IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

WIKIMEDIA FOUNDATION, et al,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	
NSA/CSS	)	1:15-cv-662
	)	
	)	
Defendants.	)	
	)	

REPORTER'S TRANSCRIPT

MOTION HEARING

Friday, September 25, 2015

BEFORE: THE HONORABLE T.S. ELLIS, III
Presiding

APPEARANCES: PATRICK TOOMEY, ESQ.
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For the Defendant

THE CLERK: Wikimedia Foundation, et al versus NSA/CSS, et al.

Civil case number 1:15-cv-662.

THE COURT: All right.

Who is here on behalf of the various plaintiffs in this case?

Why don't we begin with the counsel who is, probably, by agreement and designated to take the leading role on this argument on the standing issue, who will that be?

ATTORNEY TOOMEY: That is me, your Honor.

Good afternoon. My name is Patrick Toomey. I am here from ACLU representing the plaintiffs.

If you would like me to introduce my colleagues, I can do that.

THE COURT: Yes, you may do so.

ATTORNEY TOOMEY: Also here with me from the ACLU are Jameel Jaffer, Alex Abdo, and Ashley Gorski.

ATTORNEY GORSKI: Good morning, your Honor.

ATTORNEY TOOMEY: And just so your Honor knows, our colleagues from the ACLU, Maryland, Deborah Jeon and David Rocah, who are also -- have appeared in the case are in the galley.

THE COURT: All right. What about all the other -- good morning to all of you or good afternoon

now.

What about all the other plaintiffs?

ATTORNEY TOOMEY: We represent all the plaintiffs, your Honor.

THE COURT: All the plaintiffs.

ATTORNEY TOOMEY: Yes.

THE COURT: Okay. Thank you.

Now, for the government?

ATTORNEY PATTON: Good afternoon, your Honor.

Rodney Patton. I represent the NSA and all of the other defendants. I am from the Department of Justice.

Also with me at counsel table is James Gilligan, from the Department of Justice; Julia Berman, from the Department of Justice; and Caroline Anderson, from the Department of Justice.

THE COURT: All right.

Good afternoon to all of you.

And you are from the Programs Branch?

ATTORNEY PATTON: That is correct, Your Honor.

THE COURT: All right.

Let me ask Mr. Toomey. I just am serious. It has nothing to do with the case. Do you have a much

older relative that was a student in England about 40 years ago, 45 years ago?

ATTORNEY TOOMEY: Not that I know of, your Honor.

THE COURT: All right.

ATTORNEY TOOMEY: I was a student briefly there, but I don't think that timeframe.

THE COURT: Well, I knew a student when I was a student there by the name of Dan Toomey, and that's not a relation?

ATTORNEY TOOMEY: I have several relatives name Dan Toomey, but I don't believe any of them were there with you.

THE COURT: All right.

Well, having covered my lack of any conflict on that side, let me point out that I think one of the leading lights of the Programs Branch is Ms. Jennifer Ricketts, who was my second group of law clerks some 30 years ago.

But that doesn't create a conflict, as far as I am concerned, but I disclosed it. I hope she is doing well.

ATTORNEY PATTON: She is doing very well, your Honor. Thank you for asking.

THE COURT: In fact, I have had a parade of

clerks go through the Programs Branch. I don't even know how many of them are still even there. But I think most of them have gone -- passed on that way.

I say "passed on" because I am eager to share this. Recently a story appeared in a publication expressing some disagreement with an opinion I had written. That's not surprising.

But at published a picture of me, purporting to me be with that story. The picture was of a person I knew, liked, and admired, but it wasn't me.

It was a picture of Ed Becker, a judge of the Third Circuit who past away in 2006.

Rumors of my passing are greatly exaggerated as Twain said. But am delighted to be associated with Ed Becker, even in death. He was a very interesting, remarkable, and very funny man, always.

I recall once that he wrote an opinion entirely in verse. I didn't read it. But many people did. Poetry was never one of my loves.

All right. This is a -- you all have filed -- forests have died for what you all have done. It's a very interesting case.

Let me hear first from the defendant. I have some questions to ask you. You are the movant in this matter. And, so, it is your burden to persuade me.

This -- first of all, I want to thank every one for agreeing this to hear this in Alexandria. This case was, initially, filed in Maryland; and, for reasons that I have disclosed to you, it was -- couldn't be heard -- well, it could be heard there, but not by a Maryland judge.

And when I was asked to take the case, I communicated with counsel, and I am pleased to say that you agreed to have this motion heard here, which is convenient for me, and I hope not too inconvenient for you.

Actually, one of your clients, or one of the parties lives close to where I live. I don't know the man. But I live near Charlottesville, Virginia. And I think Rutherford does as well.

But, in any event, I appreciate the agreement of counsel to do this here. And to the extent that we do other things in this case, it will always be here if by agreement. If not, then we will go to Greenbelt.

Any counsel can raise an objection at any time, and I'll go to Greenbelt. Rather not, but it wouldn't be the first time I had to do something I didn't want to do.

Now, let me ask you a couple of initial

questions. First, this is a case that challenges the NSA's gathering of Internet data from communications.

It strikes me, in my occasional forays into reading newspapers, other than the sports page, which isn't often, that there have been a lot of these cases around, and I am not so happy about doing over what other people are doing.

Now, I am familiar with the D.C. Circuit case, of course, and I am familiar with the Second Circuit case, and with the Clapper case, and the Supreme Court, all of which you all have talked about at great length in your briefs.

But aren't there some other cases going on in district courts around the country right now?

