12-1159

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

ED MOLONEY; ANTHONY MCINTYRE
Plaintiffs - Appellants

v.

ERIC H. HOLDER, JR., Attorney General;
JOHN T. MCNEIL, Commissioner
Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PLAINTIFF-APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

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I. JURISDICTIONAL STATEMENT

The Appellants, Ed Moloney ("Moloney") and Anthony McIntyre ("McIntyre") sought the District Court's consideration of their claims under Federal Question jurisdiction at 28 U.S.C. §1331. Subject-matter jurisdiction in the lower Court was asserted pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §702 *et seq*, as well as under 28 U.S.C. §1361, seeking a writ of mandamus to compel the Attorney General to perform the duties he owed to the Plaintiffs/Appellants and/or for relief under 28 U.S.C. §2201 (Declaratory Judgment Act). Pursuant to 5 U.S.C. §703, the latter two forms of legal action are additional vehicles through which to seek judicial review. See also *Cornejo-Barreto v. Seifert,* 218 F.3d 1004, 1012-15 (9th Cir. 2000); *Hernandez-Avalos v. I.N.S.,* 50 F.3d 842, 846-47 (10th Cir. 1995).

Subject-matter jurisdiction was further asserted pursuant to 18 U.S.C. §3512, by which a Federal judge may issue such orders as may be necessary to execute a request from a foreign authority for assistance in the investigation or prosecution of criminal offenses, or in proceedings related to the prosecution of criminal offenses, including an order requiring the production of documents.

Jurisdiction was challenged by the Appellees (hereinafter "the Government") by way of its Motion to Dismiss under Fed. R. Civ. P. Rule

12(b)(1) and 12(b)(6). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291, as this appeal is from a final decision disposing of all parties' claims in this jurisdiction.

Federal courts may conduct plenary review of questions of law, including questions of statutory construction and interpretation pursuant to Section 10(e) of the APA; 5 U.S.C. § 706 (1976).

A Notice of Appeal in Docket Number 11-mc-91078 [A19-A21] was timely filed on December 29, 2011from the Orders of the United States District Court for the District of Massachusetts of December 16, 2011 and December 27, 2011. See Addendum.

A Notice of Appeal in Docket Number 12-cv-12331 [A1-A10]was timely filed on January 29, 2012 from the Order of the United States District Court for the District of Massachusetts of January 24, 2012 dismissing the complaint under Fed. R. Civ.P. Rule 12(b)(1) and/or 12(b)(6).

The United States Government is a party to this action.

II.STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. The Appellants challenge the lower court's dismissal of their complaint under Fed. R. Civ. P.12(b)(1) for lack of subject matter jurisdiction, and in particular the lower court's finding that neither of the Appellants has standing to review the actions of the Attorney General under the US-UK Mutual Legal Assistance

Treaty ("US-UK MLAT").

B. Moloney and McIntyre assert that the District Court, in dismissing their compliant for failure to state a claim upon which relief can be granted, erred as a matter of law by finding on the merits that (i) the Attorney General has acted appropriately under the US-UK MLAT and (ii) that no different result regarding the issuance of the subpoenas at issue could arise if the case were to go forward on the merits.

C. The Appellants appeal from the District Court's ruling in 11-mc-91078, and assert that the lower court (i) failed properly to set forth the test for the court's discretionary authority under 18 U.S.C. § 3512; (ii) failed properly to apply the heightened balancing test; (iii) failed to subject the Government's actions to judicial scrutiny; and (iv) erred in finding that the Appellants' claims were barred by Article 1§3 of the US-UK MLAT.

D. The Appellants assert that they were entitled to intervene in Docket Number 11-mc-91078 as a matter of right or as a matter of discretion pursuant to Fed. R. Civ. P. 24.

III. STATEMENT OF THE CASE

This appeal is taken from decisions rendered by United States District Court for the District of Massachusetts (Young, J.) in the related cases of Docket Number 11-mc-91078 and 12-cv-12331.

In Docket Number 11-mc-91078, the district court denied the motion of Moloney and McIntyre to intervene in the action in which Boston College sought to quash the commissioner's subpoenas in the matter of Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Criminal Matters in the Matter of Dolours Price.

In Docket Number 11-mc-91078, by way of a Motion to Intervene, Moloney and McIntyre sought to file a Complaint for judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. §702 *et seq*, as well as a Writ of Mandamus under 28 U.S.C. §1361, to compel the Attorney General to perform the duty he owed to the Plaintiffs and/or for a Declaratory Judgment and Injunctive Relief, under 28 U.S.C. §2201 (Declaratory Judgment Act). Moloney and McIntyre asserted Federal Question jurisdiction pursuant to 28 U.S.C. §1331.

