,
 184:11

‘

‘**recover** [1] - 40:13

“

“**[a]llegations** [1] -