

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JEFFREY S. WHITE, JUDGE

CAROLYN JEWEL, TASH HEPTING, ET AL, )  
 )  
 PLAINTIFFS, )  
 )  
 VS. ) NO. C 08-04373 JSW  
 )  
 NATIONAL SECURITY AGENCY, ET AL, )  
 ) OAKLAND, CALIFORNIA  
 DEFENDANTS. ) FRIDAY  
 ) JUNE 6, 2014  
 ) 2:00 O'CLOCK P.M.

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VIRGINIA SHUBERT, ET AL, )  
 )  
 PLAINTIFFS, )  
 )  
 VS. ) NO. C 07-00693 JSW  
 )  
 GEORGE W. BUSH, ET AL, )  
 )  
 DEFENDANTS. )  
 )  
 )

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**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES :**

**FOR PLAINTIFFS**  
**JEWEL, ET AL:**  
**ELECTRONIC FRONTIER FOUNDATION**  
 815 EDDY STREET  
 SAN FRANCISCO, CALIFORNIA 94109  
**BY: CINDY COHN, ATTORNEY AT LAW**  
**ANDREW CROCKER, ESQUIRE**  
**KURT OPSAHL, ESQUIRE**

FURTHER APPEARANCES ON NEXT PAGE

AND

**RICHARD R. WIEBE, ESQUIRE  
ONE CALIFORNIA STREET, SUITE 900  
SAN FRANCISCO, CALIFORNIA 94111**

AND

**ROYSE LAW FIRM  
1717 EMBARCADERO ROAD  
PALO ALTO, CALIFORNIA 94303  
BY: THOMAS MOORE, ESQUIRE**

**FOR PLAINTIFFS  
BOTEIN, ET AL  
(BY TELEPHONE) :**

**EMERY CELLI BRINCKERHOFF & ABADY, LLP  
75 ROCKEFELLER PLAZA  
20TH FLOOR  
NEW YORK, NY 10019  
BY: ILANN MAAZEL, ESQUIRE**

**FOR DEFENDANTS NATIONAL U.S. DEPARTMENT OF JUSTICE AND  
SECURITY AGENCY, ET AL: CIVIL DIVISION**

**20 MASSACHUSETTS AVENUE N.W.  
WASHINGTON, D.C. 20530**

**BY: MARCIA BERMAN, ASSISTANT UNITED STATES  
ATTORNEY (BY TELEPHONE)  
ANTHONY COPPOLINO,  
ASSISTANT UNITED STATES  
ATTORNEY (BY TELEPHONE)  
RODNEY PATTON,  
ASSISTANT UNITED STATES  
ATTORNEY  
JULIA BERMAN, ASSISTANT UNITED STATES  
ATTORNEY (BY TELEPHONE)  
BRYAN DEARINGER,  
ASSISTANT UNITED STATES  
ATTORNEY (BY TELEPHONE)**

AND

**NATIONAL SECURITY AGENCY  
9800 SAVAGE ROAD  
PORT MEADE, MD. 20755**

**BY: CHAD BAYSE, ESQUIRE**

**REPORTED BY: KATHERINE WYATT, CSR 9866, RMR, RPR**

1 JUNE 6, 2014

2:00 O'CLOCK P.M.

2  
3 P R O C E E D I N G S

4 THE COURT: GOOD AFTERNOON, EVERYBODY. PLEASE BE  
5 SEATED, AND CALL THE CASE.

6 THE CLERK: CALLING CASE NUMBER C-08-4373, CAROLYN  
7 JEWEL, ET AL VERSUS NATIONAL SECURITY AGENCY, ET AL AND CASE  
8 NUMBER C-07-0693, VIRGINIA SHUBERT, ET AL VERSUS GEORGE W.  
9 BUSH, ET AL.

10 COUNSEL, PLEASE STATE YOUR APPEARANCES. COUNSEL IN  
11 COURT, FIRST.

12 MS. COHN: GOOD AFTERNOON, YOUR HONOR. CINDY COHN,  
13 OF THE ELECTRIC FRONTIER FOUNDATION ON BEHALF OF THE JEWEL  
14 PLAINTIFFS.

15 THE COURT: GOOD AFTERNOON.

16 THE CLERK: AND ON THE PHONE?

17 MR. COPPOLINO (BY PHONE): GOOD AFTERNOON, YOUR  
18 HONOR. THIS IS ANTHONY COPPOLINO WITH THE DEPARTMENT OF  
19 JUSTICE, CIVIL DIVISION. AND I'M JOINED IN MY OFFICE BY A  
20 NUMBER OF MY COLLEAGUES: MARCIA BERMAN, BRYAN DEARINGER,  
21 RODNEY PATTON, JULIA BERMAN.

22 AND WE'RE ON SPEAKERPHONE, YOUR HONOR, BUT WE'RE THE  
23 ONLY PEOPLE THAT ARE IN THE OFFICE HERE.

24 THE COURT: ALL RIGHT. AND ARE YOU ABLE TO HEAR THE  
25 COURT?

1                   **MR. COPPOLINO (BY PHONE)**: I AM, YOUR HONOR, VERY  
2 WELL. THANK YOU.

3                   **THE COURT**: AND WERE YOU ABLE TO HEAR MS. COHN?

4                   **MR. COPPOLINO (BY PHONE)**: YES, I HEAR HER VERY WELL,  
5 TOO.

6                   **THE COURT**: YES. AND PLEASE --

7                   **MR. MAAZEL (BY PHONE)**: AND, YOUR HONOR, ILANN  
8 MAAZEL, EMERY, CELLI, BRINCKERHOFF & ABADY, FOR THE SHUBERT  
9 PLAINTIFFS ALSO ON THE PHONE.

10                  **THE COURT**: ALL RIGHT. WELCOME.

11                   AND IT WOULD BE VERY HELPFUL TO THE COURT REPORTER  
12 AND COURT IF WHEN PEOPLE ON THE PHONE SPEAK, PLEASE IDENTIFY  
13 YOURSELF. AND I JUST NOTED THERE WERE TWO BERMANS. SO IF  
14 EITHER OF THE BERMANS SPEAK, PLEASE MENTION YOUR FIRST NAME, AS  
15 WELL, SO WE KNOW WHICH BERMAN IS SPEAKING.

16                   ALL RIGHT. SO I HAVE REVIEWED BOTH SIDES' BRIEFING  
17 AND THE SUPPORTING DECLARATION AND EXHIBITS. AND I WANTED TO  
18 ASK SOME QUESTIONS TO FOLLOW UP ON AND WHAT WAS POSED. AND AS  
19 COUNSEL ON THE PHONE AND IN COURT KNOW WELL, THIS COURT DOES  
20 READ THE BRIEFS AND THE CASES, SO I DON'T NEED COUNSEL TO  
21 MERELY REITERATE WHAT IS IN THEIR BRIEFS, UNLESS IT'S TO  
22 HIGHLIGHT A SPECIFIC RESPONSE TO THE COURT'S QUESTION.

23                   IF I ASK A QUESTION IT MEANS THAT I DON'T FEEL LIKE  
24 THE INFORMATION HAS BEEN PROVIDED TO THE COURT AT THIS POINT.  
25 SO IT'S POSSIBLE IN THE HEAT OF BATTLE I MAY HAVE MISSED SOME

1 OF IT, BUT THAT'S WHY I WANT YOU TO ANSWER THESE QUESTIONS.

2 SO THE FIRST QUESTION -- AND AS I USUALLY DO, I'M  
3 GOING TO BEGIN THE QUESTION WITH A PREAMBLE SO YOU UNDERSTAND  
4 WHERE THE COURT IS COMING FROM, AND THEN ASK COUNSEL QUESTIONS.

5 YOU'RE ALWAYS FREE ONCE YOU ANSWER THE QUESTION TO  
6 QUARREL WITH THE COURT'S PREAMBLE. BUT PLEASE ANSWER THE  
7 QUESTION FIRST, AND THEN YOU CAN TELL THE COURT WHY ITS  
8 PREAMBLE WAS -- YOU DISAGREE WITH IT.

9 SO QUESTION NUMBER:

10 "WITH REGARD TO THE COLLECTION OF COMMUNICATIONS  
11 PURSUANT TO SECTION 702, DEFENDANTS HAVE REPRESENTED  
12 THAT THE INFORMATION IS RELEVANT, AND PLAINTIFFS HAVE  
13 DISTINGUISHED THEIR SECTION 215 CHALLENGES. IN HIS  
14 DECLARATION OF DECEMBER, 2013, ASSERTING PRIVILEGE,  
15 DIRECTOR OF NATIONAL INTELLIGENCE, JAMES R. CLAPPER,  
16 CONCEDES THAT COMMUNICATIONS COLLECTED PURSUANT TO  
17 FISC, F-I-S-C, ORDERS UNDER SECTION 702, QUOTE: 'MAY  
18 RELATE TO OR BE NECESSARY TO ADJUDICATE PLAINTIFFS'  
19 ALLEGATIONS,'" UNQUOTE.

20 AND THAT IS THE SO-CALLED "CLAPPER DECLARATION,"  
21 DOCKET 220 AT PARAGRAPH 61.

22 "HOWEVER, IN THEIR BRIEFING ON THEIR STATUS AS  
23 AGGRIEVED PARTIES, PLAINTIFFS DISTINGUISH THEIR  
24 CURRENT BROAD UNTARGETED TELEPHONY META DATA CLAIMS  
25 FROM THE AMNESTY INTERNATIONAL VERSUS CLAPPER

1 PLAINTIFFS' CHALLENGES TO SECTION 702, 702 SPECIFIC  
2 AND TARGETED SURVEILLANCE PROGRAM."

3 AND I'M CITING HERE PLAINTIFFS' RESPONSE TO THE  
4 COURT'S QUESTIONS AT 10 THROUGH 11.

5 SO TO THE PLAINTIFFS: ON WHAT BASIS DO PLAINTIFFS  
6 CONTEND THAT THE DATA COLLECTED PURSUANT TO SECTION 702 IS,  
7 QUOTE, "RELEVANT," UNQUOTE, TO THEIR PENDING CLAIMS?

8 AND, SECONDLY: WHERE IN THE COMPLAINT DO PLAINTIFFS  
9 SPECIFICALLY SEEK REDRESS FOR VIOLATIONS OF THEIR  
10 CONSTITUTIONAL AND STATUTORY RIGHTS PURSUANT TO THE PROGRAM  
11 EFFECTUATED UNDER SECTION 702?

12 **MS. COHN:** THANK YOU, YOUR HONOR. I THINK THAT TO  
13 ANSWER YOUR QUESTION THE 702 PROGRAM DIDN'T EXIST AS A 702  
14 PROGRAM WHEN WE FILED THE CASE.

15 WHAT WE HAD EVIDENCE OF FROM THE VERY BEGINNING OF  
16 THIS IS THAT THE NSA HAS ACCESS TO COMMUNICATIONS AS THEY FLOW  
17 OVER THE FIBER OPTIC CABLES, AND SPECIFICALLY THE AT&T BUILDING  
18 ON FOLSOM STREET, BUT IN AT&T FACILITIES ACROSS THE COUNTRY.

19 SO OUR COMPLAINT HAS ALWAYS BEEN BASED ON WHAT THE  
20 GOVERNMENT DOES. AND AS TIME HAS GONE ON, THE GOVERNMENT HAS  
21 NOW GIVEN A STATUTORY LABEL TO WHAT IT IS DOING IN TERMS OF  
22 ACCESSING INFORMATION OFF THE FIBER OPTIC CABLES.

23 AND THEY SAY THAT IT'S NOW JUSTIFIED UNDER SECTION  
24 702 OF THE FISA AMENDMENTS ACT, WHICH WAS PASSED IN 2008.

25 THE WAY THAT THIS PROGRAM WORKS IS A TWO-STEP

1 PROCESS. AND A LOT OF CONFUSION IN THESE CASES HAS TO DO WITH  
2 ALLYING THE DIFFERENCES BETWEEN THE TWO STEPS. THE FIRST STEP  
3 IS THAT THE GOVERNMENT COLLECT EVERYTHING COMING OFF OF THOSE  
4 CABLES. COLLECT IT ALL IS WHAT IT COMES OUT IN THE MOST RECENT  
5 SLIDES THAT HAVE COME OUT.

6 AND THEN, THE GOVERNMENT TAKES A SERIES OF STEPS TO  
7 REDUCE, TO MINIMIZE WHAT IT HAS COLLECTED. AND THE  
8 MINIMIZATION PROCEDURES THAT THEY INCLUDE THERE ARE THEIR  
9 EFFORTS TO TRY TO LIMIT THE FIRST STEP TO A SECOND STEP, WHICH  
10 IS I THINK WHAT THEY ARE CALLING "TARGETED SURVEILLANCE"  
11 BECAUSE IT'S DONE PURSUANT TO SELECTORS.

12 NOW, SELECTORS AREN'T JUST PEOPLE. THERE'S SOME  
13 FIGHTS ABOUT WHAT A SELECTOR IS. BUT TO KEEP THE WAY THAT THIS  
14 WORKS IN MIND, THERE'S A TWO-STEP PROCESS. THE FIRST THING IS  
15 THEY COLLECT EVERYTHING. AND THE SECOND THING IS THEY TAKE A  
16 SERIES OF MEASURES TO LIMIT WHAT THEY RETAIN TO WHAT I THINK  
17 THEY WOULD DEEM TARGETED.

18 THE FIGHT IN OUR CASE HAS BEEN LARGELY ABOUT STEP  
19 ONE: WHETHER THERE'S A CONSTITUTIONAL QUESTION AT THE TIME THE  
20 GOVERNMENT GAINS CUSTODY OF EVERYTHING IN THE FIRST INSTANCE.

21 THE GOVERNMENT'S ARGUMENT IS SECTION 702 IS ABOUT THE  
22 SECOND STEP, THE TARGETING STEP. AND THAT THE FIRST STEP JUST  
23 DOESN'T MATTER OR DOESN'T COUNT OR SHOULDN'T HAVE ANY STANDING.  
24 AND SO THERE'S CONFUSION IN THE WAY THE CONVERSATION HAS  
25 HAPPENED, BECAUSE WE'RE TALKING ABOUT STEP ONE, AND THEY ARE

1 LARGELY TALKING ABOUT STEP TWO.

2 AND SO WHEN WE TALK ABOUT CLAPPER, THE CLAPPER CASE,  
3 WAS A CASE IN WHICH THE PLAINTIFF SAID:

4 "BASED ON THE GOVERNMENT'S STATEMENTS ABOUT WHO  
5 IS KEEPING INFORMATION ABOUT IT UNDER STEP TWO, WE  
6 THINK WE'RE IT."

7 THE PLAINTIFFS IN THE CLAPPER CASE WAS AMNESTY  
8 INTERNATIONAL. IT WAS PEOPLE WHO ARE ENGAGED IN COMMUNICATIONS  
9 WITH PEOPLE WHO THEY REASONABLY SUSPECT THE GOVERNMENT MIGHT BE  
10 SURVEILLING.