On December 16, 2011, the District Court denied both the motion to intervene as of right and the motion for permissive intervention under Fed.

R. Civ. P. 24. Moloney and McIntyre then filed an original Complaint for judicial review on December 29, 2011.

The district court, *inter alia*, granted the motion of the Government's Motion to Dismiss the Plaintiff/Appellants' Complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and/or Rule 12(b)(6) for failure to state a cause of action upon which relief may be granted.

IV. STATEMENT OF FACTS

Moloney and McIntyre adopt the facts and procedural history as set forth in the Memorandum and Order of the Judge William G. Young of December 16, 2011and refer to the transcripts of hearings in 11-mc-91078 and 12-cv-12331, attached to the Addendum hereto.

The subpoenae referenced in this case were filed under seal. On May 5, 2011, Boston College received the first set of subpoenae, issued by the Commissioner under the authority of 18 U.S.C. § 3512 and the US-UK MLAT. Addendum, p.4. The subpoenae included demands for the recordings, written documents, written notes and computer records of the interviews of Brendan Hughes and Dolours Price. *Id*. The interview materials of Brendan Hughes were produced in a timely manner as the terms of confidentiality of his interviews ended with his death. *Id*. A .

A second set of subpoenae was served on August 4, 2011 to counsel for Boston College which demanded additional recordings, transcripts and records of "any and all interviews containing information about the abduction and death of Mrs. Jean McConville." *Id*. The subpoenae requested documents gathered as part of an oral history project sponsored by Boston College in 2001. *Id*. Known as "The Belfast Project," this oral history project had as its goal the documentation, by way of taped interviews, of recollections of members of the Provisional Irish Republican Army, Provisional Sinn Fein, the Ulster Volunteer Force, and other paramilitary and political organizations involved in the "Troubles" in Northern Ireland from 1969 forward. *Id*. p.5. The research sought to record the recollections of combatants who become personally engaged in the violent conflict, so that a better understanding of the causes of the Troubles could be preserved for history. *Id*. As such, its progenitors, including Moloney, saw it as a vital project to understanding the conflict in Northern Ireland and other conflicts around the world. *Id*.

The Belfast Project was funded and housed at the Burns Library of Rare Books and Special Collections at Boston College, as a result of the college's ongoing academic interest in Irish Studies and its prior role in the peace process in Northern Ireland. *Id*.

Moloney, a journalist and writer, originally proposed the Project. *Id.* p.6. The Trustees of Boston College contracted in 2001 with Moloney to become the Project Director for the Belfast Project. *Id.* The agreement between the Trustees of Boston College and Moloney required the Belfast Project Director, interviewers and interviewees to sign a confidentiality agreement forbidding them to disclose the existence or scope of the Project without the permission of Boston College. *Id.* The contract also required the adoption of a coding system to maintain the anonymity of interviews. *Id.* Only Robert K. O'Neill and Moloney would have access to the key identifying the interviewees. *Id.*

Originally, the interviews were to be stored in Boston and in Belfast, Ireland, although ultimately the project leadership decided that interviews could only be stored safely in the United States. A. The interviews were eventually stored in the Burns Library "Treasure Room," under strict security, with extremely limited access. *Id.*

Each interviewee of the project was to be given a contract guaranteeing confidentiality "to the extent that American law allows." *Id.* The contract recommended adopting guidelines for use, similar to those in Columbia University's Oral History Research Office Guidelines. *Id.*

The Belfast Project, through Moloney, subsequently employed two researchers to conduct interviews with members of the Irish Republican Army and the largest Protestant paramilitary group, the Ulster Volunteer Force. *Id*. p.7. Appellant Anthony McIntyre and another interviewer conducted, transcribed and indexed interviews with IRA members, and abided by the confidentiality requirements of the Moloney/Boston College Agreement. *Id*. McIntyre conducted twenty-six interviews which were subsequently transcribed. *Id*.

Interviewees signed a confidentiality and donation agreement that promised that access to the interviewee's record would be restricted until after the death of the interviewee, except if the interviewee gave prior written approval following consultation with the Burns Librarian. *Id*.

V. SUMMARY OF ARGUMENT

The District Court erred in dismissing the Appellants' complaint in Docket Number 11-cv-12331 under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. The lower court already had asserted subject-matter jurisdiction in relation to the facts of this case in Docket Number 11-mc-91078, which essentially set forth the same claim i.e. whether the Attorney General acted in accordance with the law in granting assistance under the US-UK MLAT.