ATTORNEY PATTON: Your Honor, as an initial matter, some of the cases that you referenced there dealt with bulk telephony metadata program.

THE COURT: Oh, I know it's not the exact same case.

ATTORNEY PATTON: So, it's not the exact same program; and that is, obviously, very important in terms of standing.

THE COURT: Yes, I understand that.

ATTORNEY PATTON: But there are, in fact --

THE COURT: All right.

Let me narrow it down to this. Are there any ongoing cases involving a challenge to the upstream collection of Internet data by the NSA?

ATTORNEY PATTON: Yes, there are -- there is, your Honor. At least one in the Northern District of California. We were counsel in that case, too.

The case went to summary judgment on a lot of the same topics, and assumptions, and speculations as are here, and the judge found that there was insufficient evidence to preserve even an issue for trial.

As a matter, he dismissed --

THE COURT: Was there a standing dispute in that case?

ATTORNEY PATTON: Yes, there was, your Honor. It was a standing dispute.

THE COURT: So, it must have gone beyond standing.

ATTORNEY PATTON: The standing and the merits were dealt with at the summary judgment stage. It was a motion for summary judgment -- partial motion for summary judgment by the Jewel plaintiffs on their Fourth Amendment claim. And the United States, Connor, cross-moved for summary judgment on that.

THE COURT: And who were the plaintiffs in

that case.

ATTORNEY PATTON: The plaintiffs or Jewel was one plaintiff and another particular plaintiff --

THE COURT: So, these parties were not parties.

ATTORNEY PATTON: These plaintiff were parties to the case; that's correct.

THE COURT: They were.

ATTORNEY PATTON: Yes. So, they, basically, and much the same way as the plaintiffs in this case said, there has been so much information out there in the public sphere since the Snowden --

THE COURT: Well, we will get to argument about standing. I just want to focus now, very sharply, on -- I have asked you the question, are there any other cases that are recent or ongoing, involving a challenge to the NSA's collection upstream of this Internet data.

And you've told me about one in California that went to summary judgment. Was there a Ninth Circuit appeal?

ATTORNEY PATTEN: So, there is a Ninth Circuit appeal currently ongoing on that issue, your Honor. But there is also a motion to dismiss the appeal that is being heard later in October, because it was a Rule 54(b).

THE COURT: All right.

And the plaintiffs here were plaintiffs there as well.

ATTORNEY PATTON: No, that's not correct, your Honor. None of the plaintiff there, to my knowledge, were plaintiffs.

THE COURT: Am sorry. I thought you said earlier, they were.

ATTORNEY PATTON: No. They are making the same arguments.

THE COURT: Oh, making the same arguments.

ATTORNEY PATTON: Making the same arguments.

THE COURT: All right.

ATTORNEY PATTON: The plaintiffs here.

THE COURT: All right.

Apart from the California case, any other?

ATTORNEY PATTON: I am not aware of any others on the civil side. Obviously, on the criminal side, there is a Hasbarjrami case that, I think, the ACLU filed an amicus brief on that, in that particular case, challenging both upstream and PRISM.

So, but, as far as civil cases are concerned, I am not aware of any other upstream challenge other than this one and the one in the Northern District of California.

THE COURT: All right.

ATTORNEY PATTON: And there are other civil actions under Section 702, but those are all PRISM cases challenging a different program.

THE COURT: All right.

Now, the second question I want to ask you is -- well, no, I'll make it the third, because the second question I am going to ask you is probably going to take longer.

So, I'll ask another question first. I take it that at some point in time, or points in time, the data collection that the NSA is undertaking that is being challenged in this case went to the FISC -- went to the Foreign Intelligence Surveillance Court, and an order issued.

ATTORNEY PATTON: That's correct, your Honor. The process works under Section 702.

THE COURT: Right.

ATTORNEY PATTON: The Attorney General and the --

THE COURT: But there is, usually, an order and an opinion sometimes with it. Did that occur? And the reason I know that is that I have had a number of classified information cases here. We get cases of that sort here, and I have had to consider those orders and

those opinions.

Most of them have been -- most of them, there only have been two or three -- have been classified.

Is there a public order or opinion in -- that relates to the data collection practices challenged here?

ATTORNEY PATTON: I don't believe there is an unclassified opinion.

THE COURT: But there would have to be a classified order and/or opinion; is that right?

ATTORNEY PATTON: Certainly a classified order because --

THE COURT: All right.

ATTORNEY PATTON: -- FISC has to approve both the certification coming from the Attorney General and the Director of National Intelligence --

THE COURT: So --

ATTORNEY PATTON: -- plus their targeting procedures and minimization procedures.

THE COURT: So, let me continue for just a moment and ask you, what, if any effect, should the existence of such an order have on the challenge by the plaintiffs in this case?

ATTORNEY PATTON: For purposes of them being

able to prove their standing, I don't believe it has any. For purposes of, if this case goes to the merits, I think it has a significant impact on it because -

THE COURT: All right.

ATTORNEY PATTON: -- the FISC has to prove the reasonableness of the program under the Fourth Amendment that's under the statute. And both the --

THE COURT: So, it would be akin to something like the existence of a search warrant in a case challenging the legality of the search.

The court would still have to assess whether the search was legal, and defects in the search warrant, or the affidavits, or whatever, would have to be examined.

All right. Let's go to the third question, which really leads into what's at issue today. The first two questions I asked really don't have much to do with what's before the court today.

The Clapper case is a case that you rely on quite significantly. Now, what -- and that was upstream collection data, was it not?

