

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jeffrey S. White, Judge

CAROLYN JEWEL, TASH HEPTING,)
et al.,)
)
Plaintiffs,)
) NO. C 08-04373 JSW
vs.)

NATIONAL SECURITY AGENCY, et)
al.,)
)
Defendants.)

FIRST UNITARIAN CHURCH OF LOS)
ANGELES, et al.,)
)
Plaintiffs,)
) NO. C 13-03287 JSW
vs.)

NATIONAL SECURITY AGENCY, et)
al.,)
) San Francisco, California
Defendants.) Wednesday, March 19 2014
) 2:00 p.m.

AMENDED TRANSCRIPT OF PROCEEDINGS

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1 **THE COURT:** Good afternoon. Please be seated.

2 **THE CLERK:** Calling Case Number C. 08-4373,
3 *Caroyln Jewel, et al. versus National Security Agency, et al.*,
4 and Case Number C. 13-3287, *First Unitarian Church of Los*
5 *Angeles, et al., versus National Security Agency, et al.*

6 Counsel, please step forward to the podiums and state your
7 appearances.

8 **MS. COHN:** Good afternoon, Your Honor. Cindy Cohn,
9 for the plaintiffs in both cases.

10 **THE COURT:** Good afternoon.

11 **MR. WIEBE:** Good afternoon, Your Honor.
12 Richard Wiebe, for the plaintiffs in *Jewel* and *First Unitarian*.

13 **THE COURT:** Good afternoon.

14 **MR. OPSAHL:** Good afternoon, Your Honor.
15 Kurt Opsahl, for the plaintiffs in *Jewel* and *First Unitarian*.

16 **THE COURT:** Good afternoon.

17 **MR. GREENE:** Good afternoon, Your Honor.
18 David Greene, for the plaintiffs.

19 **THE COURT:** Good afternoon.

20 **MR. RUMOLD:** Good afternoon, Your Honor.
21 Mark Rumold, for plaintiffs.

22 **THE COURT:** Good afternoon.

23 **MR. GILLIGAN:** Good afternoon, Your Honor.
24 James Gilligan, with the Department of Justice, for the
25 Government Defendants.

1 **THE COURT:** Good afternoon.

2 **MS. BERMAN:** Good afternoon, Your Honor.

3 Marcia Berman, also from the Department of Justice, for the
4 Government Defendants.

5 **THE COURT:** Good afternoon.

6 **MR. PATTON:** Rodney Patton, from the Department of
7 Justice.

8 **THE COURT:** Good afternoon.

9 **MR. BAYSE:** Chad Bayse, with NSA.

10 **THE COURT:** All right. Welcome. All right. Before
11 we get started, I have a couple of comments I'd like to make.
12 As the parties know, now before the Court is Plaintiffs'
13 request for a leave regarding the Government's preservation
14 duties in both *Jewel versus NSA*, and *First Unitarian Church*
15 *versus NSA*.

16 Together, these related cases challenge the lawfulness of
17 the National Security Agency's collection of
18 communications-surveillance materials first authorized by
19 Executive Order of the President in October 2001 following the
20 terrorist attacks of September 11th, and continuing to the
21 present time under the supervision of the Foreign Intelligence
22 Surveillance Court.

23 The issues raised by the preservation of evidence in these
24 matters requires the Court to balance important competing
25 policies within our structure of government. On the one hand,

1 the Court must weigh the critical mission of the
2 National Security Agency to protect citizens from real
3 terrorist threats, and the Government's obligations under
4 federal statute to protect the collective surveillance
5 materials from possible dissemination or misuse. On the other
6 hand, the Court must balance the significant constitutional
7 challenge made by plaintiffs here to the Government's
8 collection efforts, and must protect the integrity of the court
9 system to preserve evidence relevant to ongoing litigation.

10 However, the hearing today is limited in scope. It is not
11 about the substantive content of the Plaintiffs' challenge to
12 the governmental surveillance efforts. And although this Court
13 is concerned about the Government's compliance with its prior
14 preservation orders, this hearing conducted to address the
15 emergency issue of the Government's impending directive to
16 destroy evidence is not about enforcement of this Court's
17 earlier preservation orders. That is appropriately the subject
18 of further briefing by the parties, and further nonurgent
19 consideration by this Court.

20 The record should also reflect that yesterday, the Court
21 had reviewed all of the classified documents filed to date in
22 this matter, as well as the briefs, and public submissions made
23 by the parties.

24 In order to make the record clear, given the public
25 interest in these proceedings and the fact that it's being

1 videotaped, the Court will depart from its normal procedures,
2 and -- where I don't read questions into the record, and will
3 read the questions issued yesterday by the Court, and have the
4 parties address each of them in turn.

5 So starting right off with the questions, the first
6 question, which I --

7 And most -- many of these questions are addressed in the
8 first instance to the Government Defendants. That may change
9 with respect to other ones; but of course, I will give all of
10 the plaintiffs an opportunity to respond.

11 So the first question is as follows. Assuming without
12 deciding that the Preservation Order in *Jewel* does not cover
13 the retention or destruction of materials subject to orders of
14 the Foreign Intelligence Surveillance Court, or FISC, what is
15 the fundamental difference in the position of the Government
16 now on the argument that materials subject to FISC orders are
17 not similarly subject to preservation for discovery to
18 plaintiffs in *First Unitarian Church*?

19 And, just to complete the question, having made many of the
20 same arguments which failed to persuade the Court when it
21 issued the preservation order in the multidistrict litigation
22 and in *Jewel*, why should the Court be persuaded now that the
23 content of the materials allegedly collected under FISC
24 supervision, and clearly subject to the claims in *First*
25 *Unitarian*, should be subject to different preservation

1 treatment than the material allegedly collected under
2 Presidential directive, and clearly subject to the claims in
3 *Jewel*?

4 So I'll first hear from the defendant attorneys, and then
5 I'll hear from Plaintiffs' counsel.

6 And it would help the Court, at least throughout the
7 hearing, if you would just reintroduce yourself each time you
8 speak, so that it's clear to the reporter and to the recording
9 who is actually speaking.

10 **MR. GILLIGAN:** Very well, Your Honor. James Gilligan
11 again, for the Government.

12 **THE COURT:** Yes.

13 **MR. GILLIGAN:** Your Honor, just to start with a point
14 of clarification regarding this question, we take the Court's
15 question to be focused on the telephony metadata that are
16 subject to the five-year retention limit under FISC's orders,
17 because apart from that, as a general matter, we are -- that is
18 to say, the Government is preserving data and information
19 regarding the collection of telephony metadata pursuant to
20 Section 215 under FISA. There's no dispute there that that
21 relevant information should be collected.

22 But we -- the concern here -- and I think this would be the
23 focus of my answer -- is the telephony metadata that were
24 subject to the age-off requirements under the FISC's orders.

25 **THE COURT:** That's correct. Especially -- and the

1 occasion, of course, for the Court's issuing of the Temporary
2 Restraining Order plus having this hearing is because of the
3 potentially imminent threat that these documents or this
4 metadata would be destroyed pursuant to federal statute, under
5 the guidance of the FISC court. So you're correct in your
6 assumption.

7 **MR. GILLIGAN:** Okay. Thank you, Your Honor.

8 Well, there are essentially, as we see it, three
9 differences, then, between the telephony metadata collected
10 pursuant to FISC orders, and the telephony metadata previously
11 under Presidential authority that we are continuing to
12 preserve, pursuant to the orders in *Jewel* and in the
13 multidistrict litigation.

14 Well, the first difference that I'll mention is, as opposed
15 to the static set of data that were collected under
16 Presidential authority in a program that's no longer
17 operational, we are talking here about data that are going to
18 have to be aged off periodically in order to comply with FISC
19 requirements in a program that is still ongoing. And that
20 creates greater burdens of preservation of a financial and
21 technological -- and, in terms of personnel resources --
22 greater burdens on the NSA; and therefore, greater burdens of
23 resources from its core national-security mission.

24 For example -- and this is set forth in both the -- well,
25 this is set forth in the -- certainly in the unclassified

1 public declaration by Ms. Shea that was submitted with our
2 brief. Because we're talking about a periodic transition of
3 data from the operational database to a preservation medium,
4 we've got to develop a capability to do that, which is going to
5 require a software-development effort that could take many
6 months, and involve a diversion of many NSA resources.

7 So in terms of balancing the relevance of the data versus
8 the burden of preserving them, the burden is greater here with
9 respect to these data than with respect to the data under the
10 Presidential program.

11 Second, you know, in our calculus, there's far less need
12 for retention of the specific data that are at issue here.
13 It's -- it's not an all-or-nothing proposition that we are
14 contemplating here. We're talking about destruction, as the
15 FISC requires, of the data to be aged off under the five-year
16 retention limit, while keeping all of the other data in the
17 database -- up to five years' worth at any time -- for ongoing
18 operational purposes.

19 **THE COURT:** But if the lawsuit goes on for any period
20 of time, especially if it goes up on appeal, which it is likely
21 to do, then the quantum of evidence that will be subject to
22 destruction will increase periodically. Isn't that true?

23 **MR. GILLIGAN:** That is true, Your Honor; but yet --
24 but as new data are collected as part of the ongoing operations
25 of the Program, at all times there will be some collection

1 approaching five years' worth of data.

2 And it stands to reason that if there's evidence to support
3 Plaintiffs' standing and what we're aging off, there will still
4 be evidence to support Plaintiffs' standing of what we are
5 continuing to retain. Certainly, this is a point that the
6 plaintiffs have not addressed in their papers. There's no --
7 there's no evidence or argument in the record to suggest
8 otherwise.

9 **THE COURT:** But is it merely the standing issue that
10 is teed up here, or is it perhaps the scope of the surveillance
11 that the NSA has been conducting?

12 And aren't the plaintiffs entitled to know the full scope
13 of what is potentially down the road, assuming they get that
14 far? And therefore, as certain evidence is destroyed, doesn't
15 that reduce, perhaps, the evidence that might be available to
16 the plaintiffs, as to the quantum and the breadth of the
17 surveillance? And also, couldn't some of the older data be
18 directly relevant to the claims that were made by the
19 plaintiffs, at least, in the *First Unitarian* lawsuit?

20 **MR. GILLIGAN:** Well, we have not disputed their
21 relevance in principle, Your Honor. We're very clear about
22 that, but when we get to the nub of: Okay. Is this relevant
23 evidence that is so potentially beneficial to the Plaintiffs'
24 case, that preservation is required, notwithstanding the burden
25 of doing so?

1 We -- we -- simply ascertaining that the data are relevant
2 within the meaning of the Rule 26 is only the start of the
3 inquiry. It's not -- it doesn't get us the answer to the
4 question.

5 **THE COURT:** So, as you put it, the nub of the issue,
6 really, is balancing the retention or destruction of what the
7 Government considers is relevant information, versus the cost
8 of retaining it, both in terms of financial costs as they are
9 quantified in the papers submitted to the Court, as well as the
10 cost in personnel who, the Government argues, would be diverted
11 from their core mission?

12 **MR. GILLIGAN:** Correct, Your Honor, as well as
13 technological resources, all detailed in the classified
14 declarations, so it's not a matter I can go into in any depth
15 here.

16 But swinging back just quickly to the question of need and
17 your remarks about the scope the Program, we are, as I said,
18 preserving a great deal of evidence regarding the operational
19 details of the Program; the documents about the Program, as
20 opposed to the data acquired under the Program. And while I
21 can't speak in any specificity to that, because they're still
22 classified in nature and the limits of my own knowledge, it
23 again would stand to reason that simply getting into questions
24 about the scope of the Program is something that could be
25 inquired into hypothetically through evidence other than the

1 data in question here.

2 **THE COURT:** What if hypothetically -- and I say this
3 without regard to anything that the Court has reviewed in
4 either in the public record or the classified documents. What
5 if hypothetically the facts were to show down the road that the
6 Program is evolving and changing, so that the destruction of
7 certain documents might actually take away part of the
8 Plaintiffs' arguments, if that were the case? And we don't
9 know that, or we can't -- if we did know it, we can't speak
10 about that, but wouldn't that be a potential risk of destroying
11 older documents; that is to say that if the Program were
12 changing or were to change, the defendants might be deprived of
13 that evidence?

14 **MR. GILLIGAN:** Well, assuming that, again,
15 hypothetically speaking, we were -- that the Program was of
16 such a scope that one day we're collecting information about
17 the communications of certain persons, but then as the Program
18 dramatically narrows and we're no longer doing so, even if --
19 even if something like that were to occur, those data would
20 still be there on -- under the FISC orders for up to five years
21 after they've been collected.

22 There would be an opportunity when that time came perhaps
23 for us to approach the Court in an *ex parte* fashion to discuss
24 how we should proceed.

25 **THE COURT:** Well, what if the NSA was doing

1 something, say, five years ago that was broader in scope, and
2 more problematical from the constitutional perspective, and
3 those documents are now aged out? And -- because now under the
4 FISC or the orders of the FISC Court, the activities of the NSA
5 have -- I mean, again, this is all hypothetical -- have
6 narrowed. And wouldn't the Government -- wouldn't the
7 plaintiffs then be deprived of that evidence, if it existed, of
8 a broader, maybe more constitutionally problematic evidence, if
9 you will?

10 **MR. GILLIGAN:** There -- we submit a twofold answer to
11 that, Your Honor.

12 We submit that there are documents that -- and this goes to
13 Your Honor's Question 5B, perhaps. There are documents that
14 could shed light on the Plaintiffs' standing, whether we've
15 actually collected information about their communications, even
16 in the absence of those data.

17 As far as -- as Your Honor's hypothetical goes, it's a
18 question that I am very hesitant to discuss on the public
19 record; but I can say if this is something that the Court
20 wishes to explore, we could we could make a further classified
21 *ex parte* submission to Your Honor on that point.

22 **THE COURT:** All right. Did you want anything,
23 Ms. Berman?

24 **MS. BERMAN:** No, thank you.

25 **THE COURT:** Let's hear -- all right. Is that the --

1 is that the --

2 **MR. GILLIGAN:** The only other difference I would draw
3 the Court's attention to between the current data --

4 **THE COURT:** Yes.

5 **MR. GILLIGAN:** -- and the data we are preserving from
6 the Presidential program is the fact that -- I believe
7 Your Honor touched on this a few moments ago -- that these data
8 were acquired pursuant to the FISA and the FISA's minimization
9 requirements, which direct that, in the interests of protecting
10 the privacy interests of the U.S. persons, data that are not
11 being used for purposes of acquiring foreign intelligence
12 therefore should be destroyed.