Accordingly, the question going to the heart of the Government's Motion to Dismiss under Rule 12(b)(1) in Docket Number 11-cv-12331 was whether or not Moloney and McIntyre had standing to review the actions of the Attorney General under the US-UK MLAT, and whether or not Moloney and McIntyre had alleged a cause of action upon which relief could be granted.

The Appellants submit that they have demonstrated the "concrete and particularized injury" necessary to establish the constitutional standing needed for their legal claims against the Attorney General and the Commissioner; that this injury is fairly traceable to the failure of the Attorney General to comply with his obligations under the US-UK MLAT; and, that an Order remanding the matter to the Attorney General to carry out his obligations will redress the injury. *See Becker v. Federal Election Commission*, 230 F.3d 381, 384-85 (1st Cir. 2000).

In particular, Moloney and McIntyre have alleged that personal harm, as well as the chilling effect on the free flow of information to the Belfast Project and future oral history projects and to oral historians will occur if the materials subject to subpoena are released. The Appellants posit that, contrary to the requirements of Fed. R. Civ. P. 12(b)(1), the District Court did not accept the material factual allegations in their complaint as true, nor

did the lower court draw all reasonable inferences in their favor, as required by law. The nexus of harm clearly presented a controversy and question of fact for the District Court to determine that dismissal under Fed. R. Civ. P. 12(b)(1) was improper.

The Appellants further assert that the District Court, in dismissing their compliant for failure to state a claim upon which relief can be granted, erred as a matter of law and fact by finding on the merits that (i) the Attorney General has acted appropriately under the US-UK MLAT and (ii) that no different result regarding the issuance of the subpoenas at issue could arise if the case were to go forward on the merits.

The Appellants also assert that, in the lower court's Decision in 11-mc-91078, Judge Young erred as a matter of law in that he (i) failed properly to set forth the test for the court's discretionary authority under 18 U.S.C. § 3512, and that he should have had regard to the discretionary factors set forth at *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247-49, 124 S.Ct. 2466, 159 L.Ed.2d 355 (2004); (ii) failed properly to apply the heightened balancing test; (iii) failed to subject the Government's actions to judicial scrutiny.

Moloney and McIntyre further assert that they were entitled to intervene in Docket Number 11-cv-91078 as a matter of right or as a matter of discretion pursuant to Fed. R. Civ. P. 24.

VI. ARGUMENT

A. The District Court Erred as a Matter of Law in Dismissing the Complaint for Lack of Subject-Matter Jurisdiction.

a) Standard of Review for Fed. R. Civ P. 12(b)(1) Dismissal

The Honorable Court reviews *de novo* a district court's dismissal for lack of subject matter jurisdiction. *Fernández-Vargas v. Pfizer*, 522 F.3d 55, 63 (1st Cir. 2008); *United Seniors Ass'n, Inc. v. Philip Morris USA*, 500 F.3d 19, 23 (1st Cir. 2007); *Stewart v. Tupperware Corp.*, 356 F.3d 335, 337 (1st Cir. 2004).

The Honorable Court has distinguished between dismissal under 12(b)(1) for lack of subject matter jurisdiction and 12(b)(1) for failure to state a cause of action. *See Alberto San. v. Consejo De Titulares*, 522 F.3d 1, 3 (1st Cir. 2008) citing *Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d 317, 322 (1st Cir. 2001) ("[T]he Supreme Court has often said that a colorable claim of a federal cause of action will confer subject matter jurisdiction even though the claim itself may fail as a matter of law on further examination.")

For the purposes of a *de novo* review of a district court's dismissal for want of subject matter jurisdiction , the Honorable Court gives "weight to the well-pleaded factual averments in the operative pleading… and indulge every reasonable inference in the pleader's favor." *Aguilar V. U.S. Immig.*, 510 F.3d 1, 8 (1st Cir. 2007) citing *Muñiz-Rivera v. United States*, 326 F.3d 8, 11 (1st Cir. 2003).

Where such facts are "illuminated, supplemented, or even contradicted by other materials in the district court record, [the Court] need not confine our jurisdictional inquiry to the pleadings, but may consider those other materials." *Id. See J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004); *Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002).

b) The Appellants Properly Have Asserted Federal Question Jurisdiction.

The APA does not *per se* provide an independent grant of subject matter jurisdiction to the federal courts. *See Califano v. Sanders,* 430 U.S. 99 (1977). Instead, the Federal Question statute at 28 U.S.C. § 1331 confers subject matter jurisdiction on the district courts over any actions "arising under" federal law. ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). The Appellants' complaint raises questions under the First and

Fifth Amendments of the Constitution, as well as under the US-UK MLAT pursuant to the APA and 18 U.S.C. §3512 which invokes the "reasonableness standard" at F.R. Crim.P. 17(c)(2)[1].

