

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

John Doe,	)	Civil Action
	)	No. 14-cv-372
Plaintiff,	)	
	)	MOTION HEARING
vs.	)	
	)	Washington, DC
Federal Democratic Republic	)	July 14, 2015
of Ethiopia,	)	Time: 2:00 p.m.
	)	
Defendant.	)	

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TRANSCRIPT OF MOTION HEARING  
HELD BEFORE  
THE HONORABLE JUDGE RANDOLPH D. MOSS  
UNITED STATES DISTRICT JUDGE

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A P P E A R A N C E S

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1 THE COURTROOM DEPUTY: Civil action 14-372, John  
2 Doe versus the Federal Democratic Republic of Ethiopia.

3 Counsel, will you please approach the podium and  
4 identify yourselves for the record.

5 MR. CARDOZO: Good afternoon, Your Honor. Nathan  
6 Cardozo for the plaintiff John Doe, A/K/A Mr. Kidane. And  
7 with me I have my colleague Cindy Cohn and Scott Gilmore.

8 THE COURT: Good afternoon.

9 MR. CHARROW: Robert P. Charrow for the defendant  
10 Federal Republic. And with me is Miss Prusock, you just  
11 admitted.

12 THE COURT: Thank you again. Welcome. Just  
13 before getting going, one thing that I just wanted to put on  
14 the record, I don't think is an issue, but I always prefer  
15 full disclosure on these things, and if anyone sees an  
16 issue, please let me know. But when I was in private  
17 practice, not all that long ago, one of the opposing counsel  
18 in at least one of my cases was EFF.

19 And in addition, I think that Mr. Snider, who is  
20 one of the counsel representing the Federal Republic was at  
21 Wilmer, Cutler, Pickering, Hale and Dorr when I was there,  
22 as well. So, if anyone has any issue, please let know. But  
23 I'm not aware of any.

24 So, we're here for argument today on defendant's  
25 motion to dismiss. I think that given the number of issues

1 that are involved, that if the parties don't mind doing it  
2 this way, it would probably be most helpful for the court to  
3 proceed, at least, on an issue-by-issue basis with respect  
4 to the major issues. I think we could probably clump some  
5 of the issues together.

6 But I think that rather than having defendants go  
7 first and go through all the issues and then having the  
8 plaintiff then have to go back and respond to things that I  
9 may have heard oral argument about some time earlier, it may  
10 be easier to do it one issue at a time.

11 And I guess the issue where I would like to start  
12 would be with the discretionary function exception to the  
13 Foreign Sovereign Immunities Act. And, obviously, if there  
14 are any overview points that you want to make, you should  
15 feel free to make those at this time as well.

16 MR. CHARROW: Thank you very much, Your Honor. I  
17 would like to begin with one overview point. There is  
18 apparently some disagreement about the burden of proof that  
19 pertains in a case involving a section 1330 case, and I  
20 would like to address that to start with because I believe  
21 that is an overarching consideration. And obviously, the  
22 burden of proof only relates to questions of fact.

23 And in the context of the Foreign Sovereign  
24 Immunities Act, when we're dealing with an exception, it  
25 really relates to those facts that are jurisdictional in

1 nature, that are independent of the facts necessary to  
2 establish the textbook version of the cause of action at  
3 issue. And in this case there are two such facts.

4 And also, as an overarching consideration, there  
5 are really two burdens of proof. And part of the confusion  
6 comes from that. There is the burden of producing evidence.  
7 And the burden of producing evidence at this stage of the  
8 proceeding rests with the plaintiff. And there is the  
9 burden of proof to establish by proof at some point later in  
10 the case that the exception to the Sovereign Immunities Act  
11 applies, and that would be the defendant's burden.

12 And the two factual predicates that are  
13 independent of the cause of action but are jurisdictional in  
14 this case would be, number one, whether the entire tort  
15 occurred in the United States, and, number two, was there a  
16 personal injury. Those are the two factual predicates that  
17 stand as jurisdictional predicates, that are independent of  
18 the two causes of action. In other words, these are unusual  
19 torts. Both torts can be maintained in textbook format  
20 without allegation of proof of personal injury.

21 THE COURT: My understanding, and I think this is  
22 just a version of what you've said, is that the defendant in  
23 a Foreign Sovereign Immunities Act case where it is  
24 asserting immunity carries the ultimate burden throughout  
25 the process.

1 MR. CHARROW: That's correct.

2 THE COURT: And that the plaintiff has some burden  
3 of coming forward and placing the issue in contest, but that  
4 it remains the defendant's burden of ultimate persuasion.

5 MR. CHARROW: Correct. The ultimate burden of  
6 proof rests with the defendant. However, the burden of  
7 producing evidence shifts back and forth. And with respect  
8 to the burden of producing evidence -- it's a 12(b)(1).  
9 Once a plaintiff -- or, once a defendant calls into question  
10 the fullness of the pleadings, whether they're adequate, it  
11 is then the plaintiff's burden in this context to produce  
12 evidence to demonstrate the underlying jurisdictional fact,  
13 provided that fact is independent of the textbook version of  
14 the cause of action.

15 THE COURT: This is something perhaps we'll  
16 explore more as the arguments proceed, but one question that  
17 I'll have -- I can ask you now, but I probably should ask it  
18 again when we're closer to the end of the argument -- is  
19 whether there is a factual dispute between the parties, or  
20 whether it is a legal dispute on these issues. And related  
21 to that, if there is a factual dispute, is there any need  
22 for jurisdictional discovery in order to decide the pending  
23 motion?

24 MR. CHARROW: It is a dispute based on the  
25 pleadings. So it is an 8(a) dispute.

1 THE COURT: If that's the case, then doesn't the  
2 court take the plaintiff's pleadings as true for purposes of  
3 resolving the motion?

4 MR. CHARROW: No, the court does not. Only  
5 factual assertions are taken as true.

6 THE COURT: Fair enough. That's what I meant.  
7 But the factual assertions that are in the complaint.

8 MR. CHARROW: The factual assertions that are in  
9 the complaint can be taken as true, if they are in fact  
10 factual assertions, as opposed to legal conclusions.

11 THE COURT: If they are legal conclusions, we  
12 don't need facts, the court will decide the law. And if  
13 it's a factual dispute, then the court, absent someone  
14 putting other evidence before the court, which could occur,  
15 that the court would take the pleadings or the plaintiff's  
16 complaint as true and any reasonable inferences that can be  
17 drawn from the complaint for purposes of deciding the  
18 present motion, is that right?

19 MR. CHARROW: That is partially true, correct.

20 THE COURT: Tell me where I'm not true.

21 MR. CHARROW: I think that with respect to the  
22 facts as pled, there is a subtle difference between what is  
23 sufficient in a normal case and what is sufficient in a 1330  
24 case.

25 THE COURT: Okay.

1 MR. CHARROW: And I think there's a heightened  
2 standard of pleading in a 1330 case because, unlike in a  
3 normal case, you don't have a moving burden of producing  
4 evidence at the pleading stage, at the 12(b)(1) stage, and  
5 you do in a 1330 case. And that's what's unusual about  
6 these cases.

7 THE COURT: So is there any case that you can  
8 point me to saying there's a heightened standard that  
9 applies in a 1330 case?

10 MR. CHARROW: I think any of the Supreme Court  
11 cases deal with the fact there's a significant presumption  
12 against bringing a foreign country into court in the United  
13 States. And it's that underlying presumption that drives  
14 the shifting burden of producing evidence. If you look at  
15 the, *Chabad* case, for example, it deals with the shifting  
16 burden of producing evidence and the fact the pleadings  
17 themselves --

18 THE COURT: I don't understand, though, your  
19 emphasis on the shifting burden of producing evidence in a  
20 context in which neither you nor the plaintiff is putting  
21 any evidence before the court and the court is relying on  
22 the complaint. I would understand that if you had come  
23 forward with some evidence that might then shift the burden  
24 in some way back to the plaintiff to contest that evidence.  
25 But in a case in which there's no evidence in front of the

1 court and there's just a complaint in which the court  
2 accepts the allegations, the factual allegations as true,  
3 I'm not quite sure I follow the shift.

4 MR. CHARROW: Let me provide you the context in  
5 this case, I think, that makes it clear. I think the one  
6 factual allegation that is subject to the moving burden, the  
7 shifting burden of producing evidence, is the allegation of  
8 mental distress. That is not an allegation that is  
9 necessary to establish either cause of action. It is an  
10 allegation, however, that is essential to establishing this  
11 court's jurisdiction. Without it there is no jurisdiction.

12 THE COURT: But it's alleged in the complaint.

13 MR. CHARROW: It is alleged in the complaint, but  
14 there are no facts to support it. At the point that we  
15 place that at issue, it was the plaintiff's burden to come  
16 forward with some evidence or some additional pleading  
17 demonstrating that, in fact, an emotional distress in the  
18 form of an injury was in fact suffered.

19 THE COURT: How did you place that issue, that  
20 question at issue, other than simply saying we doubt it?

21 MR. CHARROW: We doubt it -- well, we doubt it in  
22 more ways than one. Obviously, it was not in the initial  
23 complaint. We pointed that out in our first motion to  
24 dismiss. It suddenly appeared as a conclusion in the second  
25 complaint, i.e., the first amended complaint.

1 THE COURT: But not a surprising allegation, given  
2 the nature of the underlying allegations in this case.

3 MR. CHARROW: Not surprising, but when dealing  
4 with shifting burdens under the context of 1330 it's  
5 incumbent upon the plaintiff to at least present some  
6 factual support for the assertion that there is emotional  
7 distress. Because, remember, both of these causes of  
8 action, when private parties are involved, can survive  
9 without a demonstration of personal injury.

10 THE COURT: Okay.

11 MR. CHARROW: That's what makes it unusual. Okay?  
12 Discretionary function?

13 THE COURT: Please.

14 MR. CHARROW: Okay. Assuming -- assuming that the  
15 torts exception were to be satisfied with respect to where  
16 the tort occurred, the discretionary function exemption  
17 obviously must be satisfied in this case. And it obviously  
18 exempts from review by a court any activity which is a  
19 discretionary function of a foreign nation. And the  
20 plaintiff argues that the courts have used, by analogy, the  
21 Federal Tort Claims Act. We don't dispute that. We think  
22 it provides some analogy. Obviously it provides an  
23 analytical basis for which a court can analyze the extent to  
24 which a foreign can exercise its discretionary function.

25 The allegations in the complaint are that there

1 was spying done. It's not quite clear where the spying was  
2 done. It's not quite clear whether the defendant was aware  
3 that it was spying on the plaintiff. And I'll get to that  
4 shortly. This is all from the pleadings. This is not  
5 something I'm making up.

6 The central point, though, is that a nation, even  
7 the United States, has a discretionary function of deciding  
8 whether it will spy abroad and on whom it will spy on. And  
9 I think we've seen a number of cases where that issue has  
10 arisen and the courts have said discretionary function  
11 exemption applies here because it's inherent in the  
12 decision.

13 THE COURT: What cases are you referring to?

14 MR. CHARROW: I think the case involving China,  
15 which was, I think, the *Jin* case, State Security. *Jin*  
16 versus State Security.

17 THE COURT: That was a case in which someone was  
18 killed, correct?

19 MR. CHARROW: No, that was not a case in which  
20 someone was killed. That's *Liu*. *Liu* was a case where  
21 someone was killed. *Liu*, I believe, was out of the Ninth  
22 Circuit. *Jin* was, I believe, out of this circuit. And in  
23 *Jin* -- that's my recollection. And in *Jin* there was an  
24 allegation that Chinese citizens who were adverse to the  
25 government were being harassed in the United States by

1 agents of the Chinese government, and the court said that  
2 that's a discretionary function.

3 Correspondingly, when the head of security of  
4 Saudi Arabia was sued for funding, as part of the spying  
5 efforts, entities that ultimately were responsible,  
6 according to the complaint, in the 911 terrorist attack.  
7 Again, the court said that is a discretionary function, who  
8 they fund, how they go about their intelligence operations.  
9 And, obviously, the plaintiff argues that that type of  
10 conduct is not subject to a discretionary function because  
11 it's illegal in the United States. Well, obviously, all  
12 torts are civil wrongs and the discretionary function  
13 exception, obviously, does not apply to all torts.

14 Let's go back a minute, however. The real  
15 question, though, in assessing the discretionary function is  
16 whether it is legal or illegal in the country that's  
17 performing the actions. And here it's Ethiopia. And under  
18 Ethiopia law, it's not illegal to engage in spying overseas.  
19 Just as in the United States, it's not illegal for the U.S.  
20 government to engage in spying overseas.

21 THE COURT: That was one of the questions I had,  
22 actually. No one actually cites to Ethiopian law in any of  
23 the briefing on this issue. What is, in fact, the Ethiopian  
24 law with respect to alleged computer intrusions? And, you  
25 know, I think you need to be somewhat specific about this

1 and not simply, you know, simply say, you know, spying, but  
2 the question is, is it in fact lawful? And I should say, by  
3 the way, I'm taking, for purposes of this entire hearing,  
4 the allegations of the complaint as true. I have no idea  
5 whether they're true or not.

6 MR. CHARROW: So are we.

7 THE COURT: Everything I say, take that, too.

8 MR. CHARROW: Obviously the defendants disagree  
9 with the underlying allegation, but we are accepting as true  
10 for the purposes of this hearing only.