ATTORNEY PATTON: That was Section 702, which authorizes upstream selection and authorizes PRISM. But it was a facial challenge brought, in fact, by six of the nine plaintiffs here, a facial challenge

to the statute that authorizes this very program.

THE COURT: Now, what -- and, of course, Clapper held there was no standing in a divided court.

ATTORNEY PATTON: Well, divided in the sense that it was five, four. But, yes, the majority ruled that there were no standing for the same reason --

THE COURT: Yes.

ATTORNEY PATTON: -- were pending in this case.

THE COURT: Now, I want to know -- and I am going to ask this of the -- of you, Mr. Toomey.

What is there in this second or amended complaint that is different from or in addition to the facts that were alleged in Clapper?

And I ask that for an obvious reason. And that is, that if the facts in this case are exactly the same as Clapper, no different from Clapper, then I don't know that I have the authority to reach any different conclusion.

So, I want to know whether, chiefly from you, Mr. Toomey, what is alleged in this case that is different from or in addition to what was alleged in Clapper.

ATTORNEY PATTON: Your Honor, if I may answer that question as quickly as I possible, because

there are, obviously, a lot of things that are alleged.

But the bottom line here is that in Clapper the Supreme Court ruled that the plaintiffs in that case could only speculate and make assumptions about who the targets were.

Here the same kind of speculations and assumptions have to albeit, by these plaintiffs, as to whether or not their communications were intercepted. So, it's only sightly different, but it's the speculation on the assumptions that's key.

And here, whether -- whether anyone that these plaintiffs are talking to is a target, classified. Whether, what the scope of upstream collection is, how it actually operates, classified.

So, the only things that the plaintiffs can do, as set aside and throw against the wall, as much information as they can taken from this snippet or that snippet, but the bottom line is, they have to say, you must be collecting this. It's speculation. You've got to do it in this way in order to be effective.

And the D.C. Circuit through Judge Sentelle and Judge Williams, just last month, looked at albeit the bulk telephony metadata program in that case, and said that's not enough.

When you are looking at a program and

saying, well, in order to be effective as a bulb telephony metadata, you must be collecting from Verizon wireless. That's just one piece of speculation. And I know that we are going to hear from the plaintiff about a chain of speculation in Amnesty and that there is not as long a chain here. The point is, it's still speculation.

And one case of speculation was sufficient for the D.C. Circuit to say, you've not shown standing in that case. That was one of the cases that your Honor alluded to earlier.

And the point is, the plaintiff in that case could not say, following Amnesty, that just because we think the program would be effective, only if you had Verizon wireless, that we can presume that Verizon is part of the program.

Here, plaintiffs make the same arguments. We presume it has to be substantially all because, otherwise, how could you do this, or how could you do that?

And, of course, the point is how the program operates is classified. There are very few pieces of information out there in the public. There is Privacy and Civil Liberties Oversight Board. There are some FISC opinions. I recommend 2011 FISC opinion from

October 3rd of that year by Judge Bates, which explains a lot about this program. But what it doesn't explain is the scope of the program, the operational details of how it works. Those were classified, and they are still classified.

So, plaintiffs, they will tell you a lot of things together, and their words would be, they must be doing this. To be effective, they must do this. Those are all speculative words. They are all assumptions that the plaintiff make.

So, notwithstanding the pieces of information that have come out, official acknowledgement since the Snowden leaks that occurred, nothing that has come out as an official acknowledgement has indicated in anyway the scope of this program or how it works.

The plaintiff are left to speculate. That's exactly what the Supreme Court said they can't do in order to show standing on page 1148 of the Clapper versus Amnesty opinion.

So, we submit this case is not that difficult, notwithstanding the forest that we killed to prove the point to you, is that plaintiffs, two years later, cannot get any further than the -- six of the same plaintiffs did in Clapper versus Amnesty International.

THE COURT: I take it you would not contest standing if the plaintiffs adduced an e-mail of theirs that they got from Snowden saying he got it from NSA.

ATTORNEY PATTON: That would be very fact specific, your Honor. Obviously --

THE COURT: And then it would be the credibility of Snowden.

ATTORNEY TOOMEY: Well, I am certainly not going to address that. But what I will address is official acknowledgments, for example --

THE COURT: Well, I think, what my question really was is how in the world does the plaintiff in this situation show standing other than by inference and probabilities?

ATTORNEY PATTON: Well, your Honor, that certainly a problem that the plaintiffs at Amnesty International had. And, as I alluded earlier, the ACLU on behalf of Mr. Hasbarjrami, he received an official notice, not specific to upstream collection or PRISM, but a 702 notice that the parties have discussed in their papers. And so they briefed that issue of the legality of Section 702 upstream and PRISM, and so those issues were briefed.

If some plaintiff came forward with evidence that they had, in fact, being -- their communications

being intercepted, then certainly we would look at that and the facts of that case.

THE COURT: How in the world would they get that evidence?

ATTORNEY PATTON: Well, that's -- that's one of the features of a classified program. It's not a bug of a classified program that it's hard to prove standing.

THE COURT: Yes. And you couldn't and shouldn't tell me how they could get that because you would be revealing, if you knew --

ATTORNEY PATTON: Right.

THE COURT: -- classified information.

ATTORNEY PATTON: That's correct.

THE COURT: I am just making the observation that, I am sure, was apparent to the Supreme Court in Clapper that this is a significant, very difficult burden for a plaintiff that they are setting.

And in one of -- life is full of ironies. I believe Justice Breyer was an author of either Iqbal or Twombly. I don't remember which one.

Which one was anti-trust case?

ATTORNEY PATTON: I think they were both anti-trust case.