13 **THE COURT:** All right. Thank you very much.

14 Ms. Cohn. So isn't that somewhat of an irony -- and you
15 noted this in your papers, Ms. Cohn -- that is, that the very
16 documents that you claim constituted constitutional
17 interference, your clients are seeking to preserve, even though
18 the law -- the policy and the literal wording of the law --
19 seems to require that those materials be minimized, sort of, if
20 you will, to the extreme, by being destroyed? So do you agree
21 with that irony?

22 **MS. COHN:** Yes, Your Honor. It's a very strange
23 position to be in, to be arguing for the preservation for the
24 very records we think they shouldn't have gotten in the first
25 place.

1 **THE COURT:** All right.

2 **MS. COHN:** Nonetheless, the Government has not
3 wavered from its position that we cannot -- you know, unless we
4 can demonstrate individual collection for each of the
5 individual plaintiffs, we can't pursue this case. And so I
6 think they've put themselves in a position where, on the one
7 hand, their position with regard to standing, which we disagree
8 with -- but their position with regard to standing requires the
9 retention of the very records that now they're seeking to
10 destroy. So, you know, it's somewhat ironic for me, but I also
11 think there's a little irony on the other side, as well.

12 **THE COURT:** What about the argument that the
13 Government just made, which is that there's plenty of -- if you
14 will, there's plenty of stuff to go around here? It's not like
15 it's all going to be destroyed, you know, immediately. It's
16 going to be destroyed incrementally, and aged out?

17 So wouldn't your concerns be allayed by the fact that there
18 will continue to exist at any point in time massive amounts of
19 documents -- or data, shall we say?

20 **MS. COHN:** Well, again, if the Government is prepared
21 to make some sort of a statement that we can rely on going
22 forward about what was included in the records before they
23 destroyed them, then -- I mean, this was our suggestion to the
24 Court as a way to allow the records to be destroyed, without
25 the information within them being lost to us, as something we

1 can do.

2 I think that five years -- a five-year backdrop, for --
3 for -- for, you know, standing, and for the fact of collection
4 is probably not sufficient here.

5 First of all, I'm a little puzzled by their position in
6 front of Your Honor, because what we proposed is what they
7 proposed to the FISC. They proposed just keeping everything,
8 for purposes of the litigation.

9 And the FISC turned them down; but it turned them down
10 based upon not a full record of the litigation needs.

11 So I'm a little confused about why they're fighting in
12 front of you for the very thing they asked for in the FISC.
13 They didn't talk about operational problems or difficulties
14 preserving it when they asked the FISC for permission for this
15 on March 7.

16 The other thing, Your Honor, is, as I think Your Honor
17 pointed out, you know, times change. You know, one of my
18 clients in the *Jewel* case has passed away. And so, you know,
19 this litigation's being going on now for a long time. I
20 started this in 2006, eight years ago. I certainly wouldn't
21 want to tell his widow that, you know, because the Government
22 aged off the information, that the cause that he tried to stand
23 up for, you know, just goes away, because, you know, he didn't
24 manage to outlast the litigation.

25 I'm -- I also think that the President is indicating that

1 he might end or significantly change the Program. And so I
2 think your concern about changes in the Program over time is a
3 very legitimate one that may leave our clients in a situation
4 in which they can't prove that the Government did what the
5 Government actually did with their telephone records.

6 I think it's not a fair place to put them in, to have to
7 guess whether their information is -- happens to be in the five
8 years that the Government has it at any point in time.

9 **THE COURT:** How does the Government -- how does the
10 Court deal with the issue of -- although, putting aside that
11 the Government may have taken a different position before the
12 FISC Court, it is represented in the public filing that there
13 would be -- putting aside the economic issues -- they don't
14 persuade the Court. But the operational issues and the
15 diverting of resources of the NSA to -- just to keep these
16 documents. And let's assume hypothetically that the
17 representations made -- and I don't think what I'm about to say
18 is classified. There's an attempt to support that in the
19 classified portion of the materials. How does that Court
20 balance those legitimate interests?

21 **MS. COHN:** Well, yeah, it's difficult, Your Honor.
22 I'm shadow boxing here, because I don't know what they've told
23 you in their secret presentation. It does appear that the
24 NSA's pretty good at saving big amounts of data, so I would
25 question whether it's really not within their capabilities to

1 keep this, but I don't know what they've told you in secret.

2 I do think that the -- you know, we tried to point the way
3 to an answer here, which is, you know, this is all about their
4 position that the clients can't possibly sue unless they can
5 prove that their individual phone records were collected. And
6 if that position was not the position that the Court adopted,
7 or if the Court put into someplace where we could preserve that
8 fact -- right? -- in a way that I could rely on later in a
9 motion for summary judgment; or as the case goes forward, I
10 don't think I need them to keep the actual records. I need to
11 know the fact that the records were collected, and what time
12 frames for damages and for mapping a class. In *Jewel*, we have
13 a class action of the AT&T customers. Those are the only
14 things I need those records for.

15 I don't need to know on February 27th, there was a phone
16 call from Joe to Mary. That was included in the records.

17 I would like that. And I think as a litigator, you know,
18 you always kind of want everything; but we thought hard about
19 this, Your Honor. We thought about what is the minimum we need
20 in order to be able to go forward with our case, so that you
21 could have an opportunity to balance these things in a way that
22 I think is very different than the position I'd be taking in
23 ordinary litigation, which would be, you know, we don't know
24 yet what's in those records, and until we get discovery,
25 nothing should be --

1 **THE COURT:** So your primary focus really is on the
2 standing issue before you get to the standing; i.e., were or
3 were not your clients actually illegally or surveilled --

4 **MS. COHN:** Right.

5 **THE COURT:** -- period; and if so, to what extent and
6 over what period?

7 **MS. COHN:** I think that's right. I hesitate to land
8 it only on standing, Your Honor, because the Government has
9 raised this fact -- this fact that -- you know, this question
10 of whether they, in fact, collected or not in support of a
11 bunch of different arguments that they've made.

12 I think it sounds most easy to see in it standing, but I
13 would say that rather than thinking about standing, we think
14 about it in terms of this fact: The fact of the collection of
15 our clients' records. And then how that fact gets played out
16 in support of what legal arguments we might make or defenses
17 they might raise, we might disagree and we might have arguments
18 later on; but I don't have to argue about the fact of
19 collection or the time frame.

20 Again, I've got a client who's deceased. I've got some
21 other things where I've kind of got a class where I'm going to
22 need to know a little bit about the time frame for collection
23 at least for possibly damages purposes, but --

24 So I agree with you. I think standing is the way that I
25 think of this first; but I'm not sure that that's the only

1 place that the Government might try to argue this. So I'd like
2 to have the fact established in a way that I can rely on it,
3 and that they are estopped to deny it for whatever purposes we
4 have going forward in the case.

5 **THE COURT:** Let me ask you this question. And I
6 don't think this reveals anything classified, because there are
7 three possible answers to the question "Were your clients
8 surveilled?"

9 "Yes," "No," or "We don't know."

10 **MS. COHN:** Yes.

11 **THE COURT:** Let's assume the answer was "No,"
12 hypothetically, without any basis for it. Let's assume it --
13 where would that leave you, if they could say that in a sworn
14 declaration or something that was credible? Where would that
15 leave this case?

16 **MS. COHN:** Well, Your Honor, I guess I'd have to
17 unpack that a little bit, given that the Government has
18 admitted mass collection, you know, repeatedly and a lot since
19 2013. How would that -- how does that play, given that I've
20 got 23 different plaintiffs groups in the First Unitarian
21 Church who have a range of providers, and who call a lot of
22 people for other providers?

23 I guess I would -- I would find it difficult, given what we
24 know on the public record right now, to believe that somehow,
25 magically, none of the people who I represent have ever had

1 their phone records collected by the Government.

2 **THE COURT:** Okay. So let's say the answer -- the
3 next possibility is "Yes." Maybe you'd want to know: What was
4 the scope? You know. What was the scope? What was the --
5 both temporally and from a quantitative perspective. Correct?

6 **MS. COHN:** I think so. And temporally is, frankly,
7 more important, Your Honor, because the Government, as we know,
8 and as has actually become clear -- that the Government has had
9 different -- if you want, you know, different authorities under
10 which they've conducted the same behavior over time.

11 So I think Your Honor might feel differently about stuff
12 that was collected under Presidential authority, or stuff that
13 was collected under one FISC order.

14 We know in the context of the FISC orders that have been
15 unsealed so far that there's been a lot of tinkering with the
16 Program in terms of what they're allowed to collect, how long
17 they're allowed to keep it. And they've had to admit some
18 mistakes in overcollection in various different programs. And
19 so I think we do need to have some idea of the time frame, in
20 order to be sure what this -- you know, what the scope of the
21 of the collection was; but I think time frame is more
22 important.

23 I mean, I don't need to know that they collected
24 20 million -- you know, 2,000 calls from my clients in February
25 of 2008. I just need to know that as of February 2008, there

1 was a bulk-collection order that included my clients' carriers.

2 **THE COURT:** Oh, okay. Without regard to a search of
3 the specific call data?

4 **MS. COHN:** I think, Your Honor. I mean, our case
5 turns on the collection of the call records data.

6 What the Government does after it -- their searching, which
7 is all still a very murky kind of situation -- we could sort
8 that out later, but the first step is I need to know that they
9 collected it.

10 **THE COURT:** Well, let me ask you this. It's easy to
11 ask it rather than to assert something that might be
12 classified. Has it come out of the public record as to the
13 need -- the identity of any carriers who may or may not have
14 been cooperating with the Government?

15 **MS. COHN:** Well, certainly the Government is no
16 longer denying the Verizon order that was the subject of the
17 very first revelation in June of last year; Verizon Business
18 Services, which is a bunch of Verizon services. So that one, I
19 don't think the Government is denying anymore.

20 And this is my -- the thing that we pointed you to in the
21 *ACLU versus Clapper* case. In that case, the Government isn't
22 contesting that the ACLU's phone records were collected. They
23 were a Verizon customer during the time frame of that
24 particular order.

25 I think that if you look at Congressional testimony, if you

1 look at the Presiden'ts statements, if you look at a lot of
2 statements from the Department of Justice and the NSA since
3 then, it's very clear that there is a massive, bulk,
4 telephone-records collection. They have a program. They have
5 admitted that.

6 And there are things in various other -- things about the
7 scope of it, about which there's references to various
8 companies -- Company A, Company B, Company C -- and FISC
9 orders, for instance, that talk about the size of the company
10 that -- you know, if you do a little searching online, you can
11 figure out that a company of a certain size -- that's AT&T.
12 And company of a certain size --

13 **THE COURT:** So what you want to know or what your
14 clients want to know is: What carriers? You want the full
15 list of carriers or companies that were coöperating with the
16 Government, and over what time period?

17 **MS. COHN:** I think, Your Honor, that would clear this
18 up. I mean, I honestly think there's a lot of public evidence
19 here. We've made presentations to you in the stuff that we've
20 filed so far that there's really no secret about the fact that
21 they're collecting AT&T phone records, and have been for a very
22 long time.

23 But as long as the Government is taking the position that
24 that's not enough -- I mean, we think it's enough. And we've
25 told you we think it's enough. But as long as the Government's

1 taking the position that's not enough, I don't think they can
2 simultaneously say that you don't have enough evidence; that
3 we've collected your information, and then destroyed the very
4 evidence we would need to make that showing, consistent with
5 their own standards. I just think that's not fair or right.

6 **THE COURT:** Okay. All right. Anything further on
7 that question?

8 **MS. COHN:** I think the only other thing -- so, I
9 mean, in answer to the actual question you asked, Your Honor --

10 **THE COURT:** I did get you off on a tangent.

11 **MS. COHN:** I think that the Court's language in the
12 MDL order from 2007 that was adopted in *Jewel* should apply in
13 *First Unitarian*. We suggested an additional clause, to be
14 really clear about the fact that this preservation requirement
15 doesn't depend on the particular legal authority under which
16 the Government's doing the collection.

17 So Mr. Gilligan pointed out that, you know, they're talking
18 about collection under Section 215.

19 I think it's not at all clear that collection telephone
20 records is only happening under Section 215 of the PATRIOT Act

21 We didn't sue only about the collection that's happening
22 under whatever hat the Government happens to be wearing this
23 day. We sued about the collection of telephone records. So I
24 wouldn't want the preservation order to be tied to the
25 particular authority that they're under right now, because we

1 know that could change.

2 And, in fact, you know, President Obama has asked, I think,
3 for -- very soon for a report back about how the
4 telephone-records-collection program might change; but it's not
5 at all clear they're going to stop collecting telephone
6 records. I think there's a good possibility they're just going
7 to change the hat under which they do it.

8 So we wouldn't want our preservation order to be tied to
9 any particular authority.

10 And I don't think -- Judge Walker didn't do that in 2007.

11 I think the Government's arguments that that is what
12 happened are wrong. And I know Your Honor wants to hear about
13 that later.

14 **THE COURT:** Yes.

15 **MS. COHN:** I wouldn't want us to re-create that
16 problem now.

17 **THE COURT:** All right. I got you. All right.

18 Anything you want to say in reply, Counsel?

19 **MR. GILLIGAN:** Well, Your Honor, as both Plaintiffs'
20 counsel alluded -- took something of a detour there through a
21 number of the other questions that the Court has raised. And I
22 can address those issues now or.

23 **THE COURT:** No. We can raise -- and I want to keep
24 things sort of in the order in which I proposed them, but just
25 in response to the question, the Government -- there seems to

1 be an inconsistent position the Government has taken before the
2 FISC Court versus this Court. So that is directly related to,
3 I think, Question Number 1. And it also relates to the issue
4 of the burden that the Government claims this would put on
5 them, if they had to preserve this aged -- otherwise aged-out
6 information.

7 **MR. GILLIGAN:** Correct, Your Honor.

8 The situation that we found ourselves in before we filed
9 our motion for the FISC was that we were coming up on our
10 deadline to comply with the five-year retention requirement.
11 And we -- and we had about half dozen of these cases around the
12 country, and did not -- calculated that we simply did not have
13 time before action had to be taken one way or the other to
14 litigate this issue in a half dozen courts around the country
15 with various sets of plaintiffs. And so we went to FISC, and
16 asked the FISC for relief from the five-year destruction
17 requirement, as we put it, until we could be relieved of any
18 preservation obligations we might have in the civil litigation.