11 SO WHEN WE SAY THAT THE CLAPPER CASE WAS ABOUT  
12 TARGETED SURVEILLANCE IT'S BECAUSE THE PLAINTIFFS WERE ARGUING  
13 THAT THEY WERE WHAT WAS BEING KEPT IN THE SECOND STEP OF THIS  
14 SURVEILLANCE. AND WE'RE ARGUING ON BEHALF OF THE MILLIONS AND  
15 MILLIONS OF ORDINARY PEOPLE WHOSE INFORMATION IS CAPTURED AND  
16 SCANNED AS PART OF STEP ONE.

17 SO THE TERMINOLOGY HAS CHANGED SO MUCH. SO THE  
18 GOVERNMENT ORIGINALLY CLAIMED THAT "COLLECT" DIDN'T MEAN STEP  
19 ONE. "COLLECT" MEANT WHAT THEY HAD AFTER STEP TWO. NOW THEY  
20 SAY IT'S A TARGETED PROGRAM BECAUSE WHAT THEY KEEP IS ONLY THE  
21 STUFF THAT THEY KEEP, SO THAT'S TARGETED. SO THE WHOLE PROGRAM  
22 IS A TARGETED PROGRAM.

23 BUT THAT'S NOT -- I DON'T THINK THAT'S A FAIR  
24 CHARACTERIZATION OF HOW 702 IS OPERATING, FRANKLY. THEY ARE  
25 COLLECTING EVERYBODY'S STUFF FIRST, AND THEN SORTING OUT SECOND



1 WHAT THEY NEED. BOTH OF THOSE STEPS ARE CONSTITUTIONALLY  
2 SIGNIFICANT.

3 DID I EXPLAIN THAT WELL?

4 **THE COURT:** WELL, YOU EXPLAINED IT WELL, BUT I DON'T  
5 KNOW IF YOU ARE GETTING TO THE DIRECT ANSWER, WHICH IS WHERE IN  
6 THE COMPLAINT DO YOU ALLEGE VIOLATION OF WHAT YOU'RE CALLING  
7 STEP TWO, OR THE 702 PROGRAM?

8 **MS. COHN:** STEP ONE IS WHAT WE ARE --

9 **THE COURT:** I THOUGHT YOU MEANT STEP ONE WAS THE  
10 COLLECTION, THE MASS COLLECTION OF META DATA.

11 **MS. COHN:** NO. THE MASS COLLECTION OF EVERYTHING,  
12 CONTENT AND META DATA.

13 **THE COURT:** ALL RIGHT.

14 **MS. COHN:** THE FIBER OPTIC CABLES CARRY BOTH CONTENT  
15 AND META DATA.

16 OKAY. SO THAT'S STEP ONE.

17 **MS. COHN:** THAT'S STEP ONE.

18 **THE COURT:** ALL RIGHT. STEP TWO IS THE SO CALLED  
19 "TARGETED APPROACH."

20 **MS. COHN:** RIGHT.

21 **THE COURT:** DOES YOUR COMPLAINT OR CAN YOU CITE THE  
22 COURT IN YOUR COMPLAINT TO ANYWHERE WHERE STEP TWO IS RELEVANT  
23 TO THE PLAINTIFFS' CLAIMS IN THIS CASE?

24 **MS. COHN:** WELL, PLAINTIFFS HAVE A DIFFICULT TIME  
25 UNDERSTANDING WHETHER THEIR INFORMATION CONTINUES TO BE

1 RETAINED BY THE GOVERNMENT AFTER THE GOVERNMENT APPLIES ITS  
2 MINIMIZATION PROCEDURES BECAUSE THOSE PROCEDURES ARE SECRET.  
3 SO WE'VE FOCUSED OUR CASE ON STEP ONE, WHICH IS THE INITIAL  
4 COLLECTION.

5 **THE COURT:** WELL, LET ME STOP YOU RIGHT THERE. SO  
6 LET'S ASSUME THAT -- YOU KNOW, I WANT TO MAKE SURE THAT THE  
7 GOVERNMENT AND THE PLAINTIFFS ARE TALKING ABOUT THE SAME THING.  
8 OR MAYBE THERE IS -- I'LL LET YOU CONFER WITH YOUR COCOUNSEL  
9 THERE.

10 **MS. COHN:** I'M GRABBING THE COMPLAINT, YOUR HONOR.

11 **THE COURT:** IT'S OKAY TO DO THAT. BUT IF WHAT YOU'RE  
12 SAYING IS THAT THE STEP ONE, YOU KNOW, WHOLESALE OR LARGE  
13 COLLECTION UNDIFFERENTIATED, IF YOU WILL, IS SOMETHING -- IS  
14 THAT SOMETHING THAT YOU ARGUE IS DONE PURSUANT TO SECTION 215?

15 **MS. COHN:** NO.

16 **THE COURT:** YOU'RE SAYING THAT THAT'S DONE PURSUANT  
17 TO 702.

18 **MS. COHN:** CORRECT.

19 **THE COURT:** OKAY. SO OKAY. NOW, WHERE IN YOUR  
20 COMPLAINT IS IT SPECIFICALLY ALLEGED THAT 702 OR ACTIONS UNDER  
21 702 BY THE GOVERNMENT ARE VIOLATING THE CONSTITUTIONAL RIGHTS  
22 OF THE PLAINTIFFS?

23 **MS. COHN:** WELL, YOUR HONOR, THE COMPLAINT ISN'T  
24 BASED ON SECTION 702, BECAUSE IT WASN'T UNTIL VERY RECENTLY  
25 THAT WE LEARNED THAT THE GOVERNMENT IS DOING THIS BEHAVIOR

1 UNDER A CLAIM OF AUTHORITY UNDER SECTION 702. WHAT THE  
2 COMPLAINT IS ABOUT IS ABOUT THE BEHAVIOR. THE COMPLAINT IS  
3 ABOUT THE WHOLESALE COPYING OF THE COMMUNICATIONS OF AT&T  
4 CUSTOMERS OFF OF THE FIBER OPTIC CABLES.

5 **THE COURT:** WHICH YOU CONTEND IS DONE BOTH PURSUANT  
6 TO 215 OR 702 OR JUST 702?

7 **MS. COHN:** NO, YOUR HONOR. JUST 702. A DUAL  
8 COMPLAINT HAS TWO PIECES. SO IF I -- IT'S A LITTLE CONFUSING.

9 **THE COURT:** ONE IS PRESIDENT BUSH -- SO-CALLED  
10 PRESIDENT BUSH AUTHORIZED COLLECTIONS, AND THE SECOND ONE IS  
11 THE SO CALLED "FISA AUTHORIZED COLLECTION"?

12 **MS. COHN:** NO, YOUR HONOR. IF I MAY.

13 **THE COURT:** PLEASE.

14 **MS. COHN:** THERE ARE TWO FACTUAL PIECES IN OUR CASE.  
15 ONE IS THE TELEPHONE RECORDS COLLECTION, AND THE SECOND IS THE  
16 COLLECTION OFF OF THE FIBER OPTIC CABLES. SO THERE ARE TWO  
17 DISTINCT ACTIVITIES THAT IT IS GOVERNMENT IS DOING.

18 NOW, POST SNOWDEN, THE GOVERNMENT HAS ADMITTED THAT  
19 THERE ARE TWO DIFFERENT STATUTORY BASES UPON WHICH IT'S DOING  
20 THESE TWO SEPARATE PROGRAMS. IT'S COLLECTING THE PHONE RECORDS  
21 UNDER SECTION 215. IT'S COLLECTING THE INTERNET CONTENT UNDER  
22 702.

23 BUT OUR COMPLAINT IS BASED ON THESE TWO BEHAVIORS.  
24 THE GOVERNMENT'S STATUTORY OR OTHER ARGUMENTS UPON WHICH IT  
25 THINKS IT CAN DO THIS BEHAVIOR HAVE SHIFTED OVER TIME.

1                   AND SO TODAY IT'S UNDER 702. FOR AWHILE THEY WERE  
2 USING THE PEN REGISTER STATUTE FOR PIECES OF THIS. SO OUR  
3 COMPLAINT HAS NEVER BEEN TIED TO THE GOVERNMENT'S DEFENSES.  
4 IT'S TIED TO THE BEHAVIORS.

5                   **THE COURT:** ALL RIGHT. MR. COPPOLINO, ARE YOU GOING  
6 TO RESPOND INITIALLY ON BEHALF OF THE GOVERNMENT?

7                   **MR. COPPOLINO (BY PHONE):** I AM, YOUR HONOR. THANK  
8 YOU, YOUR HONOR. THIS IS ANTHONY COPPOLINO.

9                   AND FIRST, YOUR HONOR, I APPRECIATE YOU DOING THIS BY  
10 PHONE ON SHORT NOTICE. AND I WANTED TO THANK YOU FOR THAT,  
11 YOUR HONOR.

12                   **THE COURT:** UNLESS THERE WAS ANY WAY THAT YOU GUYS  
13 COULD BE BEAMED OVER HERE I ASSUME THAT THAT WOULD BE  
14 NECESSARY. AND YOU DON'T NEED TO THANK THE COURT, BUT GO  
15 AHEAD.

16                   **MR. COPPOLINO (BY PHONE):** YOUR HONOR, THANK YOU.

17                   SO I HARDLY KNOW WHERE TO BEGIN. BUT I WILL START  
18 WITH THIS. FIRST OF ALL, THE CONTENTION THAT 702 DID NOT EXIST  
19 WHEN THE COMPLAINT WAS FILED IS A FALSEHOOD. 702 WAS ENACTED  
20 IN 2008, IN JULY OF 2008, AS PART OF THE FISA ACT AMENDMENTS OF  
21 2008.

22                   NOT ONLY DID IT EXIST BEFORE THIS COMPLAINT WAS  
23 FILED, THE JEWEL PLAINTIFFS KNEW ABOUT IT, BECAUSE IT'S  
24 PRECISELY WHY THEY FILED SUIT. THAT LEGISLATION CREATED  
25 IMMUNITY FOR THE TELECOMMUNICATION COMPANIES. AND THE OTHER

1 LAWSUIT THAT EFF BROUGHT ON BEHALF OF THESE SAME PLAINTIFFS  
2 CALLED "HEPTING" GOT DISMISSED BECAUSE OF THAT STATUTE BASED ON  
3 THE IMMUNITY PROVISIONS, AND JUDGE WALKER DISMISSED THE CASE.

4 THAT STATUTE ALSO HAD A TITLE WHICH CREATED WHAT WE  
5 CALL THE "FISA ACT AMENDMENTS OF 2008," WHICH ESTABLISHED  
6 SECTION 702 OF THE FISA. SO IT'S NOT TRUE THAT IT DIDN'T EXIST  
7 BEFORE THE LAWSUIT WAS FILED.

8 AND IN AMNESTY INTERNATIONAL THE PLAINTIFFS IN THAT  
9 SUIT, THE ACLU OVER IN NEW YORK, KNEW QUITE WELL IT EXISTED.  
10 THEY FILED A COMPLAINT, I THINK, THE DAY IT WAS ENACTED INTO  
11 LAW. AND THAT MADE A LOT OF HEADLINES, AND IT WAS LITIGATED.  
12 AND IT WAS ALL, ALL PUBLIC. NO SECRET PROGRAM. AND IT WAS OUT  
13 THERE.

14 SO THAT STATEMENT IS JUST NOT TRUE.

15 THE SECOND THING THAT'S NOT TRUE IS HER PROGRAM  
16 DESCRIPTION. 702 IS A PUBLIC STATUTORY PROGRAM. IF YOU LOOK  
17 AT THE AMNESTY INTERNATIONAL DECISION, IT DETAILS HOW THAT  
18 PROGRAM OPERATES. AND SO THAT IS THE SOURCE OF WHAT SHOULD BE  
19 THE COURT'S UNDERSTANDING FOR THIS PROGRAM AND HOW IT OPERATES.

20 HER DESCRIPTION OF STEP ONE AND STEP TWO, I DON'T  
21 THINK I'VE EVER HEARD THIS BEFORE. IT'S NEVER BEEN BRIEFED AS  
22 FAR AS I CAN TELL. AND ONE OF THE PROBLEMS THAT WE'RE HAVING  
23 HERE IS WE'RE HERE BEFORE THE COURT ON AN EMERGENCY TRO, AND  
24 WE'RE TALKING FOR THE FIRST TIME ABOUT SECTION 702.

25 IT'S NOT IN THE COMPLAINT. IT'S NEVER BEEN BRIEFED.

1 THIS COURT HAS NEVER BEEN GIVEN AN OPPORTUNITY TO UNDERSTAND  
2 THE INS AND OUTS OF HOW IT WORKS AND WHETHER THERE'S A STEP ONE  
3 OR TWO OR NOT.

4 IN FACT, THE SUPREME COURT DELINEATED PRECISELY HOW  
5 THE PROGRAM OPERATES. AND IT IS A TARGETED PROGRAM. IT IS A  
6 PROGRAM THAT IS TARGETED AT SPECIFIC SELECTORS, THAT IS PHONE  
7 NUMBERS OR EMAIL ACCOUNTS. THAT'S THE FIRST THING THAT  
8 DISTINGUISHES IT FROM THE ALLEGATIONS IN THIS CASE.

9 THE SECOND THING THAT DISTINGUISHES IT. I THINK MOST  
10 IMPORTANTLY, IS THAT IT IS DIRECTED AT NON U.S. PERSONS  
11 LOCATED -- REASONABLY BELIEVED TO BE LOCATED OUTSIDE THE UNITED  
12 STATES.

13 THE PLAINTIFFS COULDN'T POSSIBLY BE TARGETED UNDER  
14 THIS PROGRAM. AT LEAST NOT LEGALLY. AND THEY DON'T ALLEGE  
15 THAT THEY WERE TARGETED UNDER THIS PROGRAM. AND SO THEY  
16 COULDN'T BE THE TARGET OF A SURVEILLANCE UNDER THIS PROGRAM AS  
17 A MATTER OF LAW.

18 SO THE ONLY POSSIBLE ARGUMENT THEY COULD POSSIBLY  
19 MAKE HERE IS THAT THEIR COMMUNICATIONS WERE SOMEHOW  
20 INCIDENTALY, UNLAWFULLY COLLECTED. THAT IS PURE RANK  
21 SPECULATION.

22 IN FACT, ONE OF THE REASONS I THINK WE SHOULD  
23 CONTINUE TO BRIEF THIS ON THE SCHEDULE THAT YOU HAVE ALREADY  
24 SET FORTH IS I QUESTION WHETHER THEY HAVE EVEN ARTICULATED  
25 STANDING FOR BRINGING A SECTION 702 CLAIM. AMNESTY

1 INTERNATIONAL DISPOSES OF THAT. AMNESTY INTERNATIONAL SAYS YOU  
2 CANNOT COME TO COURT AND SPECULATE THAT YOU MIGHT BE SUBJECT TO  
3 THIS SURVEILLANCE AUTHORITY AND HAVE STANDING. AND THEY  
4 DISPOSED OF THAT ARGUMENT, AND THAT IS EXACTLY WHAT THE  
5 PLAINTIFFS ARE DOING BASED ON THEIR OWN SPECULATION AS TO HOW  
6 IT WORKS, STEP ONE AND STEP TWO.