THE COURT: Well, one of the --

ATTORNEY PATTON: Twombly, I am sorry. Twombly was anti-trust case.

THE COURT: I think Breyer authored Twombly; and, of course, he doesn't -- he is not happy with its application, as the majority put it in this case. Just an irony that I -- I am increasingly amused by in life. There are lots of them in everyone's lives.

I think I understand the parties' arguments. Let's do this. You'll have the last word. You are the movant. But let me ask Mr. Toomey to tell me. And pay attention to this because this is one of the things that I do want you to respond to.

My first question to Mr. Toomey is the obvious one. What has been alleged in this case that is different from or in addition to what was found to be insufficient in Clapper?

ATTORNEY TOOMEY: Of course, your Honor.

There are four reasons.

THE COURT: I am sure that's a question you anticipated.

ATTORNEY TOOMEY: We had an idea you might ask it, your Honor.

THE COURT: All right.

ATTORNEY TOOMEY: There are four basic reasons this case is not foreclosed by Amnesty

International, your Honor.

And if I can just describe in each briefly and then get into more detail, if you you want to go further. The first reason is that this surveillance is fundamentally different from the surveillance that was at issue in Clapper.

The surveillance at issue in Clapper concerns what the Supreme Court understood to be targeted surveillance, surveillance that was directed at the communications to or from the government's foreign targets.

The surveillance that has been disclosed now, and officially acknowledged by the government, is far broader than that. It involves, in the first instance, this screening, as the government calls it, and as we refer to it, the copying and reviewing of, essentially, everyone's communications, targets and non-targets alike, in search of certain terms that are associated with the government's targets.

So, to put it maybe more simply, your Honor, to put in terms of physical mail, for instance. If the government wanted to collect mail from its -- from just its targets, it could look at the outside of the envelope and say, I'll take this letter and that letter.

If the government wanted to find the letters

containing the e-mail address or the name of a target, it would have to look at the content of every letter coming through, you know, the postal screening service in order to find the communications that it was looking for.

And that's very important to know about what this surveillance entails. And it was not before the Supreme Court in Clapper, precisely, because, as others have observed since, the government did not inform the Supreme Court that that was how some of the surveillance was being conducted.

The second difference, your Honor, is that far, far more is known -- is now known about the surveillance than was known at the time of Clapper.

And the PCLOB report makes this point explicitly. And we, we identified that statement in paragraph 51 of our amended complaint, that at the time Clapper was decided and, in fact, when the statute was passed, no one in the public or the Supreme Court understood the surveillance to operate in this way; that is, to be this broad net looking at the content of all the transiting communications, as opposed to merely being focused on the communications of targets.

And we have pointed to numerous other official disclosed -- disclosed documents that showed

this. We don't have the FISC order in the terms that, perhaps, you were asking before that authorizes this surveillance.

But we certainly have FISC opinions that you can find on Westlaw, in fact, that describe the surveillance at issue, that describe upstream surveillance. And one of those opinions is an opinion from Judge Bates from October 2011, where he found certain of the procedures that govern upstream surveillance unconstitutional.

And there are other opinions out there that are also touching surveillance that have been released by the government. So, the record that the court has before if today about how this surveillance operates, the government says everything about how this surveillance operates is classified. Well, that's not true.

The PCLOB report describes in a number of ways how this surveillance operates.

THE COURT: What report?

ATTORNEY TOOMEY: The PCLOB report, your Honor. That's the Privacy and Civil Liberties Oversight Board report. It's a 196-page report that evaluates the government's surveillance activities under Section 702.

It describes upstream surveillance in

significant detail, and many of the key points are identified, both in our briefs, and in our amended complaint.

The third difference from Amnesty is that the plaintiff are different, not merely in their name, your Honor, but in terms of how they communicate and the volume and distribution of their communications.

We have pointed, specifically, to Wikimedia's communications. It engages in more than trillion Internet communications, international Internet communications each year with individuals in every country on earth.

No -- none of the plaintiffs in Amnesty put that record before the court. And we've also put before the court a member of NACDL, Mr. Dratel, whose clients received an FAA notice. In other words, whose client was told that the government used FAA surveillance to intercept --

THE COURT: Say that last again, please.

ATTORNEY TOOMEY: Say which part again, the last part?

ATTORNEY TOOMEY: Mr. Dratel's client received a notice from the government, an official notice, that his communications were intercepted using FAA surveillance.

And Mr. Dratel had a second client whose investigation involves a co-defendant, who also government officials have described in testimony using FAA surveillance.

THE COURT: That just shows that those particular communications were gathered. And for all we know, those persons' clients were designated terrorists overseas, right?

ATTORNEY TOOMEY: The lawyers' clients were individuals here in the U.S.

THE COURT: But were they -- certainly, if they were people they were communicating with were terrorists, that wouldn't be a problem, Constitutionally, would it, if they were communicating overseas and there was a FISC court order that permitted it.

ATTORNEY TOOMEY: Our argument here, your Honor, is that the facts that --

THE COURT: Can you say yes or no and then answer my question, and then go to explain it. It's frustrating when I ask a question, and I -- this isn't politics. This isn't -- you are not on the stump. It's better to give me a direct answer.

If the person who received these notices was communicating, or not the person receiving notice, but

the client was communicating with someone who was a designated terrorist or something of that sort overseas, then nothing constitutional -- unconstitutional about that if there is a FISC order, is there?

ATTORNEY TOOMEY: We think there is something unconstitutional with that, your Honor. That's not the issue here right now.

To be very clear about the type of FISC orders that are involved in Section 702 surveillance, they are not individualized warrants or individualized orders finding probable cause of the same kind, as what we refer to as a traditional FISC order.