19 We never contemplated that our motion before the FISC would
20 be the end of the matter. We were asking for leave, really, as
21 it were, to put a lit. hold on these data until the issue that
22 we are talking about today could be resolved.

23 Now, unfortunately, the FISC denied that motion without
24 prejudice, but that's what then put us in the emergency
25 circumstance we find ourselves today; but we'd always

1 contemplated that even if the FISC had given us relief, if the
2 burdens of maintaining the data proved to be too great on the
3 NSA -- and we've outlined those burdens in the classified
4 submissions we've made -- that we would come to the District
5 Courts, as we are in this Court today, seeking relief from a
6 long-term obligation to preserve those data.

7 And since that seems to be what we're talking about here --
8 a long-term obligation pending the completion of litigation
9 certainly in the *First Unitarian* matter -- we felt we had no
10 choice but to resist that.

11 **THE COURT:** All right. Is there anything further you
12 want to say on that point, Ms. Cohn?

13 **MS. COHN:** Well, the only thing that is a bit of a
14 puzzle in what they -- first of all, this second phase of their
15 proposal to -- that they were going to come to you and to the
16 Courts around the country and ask for relief from preservation
17 isn't really reflected in what they said to the FISC. It
18 certainly isn't reflected in anything ever, before now; but
19 also it does appear from the Shea Declaration that they
20 actually were destroying evidence; that they were -- they were
21 continuing their destruction through until March 11th, which
22 was four days after they asked the FISC for -- for relief.

23 And one of the questions that this raises for me is: We
24 filed *First Unitarian* and *Jewel*. The Government was clearly on
25 notice in June that it was going to happen. I think there's a

1 chance that, even in *First Unitarian*, they haven't preserved
2 everything that they needed to preserve, because it appears
3 they have been continuing their five-year roll-off destruction
4 efforts all the way through until March 11th, from June.

5 **THE COURT:** Well, as I said in my opening comments, I
6 don't want to get into that now; not that I'm minimizing it in
7 any way, but I do want to focus on what to do now vis-à-vis
8 preservation, so at least as of this moment or as of the
9 issuing of the Temporary Restraining Order, whatever practice
10 was going on would cease or would not cease.

11 So I want to stay with you, Ms. Cohn.

12 Yes.

13 **MR. GILLIGAN:** Your Honor, can I answer that specific
14 point while the moment is still ripe?

15 **THE COURT:** Yes.

16 **MR. GILLIGAN:** I want to be very clear about this,
17 because this is a point raised in Plaintiffs' reply. We didn't
18 have a chance to respond to it in writing.

19 Since this suit was filed, the NSA has destroyed no
20 telephony metadata collected under Section 215 for purposes of
21 complying with the FISC's five-year retention requirement, or
22 at least, as far as I am aware, for any other reason. And I
23 trust that is clear in -- or at least it can be understood in
24 the basic classified files.

25 **THE COURT:** Since the question's ripe, now I'll

1 violate my own rule and get into this.

2 Has there been any evidence that the NSA has destroyed that
3 would be properly within the subject matter of the *First*
4 *Unitarian* lawsuit since the lawsuit was filed?

5 **MR. GILLIGAN:** Not that I'm aware of, Your Honor.

6 **THE COURT:** Okay. Well, that's to be continued until
7 a later time.

8 **MR. GILLIGAN:** We're moving on a very fast timetable
9 here.

10 **THE COURT:** I understand. Ms. Cohn, I want you to
11 address Question Number 2, which is: Must the Court determine
12 the intended scope of the allegations in the *Jewel* Complaint,
13 and the resulting preservation order in that matter, or may it
14 issue a similar preservation order -- excuse me -- in
15 *First Unitarian Church*, and proceed accordingly and
16 concomitantly?

17 Next part of the question: Should the Court revisit in a
18 separate proceeding the issue of whether the *Jewel* preservation
19 order covered the currently disputed FISC-related materials
20 with regard to the Plaintiffs' contention that the Government
21 has failed its retention obligations?

22 Boy, that is a long, run-on sentence. Get the idea?

23 **MS. COHN:** I think I do. I got to read it last
24 night.

25 **THE COURT:** Okay.

1 **MS. COHN:** I think if we're only talking about going
2 forward, and we're talking about telephone records only, then
3 this Court can just issue an order in *First Unitarian* that
4 reads like the Order that we had in *Jewel*. And that will cover
5 the telephone records program going forward.

6 We suggested a little addendum to our proposed order that I
7 think is appropriate, but I think if the only question is "What
8 should happen going forward with regard to only the telephone
9 records?" that that order -- just issuing an order like the
10 *Jewel* Order going forward in *First Unitarian* will reach all
11 phone records. If all of the phone records are preserved, then
12 I think we're okay going forward.

13 As I said, I think we've got backwards-looking problems in
14 both *First Unitarian* and *Jewel*.

15 And in *First Unitarian* -- I appreciate the counsel's
16 statement here today, but I'm still puzzled about what Ms. Shea
17 meant in her declaration, but in -- and then, of course,
18 there's going backwards. And going backwards in *Jewel*, you
19 know, Your Honor has to address the scope questions so that we
20 can figure out both going backwards what happened in the
21 remedy; but also going forward in *Jewel* what needs to be
22 preserved, because we're still litigating *Jewel*.

23 And if the Government -- if the Court doesn't agree the
24 Government about their creative reinterpretation of my
25 Complaint in *Jewel*, then they need to start preserving in *Jewel*

1 immediately.

2 **THE COURT:** All right. What's your response?

3 **MR. GILLIGAN:** Your Honor, we -- as we've said in our
4 papers, we don't have objection to the entry in *First*
5 *Unitarian*.

6 And a preservation order that is exactly the same, with the
7 addendum that Plaintiffs' counsel is speaking of, I think, is
8 the subject of another one of Your Honor's questions. We
9 object very strenuously, actually, to that addendum. I can get
10 into that now or later, as the Court prefers.

11 But in terms of entering an order in *First Unitarian* that's
12 exactly the same as *Jewel*, we have no objection to that. Of
13 course, the parties are going to need the Court's guidance on
14 the specific question before us today, whether that requires
15 the preservation of metadata that are subject to the FISC's
16 age-off requirements.

17 And we at all -- in all events, we don't want to find
18 ourselves in a situation where we're subject to conflicting
19 directives from Courts. We want to know some way or another
20 where our ultimate legal obligation lies.

21 **THE COURT:** This may be the elephant in the room.
22 Maybe it's not, because nobody's really mentioned it. Maybe
23 that's the way it is -- an elephant in the room -- which is: I
24 assume the Government doesn't contest the fact or dispute the
25 fact that that Court has inherent jurisdiction to order

1 retention, even if that retention of the otherwise aged-off
2 material would be directly in contravention to FISA. Is there
3 any dispute about the Court's authority to do that?

4 **MR. GILLIGAN:** We don't dispute the Court's authority
5 in this case to direct the preservation of relevant information
6 if it's deemed to be so valuable to the case as to outweigh the
7 burdens of preservation.

8 What we, as we've said in our papers, would do if this
9 Court were to order preservation is then go to the FISC and say
10 that this Court has directed that we preserve this data, and
11 ask the FISC on that basis then to allow us to continue to do
12 so, notwithstanding the destruction requirement that would
13 otherwise apply.

14 **THE COURT:** I was under the impression that the
15 Judge Walton of the FISC Court deferred to this Court's
16 jurisdiction.

17 **MR. GILLIGAN:** The -- the Order that Judge Walton
18 entered, at least as we read it, Your Honor, says that
19 permission is granted for us to continue to retain the data is
20 through the pendency of this proceeding immediately before this
21 Court. So as we read the Order, we would then have to go back
22 to the FISC and get permission for long-term retention of the
23 data, pending the conclusion of the litigation.

24 **THE COURT:** All right. Well, we won't get into the
25 issue of what happens at that point.

1 But, Ms. Cohn, is there anything -- I assume I'm preaching
2 to the choir here, but is there any dispute over any of this
3 Court's jurisdiction to essentially override a federal statute
4 that requires destruction -- purports to require destruction of
5 the aged-off information?

6 **MS. COHN:** Your Honor, I think that the Court's duty
7 to preserve evidence that might be relevant in litigation is
8 the paramount issue here. I don't think that -- I mean, the
9 statute doesn't require five years aging-off. The statute
10 requires there be minimization requirements; and the
11 Attorney General has said five years is what they want. So to
12 be clear, it's not a statutory duty that they are objecting to
13 here. It's their own rules, that then -- the FISC Court said
14 they had to follow their own rules.

15 But yes, I think that the -- the preservation of --
16 evidence preservation applies, regardless of other duties that
17 one might have to -- to destroy evidence.

18 **THE COURT:** All right.

19 **MR. GILLIGAN:** Your Honor, on that point,
20 Judge Walton issued an opinion on March 7th, I believe it was,
21 that said otherwise. So there's -- there's where we are.

22 And so we're hoping that the situation will resolve itself,
23 without the Government being placed --

24 **THE COURT:** "Said otherwise" in what sense?

25 **MR. GILLIGAN:** Judge Walton said that the obligation

1 under FISA to comply with minimization procedures that are
2 reduced to writing in the FISC's orders would trump a
3 common-law obligation to preserve evidence.

4 **THE COURT:** Well, you know, this -- we're here in
5 this lowly trial court. And it's hard enough to do this
6 Court's job. To worry about conflicting orders or something
7 that maybe others will have to deal with at the appropriate
8 time -- and I think that then raises very interesting appellate
9 jurisdiction issues, as well, which we don't need to get into
10 at this point.

11 **MR. GILLIGAN:** That was our view of the matter as
12 well, Your Honor.

13 **THE COURT:** Yes.

14 **MS. COHN:** Your Honor, I do think that, you know, the
15 fact that, A, we weren't there, it was all done *ex parte*, and
16 B, when Judge Walton found out we were here, and we cared, he
17 changed his mind, and recognized this Court's authority here.

18 I think that they're still trying to pretend like something
19 didn't happen after the FISC Court got full information, but it
20 did. And what happened was the FISC Court said, "I recognize
21 this Court has primary" -- thing.

22 And I think it would be improper -- and I'm troubled by the
23 idea -- that they could sign a preservation order or this Court
24 could issue a preservation order that then they would go
25 violate, because the FISC told them to do something else.

1 I think there needs to be one place where we decide what
2 they're preserving; and that place is here.

3 **THE COURT:** All right. I'd like to move on to
4 Question Number 3, and start with Government counsel. So
5 Question 3A says: With regard to the NSA's retention policy,
6 according to the Government's now partially unclassified
7 submission filed in conjunction with the preservation
8 proceeding before the multidistrict litigation in the MDL
9 matter, quote, "NSA's operational policy is to continue to
10 migrate telephony metadata beyond five years old in an online
11 database to tapes for preservation." Unquote. And I was
12 citing Exhibit A to the Government's opposition in paragraph
13 25. See also Exhibit B at paragraph 9.

14 Has the NSA retention policy changed since those
15 submissions from October 2007?

16 **MR. GILLIGAN:** Well, regarding the data collected
17 under Presidential authorization, no. The policy, Your Honor,
18 is still to retain them. And we are retaining them, in
19 accordance with the preservation orders that were entered in
20 the multidistrict litigation and in *Jewel*.

21 With respect to telephony metadata acquired under FISC
22 orders pursuant to the FISA, our policy -- if you want to call
23 it that -- is has been to obey the orders of the FISC, and to
24 comply with the five-year retention limit in those orders, at
25 least until -- at least until now. We are now, of course,

1 preserving them, pending the outcome of the instant matter.

2 **THE COURT:** So basically what you're saying, then, is
3 this migration has continued, and continues to this day?

4 **MR. GILLIGAN:** Well, there is -- in terms of the data
5 that were acquired under Presidential authority, that program
6 is terminated. And there is a static set of data that are now
7 in a preservation state. That is -- that is all done and taken
8 care of. There's no ongoing operation of any kind.

9 With respect to data acquired under authority of the FISC
10 pursuant to FISA, the policy has been, as necessary, to destroy
11 data that are subject to the five-year retention limit; that
12 that is the way we have been operating under FISA, the
13 Section 215 program, at least until now. We've put things on
14 hold, pending the resolution of the issues before the Court
15 today.

16 **THE COURT:** Now, I need to ask you this question. So
17 are you saying that up until the time that the Government went
18 to the FISA court, asking its permission to withhold joint,
19 aged-out information -- up to that, in previous years, the
20 Government was destroying that information, pursuant to FISA?

21 **MR. GILLIGAN:** Yes, Your Honor.

22 **THE COURT:** Even since the pendency of this lawsuit?

23 **MR. GILLIGAN:** Not since the pendency of this
24 lawsuit. As I said a few moments ago when the question came up
25 the first time, since the pendency of this lawsuit, no data

1 have been destroyed for purposes of complying with the
2 five-year retention requirement or of any other data that I'm
3 aware of.

4 **THE COURT:** Okay. So the question specifically then
5 is: Any information, any metadata that would otherwise be
6 destroyed as aged out has now been -- but ordered preserved at
7 least temporarily by this Court has been recorded on tapes?

8 **MR. GILLIGAN:** I -- I -- I believe I can say without
9 getting into any classified matters that it is -- it's not --
10 it is not on tape, Your Honor.

11 **THE COURT:** Just a second. I just read an
12 unclassified portion of the declaration in which it says that
13 the policy is to continue to migrate telephony metadata beyond
14 five years old from on online database to tapes for
15 preservation.

16 **MR. GILLIGAN:** That was from, I believe, the 2007
17 declaration regarding the Presidential --

18 **THE COURT:** Correct.

19 **MR. GILLIGAN:** -- the data acquired under the
20 Presidentially authorized program.

21 **THE COURT:** All right. So you're saying it would be
22 classified for you to disclose whether, with respect to
23 otherwise aged-off information that the Government has been
24 retaining, that that is also being put on -- migrated to tapes?

25 **MR. GILLIGAN:** It has -- I do not believe it has been

1 migrated to tapes. It's being held now in such a way that it
2 is not available to NSA intelligence analysts for query and for
3 intelligence purposes.

4 I do not believe -- I can confer with my co-counsel about
5 that, if you would like.

6 **THE COURT:** Yes. Please do.

7 (Discussion off the record.)

8 **MR. GILLIGAN:** Because of the sort of
9 twixt-and-between setting where we find ourselves litigating
10 here, litigating in front of the FISC all at a time when we
11 were in a compliance mode, if you will, Your Honor, the data
12 that were to be aged off are in various media at the moment,
13 including tape, but not exclusively.