11 THE COURT: Accepting the allegations as true, is  
12 there, in fact, Ethiopian law that says that there are  
13 individuals in Ethiopia who are authorized, or where it is  
14 lawful for people in Ethiopia to reach out through the  
15 internet and to intrude into the computers of people in  
16 other parts of the world for purposes of eavesdropping on  
17 their telephone conversations, their Skype conversations,  
18 eavesdropping on what may be going on in their home, reading  
19 their text messages? I don't know the answer to know  
20 whether that's lawful or not under Ethiopia law.

21 MR. CHARROW: I believe it is. And I believe it's  
22 the same in most nations. Clearly, in the United States the  
23 law establishing the CIA gives the CIA the authority to do  
24 precisely what Ethiopia is alleged to have done here  
25 overseas.

1           THE COURT: I do think there's sort of an  
2 interesting and difficult question I want to spend some time  
3 talking about: Illegal in what sense? And you're the one  
4 who has said illegal under Ethiopian law. And I think that,  
5 you know, under those circumstances, particularly where  
6 you're representing the government of Ethiopia, it may your  
7 obligation to come forward, if that's what your argument is  
8 here, and point me to, hopefully, a translated Ethiopian  
9 statute, code, provision, something that says that we are  
10 authorized to do this.

11           I do think that, even putting that aside, that  
12 there are some difficult questions about whether that's the  
13 right standard of thinking about illegality here. I think  
14 you, in your own brief, say that, you know, if an act -- I  
15 don't have the language in front of me, but if an act is  
16 sufficiently outrageous, that it could rise to the level  
17 of -- even if it were not a violation of Ethiopian law, that  
18 it is so fundamental it violates international law, that you  
19 would say, you know, they're not authorized to do this.

20           MR. CHARROW: Obviously I don't want to get into a  
21 discussion of natural law with the court, but if we're  
22 thinking about natural law versus positive law, obviously  
23 the cases involving murder would trigger natural law.  
24 Fairly uniform recognition that murder is illegal.

25           THE COURT: One hint of what standard might be

1 used is in the D.C. circuits opinion in the -- which case  
2 was this one? Oh, I guess it was in the *MacArthur Area*  
3 *Citizens Association* case, where the court, in a footnote,  
4 says, Well, there may be a difference between crimes that  
5 are *malium prohibitum* and those that are *malium in se*.

6 And I guess one question I would have is, is  
7 whether, in fact, you know, does one look to U.S. law, does  
8 one look to international law, does one look to foreign law  
9 for purposes of making this determination? I have some  
10 concerns -- I take your point about the analogy to the  
11 Foreign Sovereign Immunities -- to the Federal Tort Claims  
12 Act, and you might ask whether the Ethiopian official had  
13 authority to act as an Ethiopian official, analogous to the  
14 U.S. official having authority to act.

15 I have to say, I think that raises some  
16 significant issues about whether it's appropriate and  
17 whether Congress would have intended for a U.S. court to be  
18 making judgments of that type, which seems to me to perhaps  
19 raise even greater comity concerns of reaching into the  
20 domestic law of Ethiopia and deciding whether, for example,  
21 a particular official in Ethiopia was acting within his or  
22 her authority in doing something, at least raises some  
23 issues that I think ought to make a U.S. court a little bit  
24 uncomfortable and question whether that's the right standard.

25 Similarly, one might say that as a U.S. court, you

1 know, I ought not say someone has discretion to violate the  
2 law in this country. And I take your point about negligence  
3 and things like that, but maybe that's where you get into  
4 the *malium prohibitum* and *malium in se* or, as the  
5 Restatement does, the difference between serious crimes and  
6 nonserious crimes.

7 But there is something -- and the cases don't  
8 speak terribly directly to any of this, but there's  
9 something a little bit troubling about a U.S. court saying,  
10 Oh, yeah, someone was acting within their discretion when  
11 they came into the United States and committed a clear  
12 violation, and I'm not saying that's this case, but a clear  
13 violation of U.S. law in some way.

14 In the *Letelier* case -- I mean, you know, I'm not  
15 sure you need to turn to international law or the law of  
16 humanity to simply say that it's troublesome for a U.S.  
17 court to say that someone was acting within their discretion  
18 to come into the United States and in the United States  
19 assassinate somebody.

20 MR. CHARROW: Correct. And that's why, I think, I  
21 was talking about natural law and the concept of those types  
22 of actions that are universally viewed as reprehensible.

23 THE COURT: So let me get at that. How would you  
24 articulate that standard? If the standard is not just the  
25 law of Ethiopia, but there's, you know, a second prong to

1 it, it's -- you know, even if they had authority under  
2 Ethiopian law, if they did something that was X --

3 MR. CHARROW: I think most courts that have  
4 addressed this issue have either overtly or subconsciously  
5 reverted to U.S. law. And they have said, okay, make  
6 believe this were the U.S. government acting overseas.  
7 Would this be legal or illegal under U.S. law? Would this  
8 be viewed as a discretionary function of U.S. law if it were  
9 done overseas? And this type of conduct here, as alleged in  
10 the complaint, clearly would be within the scope of what the  
11 CIA is expressly authorized to do by statute.

12 So if you use the U.S. law as a gloss, if you  
13 will, as a template for what is proper and what is not  
14 proper in terms of discretionary function, I think you come  
15 away with the understanding that this would be a valid  
16 exercise of a nation's discretionary function.

17 THE COURT: How would you articulate the standard  
18 though?

19 MR. CHARROW: I think I would look at it as a  
20 two-prong standard. First of all, I would ask myself, Is  
21 this something that is so inconsistent with universal norms  
22 as to be condemned by all nations? A standard very similar  
23 to that which would be used in the international legal area.

24 The next question would be if it isn't, then is  
25 this a type of activity which, if done by the United States

1       abroad, would in fact be viewed as something subject to  
2       governmental discretion? And I think in both cases we find  
3       that this is not something that would be viewed as  
4       reprehensible internationally and, number two, it is  
5       something that is done by the United States abroad and  
6       pursuant to its discretion. And if you apply that to this  
7       case, I think it would be -- I think it would be  
8       inappropriate for a court to say, well, the United States  
9       can do it overseas, but another nation can't do it here, in  
10      terms of exercising its discretion in its homeland, making a  
11      decision what to do.

12                THE COURT: Well, that actually raises another  
13      question which has been on my mind, which is has anyone  
14      actually asked the United States what their position is with  
15      respect to this case? Has anyone raised the question with  
16      the United States as to whether the United States should  
17      file a statement of interest?

18                MR. CHARROW: Normally the State Department, in my  
19      experience, does not file statements of interest, normally,  
20      in District Court proceedings. They wait until a matter  
21      pops up to Court of Appeals.

22                THE COURT: Do you know whether it's been raised  
23      with the State Department at this point?

24                MR. CHARROW: I can't say one way or another.

25                THE COURT: Any views on whether the court should

1 ask for the State Department's views? Frankly, as a  
2 District Court Judge I don't -- it's not the best --

3 MR. CHARROW: I guess the issue is this: The  
4 issue is -- there are a lot of issues in this case, for  
5 example, that arguably raise potential Constitutional  
6 issues. This court can dispose of this case without getting  
7 to those issues.

8 THE COURT: So there's another line of defenses in  
9 this case, I take it, that if these defenses fail, is there  
10 an active state defense?

11 MR. CHARROW: We haven't raised an active state  
12 defense, Your Honor. I think that the Federal Tort Claims  
13 Act, tortious exception 1605(a)(5) in this Circuit and in  
14 the Ninth Circuit and in the Second Circuit and in the Sixth  
15 Circuit require that the entire tort be committed in this  
16 country.

17 THE COURT: That will be our next segment.

18 MR. CHARROW: And that hasn't occurred here. And  
19 that, to me, is the cleanest and easiest way to resolve this  
20 case.

21 THE COURT: Is the reason you raise that point now  
22 is because the Active State Doctrine usually applies to  
23 conduct that occurs outside the United States?

24 MR. CHARROW: Correct.

25 THE COURT: Are there other Constitutional

1 defenses?

2 MR. CHARROW: There are Constitutional issues.  
3 There is one lurking that's very subtle, that we did not  
4 raise in our briefs, but it is there nonetheless, and that's  
5 the definition of person.

6 THE COURT: You did raise that in your briefs.

7 MR. CHARROW: We did, but I don't believe we  
8 raised the Constitutional issue in the brief, to alert the  
9 court that if it were to hold that the word "person"  
10 included a foreign entity, then one has to look back and  
11 question whether the in persona jurisdictional provisions  
12 are Constitutional of 1330.

13 Because, remember, in this Circuit a foreign state  
14 is not a person for due process clause protections. That  
15 permits service of a foreign state in the United States,  
16 even though it doesn't satisfy minimum contacts. If a  
17 foreign state is a person, then we have a Constitutional  
18 issue of due process.

19 THE COURT: I see your point. Did service occur  
20 through the State Department in this case?

21 MR. CHARROW: I don't know how service was  
22 perfected in this case. We received it after the fact and --

23 THE COURT: Would you have any objection to the  
24 court asking if the United States cared to express its views?

25 MR. CHARROW: We do not. We would not object to

1 that, Your Honor.

2 THE COURT: Okay. Another question with respect  
3 to the discretionary function exception is -- there's no  
4 briefing on international law. And I guess I had a question  
5 about whether you have a view as to the type of conduct that  
6 is alleged here, whether it's consistent with international  
7 law, whether it's consistent with the international covenant  
8 on privacy and civil rights to which, I believe, Ethiopia is  
9 a signatory -- or, not a signatory, it's a party.

10 MR. CHARROW: I believe it's consistent with  
11 international mores, which I think is more important in that  
12 respect.

13 THE COURT: Well, but is it consistent with  
14 international law or not?

15 MR. CHARROW: I believe the actions are consistent  
16 with international law.

17 THE COURT: What about the international covenant  
18 on privacy and civil rights?

19 MR. CHARROW: I believe that the actions here  
20 would be consistent with that.

21 THE COURT: Any view about whether the conduct at  
22 issue that is alleged here is malium in se or malium  
23 prohibitum?

24 MR. CHARROW: Haven't thought about it long enough  
25 to give you an answer. I just view it very simply as

1 something that falls well outside the area that would not be  
2 subject to a discretionary function exemption.

3 THE COURT: All right. Anything further on  
4 discretionary function?

5 MR. CHARROW: I think not.

6 THE COURT: Let me hear from the plaintiffs then.

7 MR. CARDOZO: Good afternoon, Your Honor. Thank  
8 you.

9 THE COURT: Good afternoon.

10 MR. CARDOZO: As my opposing counsel did, I'll  
11 start with just a very brief introduction about why we're  
12 here.

13 Congress has, of course, given foreign governments  
14 wide berth and immunized them against civil actions for many  
15 torts. But, the question before this Court is whether a  
16 foreign sovereign has discretion to commit a violation of  
17 the Wiretap Act, which is a tort as well as a serious  
18 felony, discretion that not even the U.S. government claims  
19 for itself. So -- and I will, if Your Honor will allow it,  
20 switch to burden very briefly. Or would Your Honor prefer I  
21 go to straight to discretionary function?

22 THE COURT: I was thinking about what you said in  
23 your opening. Let me get that up a second.

24 MR. CARDOZO: Yeah, I will.

25 THE COURT: Feel free to go to burden.

1 MR. CARDOZO: I'll continue on discretionary  
2 function, actually. As a court in this District ruled in  
3 *Orlikow* versus United States, that court found that CIA  
4 agents have no discretion to commit intelligence operations  
5 that are lacking in statutory authority. That's the case  
6 that controls here. You know, if a CIA agent was caught  
7 here in the United States and violated the FTCA. Same thing  
8 would apply to an Ethiopian agent if they were caught here.

9 CIA agents, when they conduct intelligence  
10 operations undercover abroad, if they get caught, they go to  
11 jail. It's not something that is legal for CIA agents to  
12 do. That's essentially what the government in Ethiopia is  
13 claiming here, that what CIA agents can't do, or if they did  
14 do they would get sent to jail, that Ethiopia can.

15 The question that this Court asks in determining  
16 whether the spying alleged here was a discretionary function  
17 is whether this is the type of judgment that Congress meant  
18 to immunize. And the Foreign Tort Claims Act case law cited  
19 in *Letelier* shows that this is not the type of judgment that  
20 Congress meant to immunize. This court, in *Letelier*, stated  
21 that foreign states have no discretion to have their  
22 officers commit an illegal act. Of course, illegal acts  
23 must be sufficiently grave to fall outside the discretionary  
24 act exception.

25 And *Orlikow* shows us that violating a federal

1 criminal statute for which, here, a Wiretap Act violation,  
2 carries a five years prison sentence. There's no discretion.

3 THE COURT: Is that true for the Federal Tort  
4 Claims Act as well? If there's some level of seriousness --  
5 seriousness threshold that has to be met before an act is  
6 deemed to be nondiscretionary?

7 MR. CARDOZO: So in the Federal Tort Claims Act,  
8 as in the Federal Sovereign Immunities Act, there's a two-  
9 step process. The first is, is there an element of choice?  
10 And that's where defendant fails. If U.S. criminal law  
11 prohibits one of your options, with a serious enough -- and  
12 there is no bright line, there's no -- "serious enough" is  
13 not a bright line distinction. But if U.S. criminal law  
14 prohibits one of the options but offers a regulated lawful  
15 pathway to go about accomplishing the same end, then there's  
16 no discretion to go about the illegal channel.