7 SO FOR PURPOSES OF TODAY'S HEARING, TO KIND OF BRING  
8 THIS BACK, WE DISAGREE WITH THEIR ASSESSMENT OF HOW THIS THING  
9 WORKS. BUT YOU SHOULDN'T BE ENTERING A TRO CAUSING THE  
10 PRESERVATION OF DATA THAT IS COLLECTED UNDER THIS HUGELY  
11 SIGNIFICANT PROGRAM WITHOUT FULLY UNDERSTANDING HOW THE PROGRAM  
12 OPERATES AND WITHOUT ITS RELEVANCE TO THE SUIT.

13 NOW, THE FACT THAT THEY DIDN'T PLEAD IT TO US SHOULD  
14 BE DISPOSITIVE. IT WAS A KNOWN PROGRAM. THE PLAINTIFF IN  
15 AMNESTY PLED IT. THEY COULD HAVE PLED IT. AND THEY COULD HAVE  
16 MADE WHATEVER ARGUMENTS THEY WANT.

17 IN FACT, I'LL POINT OUT THERE WAS A PREDECESSOR  
18 STATUTE CALLED THE "PROTECT AMERICA ACT," WHICH WAS  
19 IMPLEMENTED IN THE TRANSITION BETWEEN THE SO-CALLED "TERRORIST  
20 SURVEILLANCE PROGRAM" AND THE FISA ACT AMENDMENTS.

21 AND ANOTHER LAWYER IN THIS MULTIPLE DISTRICT  
22 LITIGATION IN THE CENTER FOR CONSTITUTIONAL RIGHTS CASE, CAME  
23 INTO COURT AND ASKED TO AMEND HIS COMPLAINT TO CHALLENGE THAT  
24 STATUTE. MS. COHN WAS IN THE COURTROOM THAT DAY. I HAVE THE  
25 TRANSCRIPT. THEY DIDN'T CHALLENGE THE PAA, EITHER. AND THAT

1 WAS A PUBLIC STATUTE AS WAS FAA.

2 SO IT IS -- THIS PROGRAM IS, IN OUR VIEW, NOT  
3 RELEVANT TO THIS LAWSUIT. BUT ON THE TOPIC THAT IS AT ISSUE  
4 HERE, EVEN IF YOU THINK IT WAS, FOR THE REASONS WE SET FORTH  
5 THE COURT SHOULD NOT ISSUE THE KIND OF PRESERVATION ORDER THAT  
6 THEY SOUGHT. AND, INDEED, WE IDENTIFIED THE PROBLEMS WITH THE  
7 ORDER THAT YOU ISSUED YESTERDAY. AND WE CAN TALK ABOUT THAT  
8 FURTHER.

9 I DO WANT TO TAKE ISSUE BEFORE I GIVE UP THE  
10 MICROPHONE HERE, YOUR HONOR, WITH SOME OF YOUR PREAMBLE, AND  
11 JUST POINT OUT THAT WE HAVE NOT CONCEDED THAT SECTION 702 IS  
12 RELEVANT TO THE CLAIMS. WHAT WE HAVE SAID IS THAT IN ORDER TO  
13 LITIGATE THE CLAIMS AND IN ORDER, INDEED, TO DISPUTE THE CLAIMS  
14 THE GOVERNMENT -- THE SOURCES AND METHODS UTILIZED UNDER 702  
15 WOULD BE AT RISK OF DISCLOSURE AND, HENCE, THEY WERE SUBJECT TO  
16 THE STATES SECRETS PRIVILEGE, DIRECTOR CLAPPER'S STATES SECRETS  
17 PRIVILEGE.

18 IT WAS NOT A CONCESSION THAT THEY CHALLENGED 702. IT  
19 WAS NOT A CONCESSION THAT 702 IS RELEVANT TO THE CLAIM. IT  
20 SIMPLY POINTS OUT THAT IN ORDER TO LITIGATE THE CASE AND  
21 DISPROVE THE CLAIMS AND, INDEED, TO SHOW THAT THEIR CLAIM THAT  
22 THESE ACTIVITIES WERE OCCURRING WITHOUT STATUTORY AND JUDICIAL  
23 AUTHORITY WE WOULD HAVE TO GET INTO THE SOURCES AND METHODS  
24 THAT WERE, IN FACT, BEING UTILIZED UNDER STATUTORY LAW.

25 **THE COURT:** ALL RIGHT, MS. COHN.



1           **MS. COHN:** YES, YOUR HONOR. I DID GET A CHANCE TO  
2 LOOK THROUGH THE COMPLAINT, YOUR HONOR. FROM PARAGRAPHS 50 TO  
3 PARAGRAPHS 80 OF THE JEWEL COMPLAINT WE DESCRIBE THE NSA'S  
4 DRAGNET INTERCEPTION OF COMMUNICATIONS TRANSMITTED THROUGH AT&T  
5 FACILITIES. THAT'S THE FACTUAL PREDICATE FOR ONE HALF OF THE  
6 JEWEL CASE. THE OTHER PART BEING THE TELEPHONE RECORDS.

7           AND SO THE JEWEL COMPLAINT DIDN'T -- AGAIN, THE  
8 GOVERNMENT'S LEGAL RATIONALES HAVE SHIFTED. NOW HE'S TOLD YOU  
9 HE'S NOT EVEN CONCEDED THAT 702 IS WHAT IS AT ISSUE IN THIS  
10 CASE.

11           **THE COURT:** WHAT ABOUT THE ARGUMENT THE GOVERNMENT  
12 JUST MADE THAT ALL OF THIS, THIS PROGRAM, BY ITS EXISTING NAME  
13 AND PREDECESSOR NAMES WAS WELL-KNOWN TO THE PLAINTIFFS IN THIS  
14 CASE?

15           **MS. COHN:** NO, YOUR HONOR. I THINK THAT'S JUST  
16 FACTUALLY INCORRECT. THE GOVERNMENT HAS REVEALED ASPECTS OF  
17 ITS SURVEILLANCE IN A VERY LIMITED AND CABINED WAY OVER TIME.

18           THEY STARTED BY, YOU KNOW, PRESIDENT BUSH SAID:

19                   "IF YOU ARE TALKING TO MEMBERS OF AL QAEDA, WE  
20 WANT TO BE LISTENING."

21           AND SO THE PRESUMPTION THERE AND DEFENSE THERE WAS  
22 THAT THIS WAS JUST ABOUT TARGETED SURVEILLANCE TO SPECIFIC  
23 TERRORISTS TARGETS.

24           WE THEN LEARNED IT WAS A MUCH BIGGER PROGRAM AND THAT  
25 IT ACTUALLY COLLECTED THE INFORMATION OF MILLIONS AND MILLIONS

1 OF PEOPLE ON THE WAY TO THAT LITTLE BIT THAT THEY -- THIS  
2 PROCESS OF REVELATION HAS GONE ON OVER TIME.

3 AT THE TIME THAT THE FISA AMENDMENTS ACTS WAS PASSED  
4 THE GOVERNMENT CLAIMED THAT 702 ONLY REPRESENTED A VERY  
5 TARGETED PROGRAM AND THAT IT WOULDN'T INVOLVE THE COLLECTION OF  
6 MILLIONS OF INNOCENT AMERICANS' COMMUNICATIONS CONTENT.

7 THEY BASICALLY SAID THAT'S NOT WHAT IT WAS. THAT IT  
8 WAS A TARGETED PROGRAM, "TARGETED" MEANING IF YOU ARE TALKING  
9 TO SOMEBODY WHO IS ON THEIR SELECTOR LIST, ONE WAY OR ANOTHER,  
10 THAT'S WHAT THEY ARE COLLECTING.

11 AND WE HAVE ALWAYS MAINTAINED THAT THAT'S A  
12 INCOMPLETE DESCRIPTION OF WHAT THE GOVERNMENT'S DOING, AND IT  
13 ALLIES SOME VERY IMPORTANT CONSTITUTIONAL QUESTIONS. SO WE HAVE  
14 ALWAYS GROUNDED OUR LAWSUIT NOT ON THE GOVERNMENT'S LEGAL  
15 DEFENSES. AND IS THIS UNDER 702? WAS IT UNDER 215? IS IT  
16 UNDER THE PEN REGISTER STATUTE? IS IT UNDER THE GOVERNMENT'S  
17 EXECUTIVE AUTHORITY?

18 THOSE ARE ALL THE GOVERNMENT'S DEFENSES FOR ITS  
19 ACTIVITIES.

20 OUR COMPLAINT TALKS ABOUT A PARTICULAR BEHAVIOR BY  
21 THE GOVERNMENT. THE ACCESS UNDER PARAGRAPHS 50 THROUGH 80 ARE  
22 THE INITIAL DESCRIPTION OF A MASSIVE COLLECTION OF  
23 COMMUNICATIONS, AND THE VERY SPECIFIC TECHNOLOGIES INVOLVED,  
24 WHICH ARE DESCRIBED IN THE DECLARATION OF MARK KLEIN, THE  
25 EXPERT DECLARATION OF J. SCOTT MARCUS.

1           AND OUR CASE SAYS THIS THING THAT THEY ARE DOING IS  
2 UNCONSTITUTIONAL, AND IT ISN'T JUSTIFIED BY ANY STATUTE. AND  
3 THAT'S WHAT WE'VE BEEN ALLEGING ALL ALONG. AND FOR THE  
4 GOVERNMENT TO TRY TO LIMIT THE SCOPE OF OUR CASE BASED UPON THE  
5 FACT THAT WE WEREN'T QUITE AWARE OF WHAT PARTICULAR STATUTORY  
6 BASES THEY WERE CLAIMING AT ANY PARTICULAR POINT IN TIME FOR  
7 THIS BEHAVIOR IS, I THINK, FRANKLY, QUITE UNFAIR TO US GIVEN  
8 THE SECRECY HERE.

9           **THE COURT:** A COUPLE OF RELATED QUESTIONS, WHICH  
10 IS -- AND THEN I'LL GIVE MR. COPPOLINO A CHANCE TO RESPOND. I  
11 REVIEWED THE TRANSCRIPT OF OUR PREVIOUS PROCEEDINGS AND ALSO  
12 THE ORDER THAT THE PLAINTIFFS PRESENTED, WHICH WOULD HAVE BEEN  
13 MUCH BROADER -- IT WAS MUCH BROADER THAN WHAT THE GOVERNMENT --  
14 WHAT THE COURT ULTIMATELY ENTERED.

15           AND THERE WAS A COLLOQUY WITH THE COURT IN WHICH IT  
16 APPEARED TO THE COURT THAT THE PLAINTIFFS WERE FORESWEARING OR  
17 ESCHEWING AN ARGUMENT UNDER -- IF NOT 702, SPECIFICALLY, THEN  
18 BEHAVIOR THAT IS DESCRIBED.

19           AM I CORRECT IN THAT ASSUMPTION?

20           **MS. COHN:** YES, YOUR HONOR. I'M AFRAID YOU ARE. IF  
21 I GAVE YOU THAT IMPRESSION, THEN I WAS -- THAT WAS INCORRECT.

22           **THE COURT:** WELL, THE FIRST ONE IS IN THERE. THE  
23 SECOND ONE MAY BE INTERPRETATIVE. THE FIRST ONE IS U.S. OR  
24 BROADER ORDER THAT MIGHT HAVE INCLUDED WHAT YOU'RE TALKING  
25 ABOUT NOW. AND I FELT THAT THAT WAS TOO BROAD, AND I DID NOT

1 ISSUE THE ORDER TO THAT EFFECT.

2 SO WHAT DO YOU SAY ABOUT THAT?

3 **MS. COHN:** WELL, TO THE EXTENT THAT YOU SCALED BACK  
4 OUR PROPOSED ORDER, YOUR HONOR, I DON'T THINK THAT YOU SCALED  
5 IT BACK IN ORDER TO EXCLUDE ONE HALF OF THE FACTUAL ALLEGATIONS  
6 IN OUR COMPLAINT FROM BEING REQUIRED TO BE PRESERVED.

7 I MEAN, IT'S TRUE THAT WE CAME TO YOUR HONOR WITH AN  
8 IMMEDIATE PROBLEM. AND THE IMMEDIATE PROBLEM HAD TO DO WITH  
9 THE FACT THAT THE GOVERNMENT HAD BEEN TOLD BY THE FISC THAT  
10 THEY HAD TO DESTROY TELEPHONE RECORDS.

11 AND IT WASN'T UNTIL THE MONDAY BEFORE WE TALKED TO  
12 YOU ON THE WEDNESDAY THAT I REALIZED THAT BASED UPON THE  
13 GOVERNMENT'S RATIONALE IT DIDN'T SEEM THAT THEY WERE PRESERVING  
14 EVIDENCE UNDER THE SECTION 702 PROGRAMS, EITHER, BECAUSE IT WAS  
15 ON THAT MONDAY THAT THEY FINALLY PRESENTED THEIR SECRET  
16 DECLARATIONS FROM 2007 WHERE THEY TOOK THE POSITION,  
17 UNBEKNOWNST TO US, THAT THE FISC ORDERS, ANYTHING THAT HAPPENED  
18 AFTER THE FISC ORDERS CAME INTO PLACE WASN'T INCLUDED AT ALL IN  
19 THEIR PRESERVATION OBLIGATION.

20 **THE COURT:** ALL RIGHT.

21 **MS. COHN:** AND SO I DIDN'T READ, AND I DON'T READ,  
22 WHAT HAPPENED IN TERMS OF YOU NOT ACCEPTING MY PROPOSED ORDER  
23 AS SAYING THE GOVERNMENT CAN CONTINUE DESTROY EVIDENCE UNDER  
24 PART OF -- NOW THAT WE KNOW THAT THEY DON'T THINK THEY HAVE A  
25 PRESERVATION DUTY UNDER SECTION 702, IT'S OKAY FOR THEM TO

1 CONTINUE TO DESTROY EVIDENCE WHILE WE SORT OUT WHAT HAPPENED  
2 FOR THE LAST SEVEN YEARS.

3 **THE COURT:** ALL RIGHT. MR. COPPOLINO.

4 **MR. COPPOLINO (BY PHONE):** THANK YOU, YOUR HONOR. A  
5 COUPLE OF POINTS HERE. FIRST OF ALL, THE TRANSITION FROM THE  
6 TERRORIST SURVEILLANCE PROGRAM TO THE PROTECT AMERICA ACT IN  
7 SECTION 702 IS DETAILED IN OUR PAPERS. AND THE NOTION THAT THE  
8 LAWSUIT HAS TO BE -- AND PRESERVATION OBLIGATIONS HAVE TO BE  
9 DRIVEN BY GENERAL ALLEGATIONS OF CONDUCT IS NOT CORRECT.