They are the FISC orders that apply to this surveillance part, general orders authorizing and approving the procedures that the government proposes to follow.

The government never identifies through the court its particular targets. And, in fact, those targets do not need to be designated terrorists at all. They could -- they can be any foreigner located abroad, any person who the government believes has -- is likely to communicate information with foreign intelligence value to it. It could be journalists. It could be human rights activists. It could be academics. It could be individuals who work at companies abroad.

So, I just want to be very careful to distinguish between what -- what the traditional FISC process required, which was and had done an individualized order, and the surveillance at issue here in which the government is able to identify 92,000 targets, foreign targets, under a single FISC order.

And we do believe that there are grave constitutional problems with the government's ability to do that absent some type of probable cause finding required by the Fourth Amendment.

Back to Mr. Dratel, your Honor, because -- and the lawyer who has a client who received one of these notices. Our argument is -- and the Supreme Court made this point in Amnesty itself, the five justices in the majority.

The court observed that an attorney whose client was subject to FAA's surveillance would be able to make a stronger evidentiary showing that his communications had been intercepted, than the plaintiffs who are before the court in Amnesty.

And the reason that we believe we have made that this type of stronger showing here is because in order to investigate a defense, in order to contact witnesses abroad, when a defendant has received a notice, the defendant's lawyer must reach out to

individuals abroad, contact key witnesses, research the allegations in the indictment, and that that lawyer is likely to communicate with or about the same person who was targeted through the FAA surveillance.

So, that's why we believe the facts that Mr. Dratel puts before court are very different from the lawyers who were before the court in Amnesty itself.

But the third point is more generally that Wikimedia's communications are so widely distributed across the globe and so immense in number that they transit all of the major Internet circuits that the government is monitoring.

So, whichever circuits the government is monitoring, our arguments is, the government must be intercepting at least some of plaintiffs' Wikimedia's communications.

The fourth point, your Honor, is that the legal standard in this case is different from the legal standards in amnesty. We are here, of course, on a motion to dismiss. The government says the legal standard is plausibility.

In Amnesty, the parties were before the court on a motion for summary judgment. And the Supreme Court has emphasized in a number of different places and a number of different ways that what a party is required

to put forward at the pleading stage is different than what a party must put forward at the summary judgment stage.

So, those are the main four categories in which we think this case is very different from Amnesty. You can also see this in concrete way by comparing the facts of this case to contingencies that Justice Alito identified on page 1148 of the court's opinion.

First he said -- you know, he said that the court was considering a set of contingencies that the plaintiff was putting forward. The first of them was that the government would target the plaintiffs' contacts.

Now, the surveillance -- because the surveillance here is different, because it involves examining the content of, essentially, everyone's targets and non-targets communications, the fact that the surveillance implicates plaintiff doesn't depend on whether the government is surveilling plaintiff's individual context.

Second, the second contingencies that Justice Alito identified was that government would choose to use FAA surveillance.

But, of course, the government has officially disclosed that it is using upstream

surveillance; and the PCLOB, the Privacy and Civil Liberties Oversight Board, has described that surveillance, and it has been described in another number of other context by the government.

Third, justice Alito said that the plaintiffs in that case could not know whether the FISC had approved the surveillance. But, of course, here we know that for a fact that the FISC had approved the surveillance.

The government just told you that and, of course, it is reflected in the materials that we cited in the paper and in the amended complaint.

And, fourth, the Court said that plaintiffs were speculating about whether the surveillance would implicate their communications.

But we have put forward facts showing that this surveillance implicates the plaintiffs' communications. We have alleged first that the government is intercepting, it's copying, and reviewing substantially all international communications, including those of plaintiffs; and second, even if that were not enough, we have alleged facts showing that the government is copying and reviewing at least some of the plaintiffs' trillion or more communications each year.

And that showing, I want to emphasize, we

are saying to a virtual certainty that the government, in order to carry out upstream surveillance, must be copying and reviewing at least some of the plaintiffs' communications.

We say that based on three factual premises, your Honor. First, the facts that the government, itself, has acknowledged about how upstream surveillance operates.

The PCLOB has described -- the Privacy and Civil Liberties Board has described in analyzing precisely this type of surveillance, the use of surveillance devices that examine the content of all communications transiting that device.

And it has put forward even more detailed description about how the government's review of the contents of communications requires it to access, not just the communications of targets, but the communications of others.

Second, we have appointed to the volume and distribution of plaintiff Wikimedia's communications. The fact that Wikimedia's communications are so numerous and spread across the globe that they transit every major Internet circuit entering and leaving the country.

And third, we have pointed to technological requirements of -- for conducting this type of

surveillance. And we have explained those technological requirements and the structure of Internet communications in great detail in our papers.

And those -- those technological requirements are consistent with the analysis of computer experts that are cited in the New York Times article that we also rely upon which says, based on interviews with government officials, review of NSA documents, and conversations and -- conversations with computer scientists that in order to carry out this type of surveillance the government would have to be copying and reassembling, essentially, all the tiny packets that are flowing in the stream of data in order to review and identify the communications of its 92,000 individual targets that are spread across the globe.

And we believe we can make this showing, your Honor, on the basis of information that's in the public record. But, of course, we have also pointed the court to materials that corroborate plaintiffs' showing on these points that show that the government is conducting the surveillance at many choke points and that it has identified and pointed to plaintiff, Wikimedia's, own communications in connection with upstream surveillance.

THE COURT: All right.

Thank you.