17 And here there is a mandatory channel. Ethiopia  
18 could have accomplished this act of spying in the United  
19 States legally if it had wanted to. We have a mutual legal  
20 assistance treaty framework. Ethiopia is not a signatory to  
21 an MLAT with the United States. But even if it's not a  
22 signatory to an MLAT, it still may request State Department  
23 or Justice Department assistance collecting evidence. And  
24 that happens all the time, Your Honor.

25 THE COURT: Is the allegation here that Ethiopia

1 was engaged in a criminal enterprise or an intelligence  
2 enterprise? And if it was intelligence versus criminal, is  
3 there any authority or basis for seeking mutual assistance  
4 in an intelligence activity?

5 MR. CARDOZO: Your Honor, the plaintiff is not  
6 aware whether this was considered a criminal or an  
7 intelligence operation. And there's no distinction, Your  
8 Honor. At the MLAT framework there is no distinction  
9 whatsoever. And at least in this Circuit the defendant is  
10 simply wrong. This court, in *Letelier*, said that we look to  
11 U.S. law to determine whether a discretionary function is  
12 being exercised.

13 THE COURT: It went a little bit beyond the U.S.  
14 law and talked about crimes against humanity or something to  
15 that effect. There was some language in there which was  
16 stronger than just this was a violation of U.S. law. And I  
17 assume it was also a violation of Chilean law as well, I  
18 would assume.

19 MR. CARDOZO: That is certainly possible, Your  
20 Honor. And notably, the defendant hasn't alleged that they,  
21 for instance, got a warrant to serve on Mr. Kidane. But in  
22 any case, the conduct that happened here was not consistent  
23 with the international covenant on civil and political  
24 rights. The -- that covenant requires that intelligence  
25 activities or surveillance be necessary and proportionate.

1 And defendant has not made even an argument, much less a  
2 showing, that the -- this surveillance was necessary and  
3 proportionate.

4 THE COURT: Can I ask you another question about  
5 the International Covenant, which is, based on my reading of  
6 it, it -- let's see if I have it here. It's Article 17  
7 says, "No one shall be subjected to arbitrary or unlawful  
8 interference with his privacy, family, home or  
9 correspondence." Is that the provision you're relying on,  
10 as well?

11 MR. CARDOZO: Yes, Your Honor.

12 THE COURT: When it refers to unlawful  
13 interference, this gets us back to the same question again:  
14 Unlawful under international law, unlawful under the law,  
15 the domestic law of the target nation, or unlawful under the  
16 domestic law of the targeting nation?

17 MR. CARDOZO: I think in the covenant, Your Honor,  
18 that it's referring to international law. But here we can  
19 look to U.S. domestic law and international norms, as did  
20 the court in *Letelier*, as do courts in this Circuit  
21 generally.

22 THE COURT: But the International Covenant, in  
23 particular Article 17, is not self-executing in the United  
24 States.

25 MR. CARDOZO: That's correct, Your Honor. And we

1 have the Wiretap Act to do that work for us here.

2 THE COURT: So what work does the International  
3 Covenant do for you?

4 MR. CARDOZO: It's just simply another indication  
5 that the conduct that Ethiopia subjected Mr. Kidane to is  
6 simply not accepted at international law or at U.S. law.

7 The other case, which is a Foreign Tort Claims  
8 Act, which I think speaks directly to this, is from the  
9 district of Hawaii, which is *Cruikshank versus United*  
10 *States*. And in that case CIA agents were found to not have  
11 the discretion to break the law in the course of an  
12 intelligence operation. *Cruikshank* is also important  
13 because it shows that privacy torts are not barred by the --  
14 in that case the FTCA, and this is, of course, a privacy  
15 court.

16 And then --

17 THE COURT: How would you articulate the test, the  
18 test for unlawfulness?

19 MR. CARDOZO: The test for unlawfulness, Your  
20 Honor, is was there an element of choice? Here a federal  
21 felony criminal statute takes away the element of choice.  
22 And second, was there a mandatory pathway? And again, the  
23 answer is yes.

24 THE COURT: On prong one, how do you distinguish  
25 the *MacArthur Area* case then?

1 MR. CARDOZO: Your Honor --

2 THE COURT: We know there isn't a choice to  
3 violate the zoning laws.

4 MR. CARDOZO: Indeed, Your Honor. But it wasn't a  
5 felony. No one was going to jail for five years for  
6 violating a zoning law. Similarly, in the consular  
7 assistance cases, no one is going to jail for those. In a  
8 grant recommendation, no one is going to jail.

9 THE COURT: So it turns on the seriousness of the  
10 crime?

11 MR. CARDOZO: Indeed, Your Honor.

12 THE COURT: Here you said that it's a felony. And  
13 it struck me, on reading the briefs, that you have an  
14 argument, and a substantial argument, that a foreign entity  
15 may be subject to civil suit under 2520.

16 MR. CARDOZO: Yes, Your Honor.

17 THE COURT: Because that statute refers to person  
18 or entity. But the criminal provisions of the statute refer  
19 to just persons. And so do you actually have an argument  
20 here that anything Ethiopia would have done would have been  
21 criminal?

22 MR. CARDOZO: Your Honor, if I was a U.S. attorney  
23 standing up here with the Ethiopian intelligence agent who  
24 directed this operation in the witness box, perhaps I would.

25 THE COURT: But with the individual, not the

1 nation then?

2 MR. CARDOZO: Correct. But, obviously, I'm not a  
3 U.S. attorney.

4 THE COURT: Right.

5 MR. CARDOZO: Turning to the issue of burden here,  
6 the motion to dismiss --

7 THE COURT: To be clear, I don't mean to be  
8 suggesting that there -- you know, that I have reason to  
9 conclude there's anything criminal here. As I said, I'm  
10 just taking the allegations as started in your arguments as  
11 stated.

12 MR. CARDOZO: Yes, Your Honor. Turning to the  
13 issue of burden. As opposing counsel noted, it is -- it's  
14 not particularly straightforward, but it's not as complex as  
15 opposing counsel suggests. At the motion to dismiss phase,  
16 Ethiopia has its initial burden to show that it is in fact a  
17 foreign sovereign and entitled to immunity. And, of course,  
18 it has met that burden. The burden then shifts to the  
19 plaintiff. And at this stage, at the motion to dismiss  
20 stage, all that's required is that the plaintiff assert  
21 allegations sufficient to bring this claim within the  
22 exception. And that comes directly from *O'Bryan versus Holy*  
23 *See out of the Sixth Circuit.*

24 And our evidence here is that there's been an  
25 interception; that Mr. Kidane's Skype calls, his web search

1 history, possibly his e-mail as well, and that of his  
2 family, were all monitored by the government in Ethiopia.  
3 And that's all that's required to get past a motion to  
4 dismiss.

5 THE COURT: Let me ask you another question about  
6 the discretionary function exception here. I take your  
7 point, there certainly is lots and lots of support in the  
8 case law for modeling the discretionary exception, kind of  
9 discretionary function exception under the Foreign Sovereign  
10 Immunities Act and the Federal Torts Claims Act, it was  
11 modeled on it in the cases cited. But they don't apply in  
12 exactly analogous circumstances. And the purposes of the  
13 Federal Tort Claims Act and the Foreign Sovereign Immunities  
14 Act are not the same.

15 And going back to John Marshall, one of the  
16 principal reasons for having foreign sovereign immunity is  
17 comity between nations. And if I were to rule your way on  
18 this case, does that open the door to a situation that, not  
19 necessarily in this case or just in this case, but more  
20 broadly gives rise to pretty serious foreign policy issues  
21 where -- and, again, let me not use this case because I  
22 don't want to comment, necessarily, on this case in any way,  
23 but imagine a case in which someone has a grudge with a  
24 nation that they've left and they left on bad terms, there's  
25 some hostility between somebody who's moved to the United

1 States from that nation. The person comes into court and  
2 says, You know what? I think I've got a good enough basis to  
3 believe, you know what? there's guys back in my old country,  
4 I think they're spying on me.

5 You come in, maybe there's a little bit of  
6 evidence on that, and someone comes in and says, Okay, now I  
7 want to subpoena the head of intelligence, you know, the  
8 prime minister, I want to find out if it was authorized.  
9 You know, I got to ask the prime minister if the prime  
10 minister authorized this. I have to delve into, you know,  
11 highly confidential either law enforcement or intelligence  
12 activities of a foreign nation and have this federal court  
13 doing that. Doesn't that raise the sort of comity concerns  
14 that animated the Foreign Sovereign Immunities Act and  
15 foreign sovereign immunity going back to the beginning of  
16 the nation?

17 MR. CARDOZO: It might, Your Honor, but, luckily,  
18 that's not the case we have in front of us and that's not  
19 the case that this Court is going to face going forward. In  
20 FSIA context, discovery -- factual discovery is not  
21 permitted until after a motion to dismiss. And just  
22 stepping back a little bit further, the Mutual Legal  
23 Assistance Treaty framework, which the U.S. is a vibrant  
24 participant in, would be rendered superfluous if the  
25 Ethiopia government's argument was correct. What Ethiopia

1 has argued to Your Honor today is that their failure to sign  
2 a Mutual Legal Assistance Treaty with the United States  
3 gives them more power than if they had.

4 THE COURT: My point, though, is the legal  
5 principle that you're arguing for here -- again, putting the  
6 facts of this case aside, or the allegations in this case  
7 aside, but the legal principle is that if someone from  
8 outside the United States, a foreign state reaches into the  
9 United States in a way in which someone can make an  
10 allegation that they've committed a felony, that that then  
11 allows a federal court to take jurisdiction over that matter  
12 in a way that could, at least in some cases, really upset a  
13 fairly delicate set of issues of foreign relations.

14 You could imagine a case in which a judge --  
15 again, not this case, but you can imagine a judge, based on  
16 that type of policy, the use of the subpoena power and so  
17 forth, could strain, if not worsen relations with a foreign  
18 power. Could, where you -- could have had, you know, the  
19 United States government could have been working very  
20 carefully -- again, not this case, but could have been  
21 working very carefully to establish some sort of  
22 relationship with a country, could have gotten very close  
23 to, you know, a treaty of some type with the country, could  
24 have been huge U.S. interests in this issue, and all of a  
25 sudden you've got a judge who's dragging in the head of

1 intelligence saying, you know, I need to know what happened  
2 here and let's do some depositions. And the foreign  
3 government starts saying, you know, this is out of control  
4 and, you know, is calling up and yelling at the president  
5 about this crazy judge.

6 And I'm really more getting at the principle here  
7 than the particular facts of this case. And how do you draw  
8 the line in a way to make sure that that purpose of the  
9 Foreign Sovereign Immunities Act isn't overridden by  
10 whatever rule you're asking me to adopt?

11 MR. CARDOZO: Two points in response, Your Honor.  
12 First, federal discovery does not extend, I think, to the  
13 extent that Your Honor is worried about. If a U.S. litigant  
14 attempted to haul the chancellor of Germany into a  
15 deposition, a federal court should and would grant a  
16 protective order to stop that. So that's not what's going  
17 to happen.

18 The second thing is the diplomatic harm or the  
19 nation-to-nation harm that occurs is simply the harm that  
20 occurs when spies get caught. That's just when spies --  
21 when a spy of a friendly nation or of a not-so-friendly  
22 nation gets caught, diplomatic harm occurs.

23 THE COURT: There may be a difference in whether  
24 the authorities in one of those nations is making a decision  
25 about whether to prosecute that person versus, you know,

1 allowing a civil litigant and a nonelected judge to make the  
2 decisions about whether to create what could become an  
3 international crisis.

4 MR. CARDOZO: Perhaps, Your Honor. But Congress  
5 gave this court, with the Discretionary Act exception, gave  
6 this Court the power to decide whether this is the sort of  
7 tort that was intended to come within this Court's power.  
8 And here the answer is yes.

9 THE COURT: Is there some other doctrine that  
10 would address the types of concerns that I'm raising, so  
11 that even if the court were to conclude that it had  
12 jurisdiction over the matter, that there might be, if not  
13 active state, which I guess is also in the form of immunity,  
14 but, you know, they're -- for example, there are cases that  
15 preclude state courts, like the *Garamendi* case and those  
16 lines of cases, from adjudicating matters where doing so  
17 could interfere with foreign relations? Is there some other  
18 doctrine that would provide a safety valve for the types of  
19 concerns I'm talking about?

20 MR. CARDOZO: First of all, the Active State  
21 Doctrine can't apply because it only applies to conduct  
22 within the territory of the foreign state. So that's not at  
23 issue here. The Political Question Doctrine might apply,  
24 but no court has ever applied it in the Foreign Sovereign  
25 Immunities Act context.

1 THE COURT: What about the assertion of the  
2 foreign relations powers, the separation of powers issue?

3 MR. CARDOZO: There is no such doctrine, at least  
4 not to dismiss an FSIA case. No federal court, to my  
5 knowledge at least, has applied such a doctrine in the FSIA  
6 context. And Congress didn't intend that. Congress  
7 intended that for nondiscretionary acts that create personal  
8 injury here in the United States, and acts that occurred  
9 here in the United States, that this court should exercise  
10 its jurisdiction. This court has jurisdiction to hold the  
11 foreign sovereign accountable to that.