10 I THINK THE COURT HAS TO FIND SPECIFICALLY, AND  
11 SHOULD FIND, PARTICULARLY IN A CASE OF AN INJUNCTION, THAT THE  
12 REQUESTED PRESERVATION STEPS ARE RELEVANT TO PARTICULAR CLAIMS.

13 AND ALL THAT WE HAVE POINTED OUT IN THESE LAST TWO  
14 DAYS TO YOU IS THAT THE STEPS THAT THEY ARE ASKING US TO TAKE  
15 WITH RESPECT TO 702, ARE, A: UNMOORED FROM ANY CLAIM REGARDING  
16 702, WHICH IS EXTRAORDINARILY SIGNIFICANT. IT WAS AN  
17 ESTABLISHED PROGRAM. AND, B: WITH RESPECT TO THE DATA  
18 DELETION POLICIES OF THE NSA THAT ARE GOVERNED BY FISC  
19 REQUIREMENTS AND MINIMIZATION PROCEDURES, THAT THAT WOULD CAUSE  
20 EXTRAORDINARY HARM TO NATIONAL SECURITY IF WE WERE TO GO  
21 FORWARD WITH THAT.

22 NOW, WITH RESPECT TO THE TRO, WE SET FORTH IN THE  
23 PAPERS THAT WE FILED A SHORT TIME AGO THE EVOLUTION OF THE TRO  
24 IN FIRST UNITARIAN AND HOW IT COVERED SECTION 215. AND YOU  
25 CORRECTLY NOTE THAT YOU SPECIFICALLY REJECTED A PROPOSED ORDER

1 THEY SUBMITTED THAT CALLED FOR THE PRESERVATION OF ALL  
2 COMMUNICATION CONTENT. AND THAT WOULD HAVE BEEN THEIR HOOK TO  
3 TRY TO GET TO 702. THAT'S SET FORTH IN OUR PAPERS. I'M NOT  
4 GOING TO REPEAT IT.

5 BUT EXCEPT TO JUST SAY THIS: THE TRO, THE EXISTING  
6 TRO, DOES NOT COVER 702. SO THIS ISN'T A REQUEST TO MODIFY  
7 ANYTHING. THIS IS A RENEWED TRO REQUEST BASED ON A CLAIM THAT  
8 HASN'T BEEN BROUGHT.

9 WHAT I WOULD URGE THE COURT TO DO IS, FIRST OF ALL,  
10 TO STAY OR SET ASIDE THE ORDER YOU ISSUED YESTERDAY. TAKE  
11 FURTHER BRIEFING ON THIS ISSUE UNDER THE CURRENT BRIEFING  
12 SCHEDULE WHICH WAS IN PLACE. AND, IN PARTICULAR, I THINK WE  
13 NEED TO HAVE BRIEFING ON WHETHER THEY HAVE STATED A CLAIM UNDER  
14 SECTION 702, AND WHETHER THEY HAVE ESTABLISHED THEIR STANDING  
15 ON THE PLEADINGS UNDER 702.

16 AND THE REASON I SAY THAT IS I LITIGATED AMNESTY  
17 INTERNATIONAL IN DISTRICT COURT, ME AND ONE OF MY COLLEAGUES IN  
18 NEW YORK. AND SO I'M VERY FAMILIAR WITH THAT CASE. AND I  
19 THINK IT'S VERY IMPORTANT THAT THE COURT HAVE A FULL  
20 UNDERSTANDING OF 702, HAVE FULL BRIEFING ON THAT QUESTION,  
21 INCLUDING THE QUESTION OF WHETHER THEY HAVE STATED A CLAIM AND  
22 HAVE STANDING, BEFORE YOU ISSUE A PRESERVATION ORDER UNDER THAT  
23 PROGRAM.

24 PARTICULARLY WHAT THEY HAVE ASKED FOR IN THESE PAST  
25 FEW DAYS, WHICH IS ALL DOCUMENTS, ALL MATERIAL RELATED TO 702,

1 WHICH CLEARLY WOULD INCLUDE THE DATA THAT IS COLLECTED UNDER  
2 THAT PROGRAM, WHICH IS SUBJECT TO FISC MINIMIZATION  
3 REQUIREMENTS.

4 AND AS THE DEPUTY DIRECTOR OF NSA EXPLAINED  
5 ATTEMPTING TO CARRY THAT OUT IN THE IMMEDIATE FUTURE AND EVEN  
6 LONG-TERM WILL CAUSE VERY SIGNIFICANT OPERATIONAL PROBLEMS.

7 **THE COURT:** ALL RIGHT. I WANT TO MOVE ON. I WILL  
8 GIVE YOU AN OPPORTUNITY TO ADDITIONAL POINTS AT THE END, BUT I  
9 WANT TO MAKE SURE I GET THROUGH MY QUESTIONS IN A COMPLETE WAY.  
10 AND SO I'M NOT CUTTING EITHER SIDE OFF WITH RESPECT TO ANY  
11 ISSUE, BUT I DO WANT TO GET THROUGH MY INITIAL QUESTIONS THAT I  
12 PREPARED BASED UPON THE FILINGS.

13 SO QUESTION NUMBER TWO -- AND, AGAIN, I'LL START WITH  
14 A PREAMBLE, AND THEN I'M GOING TO ADDRESS THE QUESTION IN THE  
15 FIRST INSTANCE TO PLAINTIFFS.

16 "THE CASES REVIEWING THE MERITS OF THE  
17 CONSTITUTIONAL CHALLENGES TO THE DRAGNET SURVEILLANCE  
18 PROGRAM HAVE ALL FOUND STANDING AS A MATTER OF LAW."

19 AND FOR THAT I'D LIKE YOU TO SEE KLAYMAN,  
20 K-L-A-Y-M-A-N, V. CLAPPER, 957 F. SUPP. 2D 1, 26 THROUGH 28,  
21 DECIDED BY THE DISTRICT OF COLUMBIA COURT, FEDERAL COURT IN  
22 2013.

23 SMITH V. OBAMA, NUMBER 13-0257. THE SLIP OPINION AT  
24 THREE NOTE TWO. DISTRICT OF IDAHO, DECIDED JUNE 3RD, 2014.

25 ACLU VERSUS CLAPPER, 959 F. SUPP. 2D 724 AT 746,

1 DECIDED IN THE SOUTHERN DISTRICT OF NEW YORK IN 2013, WHICH  
2 STATES, QUOTE:

3 "AGGREGATED TELEPHONY META DATA IS RELEVANT  
4 BECAUSE IT ALLOWS THE QUERYING TECHNIQUE TO BE  
5 COMPREHENSIVE. ARMED WITH ALL THE META DATA NSA CAN  
6 DRAW CONNECTIONS IT MIGHT OTHERWISE NEVER BE ABLE TO  
7 FIND," UNQUOTE.

8 SO THE QUESTION IS THIS:

9 "IF THIS COURT SIMILARLY FINDS STANDING AS A  
10 MATTER OF LAW TO PURSUE THE MERITS OF THEIR CLAIMS,  
11 WOULD PLAINTIFFS STILL SEEK THE CONTINUED  
12 PRESERVATION OF THE EVIDENCE SOUGHT BY THE COURT'S  
13 EXISTING PRESERVATION AND RESTRAINING ORDERS?"

14 **MS. COHN:** SO, YOUR HONOR, THOSE ORDERS HAD TO DO  
15 JUST WITH THE TELEPHONY META DATA. THEY DIDN'T HAVE TO DO WITH  
16 THE CONTENT COLLECTION.

17 BUT I THINK THE ANSWER TO YOUR QUESTION IS: YES, IF  
18 THE COURT WERE TO FIND AS A MATTER OF LAW THAT THE MASS  
19 COLLECTION OF CONTENTS, JUST LIKE THE MASS COLLECTION OF META  
20 DATA, BY DEFINITION HAD TO INCLUDE OUR CLIENTS, BECAUSE THAT'S  
21 WHAT "MASS" MEANS, THEN, YES, YOUR HONOR, I THINK THAT WOULD  
22 GET US OUT OF THIS PROBLEM. THAT IS, ESSENTIALLY THE ADVERSE  
23 INFERENCE THAT I ASKED YOU TO PROVIDE.

24 MY HESITATION IS THAT I THINK THAT STANDING IS THE  
25 ONLY ISSUE TO WHICH THAT FACT WILL HAVE TO GO. I'M A LITTLE



1 HESITANT GIVEN HOW LITIGATION GOES TO SAY THAT STANDING IS THE  
2 ONLY ISSUE THAT THOSE FACTS MIGHT GO TO. BUT IT'S THE ONE THAT  
3 IS OBVIOUSLY MOST FOREMOST IN OUR MINDS AT THE MOMENT.

4 **THE COURT:** WELL, THE REASON I ASK THE QUESTION IS  
5 OBVIOUSLY, THAT TO THE EXTENT THAT THE ANSWER WERE IN THE  
6 AFFIRMATIVE IN THE SENSE THAT THE NEED FOR PRESERVATION ORDER  
7 WOULD GO AWAY IF THE COURT WERE TO FIND -- AT LEAST FOR  
8 PURPOSES OF THE NEXT STAGES OF LITIGATION -- THE COURT WERE TO  
9 FIND THE EXISTENCE OF STANDING, THAT WOULD REMOVE A BIG -- NOT  
10 A "BIG," BUT AT LEAST A PIECE OF THIS LITIGATION THAT'S  
11 CURRENTLY BEFORE THE COURT. SO THAT'S NUMBER ONE.

12 AND RELATED TO THAT IS IF THE REMEDY THAT THE  
13 PLAINTIFFS ARE SEEKING IS AN ADVERSE INFERENCE, THE COURT WOULD  
14 OBVIOUSLY ASK THE QUESTION:

15 "WELL, IF I GIVE YOU THAT, IF I GIVE THE  
16 PLAINTIFFS THAT ADVERSE INFERENCE, WHERE DOES THAT  
17 LEAVE US?"

18 AND IF THE ANSWER IS: THEN, YOU NO LONGER NEED TO BE  
19 CONCERNED WITH THE DESTRUCTION OF DOCUMENTS, THEN A FORTIORI,  
20 IF I CONCLUSIVELY FOUND THAT THERE WAS STANDING BASED UPON THE  
21 FACTORS THAT WERE RELIED ON BY THESE OTHER DISTRICT COURTS, I  
22 WOULD ASSUME THE ANSWER WOULD BE THE SAME.

23 SO WHY LITIGATE A POINT THAT IS REALLY NOT IN -- IS  
24 NOT CONTESTED HERE IS REALLY THE POINT.

25 **MS. COHN:** I AGREE, YOUR HONOR. I MEAN, THIS IS WHY

1 WE CAME UP WITH THIS IDEA OF AN ADVERSE INFERENCE. AGAIN, I  
2 WOULD LIKE TO TIE IT TO THE FACTS RATHER THAN THE STANDING  
3 LEGAL QUESTION JUST BECAUSE I'M NERVOUS ABOUT -- LIFE IS LONG.  
4 I'M NERVOUS THAT THEY MAY TRY TO ARGUE THE FACT THAT WE CAN'T  
5 DEMONSTRATE THAT OUR CLIENTS' COMMUNICATIONS WERE INCLUDED IN  
6 THIS GOES TO SOME OTHER FACT AFTER WE'RE DONE WITH STANDING,  
7 BUT --

8 **THE COURT:** THAT'S GOING TO BE MY NEXT QUESTION.

9 **MS. COHN:** -- I THINK THAT IF YOU WERE TO PROVIDE THE  
10 ADVERSE INFERENCE THAT WE'RE TALKING ABOUT, THEN WE DON'T NEED  
11 THEM TO KEEP THE INFORMATION.

12 WE'VE SAID THIS FROM THE BEGINNING, YOUR HONOR. IT'S  
13 A SOMEWHAT AWKWARD POSITION FOR US TO BE STANDING HERE TRYING  
14 TO ARGUE THE GOVERNMENT HAS TO KEEP INFORMATION WE DIDN'T THINK  
15 THEY SHOULD COLLECT IN THE FIRST PLACE.

16 SO IF WE CAN MAKE THIS PROCESS MOVE FORWARD IN A WAY  
17 THAT REDUCES THE AMOUNT OF INFORMATION THAT THE GOVERNMENT HAS  
18 TO KEEP WITHOUT HARMING MY CLIENTS' ABILITY TO MAKE THEIR CASE,  
19 THEN THAT'S THE BEST WORLD. AND THAT'S THE WORLD WE WOULD LIKE  
20 TO GET TO.

21 **THE COURT:** ALL RIGHT. LET ME -- MR. COPPOLINO, I'M  
22 GOING TO GIVE YOU A FULL OPPORTUNITY TO RESPOND TO THE SAME  
23 QUESTION. BUT I WOULD LIKE TO ADD A QUESTION TO YOU THAT MIGHT  
24 ILLUMINATE THE INFORMATION THAT I'M SEEKING.

25 AND, OF COURSE, I'D LIKE RESPONSES TO BOTH. AND I'M

1 SURE YOU CAN KEEP TRACK OF ALL OF IT.

2 SO THE QUESTION I WANT TO ASK OF THE GOVERNMENT IN  
3 ADDITION TO RESPONDING TO THE RESPONSE THAT MS. COHN JUST  
4 PROVIDED IS AS FOLLOWS:

5 "DO THE GOVERNMENT DEFENDANTS MAINTAIN THAT  
6 PLAINTIFFS MUST SHOW INDIVIDUALIZED STANDING THAT  
7 THEIR SPECIFIC COMMUNICATIONS HAVE BEEN COLLECTED, OR  
8 HAVE PLAINTIFFS DEMONSTRATED STANDING BY VIRTUE OF  
9 THE GOVERNMENT'S POSITION THAT THE SURVEILLANCE  
10 PROGRAM IS ONLY EFFECTIVE IF IT IS COMPREHENSIVE?"

11 MR. COPPOLINO.

12 **MR. COPPOLINO (BY PHONE):** YOUR HONOR, LET ME ANSWER  
13 THE LAST QUESTION FIRST.

14 **THE COURT:** OKAY.

15 **MR. COPPOLINO (BY PHONE):** WE'VE NOT AGREED WITH THAT  
16 PROPOSITION. AND THAT WAS THE PROPOSITION THAT WAS PRESENTED  
17 BY JUDGE LEON IN KLAYMAN. THAT IS THAT THE MERE -- A MERE  
18 PROGRAMMATIC DESCRIPTION AS A BROAD PROGRAM OR AS A BULK  
19 PROGRAM IS NOT SUFFICIENT TO ESTABLISH THAT A PARTICULAR PERSON  
20 HAS BEEN SUBJECT TO THAT PROGRAM, IN OUR VIEW.