ATTORNEY TOOMEY: Do you have any further questions, your Honor?

THE COURT: No, thank you.

You will have the last word. But I want you to respond, specifically, to what Mr. Toomey has said. He went through -- he counted four. I counted five differences between -- that he contends exist between this and the information available in Clapper.

ATTORNEY PATTON: Yes, your Honor. I am happy to walk through them all. The first one that I wrote down was that the -- what we have here, upstream collection, is "fundamentally different" than Section 702 that was at issue in Clapper.

First of all Clapper versus Amnesty International involved 702. 702 has upstream and PRISM. What wasn't public at the time was that upstream collection includes to, from, and about with regard to Internet communications.

What does "about" mean? The plaintiffs used this phrase as if talking about Rodney Patton was a target, that if they sent an e-mail with Rodney Patton in it, that that will show up and that's something that would be captured. That's not correct.

"About" relates to the specific

communications identifier, such as an e-mail address. So, in the context of an about communications, so the about could appear in the header or appear in the body.

If you want to know more about making a bomb, contact following e-mail. That is an about communication.

The most critical point, I think, that the plaintiffs make in their first point is, and they keep repeating it throughout is that we are copying, essentially, everyone's communications, essentially everyone's international communications.

That's not well pled under Iqbal at all. That's their conclusion. Any factual enhancement that they have suggested to support that, doesn't.

Mr. Toomey refers to the PCLOB report, for example, and there are plenty of facts about the upstream collection in this program.

What there isn't is any discussion about its scope and operational details. I want to give you one example that they cite to demonstrate that is, essentially, everyone's communications. That's page 111, note 476.

"The NSA's upstream collection may require access to a larger body of international communications than those that contained a tasked selector." May

require access to a larger body. How big, how small is that? PCLOB doesn't say, nor does the FISC opinion that both the plaintiffs and the defendants have cited and referenced to you today.

And that the FISC opinion talks about nine percent of the 702 collection being related to upstream and 91 percent being related to PRISM. That was in 2011.

That doesn't tell you anything about the extent and scope of whether, essentially, everyone's communications were copied. The same is true on the ODNI report.

The Office of Director of National Intelligence report, where it referenced there are over 92,000 targets for 702. How many are PRISM? How many are upstream? You are left to guess.

There is the Charlie Savage article from the New York Times in 2013. Again, media speculation about the extent. There is no actual knowledge in there.

In fact, the PCLOB report references this particular article on page 119 and with reference to about collection, says that that article misunderstands the more complex reality.

And that's the problem with speculation, of course, is that you don't understand what is, actually,

going on. There is reference to their technical capacity. Of course, under Iqbal, if you have the technical capacity to do something, that doesn't mean you are doing it. It is, consistency, as Iqbal pointed and Twombly pointed out, is not enough.

There are a limited number of choke points they indicated. 49, I think, is the number they used. But that number doesn't mean one thing or another with regard to how much of that the NSA is monitoring.

The purported slide that is on paragraph 68, I think, of their complaint, we can neither confirm nor deny its authenticity. But even if it's correct doesn't support the proposition that they want this court to draw from it.

It indicates or purports to indicate that there is coverage on some, but that doesn't mean all. So, the bottom line there is, with regard to it being fundamentally different, it is not.

And then far -- their second point, which I have, obviously, touched on here, is that far more is known about it. I have walked through the PCLOB report and FISC opinion. And this I could talk a lot about, this next point, but I will spare you all of the details.

The plaintiffs are different. Well, eight

out of the nine plaintiffs are not different. Eight out of the nine plaintiffs are pretty much the same as the plaintiffs in Clapper versus Amnesty International.

The one that is different here, they say is, Wikimedia. Why? They have a huge volume of communications, they said, distributed throughout the world.

These communications, of course, are someone like -- someone from France logging on and looking up a Wikimedia website. That's a communication here. They have over a trillion of those, they say.

Well --

THE COURT: Their counting of the trillion is subject to some dispute.

ATTORNEY PATTON: It is subject to some dispute.

THE COURT: Put it to one side, because it is a large number, they are counting every little bit.

ATTORNEY PATTON: Well, what they are counting are http requests. And, as our expert pointed out, http request for a Wikimedia article is a lot fewer than, say, if you are going on FISC, both because http requests would get more, the more complicated the graphics and the adds, and there are no adds on Wiki cites, and there are not as many graphics.

So, even that one trillion number is comparing apples to oranges in terms of the website visits that we've looked at and the web page views.

So, if you look at Wiki's web page views, though, and you compare just that for all the Wiki cites that they have -- I think it was 255 billion per year, it actually amounts to, when you combine just the e-mails that traverse the world, and the top 50 websites -- top 50 out of 244 million active websites out there. It's still 0.29 percent.

So, the terms of volume, the numbers seem staggering until you put it in context. They didn't put it in context, and we have done that here.

Plaintiffs talked about Mr. Dratel and Mr. Dratel's clients. Mr. Dratel's clients received a notice of Section 702 surveillance, that their case involved that.

What they didn't get was, is it an upstream case. So, he has to speculate, well, was it an upstream surveillance? Was it a PRISM surveillance? They are not told.

So, what they do in those criminal cases is they brief the legality of both. But that's fine for them to do in a criminal case. But here they need to show something more than just a mere possibility --

could have been that, could have been this. You decide. That's the mere possibility under Iqbal standards.

Again, when talking about this, he -- the plaintiffs indicated that there is a virtual certainty that we must be intercepting, and those are those speculative words.

Once you are here you, must be doing something. They must be doing this to make it effective. That's the words of speculation from page 1140 of the Clapper versus Amnesty International that says, "Assumptions and speculations are not enough."