12 Something my opposing counsel said, the privacy  
13 torts that we've alleged here are per se personal injury and  
14 nothing further is required. And that comes -- that comes  
15 from *Pearce versus E.F. Hutton* out of this District. Both  
16 intrusion upon seclusion and the sort of interception that  
17 we've alleged that's a violation of the Wiretap Act are  
18 per se a personal injury. And in terms of the burden of  
19 producing evidence, that's all that's necessary at the  
20 motion to dismiss phase.

21 Opposing counsel has cited no authority to say  
22 that the plaintiff needs to produce anything other than an  
23 allegation that what has happened is, by definition,  
24 personal injury.

25 THE COURT: The hypotheticals that I was throwing

1 at you a minute ago, which admittedly, you know, are not  
2 this case, but go to the question of how to articulate a  
3 rule here, involve the equities of the executive branch and  
4 perhaps the legislative branch. Do you have a view on  
5 whether this court should at least provide the government  
6 with an opportunity to be heard on these issues? Do you  
7 know whether anyone has explored that issue with the  
8 government thus far in the litigation?

9 MR. CARDOZO: We have not, Your Honor. And while  
10 we have no objection to the Court reaching out to the  
11 Department of State to get its views, we don't think it's  
12 necessary. Certainly the motion to dismiss phase it's not  
13 necessary.

14 And then if Your Honor has no further questions on  
15 the burden or on discretionary functioning.

16 THE COURT: Why don't we move on to the entire  
17 tort. Okay. I'll hear from the defendant.

18 MR. CHARROW: Thank you, Your Honor. Since 1984  
19 the law in this Circuit has been fairly straightforward.  
20 The entire tort has to occur in the United States in order  
21 for the exception to be triggered. And that's largely an  
22 outgrowth of the legislative history, the language of the  
23 provision, Supreme Court opinions prior to 1984 and  
24 thereafter, and a string of cases that has consistently held  
25 that the entire tort must occur in the United States. And

1 there's good reason for that. And there are a lot of policy  
2 reasons why we would want the entire tort to occur in the  
3 United States, as opposed to piecemeal, some here, some  
4 there. And I can go through those one by one with the  
5 court, if the court would like.

6 THE COURT: Sure. Whatever you think is helpful.

7 MR. CHARROW: I think some of these would be  
8 helpful. I think, first of all, we have a general  
9 presumption against extraterritoriality. And if we look,  
10 for example, at -- if we compare, for example, 1605(a)(2),  
11 which is the commercial exception to the Federal Tort Claims  
12 Act, with 1605(a)(5), which is the tort exception, which is  
13 the one before the court today, you'll note that (a)(2) does  
14 permit activity to occur overseas. It expressly so permits.  
15 Those express terms are not present in 1605(a)(5).

16 So quite aside from the law of the circuit, we  
17 have general notions of statutory interpretation, coupled  
18 with the concept of a presumption against  
19 extraterritoriality. The statute itself was primarily  
20 designed to enable citizens in the United States to sue for  
21 auto accidents. And auto accidents, by definition, occur  
22 entirely in the United States.

23 If we look at a number of the cases that were  
24 cited -- now, plaintiff argues that a lot of the cases that  
25 were cited are cases where things occurred overseas. Well,

1 that's the point. When things occur overseas, people  
2 frequently attempt to sue in the United States. And a  
3 number of cases, though, involve what I call split torts,  
4 where some of it occurred there and some of it occurred  
5 here. And the courts have consistently held in those cases  
6 that there's no cause of action.

7 I think the Colorado aircraft case, *Four Corners*,  
8 was a products liability suit against the French engine  
9 manufacturer that was owned by the French government. The  
10 crash occurred in Colorado. A portion of the tort occurred  
11 in the state of Colorado. And the Court said 1605(a)(5) did  
12 not trigger because the entire tort did not occur in the  
13 United States.

14 THE COURT: My recollection was it was actually  
15 something -- was it in Mexico that it actually occurred,  
16 where it was some sort of -- I can't remember if it was a  
17 supervision or some negligence that actually occurred in  
18 Mexico, as well.

19 MR. CHARROW: Could be. And I think the courts  
20 have consistently so held. I don't know of any court that  
21 has held that a tort that is committed overseas can give  
22 rise to a federal -- to an exception provision, trigger the  
23 exception provision of 1605(a)(5).

24 THE COURT: So you were certainly right, that  
25 there is precedent from the Circuit here that says that the

1 entire tort has to occur in the United States. I guess the  
2 question for me is what that means. And most recently, the  
3 Court of Appeals in a case called *Jerez versus Cuba*,  
4 described it this way, they said, "The law is clear that the  
5 entire tort, including not only the injury, but also the act  
6 precipitating that injury, must occur in the United States."

7 And then it went on and distinguished the  
8 situation and said, "Jerez seeks to reinforce the parties'  
9 redeployment analysis by analogizing the defendant's actions  
10 to a foreign agency's delivery into the United States of an  
11 anthrax package or a bomb. But here the defendant's  
12 infliction of an injury on Jerez occurred entirely in Cuba."  
13 He was, I believe, infected with hepatitis C. "Whereas, the  
14 infliction of the injury by the hypothetical anthrax package  
15 or bomb would occur entirely in the United States."

16 And it sounds to me like what the court is saying  
17 there is that when it refers to the entire tort occurring in  
18 the United States, it requires two things: One is that the  
19 injury be in the United States and, two, that the act that  
20 precipitated that injury occur in the United States. But I  
21 take it that that's what the plaintiffs are alleging here,  
22 at least, it did in fact take place.

23 MR. CHARROW: I think you have to step back. What  
24 does the tort consist of? These are both intentional torts.  
25 They require the marriage of mens rea, or whatever the state

1 of mind necessary for an intentional tort is, and the act  
2 itself. The two have to coexist. Here there is no doubt  
3 and no dispute that all human behavior occurred in Ethiopia.  
4 There is no allegation that any Ethiopian agent of the  
5 government of Ethiopia was present in the United States.

6 What is surprising is that if we step back a  
7 moment and look at the original infection, the original  
8 computer virus -- remember, the plaintiff here was not the  
9 target of that virus. The plaintiff's friend was. Where  
10 did that occur? That occurred, finally I figured it out,  
11 occurred in London. If you look at the translated version  
12 of Exhibit C, it appears that the individual who was  
13 originally infected was residing in London. And there's no  
14 allegation that that person was present in the United States  
15 in this complaint.

16 So the actual act did not even occur here. So I  
17 find it very difficult to understand how any part of the  
18 tort occurred in the United States. Certainly all of the  
19 acts occurred overseas. The actual reading of the  
20 documents, to the extent they occurred overseas, the intent  
21 was developed overseas, the service was located overseas,  
22 all of the individuals were overseas. Nothing occurred  
23 here.

24 THE COURT: I will, obviously, let the plaintiffs  
25 address that. But let me at least try what I think they

1 might say, just to get your response to it while you're  
2 standing here, which is -- I take it from reading their  
3 papers what they would say is that when the invasive code  
4 ended up on someone's computer in the state of Maryland,  
5 that someone then still had to activate that in some way.  
6 They may have activated it from Ethiopia, but the result of  
7 what they did was to turn on, in essence, a tape recorder on  
8 someone's computer sitting in Maryland.

9 And by, sort of, by analogy, maybe a circumstance  
10 in which, you know, I'm on vacation in Canada and I pick up  
11 the telephone and I call a friend of mine and I say, hey,  
12 there's a tape recorder under the desk in someone's office,  
13 can you do me a favor and go and flip it on? That person  
14 has no mens rea because they -- they don't know what they're  
15 doing, they're just staff and they turn on a tape recorder.  
16 But, in fact, that is -- was an illegal recording that was  
17 taking place purely in the United States and that was the  
18 act that precipitated the injury, was that recording. And  
19 so I'll hear from the plaintiffs, but I take it that's what  
20 their theory is in response to it.

21 MR. CHARROW: Right. They're arguing, basically,  
22 that a robot can commit a tort. The Restatement Third has  
23 not reached that point yet. The Restatement Third --

24 THE COURT: We live in a world in which the  
25 internet is pretty expansive.

1           MR. CHARROW: I recognize that. And as courts  
2           have recognized frequently, the law does not keep up with  
3           the internet. But in this case we are requiring the entire  
4           tort, including the intent, to be developed in the United  
5           States. That is the law of this Circuit.

6           THE COURT: And is there any case that actually  
7           says you need the intent in the United States? That's where  
8           I'm pausing a little bit, particularly this case that I just  
9           mentioned to you, because it doesn't say anything about the  
10          intent. It suggests that if someone were to mail a package  
11          into the United States that contained a bomb or anthrax,  
12          that that might be sufficient. It's dicta in the decision.  
13          But it's dicta from the Court of Appeals here. It seems  
14          that might be sufficient.

15          MR. CHARROW: The cases that we've seen do in fact  
16          have intents developed overseas with effects in the United  
17          States and the courts have held that's just insufficient.

18          THE COURT: Well, but there's usually something  
19          else that's taking place overseas in the cases that I've  
20          read. If there are cases where the only thing that occurs  
21          overseas is the intent, you ought to point me to them.

22          MR. CHARROW: I think the closest is the Mexican  
23          case from 1984.

24          THE COURT: The case we were talking about before?

25          MR. CHARROW: Correct.

1           THE COURT: I believe, and I need to go back and  
2 look at that myself, my belief is that the court held that  
3 the problem was that there was either some negligent  
4 supervision or some negligence that occurred.

5           MR. CHARROW: We're talking about a different  
6 case. We're talking about the 1984 case. My pronunciation  
7 is abysmal, it's --

8           THE COURT: You can spell it.

9           MR. CHARROW: It's *Asociacion de Reclamantes*.

10          THE COURT: Oh, yes.

11          MR. CHARROW: Scalia decision.

12          THE COURT: Okay.

13          MR. CHARROW: From '94.

14          THE COURT: *Reclamantes*, I believe.

15          MR. CHARROW: Right. And in that case the court  
16 was having difficulty figuring out precisely what the tort  
17 was. Because it was unclear whether the tort was the  
18 original taking of the property or was it the subsequent  
19 refusal of the state of Mexico to recompense the family for  
20 the taking of the property.

21          THE COURT: Right. But what the court actually  
22 held in *Reclamantes* was the tort occurred exclusively in  
23 Mexico.

24          MR. CHARROW: No, it didn't.

25          THE COURT: I believe it did.

1           MR. CHARROW: It did not hold that. It stated the  
2           entire tort has to occur in the United States. But a  
3           portion of the tort, to the extent that there was an injury,  
4           that occurred in the United States because --

5           THE COURT: Maybe -- the injury may have occurred  
6           in the United States, but my recollection of what the court  
7           held was is that by that point in the litigation, it was a  
8           complicated history, but what happened was that there was a  
9           dispute with respect to land, it was settled between the  
10          United States and Mexico.

11          MR. CHARROW: Correct.

12          THE COURT: Individuals in the United States  
13          originally had claims against the U.S. government for taking  
14          their land. The Mexican government agreed to take on that  
15          responsibility and said we will pay them for the land. Took  
16          on that responsibility pursuant to a treaty or agreement  
17          with the United States, and then didn't pay.

18          MR. CHARROW: Exactly.

19          THE COURT: And what the Court held in  
20          *Reclamantes*, I believe, was that the tort that occurred was  
21          the omission by the government of Mexico, city in Mexico to  
22          pay the amount that they were required to pay.

23          MR. CHARROW: Arguably, with the failure to send a  
24          check in to the United States.

25          THE COURT: Well --

1           MR. CHARROW: It can be viewed either way. It was  
2 cross-border activity, is the bottom line.

3           THE COURT: Right. But what I was asking you,  
4 though, is whether -- was there any case that says that  
5 where the only element of the tort that did not occur in the  
6 United States --

7           MR. CHARROW: Was the injury?

8           THE COURT: No, with the formation of the required  
9 mental state, the intent.

10          MR. CHARROW: I can't think -- I can think of  
11 none. But, of course, here none of the human acts occurred  
12 in the United States. So it was not just the intent, we're  
13 talking about the human acts.

14          THE COURT: But what about this hypothetical,  
15 thought, from the *Jerez* case where the court says, you  
16 know -- suggests, at least, that it might well be sufficient  
17 if someone were to mail a package into the United States  
18 that contains anthrax or a bomb. There, you know, no tort  
19 feisor is in the United States, but the tort is taking place  
20 in the United States and the injury is occurring in the  
21 United States.

22          MR. CHARROW: It's like throwing a bomb, if you  
23 will, from the Canadian border into the United States. Part  
24 of the act occurred in Mexico -- in Canada, part in the  
25 United States. That's the hypothetical.

1           THE COURT: Yeah. I mean, you know, as I say, I  
2 don't think it's a holding, I think it's dicta from the  
3 court.

4           MR. CHARROW: But I don't think that any court has  
5 ever addressed -- has retreated from the entire tort view  
6 when faced with the actual set of facts.

7           THE COURT: But let me put it this way: You, a  
8 minute ago, said that one of the rationales for the entire  
9 tort doctrine was that there's a general presumption against  
10 extraterritoriality. I would have assumed that the  
11 presumption against extraterritoriality would not apply  
12 where, in fact, the action that gives rise to the injury  
13 occurs in the United States, even if the intent was formed  
14 outside the United States.