14 **THE COURT:** All right. Let -- before I give Ms. Cohn
15 a chance to respond, let's go to Question B, because that's
16 really what I was getting to --

17 **MR. GILLIGAN:** Okay.

18 **THE COURT:** -- which is: The Government's most
19 recent submission indicates that, quote, "The NSA intended to
20 preserve and/or store the data that would otherwise be
21 destroyed in a format that precludes any access or use by NSA
22 intelligence analysts for any purpose." See Exhibit C to
23 response declaration of Teresa H. Shea -- S-h-e-a -- in
24 paragraph 14.

25 Is there any reason to treat the materials clearly made

1 relevant to the *First Unitarian Church* matter differently from
2 the potentially discoverable material covered by the retention
3 order in *Jewel*; or, put another way, is there any reason why
4 those materials could not be migrated to tapes that would not
5 be available to NSA people?

6 **MR. GILLIGAN:** I think the answer to this question,
7 Your Honor, brings us back to the discussion we were having
8 with respect to your first question. The -- migrating the data
9 to tape would require, because we're dealing here with a live
10 program, where data are coming in and data are periodically
11 being aged off, rather than a program that has been terminated,
12 and you have a static data set, you're going to have to or the
13 NSA is going to have to engage in a complicated
14 software-development effort to basically come up with a
15 capability of periodically aging data off from the operational
16 database into a preservation medium.

17 **THE COURT:** But you're not saying the NSA, with all
18 of its computer expertise, can't do this. You're not saying
19 it's impossible to do it.

20 You're saying it would be a burden financially and perhaps
21 operationally, but it can be done; can it not?

22 **MR. GILLIGAN:** Your Honor, we have not said it can't
23 be done. If it -- but again, it would be at significant costs
24 that are detailed in classified declaration, and would result
25 in a diversion of financial, technological, and personnel

1 resources from the NSA's core national-security mission.

2 **THE COURT:** All right. What's your response? As an
3 American citizen, does that concern you at all, Ms. Cohn?

4 **MS. COHN:** Well, I certainly want the NSA to be doing
5 its job; but Your Honor, you know, the burden of evidence
6 preservation hits every litigant. And it just strikes me that
7 I -- you know, I don't know what you've seen in secret, but
8 this is basically aging stuff off into backup tapes. And large
9 institutions dealing with a lot of data can age things off into
10 backup tapes, into a place where they can be available in case
11 of an emergency, or in case of a litigation -- under a
12 litigation hold, and not operationally available, such that
13 they get in the way.

14 I just -- it's difficult for me to imagine that the NSA,
15 given what we know about their capabilities, can't create a
16 backup system, which is kind of what I think they said they
17 were doing in 2007 in the *Jewel* case.

18 They also raised this same burden in 2007, as Your Honor
19 pointed out in his first question. They claimed that this was
20 really burdensome in 2007, too; and Judge Walker didn't buy it.
21 And so I don't see any significant difference here.

22 I mean, of course, the new news is that they claim that it
23 was only about stuff that was done under Presidential authority
24 in *Jewel*, and that they had secretly gotten a FISC order by the
25 time they were telling the Judge this. This was all, of

1 course, news to me as of Monday.

2 But I still don't think there's any reason why they can't
3 institute a preservation program that would be consistent with
4 our needs; but also, of course, I tried to point to another way
5 out of this problem.

6 I do think it's important when they say when -- I just want
7 to clarify. I think, Your Honor, we were all on the same page;
8 but when they say they're "preserving" in this case, they're
9 just talking about *First Unitarian*. They're not talking about
10 *Jewel*, because in *Jewel*, it's very clear that they are not
11 preserving anything after, I guess, May 2006, because they've
12 reinterpreted our Complaint in way that --

13 **THE COURT:** Well, we had a representation just a
14 little while ago that they were not destroying any documents or
15 evidence -- sorry -- data that I guess they contend is covered
16 by the issues in *Jewel*.

17 The issue is: What are the issues in *Jewel*, I guess.

18 **MS. COHN:** Yeah. So I just think it's a funny --
19 because it's not an ongoing thing. Right? As of --

20 Under their theory, which again I find very -- it's very
21 hard for me to not talk about how astounding their theory is,
22 but under their theory, this was a static set of information as
23 of about a year before they told about the Court about it. So
24 there wasn't any ongoing thing, because they didn't think they
25 had any ongoing preservation duties, because they'd misread my

1 complaint -- I think intentionally -- to make there be no
2 duties to preserve.

3 **THE COURT:** Would your proposed order -- let's assume
4 the Court had to do something that addresses the Plaintiffs'
5 concerns about the interpretation of the *Jewel* Complaint. Is
6 there some change/modification/whatever in the *Jewel* Order or
7 in a superseding order that would cover both cases that the
8 Court needs to consider that would address the Plaintiffs'
9 concerns?

10 **MS. COHN:** Yeah, Your Honor. Excuse me. Yes,
11 Your Honor. We put it in our proposed order.

12 **THE COURT:** That was what I was asking you. Do you
13 believe your proposed order covers that --

14 **MS. COHN:** Well.

15 **THE COURT:** -- your belief with respect to at least
16 your interpretation of the issues in *Jewel*?

17 **MS. COHN:** As of our interpretation as of Monday
18 afternoon, yes, Your Honor.

19 But I do think it's important that we make this order based
20 upon a really clear understanding of what the Government -- you
21 know, what the Government's actually doing, and what they think
22 its duties are. I mean, we've discovered one secret
23 reinterpretation of the *Jewel* Complaint. I would hate for us
24 to go to all this bother, and discover that they actually made
25 a second secret reinterpretation of the *Jewel* Complaint that we

1 didn't address; but yes, the language on our proposed order
2 that starts on page 1, line 10 through line 17, is the language
3 that we crafted to try to capture this.

4 I mean, the best that thing that we captured is for the
5 Government to respond in good faith, and for the Court to order
6 them to, because if you're -- you know, all of the language in
7 the world won't protect against that, but we think this
8 language would -- would do it.

9 And we think that, in order to be clear, it ought to be in
10 both a *Jewel* context and in a *First Unitarian* context, so that
11 we don't a run into a problem later on where they claim that
12 the *First Unitarian* Complaint only applies to 215 collection,
13 when it obviously doesn't, and because they're not doing it
14 under 215 anymore, they no longer have to preserve evidence. I
15 just don't want this problem to continue.

16 So this is our effort to try to do that. And, you know,
17 I'm happy to have the Court think about whether we did it well,
18 or not.

19 **THE COURT:** All right.

20 **MR. GILLIGAN:** Your Honor, may I address the repeated
21 remarks by Plaintiffs' counsel that we have intentionally
22 reinterpreted their Complaint so as to avoid our preservation
23 obligations? Because that is certainly not the case.

24 Plaintiffs, themselves, in their own motion to relate the
25 *Jewel* case to the cases in the multidistrict litigation

1 describe their claims as being claims about activities being
2 undertaken under Presidential authority, without Court orders
3 or judicial approval.

4 We made our understanding of the Complaint based on its
5 plain language and the plainer language in the *Shubert*
6 Complaint clear to this Court in the only way we could in 2007,
7 when even the existence of these programs was still classified
8 fact.

9 We explained to the Court -- Judge Walker -- in 2007
10 exactly how we had read the claims, and the extent of our
11 preservation obligation. We were clear. We were only going to
12 preserve data and information acquired under the Presidentially
13 authorized program, not the FISC-authorized programs.

14 And we advised the Court that we were prepared to answer
15 any questions the Court had about our submissions. We -- we
16 certified compliance under Rule 11 with our preservation
17 obligations by reference to that classified declaration, which
18 was extraordinarily clear about what we were doing. And we
19 were never advised that our interpretation of our preservation
20 obligation was in any way erroneous.

21 **THE COURT:** Was it public knowledge about what FISC
22 orders had been issued at that point?

23 **MR. GILLIGAN:** No, it was not, Your Honor.

24 **THE COURT:** Well, how would Judge Walker or the
25 Plaintiffs know --

1 **MR. GILLIGAN:** We --

2 **THE COURT:** -- how the Government was interpreting
3 this -- you know, its obligations?

4 So what I hear you saying is the Government, pursuant to
5 Judge Walker's Order, preserved all of the *Jewel*-related
6 information, i.e., from the so-called "TSP" or "Presidential"
7 program; but it secretly destroyed information related to FISC
8 orders about which the Plaintiffs had no knowledge or no way of
9 knowing. Is that what you're saying?

10 **MR. GILLIGAN:** No, not at all, Your Honor. We -- the
11 informs about the FISC -- about the programs being transferred
12 to FISC orders, with the possible exception of the content
13 collection, was not public knowledge; but it was spelled out in
14 the declaration that we submitted to Judge Walker. And it
15 was -- it was -- it was explicit. It was clear.

16 We said the Program -- the Plaintiffs are challenging the
17 programs under Presidential authority. They have now
18 transferred/transitioned to FISC authority, but because the
19 claims only pertained to Presidentially authorized activities,
20 it was only with respect to the Presidentially authorized
21 activities that we were going to preserve data and information.

22 And we don't mean to speak for the Court on this question,
23 but we can say we were never advised that -- that very clear
24 understanding of what our obligations was was disputed by the
25 Court.

1 **THE COURT:** All right. Ms. Berman, do you want to
2 say something?

3 **MS. BERMAN:** I just wanted to add on that point that
4 we did not keep from the Plaintiffs a secret that we were
5 filing a classified submission. That was in our public brief.
6 There's a notice of lodging of a classified submission on the
7 docket.

8 And furthermore, the whole sort of dispute between the
9 parties at that point was really bound up in the fact that --
10 and we told them this -- we couldn't talk about this
11 information in a public way. We couldn't confer with them in
12 any meaningful way about the information.

13 **THE COURT:** Wasn't there a concern by Judge Walker
14 that the -- that the Government attorneys had not even read the
15 classified submissions? Wasn't that a concern of Judge Walker?

16 **MS. BERMAN:** I'm sorry. That the Government
17 attorneys?

18 **THE COURT:** Yeah, that the Government attorneys that
19 were arguing before him were not familiar with the classified
20 information that was submitted to the Court.

21 **MS. BERMAN:** I'm not aware of that, Your Honor.

22 **MR. GILLIGAN:** I don't know.

23 **THE COURT:** I don't know that we're going to be able
24 to address that issue in this hearing. We have enough to deal
25 with in this hearing.

1 I understand certainly what the parties' positions are in
2 this regard, and I certainly will look at the order in that
3 context.

4 Did you want to say something?

5 **MS. COHN:** I just wanted to point out that, you know,
6 their declaration and assertion of this came when they were
7 trying to convince Judge Walker not to issue a preservation
8 order. And he denied their request, and issued a preservation
9 order that in no way says that it's limited to Presidential
10 authority.

11 I mean, obviously, you know, this is -- I feel it's very
12 difficult for me to not be upset about this, because,
13 Your Honor, I've been doing this for eight years. The idea
14 that in 2007 they secretly sent a declaration to Judge Walker
15 that he did nothing about, denying the motion they asked, and
16 that therefore my Complaint suddenly became significantly less
17 than it was at the time I even filed it -- this is -- I'm
18 sorry. This is outrageous.

19 **THE COURT:** All right.

20 **MR. GILLIGAN:** Well, Your Honor, if I may --

21 **THE COURT:** All right. Well --

22 **MR. GILLIGAN:** -- if I may take up that contention as
23 well, that Judge Walker didn't buy our arguments, Plaintiffs
24 move for a preservation order. Ms. Berman can correct me if
25 I'm misrepresenting anything. Our position was that an order

1 wasn't necessary because of everything we were doing. We
2 didn't ask not to do the things that we outlined in the
3 declaration. We said we were doing them, and so, Judge, you
4 don't need to enter an order.

5 Judge Walker entered an Order, but we were never advised
6 that anything that we had told the Court in great detail we
7 were doing was insufficient to meet our preservation
8 obligations.

9 **MS. BERMAN:** And, Your Honor, just to add one more
10 point on that front, the Order that Judge Walker entered in
11 2007 that the *Jewel* Order was patterned on added the phrase in
12 the retention paragraph, "to the extent practicable during the
13 pendency of this case." That was not in the Plaintiffs'
14 proposed order. So he didn't just give them everything they
15 had asked for. He added that phrase, which we interpreted to
16 be significant, and based on our classified filing.

17 **THE COURT:** We have enough to deal with in this
18 hearing, but it does sort of, if I might use the term,
19 "migrate" to paragraph 4 or Question 4, which is --

20 Because it may be this may be a broader question. It is a
21 broader question.

22 As the Government argued before the FISC in February and
23 acknowledged before this Court in its joint case management
24 conference statement, what is the scope of the Government's
25 obligation to preserve relevant evidence under Federal Rule of

1 Civil Procedure 26, 45, and 56(3), regardless of any
2 preservation order?

3 **MR. GILLIGAN:** Your Honor, I apologize in advance if
4 this answer isn't getting at what the question is driving at,
5 but the response that comes to my mind is that in a suit such
6 as *First Unitarian*, where there is not as yet a preservation
7 order of any kind, our obligation is the common-law obligation
8 to preserve all evidence that could be relevant to the facts
9 alleged in the claims asserted in the Complaint before us,
10 which is not what actually the Plaintiffs are proposing with
11 the addendum that they have in mind for the *First Unitarian*
12 preservation order.

13 What they're talking about is, if I may borrow the phrase,
14 a dragnet lit. hold on entire National Security Agency for
15 preservation of information, irrespective of whether it has any
16 bearing on the actual allegations in their Complaint. And
17 that's a subject that we can come back to; but as Ms. Cohn has
18 raised it several times, I thought it would raise that as well.

19 But to come back to the exact question, we recognize we
20 have a common-law obligation to preserve evidence that's
21 relevant to the claims in the *First Unitarian* suit. We've
22 issued a litigation hold for that matter.

23 **THE COURT:** But is it broader than the preservation
24 order issued in the *Jewel* case? Is that what you call a common
25 law -- it's not really common law. It's a statutory. It's

1 created by the Federal Rules.

2 **MR. GILLIGAN:** Correct, Your Honor. It's rooted in
3 the rules and the common law; various sources.

4 Well, I guess I would say that in principle, it's
5 coextensive with -- and I don't want to get into specifics, but
6 in principle, it's coextensive with our obligation in *Jewel*,
7 because the *Jewel* Order essentially tells the parties to abide
8 by their common-law obligation to -- and the obligation rooted
9 in the rules to maintain the integrity and to avoid destruction
10 of evidence that's relevant to the claims in the case.