Mr. Toomey mentioned the legal standard, and we are here on the motion to dismiss. We are here on an motion to dismiss. But we are here on an unusual sort of framework because some of the allegations have been attacked under the plausibility standard under Iqbal like the substantially all. There is no plausible allegation in there supporting that.

But they are also -- the government has attacked the factual underpinning of many of their allegations, including the key one that is a virtual certainty that volume, for example, demonstrates that Wikimedia has standing or that if you are on one cable you must be collecting all of that. That's not true as a matter of technology, and our expert pointed that out.

So, even if we are on one cable, that doesn't mean that all communications on that cable are subject to interception. That's the takeaway.

But those kinds of factual disputes put the factual burden on the plaintiffs to show, by a preponderance of the evidence, and your Honor can see that in United States ex rel. Vuyyuru versus Jadhav. And I probably have the cite here, 555 F.3d 337 at page 337. That's a Fourth Circuit case from 2009.

So, from the perspective of the legal standard, yes, there is a little difference because it was up on summary judgment at that time in front of Clapper. But up on summary judgment, the court find there wasn't even a genuine issue of material fact to take beyond summary judgment from Clapper.

In fact, there are cases that this argument started out talking about Jewel versus NSA in the Northern District of California. Same result.

This is the Clapper case versus Amnesty International both 702, this case and the Jewel case involved 702, but upstream collection specifically.

THE COURT: Clapper went on summary judgment. I take it in -- at the dismissal stage in Clapper, there was an objection to the plaintiff's standing.

ATTORNEY PATTON: I believe -- I believe it went to -- Mr. Capilano, who was here earlier was -- handled that case on behalf of United States.

THE COURT: I'm sorry. Say that again, please, sir.

ATTORNEY PATTON: I am afraid I was not on that case. I believe Mr. Jaffer was from ACLU. But my recollection of the procedural posture was that that case went directly to merits briefing. That's correct. And so it was summary judgment brief. And there was no opportunity, like there is here, for your Honor to dismiss this case without going forward to the merits and whatever could happen at the merits stage.

THE COURT: All right.

Thank you.

ATTORNEY PATTON: Thank you. I have much more I could say, but there is a lot of information in the briefs.

THE COURT: You don't get the last word. You are not the movant.

ATTORNEY TOOMEY: I understand, your Honor. I had hoped that we could say something about the procedural posture of the case.

THE COURT: All right. Go ahead. And then I'll give you the last word, because you are the movant;

and, otherwise, it's interminable, and it's lunch time.

ATTORNEY TOOMEY: I understand, your Honor. The government just explained that it now views its case as both a facial attack on the complaint and a factual attack on the complaint.

And I want to explain and make very clear, I hope, to the court why the government is trying to have it both ways, and why that's inappropriate at this stage of the case.

The government is trying to have the benefit to prevail on a motion to dismiss, using evidence that it's only entitled to the merits. And there are three reasons, if I can describe those for the court.

The first is that Fourth Circuit has made very clear, including in a case the government just cited to you that when the factual issue in dispute is inextricably intertwined with the merits, it can only be resolved on the merits under Rule 56. And that's not what the government is proposing to do here.

The fact of whether the government is copying and reviewing the plaintiffs' communications, obviously, is closely related, if not an essential element of plaintiffs showing that the government is unlawfully searching and seizing their communications.

It would be like a plaintiff suing over an

illegal house search, and the government saying, as a jurisdictional matter, we want you to prove that your house was searched and how it violated your privacy under Rule 12(b)(1).

And the Fourth Circuit's decisions in Kearns, in United States versus North Carolina, in Vuyyuru, which is a case the government just cited, and in Adams, all show to the contrary, that this factual dispute can only be resolved on the merits.

The second point is that the government didn't present --

THE COURT: It isn't a factual dispute. It's a dispute about whether the allegations in the complaint, the amended complaint, are sufficient to raise a plausible inference that your clients' communications were seized and copied. That's what is it at the threshold.

ATTORNEY TOOMEY: We entirely agree with that, your Honor. And our --

THE COURT: If we get into the facts and -- I think I -- you may be seated.

Let me ask the government. You don't intend to make it a factual determination, do you?

ATTORNEY TOOMEY: There is a portion of the motion to dismiss that we filed, and Mr. Toomey

mentioned that I just explained.

We explained this situation, what was happening in our reply brief, as to what -- because they not moved to strike, but indicated that it was improper for us to add documents outside the pleadings, the two expert declarations, for example.

But for the substantially all-allegation, that is, clearly, unsupported by any well-pled allegations in the complaint. As your Honor mentioned, it's an Iqbal plausibility determination.

When we get to the part of, they must -- the NSA must be conducting surveillances, obviously, it's speculation the say way as it was in Clapper versus Amnesty.

But if your Honor needs to get to any factual issue on that, you can also resolve that short of a merits determination to decide jurisdictional facts.

And I have heard the plaintiffs say, both in their brief and here today, that the facts are inextricably intertwined. But I have not heard how it is. In every case you have to show standing, and in every case --

THE COURT: Standing is a jurisdictional --

ATTORNEY PATTON: It's a jurisdictional

matter.

THE COURT: Just a moment. When I start, you need to stop.

ATTORNEY PATTON: Sorry.

THE COURT: He gets us only one at a time here, Mr. Rodriquez.

ATTORNEY PATTON: Too much coffee this morning.

THE COURT: And it's a jurisdictional issue. I have no power to decide the merits until I decide the jurisdictional issue.