15           So you have, for example, you know, in an  
16 antitrust case, you've got people outside the United States --  
17 and I can't, frankly, remember off the top of my head,  
18 remember if the Sherman Act applies extraterritorially or  
19 not, but assume it doesn't for purposes of this. You have  
20 people outside the United States who decide where to engage  
21 in price fixing in the United States, they get on the  
22 telephone and call all of their vendors in the United States  
23 and say set the price at X dollars and, as a result of it,  
24 every vendor selling a particular good in the United States  
25 is selling it at a particular price. Maybe the people with

1 the specific intent are outside the United States, but the  
2 tort is arguably -- I wouldn't think the ban on  
3 extraterritoriality would apply.

4 MR. CHARROW: Let's look at OPEC, it's a good  
5 example. The antitrust example you gave is a great example.  
6 If the tort exemption did not apply, citizens of California  
7 could sue under 17200, the Business and Professions Code.

8 THE COURT: I don't know the story with respect to  
9 OPEC. I assume someone might assert the commercial  
10 exception, which does apply outside --

11 MR. CHARROW: Let's make believe that I allege a  
12 tort, and I certainly can construct a tort out of price  
13 fixing and market shares, can I not, and of allocation of  
14 markets.

15 THE COURT: Okay.

16 MR. CHARROW: Okay. And if I can do that, I can  
17 sue under California's Cartwright Act, I can sue under  
18 California 17200.

19 THE COURT: Are there any cases that deal with  
20 this issue?

21 MR. CHARROW: The point is there are none, and  
22 there are none for a reason. Because what occurs outside  
23 the United States, is not subject to 1605(a)(5). That's why  
24 no one has sued, even though there's a pot of money there.

25 THE COURT: That may be a circumstance -- I'm not

1 familiar enough with it, though. May be a circumstance in  
2 which the injury is just occurring in the United States, but  
3 where the actual sale is taking place outside of the United  
4 States. I don't know the answer to that question.

5 MR. CHARROW: The sales are occurring here,  
6 actually. When you stop and think about it, you're buying  
7 the gasoline, the crude oil is coming into the United States.

8 THE COURT: I meant the sale from the --

9 MR. CHARROW: Sales come directly from those  
10 nations to the United States. So part of the tort occurs  
11 here, the injury occurs here, the mens rea occurs there, the  
12 conspiracy occurs there.

13 THE COURT: Are there cases that hold that the  
14 entire tort rule bars an action against OPEC?

15 MR. CHARROW: There was a case that did not get  
16 resolved, in 1982, that I was involved in, which was the  
17 Westinghouse antitrust litigation, where this issue was  
18 raised but the case was settled before court was involved.  
19 But it certainly involved price fixing of uranium by foreign  
20 nations.

21 THE COURT: Anything more on the entire tort  
22 issue?

23 MR. CHARROW: I think we've exhausted it. I think  
24 it's well briefed by both parties.

25 THE COURT: Let me ask you, our conversation was

1 proceeding on the assumption that the only element from  
2 outside the United States was the specific intent. Is that  
3 your position or --

4 MR. CHARROW: No, no.

5 THE COURT: Part of it, I think, is the question  
6 of how you define the tort. I want to give you a chance to  
7 do that.

8 MR. CHARROW: Here all of the acts occurred, all  
9 the human acts occurred outside the United States. No human  
10 act occurred in the United States.

11 THE COURT: Where do you think the interception  
12 occurred?

13 MR. CHARROW: There was no interception under the  
14 Wiretap Act. Zero.

15 THE COURT: Was there any interception anywhere?

16 MR. CHARROW: There was no interception. But  
17 they're relying on the Wiretap Act. There was no  
18 interception under the Wiretap Act.

19 THE COURT: Would the Stored Communications Act  
20 provide a cause of action then?

21 MR. CHARROW: No, it would not.

22 THE COURT: The Computer Fraud and Abuse Act?

23 MR. CHARROW: Don't know. But I certainly know  
24 that the Act that they're relying on, which is 2511 and  
25 2520, provides no cause of action here.

1           THE COURT:  What about their argument that the  
2 interception was, in essence, turning the plaintiff's  
3 computer into their own tape recorder?

4           MR. CHARROW:  I think they recognize that the  
5 Wiretap Act, as have a number of cases, that the Wiretap Act  
6 was passed many, many years before the internet.  And if  
7 they want to use the Wiretap Act to address this case when  
8 it doesn't, Congress is going to have to amend the Wiretap  
9 Act accordingly.

10          THE COURT:  It was amended in 1986.

11          MR. CHARROW:  I'm talking about post internet.  
12 The internet as we know it really didn't come into existence  
13 until the '90s.  It was crude e-mail before.

14          THE COURT:  Okay.  Anything further on this issue?

15          MR. CHARROW:  I assume I'll come back to the  
16 Wiretap Act.

17          THE COURT:  Yes, yes.

18          MR. CHARROW:  Okay.

19          THE COURT:  All right.  Let me just pause for a  
20 second here, ask the court reporter when you would like to  
21 take a break.

22                 You're okay?  After this.  Why don't we go through  
23 this segment and then we'll take a break.

24          MR. CARDOZO:  Thank you, Your Honor.  And I  
25 appreciate your patience with what is turning out to be a

1 long argument.

2 Before I start on location of the tort, let me  
3 clarify two points that I made earlier. The first is that  
4 entities, in fact, can commit crimes through their agents  
5 under 2511; it's just that the entities can't be prosecuted,  
6 only their agents can.

7 And then second, we haven't asked the State  
8 Department specifically for their views. I wanted to just  
9 be clear that it was the State Department that we did not  
10 ask.

11 THE COURT: Okay.

12 MR. CARDOZO: The invasion of Mr. Kidane's privacy  
13 occurred in his home in Silver Spring, Maryland, and not  
14 anywhere else. And *United States versus Rodriguez* out of  
15 the Second Circuit tells us that the interception occurs  
16 where the conversation was happening. In *Rodriguez* it was a  
17 telephone. In *Rodriguez* the court said the interception  
18 occurred at or very close to the telephone itself. And  
19 that's what we have here. The interception at or very close  
20 to Mr. Kidane's home.

21 THE COURT: I thought that the relevant law on  
22 this was the interception occurs in two places, at least  
23 with respect to the Wiretap Act more generally. It occurs,  
24 you know, using old style versions of -- thinking about  
25 this, where the alligator clips go on the line and where the

1 listening post is. Is that not --

2 MR. CARDOZO: That's actually not the law, Your  
3 Honor. The interception occurs when the acquisition is  
4 made. And where, or even if it was listened to is  
5 irrelevant for that purpose.

6 THE COURT: Right. But the cases I'm referring to  
7 are the older cases that dealt with the court's jurisdiction  
8 to enter -- or, to authorize an interception. I thought  
9 that's what they said. But the point is where the clips go  
10 on the line, the alligator clips in the old technology, is  
11 where the interception would occur.

12 MR. CARDOZO: Exactly, Your Honor.

13 THE COURT: And here, I take it, your position is  
14 that, as I was saying to your colleague, that the  
15 interception, in essence, was the commandeering of the  
16 plaintiff's computer and using the plaintiff's computer to  
17 make a recording for the defendant. Is that your position?

18 MR. CARDOZO: It is, Your Honor. And more  
19 specifically, it's the creation of the additional files on  
20 Mr. Kidane's computer. So it's not just the commandeering  
21 of the computer, it's not just the potential to listen to,  
22 it's the fact that his Skype calls were actually copied by  
23 the FinFisher software and saved on his computer in Maryland.

24 THE COURT: I understand that point conceptually.  
25 Are there any cases that have ever embraced that theory?

1 MR. CARDOZO: You know, this is the first case  
2 where we've seen a -- this particular type of malware under  
3 the Wiretap Act. It almost certainly won't be the last.

4 Something that opposing counsel said was that he  
5 was aware of no cases where the intent was formed, the  
6 tortious intent was formed abroad, but yet courts found.  
7 *O'Bryan versus Holy See* is that case, Your Honor, out of the  
8 Sixth Circuit. There there were several causes of action.  
9 The Sixth Circuit dismissed some but allowed others to  
10 proceed. The ones they dismissed were the ones that  
11 occurred entirely outside of the United States; namely, the  
12 negligent training and supervision of the priests. But the  
13 cause of action that *O'Bryan* allowed to proceed was the  
14 application of policies that were formed in the Vatican in  
15 the United States.

16 And that's what we have here. We have the  
17 application of policy formed in Ethiopia, the intent to  
18 wiretap Mr. Kidane, its application in the United States,  
19 the actual wiretapping of Mr. Kidane succeeds, and that's  
20 where the tort happened.

21 Just like in *Jerez versus Cuba*, this is the  
22 digital equivalent of the anthrax packet mailed into the  
23 United States. There's no conceptual difference here. It's  
24 just one happens on the internet and the other happened --

25 THE COURT: Do you agree that that language in

1        *Jerez* is dicta though?

2                    MR. CARDOZO:  It is, Your Honor.  But it's  
3        instructive and it should guide this court's reasoning.  And  
4        the logic is, frankly, persuasive.

5                    In the Computer Fraud and Abuse Act context courts  
6        apply this quite regularly.  In the *United States versus*  
7        *Ivanov*, for instance, there was a Russian hacker hacking  
8        entirely from Russia, compromising computers in the United  
9        States, and that posed no bar whatsoever.  The crime was  
10       committed here, where the computers were, not where the  
11       criminal happened to be.  And that's noted right here.

12                    What matters is where the relevant conduct  
13        occurred.  Here the relevant conduct is the interception,  
14        the acquisition of Mr. Kidane's phone calls.  And for the  
15        intrusion upon seclusion tort, the monitoring of his web  
16        searches and e-mail.  All of that happened at his home in  
17        Maryland.

18                    THE COURT:  One question about the Maryland state  
19        common law claim, if the court finds that there's a waiver  
20        of immunity under the Foreign Sovereign Immunities Act with  
21        respect to the wiretap claim, is that sufficient then to  
22        bring in the Maryland claim without also having to then  
23        decide whether the violation of Maryland law itself would  
24        have constituted a crime or a serious crime?

25                    MR. CARDOZO:  Yes, Your Honor.  But, of course,

1 the violation of Maryland common law is a personal injury  
2 tort of the type that is permitted to continue under FSIA.  
3 But even if it wasn't --

4 THE COURT: I'm jumping back there to the  
5 discretionary function exception. And if the test there is  
6 a serious crime has been committed, and if the serious crime  
7 is the allegation that there was a violation of the Wiretap  
8 Act, is that sufficient to pull in a Maryland common law claim?

9 MR. CARDOZO: Yes, Your Honor. And we see that in  
10 *Letelier*. In *Letelier* there was the wrongful death claim,  
11 the assassination itself, and then there was assault and  
12 battery. Assault and battery may not have been sufficient  
13 to pass the discretionary function, but the court allowed it  
14 to continue because of the more serious tort that occurred  
15 as well.

16 THE COURT: Can you respond to the defendant's  
17 argument about his inference that the original recipient of  
18 the e-mail was located in London and that there's not any  
19 allegation that the Ethiopian government was in any way  
20 involved in transferring that e-mail in London to the United  
21 States?

22 MR. CARDOZO: First of all, that's not what the  
23 e-mail says. It does not identify Mr. Kidane's  
24 acquaintances as being in London. And I'm not aware that  
25 that person was in London, frankly.

1           THE COURT: Do we know if the person was in the  
2 United States?

3           MR. CARDOZO: We do not. That's not alleged in  
4 the complaint, Your Honor, his location. And it's  
5 irrelevant because that's not the tort. The tort wasn't the  
6 sending of the e-mail, the tort wasn't even the opening of  
7 the e-mail, the tort wasn't even when Mr. Kidane opened the  
8 e-mail. The tort occurred after. The tort occurred after  
9 Mr. Kidane opened the Word attachment, his computer was  
10 infected, then Ethiopia forwarded the actual spyware to Mr.  
11 Kidane's computer, activated the infection, and began to  
12 wiretap his Skype calls. Each call that was intercepted was  
13 an individual tort. And the Wiretap Act recognizes this.

14           THE COURT: Was each call separately authorized  
15 under your view of the facts? And was there some  
16 affirmative action that was taken? Or once the malware was  
17 installed, was it just automatic at that point?

18           MR. CARDOZO: For each call, no, they were not  
19 individually authorized, it was automatic. However, because  
20 of the way that the licensing -- that the pricing schedule  
21 for FinFisher works, Ethiopia began to pay for that seat,  
22 that target seat of the spyware only when the -- Mr.  
23 Kidane's infection became active, and paid for it  
24 continuously until March of 2013 when they were caught red  
25 handed by Citizen Lab. Five days after that Citizen Lab

1 report Ethiopia pulled the plug on Mr. Kidane's infection  
2 and stopped paying. And that's when the tortious activity  
3 stopped.

4 THE COURT: Under your view of the facts, did the  
5 Ethiopian government need to engage in some affirmative act  
6 to turn on the spyware on the plaintiff's machine?

7 MR. CARDOZO: Yes, Your Honor. And that's what we  
8 allege in the complaint and that's what the brochures that  
9 we have attached from FinFisher support.