11 There's -- one of the problems that we have here is that
12 the Order does not give parties guidance on the preservation or
13 not of specific types and bodies of evidence, which is why I
14 said to the Court we need particular guidance on the issue of
15 metadata to be aged off.

16 **THE COURT:** Okay. What's your response?

17 **MS. COHN:** Your Honor, the obligations are the same.
18 I mean, the point of a preservation order is generally to put a
19 little meat on the bones of the general thing.

20 It was very difficult for us in 2007, given the
21 Government's position that they couldn't say word one about
22 what they were doing, to try to fashion something more specific
23 at that time. And we had the same problem in 2009 in *Jewel*.

24 So it's just a general recitation. So I don't think
25 there's any difference between -- as Your Honor, I think,

1 correctly points out: It's not just a duty in the common law.
2 It's part of the Federal Rules of Civil Procedure. I think
3 that duty and the duty contained in the Order should be -- if
4 we did it right, should be the same.

5 **THE COURT:** All right. At least we have agreement on
6 one question -- at least one answer.

7 All right. Question Number 5. And I think this has been
8 alluded to, to some extent, but let me make it clear by the
9 question, because this was my view before I started hearing
10 argument from you. The Court is persuaded that a targeted
11 retention policy with regard to materials possibly collected
12 pertaining specifically and only to the named Plaintiffs is
13 untenable. The alternative addressed by the Government is the
14 mass retention of all raw data possibly collected by the NSA
15 under the challenged programs. According to both the public
16 and classified declarations of the Director of Signals
17 Intelligence Directorate of the NSA, this mass data retention
18 would negatively interfere with the NSA's -- I'm sorry --
19 current mission.

20 So, A -- I'm going to ask this of -- I guess I'll start
21 with the Government, although I also want to hear from the
22 Plaintiffs on this. Is there some lesser quantum of materials
23 that would satisfy the requirements to preserve evidence
24 relevant to provide possible support for Plaintiffs' claims?
25 For instance, can the Government satisfy its obligation to

1 preserve evidence by retaining evidence of the challenged
2 surveillance programs and their breadth, without retaining all
3 of the actual collected raw data incident to the Program's
4 implementation?

5 **MR. GILLIGAN:** Your Honor, this is this question
6 focuses on, we think, a very important point, because we
7 believe -- and we talked about this a bit; and you've talked
8 about it with Ms. Cohn a bit already. We believe we are
9 already proposing to and are, in fact, preserving a great deal
10 of data that could shed light on the question of the
11 Plaintiffs' standing, without having to preserve metadata that
12 the FISC orders require us to destroy.

13 Just to recap just for a moment, we, of course, still have
14 at all times up to five years' worth of metadata at any time,
15 which would certainly shed light on the issues, setting aside
16 issues of classification and possible privilege and
17 what-have-you; but there are all of the other documents and
18 records and information the Government is preserving about the
19 operation of the Program that could provide information about
20 the scope of the Program, and -- and possibly the Plaintiffs'
21 standing.

22 One specific example that I can bring to Your Honor's
23 attention are the so-called "Secondary Orders." These are the
24 orders that the FISC issues to individual carriers, directing
25 them to provide call-detail records, telephony metadata to the

1 NSA for purposes of inclusion in the database.

2 And we have them. We have them going back to the inception
3 of the Program. They show at what particular times what
4 particular carriers were participating in the Program.

5 This, it seems to us, would go a long way toward addressing
6 the temporal point that Ms. Cohn was talking about with
7 Your Honor a few moments ago.

8 We can't say that they would answer the question.

9 **THE COURT:** Are they classified?

10 **MR. GILLIGAN:** Oh, yes, Your Honor. Yes. We have
11 asserted the State Secrets Privilege in the *Jewel* case, for
12 example, over the identities of carriers.

13 We're talking about here about preservation. Production of
14 any of the information we're talking about here is, to put it
15 mildly, another thing entirely.

16 **THE COURT:** All right. So essentially what -- your
17 position is that if you combined the non-aged-off information
18 with these Orders, the plaintiff has all it needs to prove
19 whatever it needs to prove, at least, in the current iteration
20 of the *First Unitarian* Complaint.

21 **MR. GILLIGAN:** Well, I don't know that I can agree
22 with that formulation, Your Honor, that it would provide them
23 with all they need to prove; but it would -- it would, I think
24 it would provide possible support for their standing, as stated
25 in Your Honor's question.

1 And in terms of, you know -- you know, what carriers were
2 subject to these orders at what times, you know, that would
3 provide sort of a temporal guide to the scope of the Program
4 that -- of a kind that it appears Ms. Cohn was talking about a
5 little while ago.

6 **THE COURT:** All right. So this gets back to -- well,
7 it doesn't "get back to," but this is the point I'm thinking
8 about here, is, you know, this is a trial court. And to the
9 extent we get into evidentiary hearings, the Court's concerned
10 with the rules of evidence, and as interpreted, you know, in
11 the context of the case. And so what I was thinking about -- I
12 wasn't even focused on the non-aged-off information. I was
13 thinking about -- that there may exist other evidence out there
14 that is less than the full quantum of data that the Government
15 might be destroying pursuant to FISA that might be sufficient
16 to get the Plaintiffs what they need down the road, if they
17 convince the Court that they're entitled to it. So why isn't
18 that an answer?

19 **MS. COHN:** Well, Your Honor, we don't know what the
20 "is" is there. Like the thing that's very troubling to me
21 about Mr. Gilligan's position is he said, "Well, there's
22 possible support for standing. It might get part of the way
23 there."

24 These are all hedging words that basically say, "Well,
25 we're going to destroy the best evidence. And maybe there's

1 enough left after we destroy the best evidence. And take your
2 best shot, Plaintiffs." That's just not fair or right.

3 So if the Government wants to take the position that the
4 Secondary Orders will not be challenged by them, and will be
5 accepted by them as evidence of collection of everybody who was
6 a customer during that time frame, then maybe there's some
7 space there; but I think as long as they're preserving their
8 opportunity to attack the -- what's left after they destroy the
9 best evidence, then it's not fair to us to destroy that
10 evidence.

11 Again, I think the onus is on them. If that's what they
12 want to do, then they need to actually make some
13 representations about their position regarding that information
14 if we try to use it in absence of the best evidence, which
15 would be the records, themselves.

16 **THE COURT:** Well, could the Court fashion an Order
17 that requires the Government to maintain records of X; x being
18 what carriers they were dealing with over what time period, for
19 example? So they would -- if they were ordered to do that,
20 together with the non-aged-off information, wouldn't that be
21 adequate?

22 **MS. COHN:** It might be, Your Honor. I'd need to talk
23 with my team and think about it. I think that the -- you know,
24 the better thing would be for us to have it.

25 I'm very worried about secret --

1 **THE COURT:** "It" being all of it?

2 **MS. COHN:** Well, no. I mean for us to have a
3 representation from the Government that I know that's public
4 that I can rely on about what it is they're saying about our
5 clients' collections.

6 **THE COURT:** So it's a classification piece that
7 you're concerned about; sort of the pig-in-the-poke argument?

8 **MS. COHN:** Your Honor, I've been through a rough week
9 with regard to secret government representations to the Court,
10 and it's not the first time. So, yeah, I think that Plaintiffs
11 need to know. We need to know what this evidence is, and
12 whether it's going to be sufficient for our purposes. And I
13 don't think we can do that if it's a secret -- if it's a secret
14 situation at this point, especially if the Government's not
15 waiving their right to challenge whether what they've preserved
16 for us is sufficient.

17 **THE COURT:** All right.

18 **MR. GILLIGAN:** Well, Your Honor, I -- I -- there's a
19 little bit of, it seems to me, not taking "Yes" for an answer
20 there in Plaintiffs' counsel's remarks.

21 And the point here is a larger one. And Secondary Orders
22 are an example. As I say, we're preserving, in general, the
23 documents and information concerning the operation of the
24 Program. And it may be that there are additional documents
25 that I am certainly unaware of, and certainly couldn't talk

1 about on the public record that, again, in a further classified
2 submission, if the Court wishes, we could explore this issue
3 further to see's if there is --

4 **THE COURT:** But, see, the problem is, Counsel, the
5 "maybes" and the "possiblys." And it's putting the Plaintiffs
6 at an unfair advantage, probably with great justification,
7 because the nature of the materials that we're talking about,
8 you know, are -- in the Government's view, the disclosure of
9 them could cause grave damage to our national security. So I'm
10 not deriding what you're saying; but you understand the
11 position that it puts the Plaintiffs in, and even the Court,
12 because the Court is not really free to rely on those documents
13 in any kind of a public filing.

14 **MR. GILLIGAN:** Well, I mean, the fact that all of the
15 information we're talking about is classified, Your Honor, and
16 cannot be, you know, used as part of the litigation of a case
17 on the public record in this case -- and potentially in the
18 *First Unitarian*, and in some cases already has been subjected
19 to claims of State Secrets Privilege -- I mean, that -- that is
20 an underlying problem here, you know, regardless of whether the
21 information is preserved.

22 And the question of whether it could ever be utilized in
23 litigation --

24 **THE COURT:** That's a wholly different issue.

25 And even whether it can be -- can even -- even whether

1 there -- it is technologically capable of being accessed at a
2 later point is a whole other point that we haven't discussed,
3 and we can't really discuss, except in very general, high-level
4 terms.

5 **MR. GILLIGAN:** But Your Honor, I'm not aware -- I
6 mean, Ms. Cohn talks about us waiving our position on standing
7 or pursuant to that.

8 I'm not aware of there being an obligation on a nonmoving
9 party in a situation like this to -- to have to waive its
10 defenses in order to -- in order to be relieved of onerous and
11 unreasonable preservation.

12 **THE COURT:** But that's not the argument.

13 The argument is, you know, the Government has a choice at
14 some level, which is -- because here, we're talking about not
15 grave harm to national security; we're talking about a burden
16 and an inconvenience on the NSA.

17 So what the Plaintiffs are arguing, as I hear their
18 argument, is: You know, you can't have it both ways. You
19 can't say, "Well, we're not going to keep this material. And
20 based upon that, we may argue later on that you don't have
21 standing or any basis to claim damages. And take our word for
22 it."

23 And they're saying, you know, if that's your position, then
24 they have to do it the old-fashioned way, and keep the evidence
25 preserved, and argue later on that they're entitled to see it.

1 So I don't really think that -- it's not like -- it's not
2 like the -- that you're being ordered or even compelled in any
3 way to waive a position that you have. It's really the Court
4 trying to find a balancing, so that the Plaintiffs can attempt
5 to vindicate their rights, and the Government can maintain
6 its -- you know, its secrets.

7 **MR. GILLIGAN:** And as I say, Your Honor, we're
8 willing to explore that with you with, as I say, a further
9 classified submission, where we can talk about --

10 You know, we've got up to five years of actual data at any
11 given time. And I've given you the example of the Secondary
12 Orders, which could shed light on the issue. There may be
13 further information that we can bring to the Court's attention.

14 But I mean, if the Plaintiffs' position is that, you know,
15 they have to have it all, short of us essentially waiving
16 standing as an issue, which I don't know -- which I don't
17 believe we can, because it's jurisdictional, then, you know,
18 there's -- I don't -- I'm not seeing any -- any room, at least,
19 in the position -- Plaintiffs' position.

20 **THE COURT:** You know, the Court's answer -- I'm
21 sorry. I didn't mean to interrupt you. I apologize.

22 The Court's answer to what you've just said is that there
23 has been ample opportunity by the Government to file
24 information in the public record, and classified information,
25 and information, you know, that is so secret, that the Court is

1 not even allowed to reveal the level of classification that
2 it's classified at. That sounds kind of doublespeak.

3 But the point I want to make is, you know, enough is
4 enough. We're here on a proceeding. We're now in a phase of
5 essentially a preliminary injunction phase. The Government had
6 this opportunity to propose alternatives. It didn't do it.
7 And it's too late to do it.

8 So let's move on to the next question at this point,
9 because I'm kind of getting tired of this, you know, death by a
10 thousand cuts here, which is being inflicted upon the Court and
11 to some extent on the plaintiff. So let's move on to the next
12 question.

13 I assume the Government's -- first of all, I assume you've
14 already answered Question Number B, which is, Ms. Cohn, whether
15 the scope of Plaintiffs' request is reflected in the first
16 paragraph of your clients' proposed order, together with the
17 added sentences from the Plaintiffs' reply.

18 **MS. COHN:** Yes, Your Honor. That's our best effort
19 right now.

20 **THE COURT:** What is the basis of your objection,
21 Counsel, which is at --

22 I assume the answer to the next question is: Yes, the
23 Government does object.

24 And now I'd like to know: What are the grounds?

25 **MR. GILLIGAN:** Yes. Well, because the additional

1 provision there they're seeking to have added to the Order,
2 Your Honor, is clearly overbroad, and would vastly expand the
3 Government's preservation obligations beyond the limits of
4 reason.

5 There's at issue here and in these cases are a discrete
6 number of identified activities: Content of collection --
7 content collection of communications reasonably believed to
8 involve communications with agents of terrorist organizations;
9 collection of bulk Internet metadata under Presidential
10 authority; collection of telephony metadata in bulk under
11 Presidential authority under Section 215.

12 But what they want is an order that would require us to
13 essentially, as I said before place, a dragnet lit. hold over
14 the entire NSA, to search for -- and, if there are any,
15 segregate -- records pertaining to the Plaintiffs or their
16 communications, regardless of what authority the Program is
17 being run under, whether it's a Title I FISA order, whether
18 it's collection of foreign communications under
19 Executive Order 12333.

20 The preservation obligation is rooted in the facts asserted
21 and the claims raised in the Plaintiffs' Complaint. And they
22 want to completely unmoor our preservation obligation from any
23 of that. And that's -- that is simply far beyond anything
24 that's contemplated under the common law or the Federal Rules
25 of Civil Procedure, at least as far as we're aware.

1 **THE COURT:** All right. Ms. Cohn, is it overbroad?

2 **MS. COHN:** Our effort here was to moor this in the
3 allegations of the Complaint. And I think that, sadly, this
4 gets down to the bottom of, you know, their attempt to try to
5 reconstrue our Complaint here; but we didn't allege anything
6 based upon communications with one end involving terrorists.
7 In fact, we specifically excluded from the class in *Jewel*
8 anybody who was involved with a terrorist obligation. We're
9 talking about ordinary people and bulk collection.