Only if I find standing, do I have the power to adjudicate. I am not a fan of mixing standing with the merits, and going ahead.

I am surprised that the California suit, once you get past the jurisdictional aspect then, of course, you get discovery. I would be surprised if everybody doesn't have to get some kind of clearance to look what discovery is sought.

And, so, I don't see this as a case involving a factual dispute, do you?

ATTORNEY PATTON: I don't believe so.

THE COURT: This standing issue, I don't have to resolve a factual dispute, do I?

ATTORNEY PATTON: As the record exists right

now, your Honor, I don't see -- I think we can resolve this case on --

THE COURT: So, I don't have to look at your declarations.

ATTORNEY PATTON: If you can decide this without the declarations, we are certainly --

THE COURT: Well, if I have to use the declarations to decide them, isn't that importing into the standing?

Let me do this. Mr. Johnson, I am going to take a recess before I hear your case, so that we can have lunch.

ATTORNEY JOHNSON: Yes, sir.

THE COURT: So we wouldn't begin your case until 1:30 at the earliest.

ATTORNEY JOHNSON: Yes, sir.

THE COURT: Now, your client, I think, is in the custody of the marshals. If you need to see him, you need to discuss that with the court security officer and the marshals.

ATTORNEY JOHNSON: Yes, sir, I will. That is what I am trying to do. I appreciate that, your Honor.

THE COURT: Thank you, Mr. Johnson.

All right. So, I want to be clear, do you

you believe -- is it the government's position that I have to resolve factual disputes, other than inferences. You are going to disagree about inferences.

But, do I have to get into the merits, facts of this, that is seizing of actual things to decide the case -- decide the standing issues.

ATTORNEY PATTON: You do not need to -- that's our point is that, contrary to what the plaintiff say, you do not need to get into the merits FISC facts because the merit FISC facts are not inextricably intertwined.

To the extent that at the end of all the briefing you think that there are any jurisdictional factual disputes, you are entitled, as a matter of law, in determining your jurisdiction, to resolve those.

THE COURT: All right. A last question for you. Other than producing an e-mail of the plaintiffs that they can show was trapped, and copied, and whatever by the NSA, is there any other way to get standing?

ATTORNEY PATTON: Certainly, if there is an official acknowledgement by the United States in a criminal case, if they said, we took this information from you, from the upstream process, then I can envision that.

THE COURT: But, in this context, you can't

think of any?

ATTORNEY PATTON: I can't think of any --

THE COURT: Other than what the --

ATTORNEY PATTON: -- right here, but I will say that the Supreme Court -- this same argument was made to the Supreme Court. And the response to the Supreme Court was, just because you don't have standing, and you can't think of anybody who does, there is no reason to find standing in this case.

THE COURT: Yes, I think that's clear. But no judge could decide this without thinking about that. And you would not, I think, argument on behalf of the government that just because you all keep things secret that the constitutionality of it can't be, at some point, examined and judicially determined.

ATTORNEY PATTON: Well, two points, your Honor. The constitutionality of this program is, at least, once a year examined by the Foreign Intelligence Surveillance Court that has --

THE COURT: That's the question I asked. That's the point I raised at the outset. Where are the opinions and the -- from the FISC court? And the answer to that was, well, they only decide the minimization efforts and so forth.

ATTORNEY PATTON: They decide -- they have

to decide whether the process that's in place, the minimization procedures and targeting procedures, are reasonably designed to comply both with the statute, Section 702, and with the Fourth Amendment, with full knowledge of how, from the NSA and from the National Security Division, Department of Justice, how this program works, not something that we --

THE COURT: The only thing missing from that equation is anybody arguing that it's unconstitutional.

ATTORNEY PATTON: Well, your Honor, as you know, the USA Freedom Act was enacted just a few months ago, and there are issues that are coming from that about designing particular parties to argue those --

THE COURT: Yes.

ATTORNEY PATTON: -- those kinds of --

THE COURT: Yes.

ATTORNEY PATTON: -- those kinds of things.

But the second point is, who can make these arguments. In criminal case, the ACLU is making these very arguments and has made them on behalf of Mr. Dratel's clients that -- that upstream collection is unconstitutional, that it violates the Fourth Amendment at the very least.

So, whether these particular plaintiffs are able to demonstrate to the court's satisfaction they

have standing or not, these issues are being addressed by article three judges.

THE COURT: Thank you.

ATTORNEY PATTON: Thank you, your Honor.

THE COURT: Obviously, this is an issue of some complexity and importance. I think the arguments today have been helpful, and I thank counsel for that.

The purpose of oral argument is two-fold. One is to focus matters sharply, and I think this has focused it reasonably sharply on issues. And the other is to expose my ignorance so you could fill the empty bottle, as it were, and you all have done that in your briefs and now in oral argument, and I thank you.

Again, I thank counsel for your cooperation, particularly, for your agreement to have your argument here rather than at Greenbelt.

Court stands in recess.

(Court recessed at 1:03 p.m.)

CERTIFICATE OF REPORTER

I, MICHAEL A. RODRIQUEZ, an Official Court Reporter for the United States District Court, in the Eastern District of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and evidence adduced upon the motion hearing in the case of WIKIMEDIA FOUNDATION, et al vs. NSA/CSS.

I further certify that I was authorized and did report by stenotype the proceedings and evidence in said motion hearing, and that the foregoing pages, numbered 1 to 52, inclusive, constitute the official transcript of said proceedings as taken from my machine shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 1st day of October, 2015.

/S/
Michael A. Rodriquez, RPR/CM/RMR
Official Court Reporter