Regarding their APA claim, the Supreme Court has found that 28 USC § 1331 serves as the jurisdictional basis for federal courts "to review agency action." *Califano,* 430 U.S. at 105; *see also Bowen v.Massachusetts,* 487 U.S. 879, 891 n.16 (1988) ("[I]t is common ground that if review is proper under the APA, the District Court has jurisdiction under 28 USC § 1331").

The Honorable Court in *Neang Chea Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009) confirmed that this Court has subject matter jurisdiction under a combination of 28 U.S.C. § 1331 and the APA. See *Succar v. Ashcroft*, 394 F.3d 8, 20 (1st Cir. 2005). The APA "gives a court power to 'hold unlawful and set aside' not only agency action that is 'arbitrary' or 'capricious,' but also agency action that is 'otherwise not in accordance with law' or is 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'" *Id. quoting Cousins v. Sec'y of the United States Deft of Tramp.*, 880 F.2d 603, 608 (1st Cir. 1989). See also 5 U.S.C. § 706(2)(A), (C).

[1] At page 28 of his Decision of December 16, 2011, Judge Young stated that "this Court is not therefore bound by the Federal Rules of Criminal Procedure, however the Rules still inform the Court's standard for reasonableness."

Moloney and McIntyre seek to compel the Attorney General to comply with his obligations under a treaty between the United States and the United Kingdom designed to provide mutual legal assistance in criminal prosecutions or investigations, subject to certain safeguards. The Appellants' claims were not made solely for the purpose of obtaining jurisdiction nor were they insubstantial or frivolous. Accordingly, Moloney and McIntyre assert that Federal Question jurisdiction exists as their claims turn on an interpretation of treaties, laws or the Constitution of the United States.

Moloney and McIntyre further assert that their claims are not without merit as the rights which they claim are not so "insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Donahue v. City Of Boston*, 304 F.3d 110, 119 (1st Cir. 2002) [*citing Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 666; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 at 89]. Indeed, the question raised is a matter of first impression. The question is whether or not non-defendants such as Moloney and McIntyre may bring an action to enforce the MLAT Standards (defined infra) that the Attorney General must follow under the US-UK MLAT where such action does not seek to "obtain, suppress, or exclude any

evidence, or to impede the execution of a request." This question has not been addressed by any court.

c) Appellants Have Set Forth a Case or Controversy

Article III of the Constitution imposes a requirement that a plaintiff have standing to sue, which generally requires that the plaintiff have suffered a sufficient injury-in-fact. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

The Court in *Becker v. Federal Election Commission*, 230 F.3d 381, 384-85 (1st Cir. 2000) reiterated the elements which the Court must review to determine if a party has standing:

> "To establish standing, it does not suffice for plaintiffs to show merely that they bring a justiciable issue before the court; they must show further that they have a sufficiently personal stake in the issue. This means that plaintiffs must show: (1) that they have suffered or are in danger of suffering some injury that is both concrete and particularized to them; (2) that this injury is fairly traceable to the allegedly illegal conduct of the defendant; and (3) that a favorable decision will likely redress the injury. See *Valley Forge*, 454 U.S. at 472, 102 S.Ct. 752; see also *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 36 (1st Cir. 1993)."

Moloney and McIntyre, in their Complaint, and in their Affidavits in support, have alleged that personal harm will occur if the materials are released. A27-A53; A52-A60; A184-A223; A224-A249. A Court will

generally accept the material factual allegations in the complaint as true and draw all reasonable inferences in a plaintiff's favor. Accordingly, their claims meet the 'concrete and particularized injury' test as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *McCloskey v. Mueller*, 446 F.3d 262, 266 (1st Cir. 2006). Needless to say, the nexus of harm also presented a controversy and question of fact for the lower court to determine, such that dismissal under Fed. R. Civ. P. 12(b)(1) was inappropriate.

Moloney and McIntyre have also asserted that the constitutional rights which they seek to protect are clearly sufficient for Article III standing. In particular, Moloney and McIntyre assert a clear and direct connection between the injury to their First Amendment rights, namely the free-flow of information associated with the Belfast Project, as well as the threat to future oral history projects and oral historians, and the failure of the Attorney General to adhere to the MLAT Standards (as defined *infra)* prior to granting a request for legal assistance that interfers with such rights.