10 So, first of all, all of this TSP --

11 "TSP" is a made-up term. Right? It's a term that the
12 Government --

13 **THE COURT:** Well, it's not made up. It was coined
14 after the fact.

15 **MS. COHN:** Right, to describe something that they
16 admitted, as opposed to a program.

17 And so whenever they lodged stuff in the idea of the
18 Terrorist Surveillance Program, it's always -- I think it's
19 nonsensical from our perspective, because it doesn't give us
20 any indication of what it is they're keeping; but certainly our
21 Complaint has never been about people talking to terrorists.
22 Our Complaint is about ordinary people; a class of AT&T
23 subscribers who aren't talking to terrorists. And that's how
24 the class is defined, in the class terms.

25 So the idea that this is about people talking to terrorists

1 is just not in the Complaint, at all. So they kind of made
2 that part up.

3 But in any event, the idea here is to map the preservation
4 obligations to the allegations of the Complaint. And the
5 allegations of the Complaint are about bulk collection,
6 regardless of what legal "hat" or authority the Government is
7 putting on it at any particular point in time. And that's what
8 we were trying to do.

9 **THE COURT:** If it's unconstitutional.

10 **MS. COHN:** If it's unconstitutional or violations of
11 the statutes that we've alleged.

12 I know you have an order. And there's some -- the
13 statutory stuff is still a little unclear, what's left; but
14 yeah, the things that we think are unconstitutional and illegal
15 are the things we want them to preserve.

16 And we've alleged -- and our allegations -- the thing
17 that's difficult here is our allegations -- that's difficult is
18 there's a disconnect between what the Government -- the way
19 this Government wants this case framed, and the way we want
20 this case framed.

21 I submit that we are the masters of our Complaint, so we
22 get to frame it the way we want.

23 We framed this about the behaviors: About the content
24 collection, about the Internet metadata collection, and about
25 the telephone records collection.

1 And honestly we started all of this in 2006, we did think
2 it was just Presidential authority.

3 **THE COURT:** So you're saying it goes beyond
4 President Bush's -- George W. Bush's authorization, beyond
5 FISA, beyond the PATRIOT Act.

6 Collection of this metadata by whatever -- whatever actual
7 or apparent or asserted authority?

8 **MS. COHN:** That's correct, Your Honor. If they're
9 collecting the --

10 **THE COURT:** Wouldn't that essentially, as counsel
11 said, if correct -- yes, there's a lawsuit; but yes, there's a
12 country here that has security issues that we all agree are
13 with us every day. So isn't there some limit, or isn't there
14 some way we can draw a line, so that we don't essentially have,
15 in effect -- and I don't want to be cynical about this -- the
16 NSA working for the Plaintiffs in this case, as opposed to for
17 all of us?

18 **MS. COHN:** No, Your Honor. I want them to protect
19 us. I think the NSA is an important agency, and it needs to do
20 its job.

21 On the other hand, it's important that we get a judicial
22 ruling about whether it's doing its job constitutionally. And
23 all I'm trying to get is the regular rules of civil litigation
24 to apply here as much as we possibly can.

25 **THE COURT:** Let me ask you a question that's a little

1 bit -- maybe it's off the wall, and maybe it's improper, but
2 you know, I get to do that with life tenure --

3 (Laughter.)

4 **THE COURT:** -- and that is: Has this issue ever
5 arisen in any of the other cases around the country that have
6 dealt with similar issues: The collection of telephony records
7 and metadata; a preservation order? Is this the only Court in
8 which this issue has arisen, to your knowledge?

9 **MS. COHN:** Well, Your Honor, in the *ACLU versus*
10 *Clapper* case, which is the phone-records case, the Government
11 isn't contesting that they collected the records, so the issue
12 hasn't come up. And they didn't need a preservation order,
13 because they're not fighting them on collection.

14 **THE COURT:** Now I want to ask you about that
15 question, because I've read the brief. You know, when you're a
16 Judge, you have no life other than the cases; you read this
17 stuff.

18 And there was a cite. It was a statement in -- I just read
19 the ACLU's brief.

20 **MS. COHN:** Right.

21 **THE COURT:** And they said it is admitted.

22 I didn't have the record to go back to. In what judicial
23 format was this admission that the Government had actually
24 intercepted the ACLU? Because I don't know that it's not
25 there, but I just couldn't find reference to it.

1 **MS. COHN:** I believe in the declarations, Your Honor,
2 that were submitted in that case, it is assumed that they're
3 collecting it. They're not fighting about whether they're
4 collecting.

5 Let's put it this way. I don't know exactly where in the
6 record. I know the ACLU has a citation to the record. I
7 wasn't able to track it back, in the 24 hours between when we
8 got there and today.

9 **THE COURT:** No, but the point is you're arguing --
10 you're saying that the reason -- I guess it's a little bit of
11 speculation, maybe, but the reason you believe there was no
12 order in that case was because of this acknowledgment that the
13 Government made.

14 And what about in the other case? I think it's in the D.C.
15 case?

16 **MS. COHN:** The *Klayman* case? I don't know about the
17 *Klayman* case. The *Rand Paul* case was just filed, so I'm not
18 even sure that it's been served yet. There's a case called --
19 my opponents certainly know all of the litigation.

20 I mean, the reason there wasn't a preservation order before
21 the most recent spate of cases in June is because they were all
22 collected in the MDL. And we had the -- you know, the original
23 preservation is order is for the MDL. So there was a
24 preservation order in place for all of the cases that were
25 filed prior to June 2013. It's the MDL order that we're

1 fighting over here. So because the cases all got combined,
2 they weren't popcorned out around the country. There was all
3 one.

4 Now, since June, there are three or four different cases.
5 As I said, I don't think it was challenged in the *ACLU*. I'm
6 not sure the status in *Klayman*; but obviously, they got a
7 preliminary injunction, and now that's up on appeal. And the
8 other cases, I think, are in motion practice still. So I don't
9 know the status of those; but again, I suspect the Government
10 does.

11 **THE COURT:** Maybe you could enlighten us, first of
12 all, on the *ACLU* case. I don't know if you were involve din
13 that case.

14 **MR. GILLIGAN:** I was involved. Yes, sir.

15 **THE COURT:** Was there such an acknowledgment in that
16 case?

17 **MR. GILLIGAN:** There was no admission as such,
18 Your Honor.

19 What happened was the Secondary Order directed to Verizon
20 Business Network Services was unlawfully disclosed. The day
21 after its disclosure, the Director of National Intelligence
22 acknowledged its authenticity.

23 Thereafter, after we had already taken that step, the *ACLU*
24 filed its case and alleged in its Complaint and thereafter
25 submitted declarations attesting that the organization was a

1 customer of Verizon Business Network Services during the time
2 that that order to VBNS was in place. And so we had not
3 contested the fact of collection in that case.

4 However, in all of the other cases pending around the
5 country involving this issue -- *Terry*, and the *Klayman* case.
6 And there's a case call "*Smith*" in Idaho. There's
7 Senator Paul's case; another case called "*Perez*" down in Texas.

8 Well, the *Perez* case is -- we haven't engaged in motion
9 practice there yet; but in all of the other cases, we have
10 challenged the Plaintiffs' standing. There are the
11 preservation orders in many of those other cases, because
12 haven't asked for any Preservation Orders, nor have any of
13 those other plaintiffs asked that we be required to retain the
14 data that the FISC's orders require us to age off,
15 notwithstanding that we've given them all of the same notice
16 that we've provided to the Plaintiffs in these cases.

17 **THE COURT:** All right. Not my case, but -- and I
18 asked the question, so I'm certainly not criticizing counsel,
19 but we have enough to chew on here.

20 **MR. GILLIGAN:** May I, Your Honor?

21 **THE COURT:** Yes, please.

22 **MR. GILLIGAN:** Coming back to question 5B, and the
23 language the Plaintiffs were proposing, just the one other
24 thing I would say about that is they're asking for language
25 that says the Court reaffirms that the order extends to

1 telephone records, Internet metadata records, and content data,
2 without regard to when the Government obtained them, or the
3 legal authority under which the Government obtained them.

4 That's another way of saying, "All."

5 And that's an obligation that's unmoored from any
6 allegation in the Complaint, or to which any litigant --

7 **THE COURT:** So it's your contention that the
8 Complaint in both cases, collectively, identify particular
9 programs which they contend are illegal, and under which this
10 information was intercepted, as opposed to the act of
11 intercepting, however, on whatever authority it was done? Is
12 that your position?

13 **MR. GILLIGAN:** That's our position. They *First*
14 *Unitarian* is about collection of bulk telephony metadata
15 pursuant to Section 215 of the USA PATRIOT Act.

16 *Jewel* certainly is about -- there's no dispute -- bulk
17 collection of Internet data under Presidential authority.

18 Those -- there are -- there's language there that are
19 touchstones by which a litigant in our position can make
20 reasonable decisions about their preservation obligations.

21 This language that the Plaintiffs would have the Court
22 include is essentially a requirement to basically preserve all
23 such communications data that the NSA collects, period,
24 regardless of under what authority, regardless of any relation
25 whatsoever to the matters raised in those Complaints.

1 **THE COURT:** Okay. So it would be a pretty simple
2 matter for the Court to go through the Complaint in both of
3 those cases, and fashion an order that moors the preservation
4 obligations to those allegations. Correct?

5 **MR. GILLIGAN:** In principle, yes, Your Honor.

6 **THE COURT:** All right.

7 **MS. COHN:** Your Honor, that's what we tried to do. I
8 apologize. Again, we had all of 27 hours to do this; but I
9 guess this was last week, so we had a little more. Couple
10 days.

11 But I do want to point out that on page 4 of our reply
12 brief, we give you three of many, many allegations in the
13 *First Unitarian* Complaint that are not tied to Section 215. We
14 just used 215 as an example, because it's changed over time.

15 And it will -- there's -- it's not -- you know, we're
16 not -- we're cognizant of the fact that that could happen, and
17 we drafted our Complaint so that the underlying authority
18 wasn't the driver here.

19 I'm happy to go ahead and try to propose something that
20 anchors into the allegations of our Complaint, but I'm not --
21 I'm not happy to revise our Complaint to be limited in the way
22 that the Government's trying to revise it.

23 **THE COURT:** Yeah. You see the problem that the Court
24 has is this. To some extent, the Plaintiffs are kind of
25 shooting -- throwing darts in the dark, because they don't no

1 the full breadth of the Government's programs.

2 The Court has a better idea of that, because the Court has
3 seen classified information. So in terms of essentially trying
4 to be fair to both sides, the Court must take into account what
5 it's been told without revealing classified information in
6 fashioning a proper order, because the Court knows a lot more
7 than the Plaintiffs know.

8 And so I guess the Court's task is -- whether with the help
9 or counsel, or on its own -- to go through the Complaint, using
10 the briefs and the Complaint, itself, and to try to fashion an
11 order that fairly reflects the allegations as liberally
12 construed, because the Plaintiffs don't know all of what was
13 happening here. Is that a fair point?

14 **MR. GILLIGAN:** A fair point, Your Honor, to which I
15 would say we are -- we'd be happy to draft a proposed order of
16 our own to assist the Court in that endeavor, if the Court
17 would allow.

18 And not -- not to return to an issue that I know that the
19 Court spoke its mind about on earlier, but again, to the extent
20 that there's any more information we can provide to the Court
21 to assist it in that endeavor, we stand ready to do so.

22 **THE COURT:** All right. Let's go to the Question
23 Number -- let's see -- C.

24 **MR. GILLIGAN:** 5C?

25 **THE COURT:** Yes, 5C. So what is the Government's

1 response to the Plaintiffs' suggestion that the Government
2 admit or deny that Plaintiffs' telephone records have been
3 collected, or for how long?

4 **MR. GILLIGAN:** We cannot do that, Your Honor. I
5 don't think that comes as a shock. That's precisely the kind
6 of information over which we've asserted the States Secrets
7 Privilege in the *Jewel* case.

8 As we were discussing a little bit ago, we did not admit to
9 collection of people's data -- at least, under circumstances as
10 we have in this case -- in the *ACLU* case.

11 Counsel, in raising this issue in their reply brief, used
12 the *ACLU* cases as, I suppose, a model for what could happen
13 here. And what happened there was -- is that that case
14 involves Plaintiffs who were subscribers to a carrier whose
15 participation in the Program at a particular time has been
16 officially acknowledged; but there has been no other
17 acknowledgment.

18 **THE COURT:** And it was only officially acknowledged
19 because it had been inappropriately disclosed?

20 **MR. GILLIGAN:** Only because it had been
21 inappropriately disclosed, and prior to the filing of the
22 lawsuit in question, not because of the lawsuit in question.

23 And since that time -- and before, for that matter -- the
24 Government has never confirmed or denied the participation of
25 any carrier at any particular time in any of these programs.

1 **THE COURT:** All right.

2 **MR. GILLIGAN:** And we cannot do so here.

3 **THE COURT:** All right. Well, I had to ask the
4 question. Counsel proposed it as a possible solution.
5 Sometimes you need to get that on the record. And I think in
6 case of this importance, I think you need to get the
7 parties' -- especially the Government's -- position on the
8 record.

9 Let's move to Question Number 6. Does the Government
10 object to the insertion of the third paragraph in Plaintiffs'
11 proposed order regarding the FISC's imposed restriction
12 concerning that Court's required authorization of any review or
13 use of records for intelligence gathering or any other
14 nonlitigation-related purposes?

15 **MR. GILLIGAN:** Your Honor, our trouble with this
16 proposal is twofold.

17 One, it seems we were talking a little while ago about the
18 respective jurisdiction of the two Courts: This Court, and the
19 FISC. Seems that the language that the Plaintiffs are
20 proposing there is -- involves matters that fall within the
21 FISC's jurisdiction. What access should the -- should the
22 Government and the state personnel and what-have-you have to
23 these data that collected under authority of the FISC's orders?

24 This Court's jurisdiction is to determine what our
25 preservation obligation is; but apart from preserving data,

1 what access we should have to it is something that should be
2 determined by the FISC, and in accordance with statutes and
3 regulations and Executives Orders that otherwise govern such
4 matters.

5 **THE COURT:** On minimization?

6 **MR. GILLIGAN:** On minimization, yes. Principally,
7 minimization; but perhaps otherwise.

8 The other thing that troubles us in this language is that I
9 could foresee, particularly after the debate we've been having
10 today, all in good faith, that we could find ourselves here
11 three or four years down the road, arguing whether or not this
12 language imposed some sort of independent restriction on the
13 Government's access to preserve data, which it absolutely
14 should not do.