10 THE COURT: Would they have known and do the  
11 allegations support whether they would have known that they  
12 were turning it on on the plaintiff's machine, versus the  
13 person's machine who may have forwarded the e-mail to the  
14 plaintiff?

15 MR. CARDOZO: They certainly knew it was in the  
16 United States. Mr. Kidane's IP address would have made that  
17 abundantly clear. Whether they knew who it was immediately,  
18 that's something only Ethiopia can answer. However, the  
19 infection stayed live for four and a half months. They must  
20 have -- and we allege this in the complaint, they must have  
21 figured it out and they didn't turn it off until they were  
22 caught.

23 THE COURT: This question goes both to the entire  
24 tort, but also, I think, goes back somewhat to the  
25 discretionary function. The legislative history on the

1 discretionary function exception is quite limited and refers  
2 to a concern about traffic accidents in the United States.  
3 How do you reconcile that with the theory that does involve  
4 actions that, you know, span the globe at some level, as  
5 well as with -- let me ask you that first, then I'll ask you  
6 the follow-up.

7 MR. CARDOZO: That's *O'Bryan versus Holy See*, Your  
8 Honor. A policy that's formulated in the Vatican can be  
9 actionable under the Discretionary Act exception if it's  
10 applied in the United States. Globe-spanning suits are par  
11 for the course in Foreign Sovereign Immunities Act.

12 THE COURT: The second part of my question goes  
13 back to the concern I was expressing before about the  
14 discretionary function exception and potential for policy  
15 implications of a very narrow reading of the discretionary  
16 function exception. It is the fact that Congress was  
17 principally concerned with car accidents, some indication  
18 that Congress wasn't contemplating that they were  
19 authorizing actions against foreign states that could give  
20 rise to the type of potential foreign affairs concerns that  
21 I was raising before?

22 MR. CARDOZO: No, Your Honor, I don't believe so.  
23 And the courts have not -- you know, the court in *Letelier*,  
24 the court in *O'Bryan* recognized that there were potential  
25 diplomatic consequences.

1           THE COURT: Was that from *Letelier*? There had  
2 already been a prosecution in *Letelier*.

3           MR. CARDOZO: Indeed, Your Honor. But *Letelier*  
4 wasn't just between Cuba -- Chile and the U.S., but Cuba was  
5 involved as well. So this -- in *Letelier* it was even more  
6 of a globe-spanning situation than we have here.

7           THE COURT: What was the other case that you  
8 raised?

9           MR. CARDOZO: *O'Bryan versus Holy See*, it's --  
10 *O'Bryan versus Holy See* is potentially the closest analogy  
11 we have in terms of the intent being formulated abroad and  
12 the application of that intent being actionable here.

13           Thank you.

14           THE COURT: I don't know if you had anything else.  
15 I was just looking down at my notes.

16           MR. CARDOZO: On location of the tort, Your Honor?  
17 No, only to reiterate that the tort -- both the Wiretap Act  
18 and the intrusion upon seclusion were -- began and ended  
19 here. And the fact that they were directed from abroad is  
20 irrelevant.

21           THE COURT: Is that true with respect to all of  
22 the intrusions you're alleging? I understand the point with  
23 respect to the Skype calls where, I take it, your argument  
24 is that someone remotely turned on the plaintiff's machine  
25 to store, to create, to make copies of those calls in a

1 portion of the computer files that were hidden from his  
2 views.

3 MR. CARDOZO: Yes. And the same thing happened  
4 with the web searches and e-mails.

5 THE COURT: That was my question.

6 MR. CARDOZO: Yeah. During -- while Mr. Kidane  
7 and, indeed, his family, including his children, were using  
8 the computer, the FinFisher software automatically  
9 activated, created copies of what they were doing, just like  
10 it did for the Skype calls, stored them on his computer and  
11 then, in the ordinary course of operation, would have sent  
12 them back to Ethiopia.

13 And to be -- so, in our papers -- defendant  
14 confuses this a little bit, so I want to make it quite  
15 clear. We're alleging a wiretap violation for the Skype  
16 calls and an intrusion upon seclusion action for the web  
17 searches and e-mails. So it's separate interceptions give  
18 rise to separate causes of action. The Skype calls might  
19 also gives rise to an intrusion upon seclusion case -- or,  
20 clause. But what we've claimed is that the Skype calls give  
21 rise to the Wiretap Act. And all of the conduct, including  
22 the Skype calls and the web search and e-mails give rise to  
23 intrusion upon seclusion.

24 THE COURT: Is there some reason you've pled this  
25 under the Wiretap Act instead of the Stored Communications

1 Act or the Computer Fraud and Abuse Act?

2 MR. CARDOZO: Your Honor, the plaintiff has chosen  
3 his causes of action quite carefully, and the reasons why we  
4 chose what we did is not something that I'm prepared to get  
5 into.

6 THE COURT: I'm not asking to get into your  
7 strategy. I was really more wondering whether there was  
8 something that went to the issues that we're talking about  
9 here. But I'm not asking for your strategy.

10 MR. CARDOZO: It's not having to do with the  
11 issues that we're talking about today.

12 THE COURT: Okay. That's fine. Okay.

13 Mr. Charrow, I think we've touched briefly on some  
14 of the other issues. But I want to make sure I've given you  
15 a chance to address everything you want to address. The  
16 issues that I still have left on my list that I will now put  
17 into a combined --

18 MR. CHARROW: I will try my best. A couple of  
19 points of clarification, if you don't mind.

20 THE COURT: Actually, just before you do that, I  
21 want the plaintiff to hear this as well, just the remaining  
22 issues that I have, which are damages for injury to a  
23 person, whether Title III applies to a foreign sovereign,  
24 question of whether there's an allegation of an intercept.  
25 As I said, I think we've touched on a number of these

1 points. Preemption. And the elements of the Maryland tort  
2 law in particular, whether the tort has to be directed at  
3 the plaintiff or whether there's some form of transferred  
4 intent.

5 MR. CHARROW: Let me start with that one, because  
6 I remembered, in May the --

7 THE COURT: I'm sorry. I forgot our break. We  
8 were to take a break. And I apologize, I was so engaged.

9 MR. CHARROW: No problem. How long?

10 THE COURT: Ten minutes.

11 (Pause.)

12 THE COURT: Mr. Charrow.

13 MR. CHARROW: Thank you, Your Honor. I would like  
14 to come back to one point that the court raised concerning  
15 place of injury.

16 THE COURT: Yes.

17 MR. CHARROW: If the court doesn't mind.

18 THE COURT: Not at all.

19 MR. CHARROW: And I would like to start with two  
20 things. First of all, I would like to look at the *O'Bryan*  
21 case which the plaintiff discussed. The *O'Bryan* case  
22 consisted of two genre of torts. There was the tort  
23 committed by the Holy See directly, in negligently training  
24 and negligently supervising priests that were sent from the  
25 Vatican to the United States. Very much like -- very much

1 like the virus being sent by someone from country A into the  
2 United States. The court held that the acts in Rome did not  
3 take place in the United States. Now, what about -- and,  
4 therefore, there was no waiver of sovereign immunity under  
5 1605(a)(5).

6 What about the contention that the case against  
7 the Holy See was permitted to proceed with respect to other  
8 grounds? And that is true. But it was *respondient*  
9 *superior*, it had nothing to do with what the Holy See did or  
10 not do. It was purely vicarious liability. That was the  
11 basis of those claims that were permitted to go forward, and  
12 those with respect to the bishops in the United States who,  
13 indeed, were in a hierarchical religion, employees, if you  
14 will, of the Vatican.

15 The other case I would like to come back to just  
16 to discuss with the court is the *Four Corners* case. Let's  
17 change the facts somewhat to make it simpler. Let's make  
18 believe that the plane flew from Paris to Colorado, or a  
19 scheduled flight from Paris to Los Angeles, and let's make  
20 believe that the engines fail in Colorado. Okay? It's not  
21 a tort that necessarily involves state of mind, it's a  
22 defective engine. The defect occurred in France. No waiver  
23 of -- or, no waiver of immunity under 1605(a)(5) because the  
24 entire tort did not occur in the United States, even though  
25 the infliction of the injury did occur in the United States.

1 And I think that phrase was precisely the phrase used by the  
2 *Jerez* court.

3 What if, rather than having a defectively designed  
4 engine, we have a worker who is dissatisfied with his lot in  
5 life and decides to attach a bomb to the engine. And he did  
6 that while the engine is being -- while maintenance is being  
7 conducted on the engine. And now the plane takes off, bound  
8 for the United States, bound for Los Angeles, explodes over  
9 Colorado. Different result? I think not.

10 I don't think the intent would make any difference  
11 one way or the other. The acts of setting the plane in  
12 motion occurred overseas, that's where the tort occurred,  
13 that's where the *Four Corners* held the tort occurred. And  
14 indeed, arguably, that's dicta of what the *Perez* court held.  
15 The infliction of the injury occurred here, but that's not  
16 enough.

17 THE COURT: I take it then you would reject the  
18 examples given in the dicta that we're talking about from  
19 the D.C. Circuit from a year or so ago?

20 MR. CHARROW: No, I'm reading from that. That's  
21 exactly what I'm reading from. I think that dicta is  
22 consistent with what I'm talking about.

23 THE COURT: It was *Jerez*, and they -- the court  
24 there, I thought, suggested that there would be a claim for  
25 someone mailing anthrax or a bomb to the United States.

1           MR. CHARROW: The infliction of the injury would  
2 occur in the United States. They didn't say one way or  
3 another, they just said it was different than -- or,  
4 different from, to be grammatically correct.

5           THE COURT: Which is the reason I think it's  
6 dicta. But I think the implication of what they're  
7 saying --

8           MR. CHARROW: I think it's less than dicta. I  
9 think the court wasn't grappling one way or another, but was  
10 contrasting it to what did or didn't occur in the case.

11           If you look at the Colorado case, if you look at  
12 the *O'Bryan*, all of these cases point to the very simple  
13 proposition that if you start something in the foreign  
14 country and it ends up in the United States, but the acts  
15 itself started in a foreign country, that is not enough to  
16 trigger the exemption under 1605. Which makes sense, given  
17 the original nature of 1605(a), what it was designed to  
18 accomplish and what it was designed not to accomplish.

19           THE COURT: You mean car accidents?

20           MR. CHARROW: Yeah, rudimentary torts. There are  
21 a couple of other points that I think are worth mentioning,  
22 and I'll forget if I don't address them in this order. So  
23 if the court has an objection, please let me know.

24           There was some -- the court questioned the  
25 plaintiff concerning whether they would have -- whether the

1 defendant would have known that it, in fact, was in the  
2 plaintiff's computer. And the response was they must have  
3 figured it out. That's a quote from the plaintiff during  
4 oral argument. And they pay for licenses and, therefore, as  
5 they pay more, they must have known.

6 In fact, according to the complaint, at paragraph  
7 45, they paid for a fixed number of licenses. So as long as  
8 you aren't above your threshold, the payment rate -- the  
9 amount you pay does not increase.

10 THE COURT: I thought what Mr. Cardozo indicated  
11 to me was that as alleged, the Ethiopia government would  
12 have actually had to affirmatively turn on their  
13 surveillance and that they would have known that it was in  
14 the United States because they would have recognized it as a  
15 US IP address, even if they weren't sure, didn't know that  
16 the -- it was the particular plaintiff whose machine they  
17 were turning on.

18 MR. CHARROW: I'm sorry. I didn't see that in the  
19 complaint.

20 THE COURT: Well, I'll have to take a look and see  
21 if that's there.

22 MR. CHARROW: I did not see either allegation in  
23 the complaint. I may have missed it, but I don't remember  
24 seeing either of those allegations in the complaint. What I  
25 do remember, however, are the actions of the plaintiff

1 prior, long before this hearing, that would be inconsistent  
2 with knowledge on the part of Ethiopia.

3 For example, the plaintiff is proceeding under a  
4 pseudo name. Now, if Ethiopia knew that it was monitoring  
5 the plaintiff's computer, they would know who the plaintiff  
6 was. But the plaintiff is proceeding under a pseudonym, so  
7 clearly the plaintiff assumes that the government doesn't  
8 know who he is. That would be inconsistent with the  
9 statements made during the oral argument today. And there  
10 are no statements that I've been able to find in the  
11 complaint that would be inconsistent with the petition filed  
12 to proceed under a pseudo name.

13 THE COURT: Okay.

14 MR. CHARROW: Okay. Now, you have a list of order  
15 you would like me to go through. You want to talk about  
16 transferred intent?

17 THE COURT: Sure.

18 MR. CHARROW: Transferred intent is real simple.  
19 Restatement Second discusses, in the comments to the intent  
20 sections, which would be the single digit sections, and  
21 Restatement Third, tentative draft one was just voted on by  
22 ALI in May, and under section 110 it discusses transferred  
23 intent. Makes no change to transferred intent under  
24 Restatement Two. But let me talk about Restatement Three  
25 because I'm more comfortable with it. It would be section

1 110. It would be section 110 of the tentative draft. That  
2 was, in fact, passed by ALI in May.

3 Transferred intent only applies to assault, to a  
4 battery, to false imprisonment. It does not apply beyond  
5 those three torts. It does not apply to invasion of  
6 privacy. End of story. So, if the plaintiff is relying on  
7 transferred intent, it's inapplicable.