21 LET ME MAKE A COUPLE OF OTHER POINTS ABOUT THAT. ONE  
22 IS THAT IN THE CASES THAT YOU CITED, FIRST OF ALL, THEY WERE  
23 ALL ABOUT THE SECTION 215 TELEPHONY META DATA COLLECTION.  
24 WE'RE HERE TALKING ABOUT POSSIBLE PRESERVATION ON AN ENTIRELY  
25 DIFFERENT PROGRAM, SECTION 702. BUT AS TO SECTION -- AND I

1 DON'T THINK EVEN IF YOU FELT -- AND I'M NOT CONCEDED THIS --  
2 BUT EVEN IF YOU FELT THEY HAD STANDING WITH RESPECT TO  
3 TELEPHONY META DATA, FOR SOME REASON, IT WOULD EXTEND TO  
4 SECTION 702, AND IT SHOULD NOT.

5           THEY ARE TRYING TO MERGE THESE PROGRAMS AS TO ONE BIG  
6 THING. AND IT'S NOT CORRECT, FACTUALLY. IT'S NEVER BEEN  
7 BRIEFED. AND THAT IS WHAT IS NOT FAIR, PARTICULARLY WHERE IN  
8 702 WE HAVE A CLEARLY ESTABLISHED STATUTORY FRAMEWORK OF HOW  
9 THAT PROGRAM IS CONDUCTED. IT IS NOT 215. IT IS NOT BULK META  
10 DATA COLLECTION.

11           IT'S A TARGETED COMMUNICATION SURVEILLANCE PROGRAM  
12 AGAINST NON U.S. PERSONS LOCATED OUTSIDE THE UNITED STATES. SO  
13 WHATEVER YOU MAY THINK ABOUT STAYING WITH RESPECT TO 215, IT  
14 WOULD NOT COVER 702.

15           ANOTHER POINT I WOULD MAKE WITH RESPECT TO THE 215  
16 CASES THAT YOU IDENTIFIED IS -- AND THIS IS NOTEWORTHY -- IN  
17 THE KLAYMAN CASE MY RECOLLECTION IS THAT JUDGE LEON DID NOT  
18 FIND STANDING FOR 702. IN FACT, HE FOUND THAT THEY HAD FAILED  
19 TO ALLEGE SUFFICIENT FACTS TO ESTABLISH A CLAIM THAT THEY HAD  
20 BEEN COLLECTING UNDER 702.

21           AND THAT'S PRECISELY THE PROBLEM IN THIS CASE. IT'S  
22 EXACTLY THE SAME THING. AND SO I WOULD URGE YOU TO LOOK AT  
23 FOOTNOTE SIX OF JUDGE LEON'S DECISION.

24           EVEN THOUGH WE DIDN'T DO TOO WELL OTHERWISE IN THAT  
25 CASE, WE WON THAT ONE. AND THAT CASE IS ON APPEAL, BY THE WAY,

1 YOUR HONOR, AND THE STANDING QUESTION IS SQUARELY AT ISSUE.

2 AND THE THIRD POINT I WOULD MAKE -- AND, AGAIN, I  
3 THINK THIS IS A BIT FAR AFIELD FROM THE 702 TOPIC WE WANTED TO  
4 TALK ABOUT, BUT I WOULD MAKE THIS POINT. THE PLAINTIFFS IN  
5 THIS CASE, THEIR ALLEGED -- THEIR TELECOMMUNICATIONS COMPANY IS  
6 AT&T. AND THEIR ALLEGATIONS OF SURVEILLANCE ALL CONCERN AT&T.

7 NONE OF THESE OTHER CASES, TO MY RECOLLECTION,  
8 INVOLVED AT&T PLAINTIFFS. NOW, THE GOVERNMENT HAS MAINTAINED A  
9 LINE IN THIS CASE, AS WELL AS IN THOSE CASES, THAT THERE HAS  
10 BEEN NO DISCLOSURE OR CONFIRMATION OF THE SPECIFIC CARRIERS  
11 THAT HAVE BEEN INVOLVED IN THE SECTION 215 PROGRAM.

12 AND, IN FACT, WE'VE -- EXCEPT FOR ONE -- EXCEPT FOR A  
13 VERIZON CARRIER FOR ONE FISC ORDER ISSUED IT FOR ONE DISCRETE  
14 PERIOD OF TIME. AND THAT'S IT.

15 AND WE SET THIS FORTH, AGAIN, FOR THIS COURT IN OUR  
16 MOST RECENT FILING IN WHICH THE DNI ASSERTED THE STATES SECRET  
17 PRIVILEGE AND EXPLAINED TO THE COURT THAT NOTWITHSTANDING ALL  
18 THESE TERRIBLE DISCLOSURES THAT OCCURRED OVER THE PAST YEAR --  
19 IN FACT, THIS IS THE ONE YEAR ANNIVERSARY -- DISCLOSURES THAT  
20 WE ARE CONVINCED THAT HAVE SERIOUSLY HARMED THE NATIONAL  
21 SECURITY OF THIS COMPANY, WE HAVE CONTINUED TO PROTECT THE  
22 IDENTITY OF PARTICULAR TELECOMMUNICATION CARRIERS THAT ARE  
23 ALLEGED TO HAVE ASSISTED THE NSA, NOT ONLY IN THE SECTION 215  
24 PROGRAM, WHICH WAS AT ISSUE IN THE CASES YOU CITED, BUT ALSO IN  
25 THE PRESIDENT'S SURVEILLANCE PROGRAM, ACTIVITIES WHICH ARE AT

1 ISSUE IN JEWEL AND SHUBERT, AS WELL.

2 SO WE HAVE NOT CONCEDED THAT STANDING COULD BE FOUND  
3 BASED ON THE MERE EXISTENCE OF THE BULK TELEPHONY META DATA  
4 PROGRAM, IF THAT IS YOUR QUESTION.

5 SO I THINK THE PRESERVATION ISSUE HAS TO BE EXAMINED  
6 SEPARATELY. WITH RESPECT TO THE PSP PROGRAM WE SET FORTH IN  
7 DETAIL FOR YOU HOW WE HAVE PRESERVED THAT PROGRAM, THOSE  
8 ACTIVITIES.

9 IN THE FIRST UNITARIAN CASE THAT THEY BROUGHT, WHICH  
10 IS A 215 CASE, WE HAVE GONE THROUGH THE PRESERVATION PROCESS IN  
11 THAT MATTER WITH RESPECT TO SECTION 215. AND SO THIS MATTER  
12 THAT HAS BEEN RAISED THIS PAST WEEK CONCERNS SECTION 702,  
13 DIFFERENT PROGRAM, DIFFERENT ISSUES AND MUCH, MUCH MORE  
14 DIFFERENT COMPLICATIONS INVOLVED IN PRESERVATION.

15 THANK YOU, YOUR HONOR.

16 **THE COURT:** ALL RIGHT, MS. COHN.

17 **MR. MAAZEL (BY PHONE):** YOUR HONOR, MAY SHUBERT  
18 PLAINTIFFS BE HEARD?

19 OF COURSE. OF COURSE. ANYTIME YOU WANT TO SPEAK,  
20 JUST PLEASE PIPE UP. I WASN'T MEANING TO EXCLUDE YOU. GO  
21 HEAD.

22 **MR. MAAZEL (BY PHONE):** THANK YOU, YOUR HONOR.

23 **THE COURT:** JUST RESTATE YOUR FULL NAME FOR ME.

24 **MR. MAAZEL (BY PHONE):** ILANN MAAZEL, FOR THE SHUBERT  
25 PLAINTIFFS.

1           **THE COURT:**   OKAY.   GO AHEAD.

2           **MR. MAAZEL (BY PHONE):**   AND JUST A COUPLE OF POINTS,  
3   YOUR HONOR.   THE FIRST IS THAT, YOU KNOW, THE SHUBERT CASE  
4   WHICH WAS FILED IN 2006 WAS FILED BEFORE THERE WAS A 702.   AND  
5   THE SHUBERT CASE ENCOMPASSES NOT JUST AT&T BUT OTHER PHONE  
6   COMPANIES, INCLUDING VERIZON.   ONE OF THE PLAINTIFFS, MAYBE TWO  
7   OF THE PLAINTIFFS, WERE VERIZON CUSTOMERS.   VERIZON WAS ALSO  
8   THE SUBJECT OF THAT NOW CONFIRMED FISC ORDER CONCERNING META  
9   DATA.

10                   SO MR. COPPOLINO'S ARGUMENTS THAT HE JUST MADE, YOU  
11   KNOW, DO NOT APPLY -- CERTAINLY DO NOT APPLY TO THE SHUBERT  
12   CASE.

13                   FROM OUR PERSPECTIVE, THE 702 ISSUE IS A BIT OF A  
14   FEAT OF MISDIRECTION BY THE GOVERNMENT BECAUSE WHAT YOUR HONOR  
15   ORDERED IS THAT THE GOVERNMENT MAY NOT DESTROY ANY POTENTIAL  
16   EVIDENCE RELEVANT TO THE CLAIMS.

17                   AND IN SHUBERT AND IN JEWEL SOME OF THE COURT CLAIMS  
18   INCLUDE IMPROPER COLLECTION OF CONTENT, MASS COLLECTION OF  
19   CONTENT.   AND THEY WERE NOT SUPPOSED TO DESTROY ANY EVIDENCE  
20   RELEVANT TO THAT.

21                   WHAT WE HAVE LEARNED IN THE LAST FEW DAYS IS THAT  
22   APPARENTLY THEY ARE KEEPING META DATA, BUT THEY ARE DESTROYING  
23   CONTENT.   THEY ARE DESTROYING CONTENT WHICH IS AT THE HEART OF  
24   MUCH OF THE JEWEL COMPLAINTS AND THE SHUBERT COMPLAINT.   SO  
25   WHETHER THEY CALL IT 702 OR SOME OTHER NUMBER, THE IRREFUTABLE

1 FACT IS THAT THERE ARE CLAIMS CHALLENGED, AMONG OTHER THINGS,  
2 THE ILLEGAL COLLECTION OF CONTENT. AND THEY HAVE NOW ADMITTED  
3 THAT THEY ARE DESTROYING THE CONTENT.

4 AND SO THEY HAVE VIOLATED THE TRO. WHETHER THEY  
5 CLAIM THAT IT'S 702 PROGRAM OR SOME OTHER PROGRAM. AND THAT, I  
6 THINK, IS THE HEART OF WHAT THIS HEARING IS ABOUT. THAT BOTH  
7 INDIVIDUAL PRESERVATION ORDERS AND THE CONTINUING OBLIGATION TO  
8 PRESERVE EVIDENCE, AND NOW UNDER YOUR HONOR'S TRO, THEY SHOULD  
9 HAVE BEEN MAINTAINING ALL POTENTIAL EVIDENCE RELEVANT TO OUR  
10 CLAIM, WHICH INCLUDE THE ILLEGAL COLLECTION OF CONTENT.

11 **MR. COPPOLINO (BY PHONE):** YOUR HONOR, MAY I RESPOND?

12 **THE COURT:** NO, I WANT TO GIVE HIM A CHANCE TO FINISH  
13 AND THEN I'M GOING TO ASK MS. COHN TO RESPOND TO WHAT YOU SAID.  
14 AND THEN, OF COURSE, MR. COPPOLINO, I'LL GIVE YOU A CHANCE TO  
15 REPLY.

16 **MR. COPPOLINO (BY PHONE):** OKAY.

17 **THE COURT:** PROCEED, COUNSEL.

18 **MR. MAAZEL (BY PHONE):** AND SO NEITHER THE SHUBERT OR  
19 JEWEL COMPLAINTS, AS FAR AS I CAN TELL, IS A FACIAL CHALLENGE  
20 TO SECTION 702. IT'S A CHALLENGE TO THIS MASS COLLECTION.  
21 AMONG OTHER THINGS, IT'S A CHALLENGE TO THIS MASS COLLECTION OF  
22 CONTENT, WHICH AMONG OTHER THINGS, THE FOURTH AMENDMENT.

23 AND SO THAT'S THE EVIDENCE THEY SHOULD HAVE PRESERVED  
24 UNDER THE TRO. AND THAT'S THE EVIDENCE THEY SHOULD HAVE  
25 PRESERVED BEFORE THE TRO. AND I BELIEVE THAT'S WHY WE ARE



1       HERE.

2                   **THE COURT:**   ALL RIGHT.   MS. COHN.

3                   **MS. COHN:**   WELL --

4                   **THE COURT:**   HOW DO YOU PRONOUNCE IT?   IS IT COHEN  
5       (PHONETIC) OR COHN?

6                   **MS. COHN:**   I PRONOUNCE IT LIKE THERE'S AN E EVEN  
7       THOUGH THERE'S NOT.   SO IT'S COHEN (PHONETIC).

8                   **THE COURT:**   ALL RIGHT.

9                   **MS. COHN:**   BUT I'LL ANSWER TO EITHER.

10                  **THE COURT:**   THANK YOU.

11                  **MS. COHN:**   I MEAN, I THINK THAT MR. MAAZEL HAS SAID  
12       CORRECTLY THAT, YOU KNOW, THESE COMPLAINTS ARE BASED UPON THE  
13       GOVERNMENT'S COLLECTION OF CONTENT.   THE GOVERNMENT DOESN'T  
14       WANT US TO SUE THEM OVER THE MASS COLLECTION OF CONTENT.   BUT  
15       THAT DOESN'T HAVE ANYTHING TO SAY TO THE SCOPE OF THEIR  
16       PRESERVATION EFFORTS.

17                  AND, YOU KNOW, IT'S DISTRESSING TO ME THAT WE'RE  
18       HAVING THIS CONVERSATION IN 2014.   WE SHOULD HAVE HAD IT IN  
19       2007, BECAUSE WE'VE BEEN SUING ABOUT THE MASS COLLECTION OF  
20       CONTENT, FRANKLY, SINCE 2006 WHEN WE BROUGHT THE FIRST CASE IN  
21       2007, WHEN WE BROUGHT THE FIRST PRESERVATION ORDER.

22                  AND THE GOVERNMENT HAS ENGAGED IN A SERIES OF  
23       UNILATERAL REINTERPRETATIONS OF OUR CASE TO LIMIT ITS  
24       PRESERVATION EFFORTS.   AND I THINK THAT THAT'S -- THAT'S JUST  
25       NOT RIGHT UNDER THE WAY THE PRESERVATION IS SUPPOSED TO WORK?

1 AND NOW HERE WE ARE AGAIN.

2 WE WERE HERE IN MARCH BECAUSE IT TURNED OUT THAT THEY  
3 DECIDED THAT OUR COMPLAINTS WEREN'T ABOUT THE MASS COLLECTION  
4 OF ANYTHING UNDER THE FISC ORDERS, BUT ONLY THE MASS COLLECTION  
5 OF THINGS UNDER THE PRESIDENT'S AUTHORITY. THAT'S JUST NOT  
6 TRUE.

7 AND NOW WE FIND THAT THEY'VE MADE ANOTHER CUT. AND  
8 THE CUT IS THAT, WELL, MAYBE WE WERE SUING THEM OVER THE MASS  
9 COLLECTION OF TELEPHONE RECORDS, BUT WE WEREN'T SUING THEM OVER  
10 THE MASS COLLECTION OF CONTENT. AND SO, THEREFORE, THEY DON'T  
11 HAVE TO PRESERVE THE CONTENT THEY ARE COLLECTING UP. IT'S JUST  
12 ANOTHER ATTEMPT TO TRY TO RECONSTRUE WHAT WE ARE SUING OVER IN  
13 ORDER TO LIMIT THEIR PRESERVATION DUTIES.