15 Why -- the Court's writ here is to tell us whether or not
16 to preserve; but what access we should have to our own data
17 while it's being preserved is something, again, that is not at
18 issue in this litigation.

19 **THE COURT:** All right.

20 Ms. Cohn, so the issue, from the Court's's perspective, is:
21 Is this really going beyond the purpose of this hearing and
22 beyond the Court's's authority? There's statutory authority
23 that requires minimization.

24 I understand, given the colloquy we had at the beginning
25 about the irony issue about the Plaintiffs perpetuating data

1 that they find maybe to have been unconstitutionally obtained;
2 but where does this Court have authority to do something
3 required by statute, and really is beyond the purview of this
4 case?

5 **MS. COHN:** Well, all I was trying to do -- and that's
6 why it says nothing in that Order shall change what the FISC
7 has ordered them to do -- was to be clear that there wouldn't
8 be a problem down the road that somehow, even though the FISC
9 had told them they couldn't use the data for anything other
10 than the litigation, somehow your Order countermanded that, and
11 they could use it for purposes other than the litigation.

12 I mean, ordinarily -- and again, I'm just coming from the
13 regular preservation situation, where a preservation order
14 routinely says, "You should preserve -- "You could preserve
15 this stuff for litigation, but you can't use it for any other
16 purposes." I was trying to put that idea into this; that this
17 wouldn't open the door for the Government to be able to
18 continue to make operational use of this information.

19 And so that's all I was trying to do, was to make sure
20 that, to the extent it was preserved because of this Court's
21 Order, this Court's Order doesn't authorize access outside of
22 the scope of the litigation, either.

23 **THE COURT:** All right. Well, does the Government
24 acknowledge that it would be inappropriate for the Government
25 to access any of the preserved information that would otherwise

1 be aged out?

2 **MR. GILLIGAN:** It would -- within -- any access we
3 should have to that aged-out data would have to be with the
4 permission of the FISC, and in accordance with FISC orders.

5 The language here, Your Honor, I don't believe accomplishes
6 the objective that Ms. Cohn just described. I'm either
7 misunderstanding the language, or I'm misunderstanding
8 Ms. Cohn's explanation of it.

9 It says nothing in this order -- this is language that
10 Plaintiffs would have this Court enter -- nothing in this order
11 where the Court's prior preservation orders shall be construed
12 as authorizing any review or use of telephone orders records or
13 intelligence gathering for any other nonlitigation purposes.

14 What we fear is that this -- we don't want sort of a day to
15 come where there's an argument that this language independently
16 barred us from accessing the data. Any restrictions on our
17 access to the data are -- should be imposed by the FISC in
18 accordance with the terms of FISA. To the extent that that --

19 **THE COURT:** So it's a jurisdictional issue, is really
20 what you're saying?

21 **MR. GILLIGAN:** Right. The Congress, through FISA,
22 conferred on the FISC the authority to determine whether and
23 under what circumstances the particular personnel should have
24 access to data that are acquired under the authority of FISA.

25 To the extent that this has some more benign purpose, it's

1 unnecessary. And we would --

2 **THE COURT:** Let me ask you this question.

3 Do you acknowledge and do you represent that any access
4 that the Government would want of this aged-out information --
5 they would first seek permission from the FISA Court?

6 **MR. GILLIGAN:** Absolutely.

7 **THE COURT:** Okay. So there you go. We've got a
8 representation on the record. And I think that would be the
9 law whether you said it, or not; but it's clear on the record.

10 And I do think, thinking out loud again -- I haven't
11 decided how I'm going to rule -- I think this is a little bit
12 more -- this goes a little bit beyond this Court's
13 jurisdiction, and may be unnecessary, especially in light of
14 the Government's representation. And also, from a 30,000-foot
15 level, the feasibility of accessing this information, as well.
16 So --

17 **MS. COHN:** Well, Your Honor, all I really wanted to
18 do here -- and this isn't the most important point that we're
19 here to talk about -- but is to say that nothing in this order
20 shall be construed as giving them the authority. And my
21 intention was to preserve; to make sure that there wasn't an
22 argument later that this order somehow gave them authority, so
23 that they have to go to the FISC if they want to seek it,
24 because the only reason this is being preserved is because of
25 this order.

1 **THE COURT:** Well, I understand that. All right. I
2 hear you.

3 Let's move on to Question Number 7. The preservation order
4 in *Jewel* requires that counsel submit to the Court under seal
5 and pursuant to Federal Rule of Civil Procedure 11 a statement
6 that the Court's preservation directive has been carried out.
7 Does the Government's recent and partially declassified
8 submissions regarding its preservation protocol under the *Jewel*
9 preservation order satisfy this requirement? And does the
10 Government object to this same provision in any preservation
11 order issued in *First Unitarian Church*?

12 **MR. GILLIGAN:** Well, Your Honor, we satisfied the
13 certification requirement, actually, in 2007. We filed under
14 seal a certification executed by lead counsel at the time,
15 certifying that, on the basis of the efforts that were outlined
16 in our then-classified declaration, that we had complied with
17 our preservation obligations. And so we did that back in 2007.

18 We would have no objection to, if the Court so wished that
19 part of the preservation order issued in *First Unitarian*, doing
20 the same thing here.

21 **THE COURT:** All right. Counsel.

22 **MS. COHN:** Your Honor, I think they should have the
23 same obligations here. This brings up something I do want to
24 discuss.

25 First of all, the Rule 11 statement in the *Jewel* case is

1 Docket Number 67. And it's still classified.

2 These two filings that they presented on Monday are
3 still -- are still on the secret docket, but your Court -- you
4 know, you ordered them in September to go back through the
5 entire record of both *Jewel* and the MDL, and do
6 declassification of anything that they could declassify. These
7 documents weren't part of what they submitted on December 20th.
8 We gave Your Honor a list in our response in January of some of
9 the ones that we saw at this particular point in time; but I
10 think that they need -- they haven't complied with what you
11 asked them to do in September. It's plain now -- this thing
12 they just sprung on us on Monday -- that they could have
13 declassified that before this.

14 And so I think they should have to go back through and
15 actually do a real declassification of things like what they
16 said in order to say that they had complied, and anything else
17 that they can declassify. I think they've failed pretty
18 dramatically to abide by what the Court ordered them to do in
19 September. That's why we're in this mess, and that's why we're
20 in this mess on an emergency basis.

21 **THE COURT:** Well, this is somewhat apart from the
22 purposes for which you're here; that it's a separate issue
23 about whether the Government has complied with the Court's most
24 recent Order with respect to declassification.

25 And you're saying that they didn't comply with that.

1 **MS. COHN:** Your Honor, I think that's why we're here.
2 If they'd have shown us this stuff in December, we'd have known
3 that this problem was coming, and we'd have known that their
4 reinterpretation was coming. So I guess that I think that, you
5 know, they need to declassify as much as they can.

6 Again, the actual statement that is referenced in the *Jewel*
7 order in the MDL order, you know, is Docket 67; is the one that
8 they filed in *Jewel*. I couldn't find the docket number in the
9 MDL from 2007 in the moments we had before this hearing; but
10 that they did do those things. We don't know what they look
11 like, but I think they should be ordered to try to go back and
12 declassify as much as of that as possible, so we get as big a
13 picture as we can about what they're doing for evidence
14 preservation.

15 **THE COURT:** All right. Ms. Berman.

16 **MS. BERMAN:** Your Honor, on the larger point about
17 our compliance with the December 20th deadline, I went back and
18 looked at the transcript from the case-management conference on
19 September 27th. It's very clear from the colloquy between the
20 Court and both counsel that Your Honor was ordering the
21 Government to do a declassification review of the State Secrets
22 declarations that the Government had submitted.

23 And there was a whole colloquy about it sort of ending with
24 Mr. Coppelino saying, "And we're talking about the *ex parte*
25 *in camera* State Secrets privileged declarations in *Shubert* and

1 *Jewel*; the two cases?"

2 And the Court said, "That's correct."

3 And so that was our understanding of our obligation, was
4 that we were to do a declassification review by December 20th
5 of the various State Secrets declarations that had been
6 produced in both of those cases.

7 And then, Your Honor, on the more narrow point about the
8 Rule 11 certification, my understanding is that that -- that
9 the 2007 one filed in the MDL case was filed under seal, and
10 was not -- but that it was not classified.

11 **MS. COHN:** These are not distinctions that were
12 readily apparent to Plaintiffs

13 **THE COURT:** Well, do they need to be sealed?

14 **MS. BERMAN:** Your Honor, my understanding is that
15 there's nothing classified in them.

16 **THE COURT:** That's a different issue.

17 **MS. BERMAN:** I think they were ordered under seal by
18 the Court. That's what Mr. Coppolino just told me.

19 **THE COURT:** All right. Do you have any objection
20 to -- once the Court reviews those, to them being unsealed?

21 **MS. BERMAN:** I think we'd have to check back with the
22 client, just to make double sure that there's nothing in there.

23 **THE COURT:** Why don't you do that, and let the Court
24 know one week from today whether the Rule 11 certifications can
25 be unsealed?

1 Ms. Ottolini, that date would be --

2 **THE CLERK:** March 26th.

3 **THE COURT:** Do you want to say something else?

4 I have a bigger point, but -- not a bigger point, but a
5 point. It's a question, which I -- okay.

6 So hypothetically, if there were documents that are
7 submitted under -- that are classified -- the documents are
8 classified, but within those documents, there are unclassified
9 paragraphs that are designated as such, is there any reason
10 that those cannot be disclosed?

11 The fact that they're in a document such as a declaration
12 may be the -- I understand from your classifications guru, you
13 know, the document, itself, remains classified; but I was
14 interested in the fact that as I was reviewing some of this
15 information, it had a classification that was -- which was
16 translated to me unclassified.

17 So my question is: Why can't the unclassified portions be
18 published?

19 Not -- not the document; but as I understand that, if any
20 part -- if one word of the document is classified, the whole
21 document is classified; but the individual paragraphs -- so it
22 could be broken out if they're unclassified?

23 **MS. BERMAN:** Well, I think that's what we do when we
24 submit a public version of the classified -- of a classified
25 declaration or document.

1 **THE COURT:** Well, I'm not sure. I didn't do -- I was
2 trying to, you know, compartmentalize my brain from
3 inadvertently disclosing, but it struck me that there were a
4 lot of paragraphs that were designated as unclassified.

5 And I didn't go through then the public filing to see
6 whether all of those paragraphs were disclosed in the public
7 record; but as a matter of -- in sort of theory or practice, is
8 there any reason why those stated to be unclassified paragraphs
9 could not be broken out from the document, and published?

10 **MS. BERMAN:** I think the answer to your question is:
11 That is what we do when we do the public ones.

12 So in every case where there has been a classified
13 declaration -- you know, at least the State Secrets privileged
14 declarations -- we submitted a public version of it -- with
15 that.

16 **THE COURT:** The December 2013 materials and
17 declaration.

18 **MS. BERMAN:** Right. Well, again, Your Honor, that --
19 this is sort of another way of answering it. I mean, the 2007
20 classified declaration and brief, we just went through this
21 process --

22 **THE COURT:** Right.

23 **MS. BERMAN:** -- of figuring out what was no longer
24 classified and could be produced in a public document.

25 **THE COURT:** All right.

1 **MS. BERMAN:** So we just did that for the 2007
2 documents.

3 **MR. GILLIGAN:** May I for a moment, Your Honor?

4 **THE COURT:** Yes.

5 (Discussion off the record.)

6 **MS. BERMAN:** So, Your Honor, I think if you look at
7 the -- that the redacted version of the 2007 declaration that
8 we just submitted, I mean, you will see that that paragraph
9 that has a "U" next to it is fully produced.

10 **THE COURT:** All right. So that answers my question.
11 All right.

12 And again, I just didn't do a redlined version on my own to
13 see; but it struck me as I was reading the still-classified
14 materials that were used, but which indicates "unclassified."
15 So you're saying those would have -- are now in the public
16 record?

17 **MS. BERMAN:** Yes. I'm flipping through them now, and
18 that's --

19 **THE COURT:** All right. What's your position about
20 what the Court's actually said in the case-management
21 conference with respect to what it was ordering?

22 **MS. COHN:** I did not understand the Court to only be
23 limiting their need to do a declassification review to just
24 stuff having to do with their -- just their State Secrets
25 allegations.

1 My -- my companion here just gave me the quote. And this
2 is a quote from you. "I'm going to require that all previous
3 declarations be declassified and presented to the Court -- all
4 of them, without exception -- because I want a full record
5 before the Court."

6 I did not understand that --

7 This was discussed in September.

8 I didn't understand that to be limited to their
9 declarations regarding State Secrets.

10 **THE COURT:** Well --

11 **MS. COHN:** We should have access to all facts that
12 they submitted *ex parte in camera* to this Court that they're no
13 longer claiming classification under, regardless of whether it
14 was in a State Secrets declaration, or a declaration in support
15 of evidence preservation, or any other secret declaration. If
16 it's not properly classified anymore, we should see it.

17 **THE COURT:** Well, Ms. Berman, my intention was at the
18 time -- and you've given me quotes from what I said, but my
19 intention was and the whole context of it was there had been
20 all of these unauthorized -- some would say "treasonous"; I
21 would say "treasonous" -- revelations made.

22 And the Government had acknowledged, just like counsel --
23 your colleague had just said with respect to the telephony
24 carriers -- carrier, at least -- it acknowledged the
25 authenticity of what had been leaked.

1 And so my concern was, in order to even the playing field,
2 is that any anything of that ilk which had been submitted to
3 this Court in a declaration that was otherwise classified, all
4 I was asking -- I wasn't ordering the Government to publish
5 that. I was ordering the Government to reassess whether or not
6 this information was, in fact, revealed in public and
7 acknowledged by the Government, such that they could be
8 unclassified for purposes of this litigation.

9 So irrespective of the narrow reading that you've given it,
10 I think my intention, at least, was -- and I'm not criticizing
11 the Government, because clearly I was ambiguous about it --
12 that was the intention of it. And is that something that can
13 readily be done, or has it been done?

14 **MS. BERMAN:** Your Honor, I think that the Government
15 has basically done that. I -- you know, I don't think that
16 there are other classified declarations in the *Jewel* and
17 *Shubert* cases that have not been -- gone through
18 declassification review process at this point.

19 I think that there's a few briefs, classified briefs; but
20 those would just summarize facts that were in declarations.