8 THE COURT: What about plaintiff's analogy that if  
9 you have somebody who's peeking in somebody's window and  
10 they think they're peeking in somebody else's window,  
11 doesn't really matter, they're still engaged in an invasion  
12 of privacy.

13 MR. CHARROW: But that's not the way the tort  
14 reads. 652B does not read that way. And 652B is what is  
15 being relied upon by the plaintiff in this case. And 652B  
16 deals with an intent to intrude upon the seclusion of a  
17 person and injury to that person. It is the same person.  
18 Transferred intent has no place in intrusion upon seclusion,  
19 at least under the Restatement view. And, of course, the  
20 plaintiff is relying on the Restatement for the underlying  
21 tort. So all the baggage of the Restatement necessarily  
22 comes along with it, including the limitation on transferred  
23 intent under 110.

24 THE COURT: Okay.

25 MR. CHARROW: The Wiretap Act, I mentioned to the

1 court that in my view there was no violation of the Wiretap  
2 Act as pled. And I base this on two reasons. First of all,  
3 as the Court alluded to earlier in the day, section 2520,  
4 which provides the private right of action in this case,  
5 deals with persons and entities. But 2520 gives the private  
6 right of action for a violation of the provisions of the  
7 Wiretap Act. And the provision of the Wiretap Act relied  
8 upon by the plaintiff in this case is 2511. 2511 deals with  
9 person, not persons or entity. And persons are  
10 traditionally viewed as nongovernmental entities.

11 Now, here the Wiretap Act defines a person to  
12 include federal government and local and state governments,  
13 but it does not define -- does not define it to include a  
14 foreign nation. And foreign nations are referred to  
15 throughout the Wiretap Act under other provisions. So the  
16 fact that foreign nations were mentioned by Congress is  
17 strong evidence that person is intended to exclude foreign  
18 nations, at least in 2511.

19 THE COURT: So what is that -- what work does the  
20 word entity do in 25 --

21 MR. CHARROW: There are other provisions of the  
22 Wiretap Act that do deal with entities. And 2511(a) and  
23 similar sections do not; they are limited to persons. So  
24 the Wiretap Act does not apply to foreign governments.

25 THE COURT: So what are the provisions that deal

1 with entities? Like the provision that deals with  
2 manufacturing devices?

3 MR. CHARROW: Let me see if I can find it. There  
4 is a provision (3)(b) which would be -- yeah, I'm sorry,  
5 2511(3)(b), a person or entity providing electronic  
6 communication services. (3)(a), except as provided in  
7 paragraph (b) of this section, a person or entity providing  
8 electronic communication service.

9 So the word entity is used -- and these  
10 provisions, obviously, aren't applicable here, but these  
11 provisions are used -- person or entity is used in 2511. It  
12 is not used in the provision of 2511 on which this complaint  
13 is based, though.

14 THE COURT: Are the provisions that you just read  
15 to me actually ones that give rise to liability? I think  
16 it's (3)(a), looks like it is.

17 MR. CHARROW: Um-hum. Yes.

18 THE COURT: Okay. So, the definition of person  
19 actually doesn't include the United States, it includes an  
20 agent, an employee or agent of the United States. And  
21 section 2712 creates a cause of action against the United  
22 States for violation of section 119 -- or, Chapter 119,  
23 which is the Wiretap Act.

24 So, under your theory, if entity -- under your  
25 theory, if a violation of section 2511 is limited to a

1 person, and the United States is not a person in the same  
2 way that a foreign government is not a person --

3 MR. CHARROW: I don't follow that, Your Honor.  
4 2511 deals with local and state governments, it deals with  
5 agents of the United States, does it not?

6 THE COURT: Right. But is there anywhere in 2511  
7 where it actually suggests that the United States itself  
8 would be subject to suit?

9 MR. CHARROW: No. I misspoke then.

10 THE COURT: It doesn't impose -- I mean, the same  
11 way 2511 doesn't, on it's face, impose any duty on a foreign  
12 sovereign, it doesn't impose any duty on the United States.

13 MR. CHARROW: The basic rule, obviously, if you go  
14 back to the Dictionary Act, and even this law is that a  
15 person does not include sovereigns. Here there's a  
16 peel-back of that for states and local governments, and  
17 later on for the U.S. government.

18 THE COURT: But it's not a peel-back for states.

19 MR. CHARROW: It is a peel-back for states.

20 THE COURT: I'm sorry. It's not a peel-back for  
21 states or the federal government. It's a peel-back for an  
22 agent -- in fact, it's a peel-back not for the state, it's  
23 for their -- a person is an employee or agent of the United  
24 States or any state. So it's not a peel-back for,  
25 literally, for the states themselves.

1 MR. CHARROW: But their employees.

2 THE COURT: But their employees.

3 MR. CHARROW: Correct.

4 THE COURT: So, is it your position then that an  
5 employee of a foreign government isn't subject to the  
6 Wiretap Act, the individual, him or herself, if they're  
7 acting, you know, as an employee of their foreign  
8 government?

9 MR. CHARROW: They probably would not be subject  
10 to the Wiretap Act, but that's not before the court.

11 THE COURT: I think maybe it is before the court  
12 because the question is whether, as I take it from what the  
13 parties were discussing, is whether a serious crime has been  
14 committed and if there was some agent -- obviously, no  
15 government acts without agents. And so the question is  
16 whether there's some person who committed a crime in some  
17 way, right?

18 MR. CHARROW: You would be reading out of the  
19 fundamental definition of person, the concept that it does  
20 not apply to governments presumptively, by having it apply  
21 to their employees. Indeed, if you sue someone under the  
22 Federal Tort Claims Act as an employee, what happens? The  
23 federal government intervenes.

24 THE COURT: That's true. But that's under --

25 MR. CHARROW: You cannot sue, quote, an employee

1 of the United States as an employee.

2 THE COURT: You can, but the United States is then  
3 substituted in under the statute.

4 MR. CHARROW: Correct. That's correct.

5 THE COURT: If the United States concludes that  
6 they were acting within the scope of their duties. Okay.  
7 Well, I understand your argument. Thank you.

8 MR. CHARROW: Okay. We don't believe there was an  
9 interception either, because an interception, in our view,  
10 requires contemporaneous interception. And I think there  
11 are a number of courts that have so held. And there's a  
12 split among the circuits. And the D.C. Circuit has not  
13 opined on this, to my knowledge.

14 THE COURT: But even taking the view that an  
15 interception is contemporaneous, I thought that the  
16 plaintiff's allegation is that in fact what was occurring  
17 here is the computer is being highjacked and is creating an  
18 instantaneous or simultaneous copy in an area of the files  
19 which is not generally perceptible to the user of the  
20 computer.

21 MR. CHARROW: That's exactly what happened in the  
22 *Bunnell* case.

23 THE COURT: In which case? *Bunnell*?

24 MR. CHARROW: Precisely what happened in *Bunnell*.  
25 And there the court held that there are two laws, there is

1 Title I and Title II. Title I is the Wiretap Act, and  
2 that's the one before the Court. And Title II is the  
3 Storage Act, and that is not before the court. And the  
4 court said the two are mutually exclusive. And it held  
5 there that the fact that something is -- there I believe the  
6 hacker programmed the computer to make a copy of all of the  
7 computer's e-mail and then sent those e-mails on to the  
8 hacker.

9 THE COURT: That's a different circumstance  
10 because the e-mails already reside on the computer and  
11 e-mails typically are treated as stored communications and,  
12 therefore, subject to the Stored Communications Act.  
13 Whereas, a Skyped call is not stored on the computer in the  
14 same way that an e-mail is stored and that it -- the  
15 allegation is that the call -- that a copy of the call was  
16 made in real time on the computer. With respect to an  
17 e-mail, the e-mail is residing on a server somewhere, it's  
18 residing on the computer somewhere. You're making a copy of  
19 the stored communication. But with a Skype call, I take it  
20 the allegation is that as the call is occurring, it's being  
21 recorded.

22 MR. CHARROW: But there really is no difference  
23 technologically between a Skype call when seen by a computer  
24 and an e-mail when seen by a computer. They're both subject  
25 to protocols for reassemblage and they're identical.

1           THE COURT: I would have to get back and look at  
2 the -- technologically, the case that you looked at. But  
3 technologically I don't think that they are identical  
4 because I think that the e-mail resides on your computer.  
5 And maybe -- there might be a period of time, I guess, if  
6 you intercepted the e-mail precisely as it was arriving,  
7 which it might be treated as an interception.

8           But if I've got 100 e-mails on my computer and  
9 someone comes in and copies those e-mails off my computer,  
10 they're copying a stored communication because they're on my  
11 computer. That's different than if I'm using my computer  
12 for a Skype call, where it's in real time, there's nothing  
13 that's stored on my computer, but they are making a copy of  
14 it where it's not stored on the computer, that actually  
15 would be occurring in real time in a way that an e-mail  
16 already resides there and is already sitting on the computer  
17 and is then copied.

18          MR. CHARROW: From a technological point of view I  
19 see no distinction between Skype and e-mail, number one.  
20 But more critically from a legal perspective, I don't see a  
21 distinction between whether a person goes in through hacking  
22 and forces another copy to be made and then redirected  
23 versus coping something that may not otherwise be copied  
24 onto the computer and then redirecting it. There is no  
25 difference between the two. There are no devices being

1 planted in the machine, there's just a virus, which is  
2 software.

3 THE COURT: I'm not aware of any case that has  
4 ever held that you could do this before. But I understand  
5 their theory, which is that allegedly the defendant was  
6 using the plaintiff's computer as a recording device and was  
7 intercepting the communication as it was occurring and  
8 recording it on the plaintiff's own device, unbeknownst to  
9 the plaintiff.

10 MR. CHARROW: From a technological point of view,  
11 as far as -- you know, as far as I understand e-mail and  
12 Skype, they're subject to protocols that break down the  
13 message, whether it's an e-mail message or Skype message,  
14 into packets and are reassembled at the other end.

15 THE COURT: That's when they're being transmitted.

16 MR. CHARROW: Correct.

17 THE COURT: But here the e-mails, as I might  
18 have -- based on your description of the case you're  
19 describing, is e-mails are actually sitting on the computer.  
20 And that's why it's a stored communication, it's actually  
21 sitting there on your computer and someone has to go in and  
22 copy it off of the computer where it's already stored,  
23 versus a Skype call is not stored on the computer unless  
24 someone actually creates a copy of it. If they're creating  
25 a copy, which they're saying constitutes a violation --

1 MR. CHARROW: Their allegation is transforming  
2 Skype into an e-mail is an element that creates a violation  
3 of the Act.

4 THE COURT: Making a real time copy of Skype is  
5 what constitutes --

6 MR. CHARROW: Onto the very computer owned by the  
7 plaintiff.

8 THE COURT: That's my understanding, that's their  
9 allegation. As I said, I'm not aware of a case that says  
10 that, but I conceptually understand the point.

11 MR. CHARROW: Nor am I.

12 THE COURT: Did you have more?

13 MR. CHARROW: Third aspect --

14 THE COURT: Yes.

15 MR. CHARROW: -- of the Wiretap Act are two forms  
16 of preemption. I'm only going to discuss one here because  
17 the other is discussed thoroughly in the brief we discuss.  
18 Express preemption. But merely because something expressly  
19 preempts does not preclude it from also impliedly  
20 preempting, as the court held in *Buckley*. And  
21 telecommunications, especially these laws, we view as field  
22 preempting. They would preclude the states from entering  
23 into similar laws because they, in fact, field preempting,  
24 states do not have the traditional type of law making  
25 responsibility in this area as the federal government has.

1 THE COURT: Doesn't virtually every state have its  
2 own Wiretap Act?

3 MR. CHARROW: Every state has its own Wiretap  
4 Act -- most states do, I wouldn't say every one.

5 THE COURT: I don't know. I don't mean to suggest  
6 every one, but many states do.

7 MR. CHARROW: Many states do and most of those  
8 states are -- most of those laws are criminal.

9 THE COURT: Okay.

10 MR. CHARROW: And when we're talking about civil  
11 remedies, that's when we're talking about preemption.

12 THE COURT: Why would that be different?

13 MR. CHARROW: Because there's nothing that  
14 precludes the federal government -- because normally when  
15 you're talking about preemption, you're talking about civil  
16 actions that affect conduct in the civil arena. Which  
17 sounds circular, I know, but I've never seen preemption in  
18 the criminal arena, per se; doesn't mean it doesn't exist.  
19 But, as a general rule, we're talking about in the civil  
20 arena, and here we're talking about in the civil arena.

21 And the general rule is that, okay, we're looking  
22 at telecommunications. Telecommunications have been within  
23 the purview of the federal government since the original act  
24 was passed in what? 1934? Communications Act.

25 THE COURT: Yes.

1           MR. CHARROW: Okay. States have only been able to  
2 deal with communications, telecommunications on an  
3 intrastate basis. They have only been able to deal with it  
4 beyond an intrastate basis when they're permitted to do so  
5 by the federal government. So unlike normal cases of  
6 preemption, here the default is not state law governs unless  
7 the federal government says to the contrary, the verse is  
8 true; federal law pertains to interstate and foreign  
9 communications unless -- federal law governs unless the  
10 federal government gives the state the ability to something.

11           THE COURT: The plaintiff cites three or four  
12 District Court decisions in their brief saying there's no  
13 preemption, and I don't recall your citing any authority.