14 WE MAY HAVE A FIGHT WITH THE GOVERNMENT ABOUT THE  
15 SCOPE OF OUR COMPLAINT. THAT'S WHAT I THOUGHT WE WERE  
16 BRIEFING. THAT'S WHAT WE WERE BRIEFING. YOU KNOW, MY BRIEF  
17 WAS FILED LAST FRIDAY. BUT WHAT I THOUGHT WAS GOING TO HAPPEN  
18 IN THE MEANTIME IS THAT THE GOVERNMENT WOULD STOP DESTROYING  
19 EVIDENCE.

20 AND SO WE'RE HERE BECAUSE IT TURNED OUT -- AND I KIND  
21 OF DISCOVERED THIS BY HAPPENSTANCE -- THAT THE GOVERNMENT  
22 DIDN'T READ YOUR TRO AS REQUIRING A PRESERVATION OF THE STATUS  
23 QUO PENDING CONSIDERATION OF THE CONTENT COLLECTION ISSUES IN  
24 JEWEL ONCE WE'D SETTLED THE RECORDS ISSUES.

25 AND I JUST THINK IT'S ONLY FAIR FOR THEM TO HAVE TO

1 STOP PRESERVING UNTIL WE CAN SORT OUT WHAT'S AT ISSUE IN THE  
2 CASE. AND FOR THEM TO -- FOR THEM TO CONTINUE TO DESTROY  
3 EVIDENCE IN THE MEANTIME STRIKES ME AS TREMENDOUSLY UNFAIR  
4 BECAUSE, YOU KNOW, MAYBE THEY WILL WIN, BUT, YOU KNOW, MAYBE WE  
5 WILL.

6 **THE COURT:** ALL RIGHT. MR. COPPOLINO.

7 **MR. COPPOLINO (BY PHONE):** THANK YOU, YOUR HONOR. I  
8 THINK WE'RE GOING TO HAVE TO RESPECTFULLY DISAGREE WITH WHO IS  
9 ENGAGED IN A MASSIVE MISDIRECTION IN THIS LAWSUIT, BECAUSE IN  
10 OUR VIEW IT IS THE PLAINTIFFS THAT ARE TRYING TO REWRITE THEIR  
11 COMPLAINT IN ORDER TO BRING IN FISA-AUTHORIZED ACTIVITY THAT  
12 WERE NEVER PLED WHEN ALL OF THEIR COMPLAINTS -- AND WE'VE  
13 DETAILED THIS IN THE BRIEFS THAT WE'VE FILED OVER THE PAST  
14 MONTHS -- CLEARLY CHALLENGE ACTIVITY WITHOUT STATUTORY AND  
15 JUDICIAL AUTHORIZATION.

16 I'M QUITE CONFIDENT THAT THAT IS THE CLEAR GRAVAMEN  
17 OF THE COMPLAINT. THE SHUBERT COMPLAINT, IN PARTICULAR, IS  
18 UNAMBIGUOUSLY A CHALLENGE TO THE PRESIDENT'S SURVEILLANCE  
19 PROGRAM. AND WHILE SHUBERT MAY HAVE FILED BEFORE 702, THEY  
20 AMENDED TWICE, AND THEY NEVER CHALLENGED 702, NUMBER ONE.

21 NUMBER TWO, AS FAR AS THIS MASS COLLECTION OF  
22 CONTENT, THEY ARE SETTING THAT FORTH AS IF IT'S SOME  
23 ESTABLISHED FACT. AND THEY ARE PINNING IT ON 702. I THINK  
24 THAT THE POINT THAT WE HAVE BEEN MAKING -- AND YOU CAN SEE IT  
25 NOW IN OUR DECLASSIFIED DECLARATIONS -- IT THAT THAT'S BEEN A

1 FALSEHOOD FROM THE BEGINNING.

2           **THE COURT:** JUST ONE MOMENT. I REALLY DON'T WANT YOU  
3 TO -- YOU CAN ARGUE THE ARGUMENTS. I DON'T WANT YOU TO  
4 CHARACTERIZE THEIR ARGUMENTS, AND I CERTAINLY DON'T WANT YOU TO  
5 ACCUSE SOMEBODY OF FALSEHOOD. WE HAVE EXCELLENT COUNSEL IN  
6 THIS CASE, AND I JUST REALLY DON'T WANT THAT. SO PLEASE  
7 REFRAIN FROM MAKING THOSE KINDS OF CHARGES.

8           **MR. COPPOLINO (BY PHONE):** LET ME JUST REPHRASE IT.

9           **THE COURT:** THANK YOU.

10           **MR. COPPOLINO (BY PHONE):** THAT EVERY DNI THAT HAS  
11 PROVIDED A STATES SECRETS DECLARATION -- AND A LOT OF THOSE  
12 HAVE NOW BEEN DECLASSIFIED -- HAS BEEN MADE CLEAR -- IN FACT,  
13 THEY STATE ON THE PUBLIC RECORD STATE STARTING IN 2006 AND  
14 SEVEN THAT THE GOVERNMENT HAS NOT ENGAGED IN A CONTENT DRAGNET.  
15 AND WE HAVE SPECIFICALLY IDENTIFIED AND DEFINED CONTENT. AND  
16 WE MADE CLEAR THAT THAT ALLEGATION WAS NOT TRUE.

17           AND WHAT WE SAID IN THOSE PRIVILEGE ASSERTIONS IS  
18 THAT TO DISAPPROVE IT YOU WOULD NEED TO KNOW INTELLIGENT  
19 SOURCES AND METHODS AS WELL AS THEN-STILL CLASSIFIED  
20 ACTIVITIES.

21           NOW, THE ONE DIFFERENCE, THOUGH, WITH RESPECT TO  
22 CONTENT IS THAT 702 IS NOT A CLASSIFIED ACTIVITY. THE SOURCES  
23 AND METHODS ARE. BUT 702 WAS A PUBLICLY-ACKNOWLEDGED PROGRAM.

24           PRIOR TO THAT THE TERRORIST SURVEILLANCE PROGRAM WAS  
25 A PUBLICLY-ACKNOWLEDGED PROGRAM. PRESIDENT BUSH DESCRIBED IT

1 AS LINKED TO INTERNATIONAL COMMUNICATIONS INVOLVING AL QAEDA.

2 THEY NEVER CHALLENGED 702, NOT TSP IN JEWEL OR  
3 SHUBERT. THEY NEVER CHALLENGED PROTECT AMERICA ACT. THEY  
4 NEVER CHALLENGED 702.

5 WHAT THEY HAVE CLAIMED IS THAT THERE IS A MASS  
6 COMMUNICATION DRAGNET, WHICH THE GOVERNMENT HAS CONSISTENTLY  
7 DENIED FROM THE BEGINNING OF THESE LAWSUITS.

8 NOW, WE'RE TALKING ABOUT 702 IN THIS PRESERVATION  
9 DISPUTE. IT'S A SEPARATE STATUTORY PROGRAM. PUBLIC HAS  
10 EXISTED BEFORE JEWEL AND CERTAINLY WHILE SHUBERT HAS BEEN  
11 PENDING. THAT PROGRAM HAS DEFINED STATUTORY TERMS. AND IF YOU  
12 WOULD RECEIVE BRIEFING ON THIS AND ALSO BRIEFING NOT ONLY ON  
13 HOW THE PROGRAM OPERATES, BUT WHETHER THEY HAVE STATED A CLAIM  
14 AND HAVE STANDING UNDER THAT PROGRAM, YOU WOULD NOT ENTER A  
15 PRESERVATION ORDER THAT WOULD REQUIRE THE NSA TO EFFECTIVELY  
16 SHUT DOWN ITS COLLECTION UNDER THAT PROGRAM.

17 THIS IS NOT ABOUT THE DESTRUCTION OF EVIDENCE THAT IS  
18 RELEVANT TO THIS CASE. THE INFORMATION THAT NSA CYCLES OFF  
19 THROUGH ITS DATA DELETION POLICY IS DONE PURSUANT TO ORDERS OF  
20 THE FISC IN A PROGRAM THAT WAS NEVER CHALLENGED AND IS NOT  
21 RELEVANT IN THIS LAWSUIT.

22 IT IS NOT ABOUT THE DESTRUCTION OF EVIDENCE HERE.  
23 WHAT IT IS ABOUT IS THE POTENTIAL DESTRUCTION OF NSA'S ABILITY  
24 TO COLLECT FOREIGN INTELLIGENCE ON BEHALF OF THE UNITED STATES.

25 IF YOU WERE TO KEEP THIS ORDER IN PLACE -- AND WE SET

1 THAT FORTH FOR THE COURT. AND I HAVE TO URGE THE COURT THAT  
2 WHILE ALL THESE ARGUMENTS ARE INTERESTING ABOUT THE PRIOR  
3 HISTORY OF THIS LAWSUIT, THE IMMEDIATE QUESTION THAT WE REALLY  
4 NEED RELIEF ON IS THE SENTENCE IN YOUR ORDER WHICH REQUIRES THE  
5 NSA, THE GOVERNMENT, TO SAVE ALL -- ANY DOCUMENTS THAT MAY BE  
6 RELEVANT TO THE CLAIMS IN THIS ACTION, INCLUDING SECTION 702  
7 MATERIALS.

8 THAT IS A VERY SERIOUS OPERATIONAL PROBLEM FOR THE  
9 NSA.

10 **THE COURT:** ALL RIGHT. MS. COHN, I WANT YOU TO  
11 ANSWER THE FOLLOWING QUESTION, BECAUSE I THINK MR. COPPOLINO  
12 JUST PUT HIS -- MIXED METAPHORS HERE -- PUT HIS FINGER ON THE  
13 ELEPHANT IN THE ROOM. BUT WHICH IS IN AN UNCLASSIFIED SWORN  
14 DECLARATION, THE GOVERNMENT HAS ASSERTED THAT IF THE COURT  
15 WERE, FOR WHATEVER REASON, EVEN INCLUDING IF I ACCEPTED THE  
16 PLAINTIFFS' POSITION HERE TO ISSUE -- MAINTAIN THE ORDER THAT I  
17 ISSUED ON AN EMERGENCY BASIS, THAT IT WOULD DO GRAVE DAMAGE TO  
18 OUR NATIONAL SECURITY.

19 WE'RE ALL CITIZENS OF THIS COUNTRY. WE ALL REALLY  
20 WANT SECURITY. WE ALSO WANT OUR CONSTITUTIONAL RIGHTS TO BE  
21 HONORED. BUT HOW CAN THE COURT IN THE FACE OF THAT -- AND  
22 THERE'S NOTHING IN RESPONSE, AND I'M NOT CRITICIZING THE  
23 PLAINTIFFS THAT, YOU KNOW, IT'S HARD FOR THEM TO THWART IT.  
24 BUT IT IS IN A NONCLASSIFIED DOCUMENT.

25 HOW IS THE COURT TO SAY:

1 "WELL, YEAH, THEY SAY THAT. BUT, YOU KNOW, I'M  
2 JUST GOING TO DISREGARD THAT, AND I'M GOING TO,  
3 NOTWITHSTANDING THAT, ORDER THEM TO PRESERVE ALL  
4 THESE DOCUMENTS AND SHUT DOWN THIS PROGRAM"?

5 **MS. COHN:** YEAH, YOUR HONOR. WE'VE BEEN CONCERNED.  
6 I MEAN, HONESTLY, IT'S A LITTLE FRUSTRATING THAT WE'RE EIGHT  
7 YEARS LATER AND THEY ARE FINALLY SURFACING A PRACTICABILITY  
8 PROBLEM THAT WE SHOULD HAVE BEEN TALKING ABOUT A LONG TIME AGO.

9 BUT TO THE EXTENT THAT THEY HAVE A PRACTICABILITY  
10 PROBLEM HERE -- AND I'M NOT AGREEING NECESSARILY THAT THEY DO.  
11 AND I'D CERTAINLY BE WILLING TO OFFER SOME TECHNICAL ASSISTANCE  
12 TO THE GOVERNMENT TO FIGURE OUT HOW IT IS THEY COULD PRESERVE  
13 RELEVANT EVIDENCE, IF THEY'D LIKE TO. I THINK THERE ARE PEOPLE  
14 THAT WOULD BE WILLING TO HELP THEM.

15 BUT LET'S ASSUME FOR AN INSTANT THAT THEY ARE  
16 CORRECT, THAT'S WHY WE KEEP TALKING ABOUT AN ADVERSE INFERENCE,  
17 YOUR HONOR. THERE'S A WAY. IT'S THE GOVERNMENT'S POSITION  
18 ABOUT WHAT OUR BURDEN IS TO DEMONSTRATE STANDING AND MAYBE  
19 OTHER THINGS. BUT CERTAINLY STANDING THAT CREATES THE NEED FOR  
20 US TO HAVE THIS INFORMATION.

21 WE'VE NEVER THOUGHT THAT WE NEEDED TO BE ABLE TO  
22 POINT TO CAROLYN JEWEL'S COMMUNICATIONS INSIDE THEIR DATABASES  
23 IN ORDER FOR HER TO BE ABLE TO SUE. THERE'S ALL SORTS OF OTHER  
24 EVIDENCE, INCLUDING THE FISC OPINIONS AND OTHER THINGS.

25 THE STEP ONE, THE MASSIVE CONTENT COLLECTION THAT

1 HAPPENS FIRST BEFORE STEP TWO, THE MINIMIZATION AND TARGETING  
2 IS NOT ACTUALLY A VERY BIG SECRET. I DON'T THINK IT'S A SECRET  
3 AT ALL AT THIS POINT.

4 BUT IF THE COURT WERE TO FIND, AS WE WERE TALKING  
5 EARLIER, THAT THIS EVIDENCE WOULD DEMONSTRATE THAT OUR CLIENTS'  
6 COMMUNICATIONS -- AND, YOU KNOW, OUR CLIENTS ARE A CLASS OF  
7 AT&T CUSTOMERS SO THERE'S A LOT OF PEOPLE -- WERE INCLUDED IN  
8 THE INFORMATION THAT WAS COLLECTED INITIALLY AND SEARCHED.  
9 THERE ARE SEARCHES THAT HAPPENED INITIALLY, TOO, INCLUDING  
10 ABOUT SEARCHING, SEARCHING ABOUT THE TARGET.

11 SO IF MY CLIENT, CAROLYN JEWEL, WHO WRITES, YOU KNOW,  
12 FANTASY NOVELS, IF SHE WRITES A NOVEL IN WHICH SOMEBODY  
13 MENTIONS, YOU KNOW, OSAMA BIN LADEN, THAT WOULD COME UP  
14 PRESUMABLY IN A SEARCH FOR A TERRORIST. SO ABOUT COMES UP AS  
15 WELL AS OTHER THINGS IN THE SEARCHING.