21 And so in terms of your goal that it be, you know, the
22 Government's sort of confirmation of information, I believe
23 that that has been done.

24 **THE COURT:** All right. Ms. Berman.

25 **MS. COHN:** Your Honor, we submitted a partial list.

1 **THE COURT:** Sorry. I said "Ms. Berman." I meant
2 Ms. Cohn.

3 **MS. COHN:** I'm happy to be confused with her.

4 **MS. BERMAN:** Thank you.

5 **MS. COHN:** It's Document 173 is our motion for
6 partial summary judgment where, on page -- well, 15 of 17 in
7 the Court's things, we begin to talk about the things that we
8 can glean right now they didn't give unclassified versions of
9 on their December 20th.

10 Now, I don't have a full list. I mean, we're still kind of
11 guessing a little bit here; but they certainly know. And I
12 think that they should have to go back through, and give a list
13 of everything that they've filed *ex parte in camera*, and
14 explain where they did it.

15 I'd also like, frankly, a bit of a map, because in the
16 declaration that they have just unsealed in 2007, they refer to
17 an Alexander Declaration in *Verizon* cases. That's not -- I
18 can't find that. That's not what it's called in the context of
19 the -- of the actual Court docket. So I would also like a map
20 to things that -- you know, if they're calling something in a
21 later document that's referring to something in an earlier
22 document, I really don't want to have to play *Where's Waldo?* to
23 find it. That was one we were very interested to see finally
24 unsealed.

25 And we have some guesses about which Alexander Declaration

1 they're talking about, but there's nothing called "Alexander
2 Declaration in Support of *Verizon* Cases" on the docket. So --

3 **MS. BERMAN:** Your Honor, again, Mr. Coppolino tried
4 to clarify this, to get an understanding of what the Court
5 wanted us to do at that hearing. And that's why he
6 specifically said, "Declarations in the *Jewel* and *Shubert*
7 cases; those two cases?" And the Court said, "That's correct."

8 **MS. COHN:** Well, *Shubert's* part of the MDL.

9 **MS. BERMAN:** Well, there were other declarations
10 filed in the MDL that did not specifically apply to *Jewel* and
11 *Shubert*.

12 **THE COURT:** It wasn't my intention to basically issue
13 an Order that anything that was confirmed from the
14 inappropriate leaks would then be affirmed by the Government.

15 I only cared about what was relevant to the cases before
16 this Court. So to the extent that declarations or materials
17 were presented to this Court in any proceeding, whether it's
18 summary judgment or case management or whatever -- that those
19 would be unsealed, so that we would at least have a little bit
20 more of a level playing field.

21 **MS. COHN:** Your Honor, the *Verizon* --

22 **THE COURT:** So is there a way to get to that?

23 **MS. COHN:** The *Verizon* case is part of the MDL, so
24 this was all under the same case number.

25 And I think they're trying to parse things now between

1 stuff that might have been specific to *Shubert*, which was part
2 of the MDL, versus stuff that was specific to Verizon, which
3 was also part of the MDL; but certainly to the extent that, in
4 telling Judge Walker how they read our Complaint, they're
5 referencing something that they filed in a different MDL case,
6 we should be entitled to see what they told Judge Walker that
7 they're referencing. Right?

8 So that -- I mean, I feel like I'm in this kind of strange
9 treasure hunt here, to try to figure out what the Government is
10 doing. And all I really want is a map, so I can then figure
11 out, like, what -- what are the facts that could be available
12 to us now that we deserve to see?

13 And it's not just the revelations, themselves; but of
14 course, the Government has released a large amount of
15 information. They have a whole tumbler with FISC orders, and
16 statements from officials about the mass spying now. So the
17 revelations started something, but the Government has now done
18 a lot of revealing of things that -- I think it's --

19 **THE COURT:** That would also be pertinent to the cases
20 before this Court?

21 **MS. COHN:** I believe so, Your Honor, because it's --
22 they revealed a lot of the mass spying programs. They revealed
23 the upstream program.

24 **THE COURT:** We've been going -- I usually don't go
25 two hours without giving everybody a break. So let's take a

1 break. I want to noodle over what you've said. And I want to
2 come back and give some final remarks.

3 **MS. BERMAN:** Your Honor, could I just wrap -- to wrap
4 this point up, briefly address Ms. Cohn's point?

5 **THE COURT:** Please. Yes.

6 **MS. BERMAN:** So first of all, she has a roadmap.
7 It's the docket. Every time we filed a classified filing, we
8 filed a notice of filing -- of lodging of a classified
9 document. So all she has to do with look at the docket for
10 that.

11 And just to also point out that the declarations that were
12 filed -- the State Secrets privileged declarations that were
13 filed in the *Shubert* case that Your Honor specifically told us
14 to declassify -- the caption on those, even though it's in the
15 MDL, it says, "This document relates to *Shubert*." So it's
16 clear that these are *Shubert* declarations.

17 And the ones that were filed in an MDL case, such as
18 *Hepting* or one of the other cases, that would have had the same
19 indication on those captions, too; that this document relates
20 to *Hepting*.

21 **THE COURT:** All right. Let's take a break.

22 (Recess taken from 3:55 p.m. until 4:26 p.m.)

23 **THE COURT:** Okay. So the first thing the Court is
24 going to do is direct the parties to jointly order a transcript
25 of these proceedings on an expedited basis, because I'm going

1 to make some rulings here from the Bench; some scheduling. And
2 the Court does not have -- parties may, but the Court does not
3 have an eidetic memory about what I've said. So I'm going to
4 say it on the record, and that will be the Order of the Court,
5 because, given the nature of these proceedings, it needs to be
6 on an expedited basis.

7 So first, the Court hereby extends the Temporary
8 Restraining Order issued on March 10th, 2014, until such time
9 as it issues a Final Order resolving the evidence-preservation
10 issue in this matter. So that Order is continuing until
11 further -- until that is superseded by the Final Order that the
12 Court will issue.

13 The Court is inclined to issue a preservation order in
14 *First Unitarian Church*, and adopt the language from the *Jewel*
15 preservation order.

16 The Court will not include paragraphs 3 or 4, as suggested
17 by the Plaintiffs.

18 Paragraph 1 of Plaintiffs' proposed preservation order is
19 too broad. The Court is inclined not to adopt the language
20 regarding reaffirming or referencing the preservation order in
21 *Jewel*.

22 In addition, the Court finds that the Plaintiffs' suggested
23 language on the scope of the materials to be preserved is not
24 sufficiently tethered to their Complaint. Therefore, the
25 parties are hereby ordered to submit suggested language to

1 preserve the evidence that relates to the precise claims made
2 by Plaintiffs in the *First Unitarian Church* Complaint.

3 Because of the expedited nature of these proceedings, I
4 have to give very short turnaround times for this. So the
5 Plaintiffs' submission must be made by no later than
6 March 20th, 2014, at 10:00 a.m. Pacific Standard Time. The
7 Government Defendants' submission must be made no later than
8 March 20th, 2014, at 2:00 p.m. Pacific Standard Time.

9 Now, with regard to the Government's compliance with this
10 Court's prior preservation order in *Jewel*, the Court hereby
11 issues the following briefing schedule. The Government brief
12 on this issue will be filed no later than May 9th, 2014. And
13 it shall be supported by detailed evidentiary declarations.

14 The Plaintiffs' brief shall be filed no later than
15 May 30th, 2014.

16 The Government's replies shall be filed no later than
17 June 13th, 2014.

18 And the Court will set a hearing, if necessary, by further
19 order; but I'm not going to do it right now.

20 Now, with regard to the Court's directive to the Government
21 to review the classification of declarations filed in these
22 matters, the Court hereby clarifies its oral Order from
23 September 2013 as follows. The Court requires the
24 declassification of information that has previously been
25 disclosed by the Government within all previously classified

1 declarations filed in *Jewel, Shubert*, and
2 *First Unitarian Church* cases. The deadline shall be 30 days
3 from today: April 21st, 2014.

4 The Government shall file a submission on April 21st, 2014,
5 indicating which declarations, by their docket numbers, will be
6 declassified as a result of the Government review, pursuant to
7 this Order and the September Order.

8 All declarations, whether from the MDL or any other matter
9 incorporated by reference, shall be similarly reviewed for
10 declassification purposes pursuant to this Court's Order.

11 And again, the parties are directed to order a transcript
12 of these proceedings, so they will have a precise indication of
13 what this Court has ordered.

14 So any questions or comments from Plaintiffs?

15 **MS. COHN:** Yes, Your Honor. I -- just one point of
16 clarification. So when you say "*Shubert*," do you mean the
17 entire MDL, or the subsection of the MDL? Because it appears
18 that they did not -- they understood that only to mean --

19 **THE COURT:** Well, remember the remaining -- the
20 other -- the *Hepting* case and the other cases have been
21 dismissed. Correct?

22 **MS. COHN:** Yes, Your Honor.

23 **THE COURT:** All right. So just the cases that are
24 extant before this Court. So just *Shubert*.

25 **MS. COHN:** *Shubert*.

1 **THE COURT:** Yes.

2 **MS. COHN:** And the ones that are referred -- and then
3 the declarations that referred to, which would solve my
4 problem.

5 **THE COURT:** That's correct. Exactly. That are
6 incorporated.

7 **MS. COHN:** Okay, Your Honor. That's fine. I would
8 like to see if we could get some hearing dates in some of the
9 other things that are before the Court, as long as we have your
10 attention.

11 **THE COURT:** Well, why don't you tell me what the
12 things are? I'm not promising to give it to you right now,
13 because it's a lot for -- to digest at one time; but why don't
14 you -- perhaps I'll do it in a further written order. So what
15 are the matters that you would like hearings on?

16 **MS. COHN:** So, Your Honor, we have a preliminary
17 injunction and then a cross-motion to dismiss in
18 *First Unitarian* that is fully briefed.

19 **THE COURT:** All right.

20 **MS. COHN:** We had an April 24th hearing date that was
21 vacated; I suspect because of your move.

22 **THE COURT:** Yes.

23 **MS. COHN:** But we were hoping to get a new date for
24 that.

25 **THE COURT:** All right.

1 **MS. COHN:** The -- in *Jewel*, you had asked for four
2 follow-up questions to be briefed by the parties. The last
3 brief in that will be filed, I think, in a week.

4 **THE COURT:** Right.

5 **MS. COHN:** So we'd like to have a hearing date for
6 that --

7 **THE COURT:** All right.

8 **MS. COHN:** -- so that we can kind of get these things
9 moving.

10 I mean, you know, our view is that some of this
11 evidence-preservation question might be able to be handled a
12 little better if we could get to the place where we could issue
13 the discovery that we need -- so even in a limited basis, for
14 this.

15 And the other thing I just wanted to remind the Court of,
16 which maybe we lost sight of in the fight, is that in *Jewel*,
17 our clients are AT&T customers. So to the extent there's
18 preservation obligations with -- on the NSA with regard to the
19 *Jewel* Complaint, they only reach AT&T; they don't reach the
20 other carriers.

21 Now, I can't speak for my colleague who handles the *Shubert*
22 case, but at least our case is limited to one carrier.

23 **THE COURT:** All right.

24 **MS. COHN:** And I just don't want us to lose sight of
25 that, with his statement about how we want to preserve

1 everything.

2 **THE COURT:** I understand that.

3 **MS. COHN:** That's not the scope of our -- we've never
4 claimed our Complaint reaches beyond the class, which is a
5 class of AT&T customers.

6 **THE COURT:** All right. I will take that under
7 advisement.

8 Anything else?

9 **MS. COHN:** Well, Your Honor, I have one request with
10 regard to the Government's ongoing filings of stuff that
11 they've been filing that's classified or under seal, which is:
12 It would be really helpful to us if, when they file the public
13 version of something that they've filed under seal, it's the
14 same format, only just with redactions, rather than what they
15 do now, which is that they rewrite the declaration.

16 **THE COURT:** Well, I thought their most recent
17 submission was in that format, with the blacking out and --

18 **MS. COHN:** That's correct, Your Honor. I guess what
19 I would like Your Honor to assist us in requiring is that they
20 do it like that in the ongoing one. We kind of have a
21 *Where's Waldo?* game trying to figure out what's going on.

22 **THE COURT:** All right.

23 **MS. COHN:** And if they file the same declaration form
24 with just the redactions, then the match between the two is
25 easier for everyone to see.

1 **MR. GILLIGAN:** Your Honor, that -- especially when
2 we're operating on a very compressed timetable, as in this kind
3 of matter, that can be a very time-consuming enterprise
4 involving line-by-line review of a declaration that we're
5 struggling just to complete the classified version of on the
6 day of the filing, such as just this last Monday, in the middle
7 of a Government shutdown.

8 So what we tried to do is to extract from those classified
9 filings the information that we're able to determine, as best
10 we can in a short period, can safely be put on the public
11 record. Persons familiar with the mechanics of preparing
12 classified and unclassified versions of declarations and
13 similar filings would understand that is not a trivial request
14 that has just been made by Plaintiffs' counsel.

15 **THE COURT:** Well, I'm ordering you to do it anyway.
16 That's the Order of the Court, because it's confusing for the
17 Court as well, because again, I made the error, obviously --
18 and it was corrected properly by your colleague -- about
19 whether all of these materials I was looking at that had "U"s -
20 next to them -- meaning defined as "unclassified" -- had been
21 in the public record. And there would be no way readily to do
22 that, except to do it -- either myself or a staff member to do
23 a copy -- some kind of copying. So it seems to me it's easier,
24 actually, to do a redaction like you just did, which was very
25 helpful, in the last group of filings. So that's the order of

1 the Court.

2 Anything further?

3 **MS. COHN:** One -- one small thing, Your Honor. The
4 times that you mentioned -- 10:00 a.m. and 2:00 p.m. -- that's
5 California time?

6 **THE COURT:** PST.

7 **MS. COHN:** Yes.

8 **THE COURT:** Yes. Thank you very much.

9 **MS. COHN:** We're in PDT now, but yes.

10 **THE COURT:** Pacific Savings [sic] Time. I don't
11 know. California time.

12 **MS. COHN:** The time we're in, like, now.

13 **THE COURT:** I look at my iPhone. It says
14 "Cupertino." I don't know.

15 Thank you very much, counsel. I appreciate it.

16 (At 4:35 p.m. the proceedings were concluded.)

17 I certify that the foregoing is a correct transcript from the
18 record of proceedings in the above-entitled matter.

19

20



21

March 19, 2014

22

Signature of Court Reporter/Transcriber Date
Lydia Zinn

23

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