14           MR. CHARROW: We did. The *Bunnell* case discusses it.

15           THE COURT: It says that there is field preemption.

16           MR. CHARROW: Both field preemption and express  
17 preemption. Both.

18           THE COURT: Okay. You know, I mean, for example,  
19 there are a number of states that have two-party consent  
20 requirements. Whereas, the Wiretap is a one-party consent  
21 requirement. Is it your view that all those laws are  
22 preempted and that you only need one party consent to  
23 intercept a telephone call in all those jurisdictions, to  
24 tape a call?

25           MR. CHARROW: I guess the question remains, does

1 the state have the permission of the FCC to do it? And my  
2 bet is they do.

3 THE COURT: Okay.

4 MR. CHARROW: It's very much like the Food, Drug,  
5 and Cosmetic Act, there's a broad preemption provision in  
6 section 521 of the FTCA --

7 THE COURT: Implied preemption requires that the  
8 state laws frustrate the purpose, at a minimum, of the  
9 federal law. How would any of these state laws frustrate  
10 the purpose of the federal law here by being more  
11 restrictive?

12 MR. CHARROW: Let's go back a moment. That's only  
13 one aspect of it. There's different types of implied  
14 preemption. In field preemption the government occupies the  
15 entire field.

16 THE COURT: Field preemption, there are maybe four  
17 areas that the Supreme Court has ever recognized for field  
18 preemption. This is not one of them.

19 MR. CHARROW: I beg to differ with you. It is, in  
20 fact, because we're dealing with foreign commerce.

21 THE COURT: So you're making a different argument.  
22 So you're arguing more commerce preemption.

23 MR. CHARROW: Well, you asked me about preemption,  
24 and I was relying on Article 1, Section 8, Clause 3. The  
25 only reason that states have authority to act in this area

1 is if it's given to them by the federal government.

2 THE COURT: I thought you were relying on the  
3 supremacy clause.

4 MR. CHARROW: I am relying on the supremacy  
5 clause, but it's the supremacy clause vis-à-vis the commerce  
6 clause.

7 THE COURT: But it's not based on the Wiretap Act,  
8 it's based on Congress's exclusive power to regulate foreign  
9 commerce?

10 MR. CHARROW: Correct. That's the field preemption.

11 THE COURT: That's not in the briefs.

12 MR. CARROW: I know that.

13 THE COURT: Okay.

14 MR. CHARROW: I'm aware of that.

15 THE COURT: Okay.

16 MR. CHARROW: Anything else?

17 THE COURT: Let me see.

18 No. I think that covers the questions I had.

19 MR. CHARROW: Okay.

20 THE COURT: Thank you.

21 MR. CARDOZO: Your Honor, to return for a moment  
22 back to comity. The FSIA was designed to remove foreign  
23 sovereign decisions from the executive branch. And just a  
24 couple of years ago, in 2012, the Supreme Court, in *Samantar*  
25 *v. Yousuf*, told us that pre-FSIA common law tradition was

1 based on the executive suggesting in individual cases  
2 whether to apply comity and to dismiss the case as a Foreign  
3 Sovereign Act, or to allow the case to go forward.

4 The FSIA, according to the Supreme Court in 2012,  
5 was designed to supplant the executive acts -- or, the  
6 executive branch's judgment in that case and give the  
7 judgment to this Court, to courts in the FSIA.

8 THE COURT: That's true, but a little bit circular  
9 in that the Court has to then figure out what the scope of  
10 that authority is that Congress has given to the Court. And  
11 the question is would Congress have intended to give the  
12 Court the authority to do something that would have,  
13 potentially, significant foreign policy consequences, where  
14 the legislative history suggests that Congress was  
15 principally concerned -- or, at least first concerned with  
16 auto accidents.

17 MR. CARDOZO: True, Your Honor. However, the  
18 courts certainly have not limited FSIA to auto accidents.  
19 Second -- actually, two other points. Plaintiff is unaware  
20 of any case where any federal court has dismissed for  
21 comity. Hasn't happened, to our knowledge. And second, if  
22 it did become a problem and we saw plaintiffs subpoenaing  
23 foreign ministers, then either Congress or the executive  
24 could step in. And if our discovery requests went out of  
25 order, the State Department might well do so in this case.

1 THE COURT: What way would they be able to step in?

2 MR. CARDOZO: To file a statement of interest or  
3 to intervene to protect the U.S.'s foreign diplomacy powers.

4 THE COURT: But what --

5 MR. CARDOZO: We haven't seen it. It's never  
6 happened.

7 THE COURT: So we don't know what theory they  
8 would assert. They would intervene or file a statement of  
9 interest, but we don't know what they would be able to point  
10 to as their basis for telling the court please don't do that.

11 MR. CARDOZO: Comity would be the --

12 THE COURT: That's what I was wondering, whether  
13 there's some Constitutional comity principle that might  
14 govern these cases at some level.

15 MR. CARDOZO: In a sense, that's a Constitutional  
16 principle. But comity is a pre-Constitutional common law  
17 principle.

18 THE COURT: Okay.

19 MR. CARDOZO: So to turn to the Wiretap Act issue,  
20 which my opposing counsel talked about at length.

21 From the statute, any person whose communication  
22 is intercepted may recover from any entity that engaged in  
23 the interception. Here, there was an interception. I think  
24 Your Honor quite succinctly described our theory of the case  
25 here, about how the software residing on Mr. Kidane's

1 computer, copied in real time, which is something very  
2 different than what happened in the *SCA* case. So there was  
3 an interception.

4 THE COURT: Is that all in the complaint, by the  
5 way? I think your colleague indicated -- he wasn't sure  
6 whether it was.

7 MR. CARDOZO: Yes, Your Honor, it is in the  
8 complaint. And I think it shows most strongly in the  
9 summary of allegations, toward the end, and then in the  
10 first cause of action --

11 THE COURT: Okay.

12 MR. CARDOZO: -- we describe what happened.

13 THE COURT: Okay.

14 MR. CARDOZO: And we talk about it, as well, in  
15 the opposition to the motion to dismiss.

16 But, the Second Circuit, in *Organización JD Ltda.*  
17 *versus DOJ*, told us that entities, as in 2520, must mean  
18 governmental entities. And as Your Honor pointed out,  
19 entities are not liable under 2511(a). The only entity that  
20 is directly liable under 2511 is a service provider. If  
21 Congress had meant to limit entity in 2520 to service  
22 providers, they would have done so. Instead, they excepted  
23 the U.S. government from 2520.

24 So 2520 has both *Organización* and *Adams versus*  
25 *City of Battle Creek* in the Sixth Circuit, held the 1986

1 amendment adding the word entity must mean that governmental  
2 entities are liable under the act.

3 THE COURT: I suppose, given the definition of  
4 person, even a service provider?

5 MR. CARDOZO: A service provider is definitely a  
6 person, Your Honor.

7 THE COURT: So what, then, does the word -- adding  
8 entity add, if a service provider is already a person?

9 MR. CARDOZO: So there are also governmental  
10 service providers, I think that's the issue. There are  
11 service providers that are persons and there are service  
12 providers that are nonpersons service -- you know, the  
13 internet is a weird place and there are service providers  
14 that fill both those roles.

15 But 2520 creates the cause of action to recompense  
16 plaintiffs who have suffered an interception. And that's  
17 what happened here. And it's almost that simple. And  
18 adding the word "or entity," as courts in civil circuits  
19 have held, meant that Congress intended governmental  
20 entities to be liable.

21 THE COURT: What about the preceding question  
22 though, of whether an agent of a foreign government would  
23 actually be subject to criminal liability under 2511?

24 MR. CARDOZO: I see absolutely no reason why that  
25 wouldn't be true.

1           THE COURT: But 2511 only applies to a person, and  
2 a person is defined as an employee or agent of the United  
3 States or any state or political subdivision thereof,  
4 doesn't say --

5           MR. CARDOZO: Or a natural person, an individual.  
6 When individuals are prosecuted by the United States they're  
7 not prosecuted as -- under a theory of *respondent superior*,  
8 they're prosecuted as themselves, as individuals. And  
9 there's no reason to think that whichever agent of the  
10 Ethiopia government actually supervised the surveillance on  
11 Mr. Kidane would not be subject to prosecution.

12           Congress knew how to exempt the U.S. government  
13 from 2520 and they could have exempted foreign sovereigns as  
14 well. They didn't. They chose not to. In *Bunnell*, the  
15 case that opposing counsel cites, I think opposing counsel  
16 may misapprehend the technology at issue in *Bunnell*. The  
17 access was to files, was to already stored communications.  
18 And that's not what happened here.

19           I think Your Honor -- I think Your Honor  
20 apprehends plaintiff's argument in this case.

21           Shall I turn to preemption, or do you have any --

22           THE COURT: That would be fine.

23           MR. CARDOZO: Okay. In preemption -- *Leong versus*  
24 *Carrier IQ* out of the Central District of California shows  
25 that 2518 doesn't impact preemption. It only discusses what

1 federal remedies are available. And the two sets of facts  
2 that we're talking about are distinct. So our Wiretap Act  
3 claim is limited to the Skype calls. Our intrusion upon  
4 seclusion claim encompasses the Skype calls, but focuses on  
5 the web search and e-mail monitoring. We have a little bit  
6 less technical information about how exactly that happened,  
7 but we do know it happened and we've alleged it quite  
8 clearly in the complaint.

9 So even if there is preemption, which there isn't,  
10 and *Leong* teaches us that there isn't, the preemption would  
11 only be regarding the Skype calls and it would not preempt  
12 the entirety of our claim because we're talking about  
13 different courses of action and different modules, actually,  
14 of FinFisher that did the recording.

15 THE COURT: But if -- never mind. I follow.

16 MR. CARDOZO: Your Honor indicated --

17 THE COURT: I guess, let me break this down. This  
18 goes back to the question I think I was asking earlier,  
19 which is whether a criminal violation -- or, an alleged  
20 criminal violation of the Wiretap Act is enough to get your  
21 foot in the door to then assert, notwithstanding Foreign  
22 Sovereign Immunities, your intrusion upon seclusion claims,  
23 if you're breaking those claims down in a way in which they  
24 actually are focused on something different than what you're  
25 focusing on in the Wiretap Act claims, does that mean that

1 the Court has to find some other basis of not applying the  
2 discretionary function exception as to that portion of the  
3 claim because it's not -- there's no allegation of  
4 criminality there?

5 MR. CARDOZO: No, Your Honor. The FSIA gives this  
6 court jurisdiction not over individual claims, but if you  
7 look at the language, it gives this court jurisdiction over  
8 the case, and the case is composed of all of its claims.  
9 And defendant has cited no authority, at least not that I  
10 was able to grasp, that would require this Court to dismiss  
11 the intrusion upon seclusion claim --

12 THE COURT: Okay.

13 MR. CARDOZO: -- if the entire case goes forward.  
14 Your Honor, before the break, indicated that the  
15 Court had questions regarding damages for injury to a  
16 person. And I don't think opposing counsel mentioned that.  
17 Does Your Honor --

18 THE COURT: I was really cataloging the arguments  
19 that I think the parties had raised in the case and making  
20 sure everyone had an opportunity to address those. I don't  
21 have particular questions about that one.

22 MR. CARDOZO: I would just reiterate, under both  
23 D.C. and Maryland case law, privacy torts are per se  
24 injuries to a person, and that's what we have alleged here.

25 Thank you.

1           THE COURT: Did you have anything further on the  
2           preemption argument, on the field preemption argument?

3           MR. CARDOZO: No, Your Honor. I think that this  
4           is not a case where field preemption exists. And *Leong*  
5           *versus Carrier IQ* in the Central District of California  
6           supports us.

7           THE COURT: Okay. Thank you. Anything further?  
8           Are you tired?

9           MR. CHARROW: Two hours and 20 minutes.

10          THE COURT: I thank you all. This has been  
11          extremely helpful for the Court. And I apologize for  
12          keeping you so long. But, actually, both arguments were  
13          very, very helpful and have helped me at least beginning to  
14          formulate my views on this. And I'll do my best to provide  
15          a decision as soon as I can. I still want to mull over the  
16          question of whether I should at least give the United States  
17          an opportunity to be heard, if they want to be heard at this  
18          stage.

19          I recognize that they often wait to be heard in  
20          the Court of Appeals, which puts District Courts in the  
21          awkward position of not having all the arguments in front of  
22          them that may actually be before the Court of Appeals when  
23          the Court of Appeals decides a case.

24          So I'll mull that over and render a decision on  
25          that, render a decision on the merits as soon as I can.

1 MR. CHARROW: Your Honor, we had a recent  
2 experience with the Department of Justice and they said wait  
3 until the case gets to the Court of Appeals.

4 THE COURT: Okay. All right. Anything further?

5 MR. CARDOZO: Thank you.

6 THE COURT: Thank you. Thank you all.

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10 CERTIFICATE OF OFFICIAL COURT REPORTER

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12

13 I, JANICE DICKMAN, do hereby certify that the above  
14 and foregoing constitutes a true and accurate transcript of  
15 my stenograph notes and is a full, true and complete  
16 transcript of the proceedings to the best of my ability.

17 Dated this 27th day of July, 2015.

18

19

20 /s/ \_\_\_\_\_

21 Janice E. Dickman, CRR, RMR  
22 Official Court Reporter  
23 Room 6523  
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