16 IF YOU WERE TO MAKE AN ADVERSE INFERENCE OR A FINDING  
17 AS A MATTER OF LAW THAT OUR CLIENTS' INFORMATION IS INCLUDED IN  
18 THESE MASS COLLECTIONS THEN WE DON'T NEED THEM TO PRESERVE IT  
19 ANYMORE.

20 AND WE'VE OFFERED THIS FROM THE VERY BEGINNING  
21 BECAUSE WE REALLY DON'T WANT THE NEEDS OF OUR CASE FOR OUR  
22 CLIENTS TO BE ABLE TO PROVE THEIR CASE TO GET IN THE WAY OF THE  
23 GOVERNMENT DOING ITS JOB TO PROTECT US. BUT THERE OUGHT TO BE  
24 A WAY TO DO BOTH.

25 **THE COURT:** WELL, I WOULD SUGGEST -- AND I'LL HEAR



1 FROM MR. COPPOLINO -- THAT WE'RE TALKING ABOUT MAYBE TWO  
2 DIFFERENT THINGS HERE. IT'S ONE THING TO HAVE AN ADVERSE  
3 INFERENCE WITH RESPECT TO THE 215 PROGRAM, AND ANOTHER THING TO  
4 HAVE AN ADVERSE INFERENCE WITH RESPECT TO THE 702 PROGRAM,  
5 BECAUSE, NUMBER ONE, THE COURT WOULD HAVE TO FIRST FIND THAT  
6 702 WAS CLEARLY IMPLICATED IN THE CURRENT LAWSUITS.

7 AND, SECONDLY, TO FIND AN ADVERSE INFERENCE THAT THE  
8 GOVERNMENT EITHER WRONGLY DESTROYED EVIDENCE OR THEY HAVE  
9 EVIDENCE WITHIN THEIR POSSESSION WHICH THEY COULD LAWFULLY AND  
10 PROPERLY COME FORTH WITH, BUT THEY ARE NOT, AND, THEREFORE,  
11 JUST LIKE WITH ANY EVIDENCE IN ANY CASE WOULD SUBJECT THEM TO  
12 AN ADVERSE INFERENCE.

13 THE ANSWER MAY BE SLIGHTLY DIFFERENT WITH RESPECT TO  
14 702 VERSUS 215. WOULD YOU AGREE WITH THAT?

15 **MS. COHN:** WELL, YOUR HONOR, I THINK YOU CAN GET  
16 THERE FOR BOTH. I THINK WITH SECTION 215, YOU KNOW, WE NOW  
17 KNOW THAT THERE ARE SOME TELEPHONE RECORDS THAT THEY HAVE  
18 DESTROYED. BUT SO THERE IS A QUESTION THERE ABOUT WHAT TO DO  
19 IN THE CONTEXT OF THIS CASE AND THE FIRST UNITARIAN CASE WITH  
20 REGARD TO THE PHONE RECORDS.

21 BUT WITH REGARD TO THE CONTENT COLLECTION I THINK  
22 YOUR HONOR CAN SAY TO THE EXTENT THAT PLAINTIFFS CAN ESTABLISH  
23 THAT SUCH A PROGRAM EXISTS, THE NARROWER QUESTION ABOUT WHETHER  
24 OUR CLIENTS' COMMUNICATIONS WERE INCLUDED IN THIS PROGRAM IS  
25 ONE THAT WE GET THE BENEFIT OF THE DOUBT IN.

1 SO WE'D STILL HAVE -- I MEAN, WE STILL HAVE THE  
2 BURDEN TO DEMONSTRATE THE MASS COLLECTION. AND IT'S TRUE THAT  
3 THE DESTRUCTION OF THEIR RECORDS OF THE MASS COLLECTION WOULD  
4 BE VERY -- YOU KNOW, COULD BE PROBLEMATIC FOR THAT -- IN THAT  
5 REGARD.

6 BUT I THINK THAT THE PIECE THAT'S MORE IMPORTANT FOR  
7 US IN THE MOMENT IS THAT IF WE CAN DEMONSTRATE THAT THAT MASS  
8 COLLECTION OCCURS, WHETHER IT'S UNDER 702 OR ANY OTHER  
9 PROGRAM -- FRANKLY, YOU KNOW, WE ARE TALKING ABOUT 702 BECAUSE  
10 THAT'S WHAT THE GOVERNMENT HAS NOW JUST WITHIN THE PAST YEAR  
11 INDICATED THAT THE UPSTREAM COLLECTION IS SOMETHING THAT THEY  
12 ARE DOING UNDER 702.

13 AND WE ALSO DIDN'T KNOW IT WAS CALLED "UPSTREAM" WHEN  
14 WE STARTED. WE CALL IT DIRECT ACCESS TO THE FIBER OPTIC CABLES  
15 AT AT&T IN ACCORDANCE WITH THE EVIDENCE THAT WE HAVE PRESENTED.

16 NOW, WE SEE DOCUMENTS THAT HAVE COME OUT, INCLUDING  
17 FISC OPINIONS, THAT APPEAR TO CHARACTERIZE THAT BEHAVIOR AND  
18 CALL IT "UPSTREAM" AND APPEAR TO INDICATE THAT THE GOVERNMENT'S  
19 LEGAL JUSTIFICATION FOR UPSTREAM LIES IN SECTION 702.

20 THOSE TWO THINGS ARE, I THINK, TRUE TODAY. BUT I  
21 DON'T THINK THAT THE FACT THAT IT'S DIFFICULT TO CHARACTERIZE  
22 WHAT THEY ARE DOING IN A STATUTORY BASIS SHOULD GET IN THE WAY  
23 OF US GETTING A RULING FROM THIS COURT ABOUT WHETHER THE MASS  
24 COLLECTION OF THE COMMUNICATIONS CONTENT OF MILLIONS OF  
25 INNOCENT AMERICANS IS CONSTITUTIONAL OR NOT.

1           **THE COURT:** ALL RIGHT. MR. COPPOLINO.

2           **MR. COPPOLINO (BY PHONE):** THANK YOU, YOUR HONOR.

3           I WANT TO START MY RESPONSE TO THIS RECENT DISCUSSION  
4 BY SAYING THAT I REALLY THINK IT DEMONSTRATES THAT YOU SHOULD  
5 RECEIVE SOME FURTHER BRIEFING BEFORE YOU ISSUE A FURTHER TRO  
6 WITH RESPECT TO 702, THE IMMEDIATE ISSUE BEFORE THE COURT ON A  
7 COUPLE OF POINTS.

8           ONE IS THAT I DON'T BELIEVE THE COURT CAN GRANT  
9 ADVERSE INFERENCES WITH RESPECT TO STANDING OR JURISDICTIONAL  
10 ISSUES. I THINK THERE'S LAW ON THAT, AND I THINK WE OUGHT TO  
11 AT LEAST INVESTIGATE IT AND BRIEF JUST AS A GENERAL MATTER.

12           SECONDLY, I THINK YOU IDENTIFIED THE TWO ISSUES  
13 DIRECTLY WITH RESPECT TO ADVERSE INFERENCE. AND I DON'T THINK  
14 EITHER OF THOSE WOULD BE SATISFIED. AND I DO THINK YOU HAVE TO  
15 VIEW THIS BY CLAIM.

16           I DON'T CONCEDE THAT AB ADVERSE INFERENCE WOULD BE  
17 APPROPRIATE UNDER 215 OR TELEPHONY META DATA. FOR ONE THING,  
18 WITH RESPECT TO TELEPHONY META DATA, UNDER THE PRESIDENT'S  
19 SURVEILLANCE PROGRAM, WE HAVE PRESERVED IT, AND WE HAVE  
20 DETAILED THAT TO THE COURT.

21           SO THERE WOULD BE NO BASIS FOR ANY ADVERSE INFERENCES  
22 WITH RESPECT TO THE PSP WHATSOEVER. AND I DON'T BELIEVE THERE  
23 WOULD BE ONE WITH RESPECT TO 215, AS WELL.

24           AND AS TO 702, BEFORE YOU COULD GET -- AS YOU, I  
25 THINK, CORRECTLY POINTED OUT, BEFORE YOU COULD GET TO THE

1 QUESTION OF AN ADVERSE INFERENCE AS TO 702 ON A CONTENT  
2 DRAGNET, YOU HAVE TO ESTABLISH THAT YOU HAVE STANDING AND THAT  
3 YOU HAVE STATED A CLAIM, AND THAT ANY RELEVANT EVIDENCE TO THAT  
4 CLAIM WOULD HAVE BEEN DESTROYED.

5 AND 702, AS I'VE SAID BEFORE -- AND I THINK YOU  
6 SHOULD PERHAPS RECEIVE SOME BRIEFING ON IT. AND WE HAVE A  
7 BRIEF DUE ON JUNE 27TH -- 702 IS AGAIN DIRECTED AT NON U.S.  
8 PERSONS REASONABLY BELIEVED TO BE LOCATED OUTSIDE THE UNITED  
9 STATES. SO THESE PLAINTIFFS CAN'T POSSIBLY BE 702 TARGETS.

10 WHAT THEY ARE ARGUING IS THAT THEY ALLEGED -- THEY  
11 WERE INCIDENTALLY COLLECTED, I THINK, AS SOME PART OF A CONTENT  
12 DRAGNET. AND THEY SPECIFICALLY TALK ABOUT THIS UPSTREAM  
13 COLLECTION.

14 THAT REALLY BEARS SOME INVESTIGATION ON YOUR PART,  
15 YOUR HONOR, BECAUSE UPSTREAM -- AND WE'RE HAPPY TO SUPPLY YOU  
16 WITH WHAT YOU NEED -- UPSTREAM IS A REFERENCE TO A TYPE OF  
17 COLLECTION UNDER 702 AT WHICH CERTAIN INFORMATION WAS COLLECTED  
18 OFF OF DATA LINKS.

19 AND MS. COHN'S RIGHT. JUDGE JOHN BATES ISSUED  
20 SEVERAL OPINIONS IN THE FISC ABOUT THAT. AND THEY ARE ALL  
21 DECLASSIFIED NOW. THERE WAS A COMPLIANCE INCIDENT. AND THAT  
22 INCIDENT CONCERNED, IN VERY SIMPLISTIC TERMS, WHETHER THE NSA  
23 WAS OVERCOLLECTING COMMUNICATIONS PURSUANT TO ITS 702  
24 AUTHORITY.

25 IN OTHER WORDS, IT HAD SPECIFIC TARGETS AND SPECIFIC

1 SELECTORS THAT IT WAS COLLECTING ON. BUT IN THE PROCESS FOR  
2 TECHNICAL REASONS IT WAS COLLECTING MORE COMMUNICATIONS OF  
3 NONTARGETS. AND THAT WAS THE COMPLIANCE INCIDENT BEFORE JUDGE  
4 BATES. IT WAS NOT A CONTENT DRAGNET. IT WAS A PROBLEM WITH  
5 HOW 702 COLLECTED INTERNET COMMUNICATIONS OF FOREIGN TARGETS  
6 LOCATED OUTSIDE THE U.S.

7 WHAT'S INTERESTING, TOO, ABOUT THAT IS THAT JUDGE  
8 BATES NEVER ULTIMATELY HELD THAT THE ACQUISITION VIOLATED THE  
9 CONSTITUTION. THE PROBLEM IN THAT CASE WAS THE MINIMIZATION  
10 PROCEDURES WERE NOT SUFFICIENT TO PROTECT THE FOURTH AMENDMENT  
11 INTERESTS OF THE PEOPLE OF THE UNITED STATES.

12 AND SO HE ORDERED THAT HAD THEY BE CHANGED, AND THEY  
13 WERE CHANGED. AND HE APPROVED THEM. AND IN ADDITION, IN THE  
14 PROCESS OF NOT ONLY APPROVING THE MINIMIZATION PROCEDURES, NSA  
15 IMPLEMENTED NEW SYSTEM ARCHITECTURE THAT DID A BETTER JOB AT  
16 ASSURING THAT THOSE COMMUNICATIONS WERE MINIMIZED AND  
17 ULTIMATELY DESTROYED, WHICH IS THE GOAL HERE. IT'S PART OF THE  
18 STATUTORY FRAMEWORK NOT TO COLLECT ON U.S. CITIZENS. AND WHEN  
19 YOU'VE INCIDENTALLY DONE IT, DESTROY IT.

20 IRONICALLY, THE PRESERVATION OBLIGATIONS THAT THEY  
21 ARE TRYING TO IMPOSE WOULD VACATE JUDGE BATES' DECISION AND  
22 REQUIRE NSA TO SUSPEND THAT SYSTEM ARCHITECTURE THAT WE CREATED  
23 AT THE COST OF UNDOUBTEDLY MILLIONS OF DOLLARS IN ORDER TO  
24 PRESERVE EVIDENCE WITH THE LIKELIHOOD THAT IT WOULD EVER BE  
25 RELEVANT TO THIS LAWSUIT WOULD PROBABLY BE ZERO, BECAUSE THEY

1 COULDN'T BE TARGETS. AND THEY ARE ONLY SPECULATING AS TO  
2 WHETHER THEY COULD HAVE BEEN INCIDENTALLY COLLECTED. AND THEY  
3 DON'T LIKELY HAVE STANDING ANYMORE UNDER AMNESTY INTERNATIONAL,  
4 AS WE'VE ARGUED TO THIS COURT BEFORE.

5 **THE COURT:** ANYTHING FURTHER YOU WANT TO SAY?

6 **MS. COHN:** WELL, YOUR HONOR, I WOULD JUST POINT OUT  
7 THAT THE DEFINITION OF "COLLECTED" THE GOVERNMENT HAS A PRETTY  
8 CRAMPED DEFINITION OF "COLLECTED."

9 THEIR DEFINITION OF "COLLECTED" MEANS "TARGETED,"  
10 RESULTING FROM THEIR TARGETED SEARCHES. AND WE KNOW THIS. I  
11 MEAN, THIS WAS THE SUBJECT OF A LOT OF PUBLIC DISCUSSION WHEN  
12 THIS THING FIRST CAME OUT BECAUSE THERE WAS CONGRESSIONAL  
13 TESTIMONY WHERE THE WORD "COLLECTION" WAS USED.

14 AND THEN, IT TURNED OUT THAT THE GOVERNMENT  
15 COLLECTION MEANT MUCH FURTHER ALONG IN THE PROCESS, MUCH MORE  
16 LIKE OUR STEP TWO RATHER THAN STEP ONE.

17 AND, AGAIN, I THINK THAT WHAT IS GOING ON HERE, BIG  
18 PICTURE, WHEN THEY ARE CHARACTERIZING SECTION 702 IS THAT THEY  
19 ARE SAYING IT'S A TARGETED PROGRAM BECAUSE THEY DON'T COUNT  
20 ANYTHING THAT HAPPENS BEFORE THEY ARE TARGETS.

21 AND OUR CONVERSATION IS KIND OF AT CROSS PURPOSES  
22 BECAUSE OUR CLIENTS ARE ORDINARY PEOPLE. THEY ARE MILLIONS OF  
23 AT&T CUSTOMERS. AND THE QUESTION IS: DOES THE GOVERNMENT GET  
24 CUSTODY OF THEIR COMMUNICATIONS AND SEARCH THROUGH THEM ON THE  
25 WAY TO ITS TARGETED PROGRAMS.

1 I THINK THE ANSWER IS FAIRLY CLEARLY YES AT THIS  
2 POINT. AND YOU CAN READ THAT INTO THE WAY THE FISC OPINIONS  
3 ARE LOOKING AT THINGS.

4 BUT I THINK MR. COPPOLINO IS TRYING TO WIN HIS CASE  
5 HERE RATHER THAN TALK ABOUT THE SCOPE OF EVIDENCE PRESERVATION.  
6 THE SCOPE OF EVIDENCE PRESERVATION OUGHT TO BE BASED UPON OUR  
7 COMPLAINT AND WHAT WE'RE SUING OVER. WE ARE CLEARLY SUING OVER  
8 THE MASS COLLECTION OF CONTENT. THAT'S WHAT PARAGRAPHS 50  
9 THROUGH 80 OF THE COMPLAINT TALK ABOUT.

10 THEY ARE NOT TIED TO EXECUTIVE AUTHORITY VERSUS FISC.

11 IT'S NOT TIED TO 702 VERSUS SOME OTHER STATUTE THAT  
12 THE CONGRESS MIGHT PASS IN THE FUTURE TO LET THE GOVERNMENT  
13 CONTINUE TO DO THE SAME THING.

14 IT'S ABOUT THE MASS COLLECTION OF CONTENT AND WHETHER  
15 THAT'S CONSTITUTIONAL OR STATUTORILY AUTHORIZED BY ANY STATUTE.  
16 I DON'T THINK 702 AUTHORIZES --

17 **THE COURT:** ALL RIGHT. MR. COPPOLINO, ANY FINAL  
18 WORDS?

19 **MR. COPPOLINO (BY PHONE):** I THINK A FEW, YOUR HONOR.  
20 FIRST, THANK YOU FOR YOUR PATIENCE AND FOR THIS LONG HEARING.

21 SECONDLY, I'M NOT TRYING TO WIN MY CASE ON THE  
22 MERITS. I'M TRYING TO PROTECT NSA'S VERY SIGNIFICANT NATIONAL  
23 SECURITY INTEREST IN MAINTAINING THE INTEGRITY OF THE 702  
24 PROGRAM, WHICH WE DON'T BELIEVE IS EVEN AT ISSUE.

25 BUT EVEN IF YOU THOUGHT IT WAS AT ISSUE -- AND YOU

1 DON'T HAVE TO DECIDE THAT ISSUE -- THE STEPS THAT THEY HAVE  
2 ASKED TO TAKE WITH RESPECT TO THE PRESERVATION OF DATA ON 702  
3 ARE NOT REASONABLE JUST AS A PRESERVATION MATTER, BECAUSE THEY  
4 ARE FAR TOO BURDENSOME, FAR TOO IMPRACTICABLE. THEY RISK  
5 COMPROMISING NATIONAL SECURITY. AND THEY SHOULD NOT BE ALLOWED  
6 TO STAND, EVEN IF YOU FELT THAT IN SOME WAY BY SOME MANNER 702  
7 WAS PROPERLY AT ISSUE IN THE LAWSUIT.

8 I DON'T KNOW IF I'M GOING TO GET ANOTHER CHANCE TO  
9 SPEAK, SO I THOUGHT I WOULD JUST SAY THAT IN CONCLUSION, YOUR  
10 HONOR, THAT WE HAVE ASKED THAT YOU WOULD STAY OR RESCIND  
11 YESTERDAY'S ORDER FOR THE REASONS THAT WE HAVE -- YOU KNOW, WE  
12 IDENTIFIED IN OUR PAPERS TODAY.

13 AND WHAT I WOULD ASK THE COURT TO DO IS IF YOU ARE  
14 NOT READY TO RULE TODAY ON ALL OF THESE ISSUES IN TERMS OF  
15 EXTENDING THE TRO TO 702, THAT YOU AT LEAST STAY YESTERDAY'S  
16 ORDER.

17 IF YOU ARE GOING TO RULE AND RULE AGAINST US AND  
18 ORDER THE PRESERVATION OF ALL DATA RELEVANT TO 702, AS YOU DID  
19 YESTERDAY, WE WOULD ASK THAT YOU ADMINISTRATIVELY SAY THAT SO  
20 WE CAN CONSIDER OUR APPELLATE OPTIONS IN THE NINTH CIRCUIT.

21 AND IF YOU DECIDE LATER TO ISSUE SUCH A RULING WE  
22 WOULD ASK THAT YOU ISSUE AN ADMINISTRATIVE STAY WITH THAT  
23 RULING SO THAT WE COULD SEEK OUR RELIEF FROM THE NINTH CIRCUIT.

24 **THE COURT:** ALL RIGHT. MS. COHN, ANY PARTING WORDS?

25 **MS. COHN:** NO, YOUR HONOR. WELL, YES, OF COURSE,



1 YOUR HONOR, A COUPLE OF WORDS. AND I WILL TRY TO KEEP IT  
2 SHORT.

3 **THE COURT:** MY VACUUM THEORY THAT NATURE AND LAWYERS  
4 HATE A VACUUM WHEN GIVEN A CHANCE TO --

5 **MS. COHN:** IT'S TRUE. MY CAT HATES THE VACUUM, TOO.

6 **THE COURT:** OKAY.

7 **MS. COHN:** BUT I THINK THAT, YOU KNOW, WE FELT WE HAD  
8 AN EVIDENCE PRESERVATION ORDER IN PLACE IN THIS CASE IN 2007  
9 THAT SPECIFICALLY REQUIRED THE GOVERNMENT TO PRESERVE ALL  
10 EVIDENCE RELEVANT TO THIS CASE, RELEVANT TO OUR CLAIMS.

11 WHEN WE DISCOVERED IN MARCH THAT THE GOVERNMENT HAD  
12 MASSIVELY AND SECRETLY REINTERPRETED THAT, WE ASKED YOU FOR  
13 EMERGENCY RELIEF, AND YOU GRANTED IT.

14 I'M -- YOU KNOW, IT'S KIND OF DEJA VU ALL OVER AGAIN  
15 FOR ME TO BE STANDING UP HERE AGAIN TRYING TO ARGUE THAT THE  
16 GOVERNMENT NEEDS TO PRESERVE ALL EVIDENCE RELEVANT TO OUR  
17 CLAIMS.

18 THEY DO. THAT'S JUST A BEDROCK FACTOR. I'VE TRIED  
19 TO GIVE YOUR HONOR, AND I'VE SUGGESTED THE COURT A WAY AROUND  
20 THIS PROBLEM FOR US. I THINK THE ADVERSE INFERENCE IS THE WAY  
21 TO GO. THERE MAY BE SOME OTHER WAY TO GO THAT WILL WORK ON  
22 THIS. I DON'T WANT EVIDENCE PRESERVATION OBLIGATIONS TO GET IN  
23 THE WAY OF THE GOVERNMENT'S EFFORTS TO PROTECT THE NATIONAL  
24 SECURITY.

25 BUT I ALSO DON'T WANT THE GOVERNMENT'S CLAIMS OF ITS

1 NEEDS FOR NATIONAL SECURITY TO EFFECTIVELY LET IT CHECKMATE OUR  
2 CASE BY DESTROYING THE VERY EVIDENCE THAT THEY SAY --

3 **THE COURT:** ALL RIGHT.

4 **MS. COHN:** -- WE NEED IN ORDER TO --

5 **THE COURT:** ALL RIGHT. SO THE MATTER IS SUBMITTED.  
6 I WOULD LIKE TO ISSUE SOME -- A RULING ONE WAY OR THE OTHER  
7 THIS EVENING -- TODAY.

8 SO I WOULD LIKE -- I AM GOING TAKE A BREAK TO  
9 CONSIDER COUNSEL'S ARGUMENTS, REVIEW THE BRIEFS, AND I'LL BE  
10 BACK. SO STAY AROUND. ALL RIGHT? THANK YOU.

11 AND, COUNSEL, WOULD IT BE POSSIBLE FOR YOU TO STAY ON  
12 THE PHONE? IT WILL BE 15, 20 MINUTES.

13 **MR. COPPOLINO (BY PHONE):** ABSOLUTELY, YOUR HONOR.

14 **THE COURT:** THANK YOU VERY MUCH.

15 (THEREUPON, A RECESS WAS TAKEN.)

16 **THE CLERK:** REMAIN SEATED. COME TO ORDER. COURT IS  
17 AGAIN IN SESSION.

18 **THE COURT:** ALL RIGHT. MR. COPPOLINO AND COMPANY,  
19 ARE YOU STILL ON THE PHONE?

20 **MR. COPPOLINO (BY PHONE):** WE ARE, YOUR HONOR.

21 **THE COURT:** ALL RIGHT. VERY WELL.

22 SO I'M GOING TO ISSUE -- GIVEN THE LATE HOUR AND THE  
23 LIKE, I'M GOING TO ISSUE MY RULING FROM THE BENCH.

24 OBVIOUSLY, YOU CAN ORDER A TRANSCRIPT OF MY RULING,  
25 AND YOU'LL HAVE THAT MEMORIALIZED.

1 SO THE RULING IS AS FOLLOWS: WITH REGARD TO THE  
2 COLLECTION OF COMMUNICATIONS PURSUANT TO SECTION 702, ON THIS  
3 RECORD THE COURT SIMPLY DOES NOT HAVE SUFFICIENT EVIDENCE AND  
4 LEGAL AUTHORITY TO RULE CONCLUSIVELY AT THIS TIME.

5 ACCORDINGLY, TO THE EXTENT PLAINTIFFS SEEK TO ENFORCE  
6 THIS COURT'S EARLIER PRESERVATION ORDERS TO INCLUDE DATA  
7 COLLECTED PURSUANT TO SECTION 702, THAT REQUEST IS DENIED ON  
8 THIS CURRENT RECORD WITHOUT PREJUDICE.

9 IN ORDER TO PROTECT THE GOVERNMENT'S IMPORTANT  
10 FUNCTION TO MAINTAIN OUR NATIONAL SECURITY PROGRAMS, AS SHOWN  
11 BY THE DECLARATION OF RICHARD A. LEDGETT, L-E-D-G-E-T-T,  
12 DIRECTOR OF NATIONAL -- DEPUTY DIRECTOR NATIONAL SECURITY  
13 AGENCY, THE COURT CANNOT ISSUE A RULING AT THIS TIME REQUIRING  
14 THAT THE GOVERNMENT DEFENDANTS RETAIN ALL DATA COLLECTED  
15 PURSUANT TO SECTION 702.

16 ACCORDINGLY, THE GOVERNMENT RESCINDS -- THE COURT  
17 RESCINDS ITS ORDER DATED JUNE 5TH, 2014 AS TO THE RETENTION OF  
18 THE SECTION 702 EVIDENCE, BUT MAINTAINS ITS RULING WITH REGARD  
19 TO THE PRESERVATION OF ALL DATA RELEVANT TO PLAINTIFFS' PENDING  
20 CLAIMS.

21 IN ORDER TO PROVIDE THE COURT WITH SUFFICIENT  
22 BRIEFING ON VARIOUS OPEN ISSUES, BOTH THAT WERE ALREADY OPEN  
23 AND ONES THAT WERE RAISED BY TODAY'S PROCEEDINGS, THE COURT  
24 HEREBY ORDERS THE PARTIES TO BRIEF THE FOLLOWING ISSUES IN  
25 THEIR UPCOMING SUBMISSIONS DUE TO THE COURT.

1 DEFENDANTS HAVE RESPONSIVE BRIEFS DUE JUNE 27TH AND  
2 PLAINTIFFS MAY FILE A RESPONSE TO THAT BRIEF BY NO LATER THAN  
3 JULY 18, 2014.

4 AND THE ISSUES ARE AS FOLLOWS. ONE: WHETHER  
5 PLAINTIFFS' CLAIMS ENCOMPASS SECTION 702, AND WHAT IS THE SCOPE  
6 OF THE COLLECTION ACTIVITIES UNDER THAT PROVISION?

7 THE SECOND ISSUE: THE APPROPRIATENESS OF AN ADVERSE  
8 INFERENCE OR STANDING BASED UPON THE ALLEGED DESTRUCTION OF  
9 DOCUMENTS COLLECTED PURSUANT TO BOTH SECTIONS 215 AND 702.

10 SO ALTHOUGH I WAS SPEAKING FAST, BUT NOT AS FAST AS  
11 COUNSEL, I WILL URGE YOU TO ORDER THE TRANSCRIPT OF THESE  
12 REMARKS.

13 SO I'M NOT ENTERTAINING FURTHER ARGUMENT, BUT IS  
14 THERE ANYTHING FURTHER THAT THE PLAINTIFFS WISH TO STATE?

15 **MS. COHN:** YOUR HONOR, I WOULD BE REMISS IF I DIDN'T  
16 REMIND YOU WE HAD SOME OTHER MATTERS IN THE FIRST UNITARIAN  
17 CASE THAT WE'RE WAITING FOR A HEARING DATE ON.

18 **THE COURT:** YOU WILL GET IT.

19 **MS. COHN:** AND THE FOUR QUESTIONS IN JEWEL, AS WELL.

20 **THE COURT:** RIGHT.

21 **MS. COHN:** I THINK I UNDERSTAND. SHOULD WE SET A  
22 HEARING DATE --

23 **THE COURT:** NO.

24 **MS. COHN:** -- ON THESE MATTERS?

25 **THE COURT:** I WILL SET A HEARING AS APPROPRIATE.

1           **MS. COHN:** OKAY.

2           **THE COURT:** ALL RIGHT. MR. COPPOLINO, ANYTHING  
3 FURTHER FROM THE GOVERNMENT?

4           **MR. COPPOLINO (BY PHONE):** NOTHING FURTHER, YOUR  
5 HONOR. THANK YOU VERY MUCH.

6           **THE COURT:** ALL RIGHT. THANK YOU VERY MUCH. WE'RE  
7 ADJOURNED.

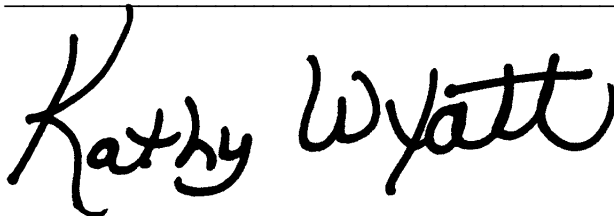
8           (THEREUPON, THIS HEARING WAS CONCLUDED.)

9 STENOGRAPHY CERTIFICATION

10           "I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT  
11 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER."

12           JULY 5, 2014

13           KATHERINE WYATT

14 A handwritten signature in black ink that reads "Kathy Wyatt". The signature is written in a cursive, flowing style. It is positioned below a horizontal line and above another horizontal line, which appear to be part of a signature block.