If any of the materials are released pursuant to the Commissioner's subpoenas, the chilling effect on the Belfast Project, as well as similar oral history projects and oral historians, will be considerable. Indeed, the lower court in its Decision of December 16, 2011 [11-mc-91078] has found that

"[i]n general, the compelled disclosure of confidential research does have a chilling effect." Addendum, p.45.

The First Amendment right in this instance is not within the sole preserve of Boston College. The Supreme Court has determined that when a party asserts First Amendment interests, as Moloney and McIntyre have done, which includes the interests of third parties, standing should be given a broad berth and that even self-censorship is harm sufficient for standing. See *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-393, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988):

> "The usual rule that a party may assert only a violation of its own rights must give way to the exception allowing the assertion of the free expression rights of others, since plaintiffs have alleged an infringement of the First Amendment rights of book-buyers. The pre-enforcement nature of the suit is irrelevant, since plaintiffs have alleged an actual and well-founded fear that the statute will be enforced against them, and there is no reason to assume otherwise. Indeed, the statute's alleged danger is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."

Accordingly, the Appellants' First Amendment interest is real and sufficiently concrete to satisfy Article III standing requirements. This interest, and the threat to their safety, means that Moloney and McIntyre have satisfied the "modest" requirements for Article III standing. See *Lujan, supra* 504 U.S. at 561; *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1331 (Fed. Cir. 2008). Where a request for legal assistance

is in violation of the Constitution, as Moloney and McIntyre allege here, that request should be subject to review. See *In Re 840 140th Ave. NE, Bellevue, Washington*, 634 F.3d 557 at 571-573 (9th Cir. 2011).

Moloney and McIntyre recognize that the APA imposes an additional standing requirement. The APA at 5 USC § 702 states that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

The Supreme Court has interpreted this provision as requiring a plaintiff not only to have an injury but also to demonstrate standing under the APA by showing that "the interests sought to be protected by the [plaintiff are] arguably within the zone of interests to be protected or regulated by the statute … in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

The "zone of interest" test does not require Moloney and McIntyre to establish that Congress specifically intended to benefit them. Rather, there is a two-step inquiry: "First, the court must determine what interests the statute arguably was intended to protect, and second, the court must determine whether the 'plaintiff's interests affected by the agency action in question are among them.'" See *Bangura v. Hansen*, 434 F.3d 487, 499 (6th

Cir. 2006) (quoting *NCUA v. First National Bank & Trust Co.*, 522 U.S. 479, 492 (1998)). One court has described this test as "a fairly weak prudential restraint, requiring some non-trivial relation between the interests protected by the statute and the interest the plaintiff seeks to vindicate." *Hernandez-Avalos v. INS*, 50 F.3d 842, 846 (10th Cir. 1995). The "zone of interest" test "denies a right of review if the plaintiff's interests are … marginally related or inconsistent with the purposes implicit in the statute." *NCUA*, 522 U.S. at 491.

The Supreme Court has made clear that: 'jurisdiction … is not defeated … by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.' Rather, the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the laws of the United States are given one construction and will be defeated if they are given another …' *Steel Co. v. Citizens for a Better Environment*, 523 U.S. at 89 (quoting *Bell v. Hood*, 327 U.S. at 682, 685).

d) <u>The District Court Erred in Finding that Article 1 Section 3 of the MLAT Precludes a Private Right of Action Under the APA or First Amendment to Enforce the Provisions of the MLAT by Non-Defendants such as the Appellants.</u>

As set forth in their Complaint at ¶¶ 19-22 [A191], Moloney and McIntyre are not barred from asserting any private right of action pursuant

to Article 1§ 3 of the US-UK MLAT. The original, master agreement, the Agreement on Mutual Legal Assistance Between the United States of America and the European Union ("Master MLAT"), contains the language that an MLAT shall not "expand or limit rights otherwise available under domestic law." Master MLAT at Article 3(5), emphasis added. A329.

With respect to judicial review under the APA, if a statute, such as Article 1 §3 of the US-UK MLAT, purports to preclude judicial review of administrative decisions, there must be "clear and convincing evidence of congressional intent" before a statute will be construed to restrict access to judicial review. *Johnson v. Robison*, 415 U.S. 361, 373-374 (1974) citing *Abbot Laboratories v. Gardner,* 387 U.S. 136, 141 (1967). There must be "specific language." See *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 673 (1986) citing *Block v. Community Nutrition Institute*, 467 U.S. 340, 349, 351 (1984).

Clearly, there is no such explicit language prohibiting judicial review in Article 1 §3 of the US-UK MLAT, and the Senate could easily have included such language if that was the intent. See *National Defense Resource Council v. Johnson*, 461 f. 3d 164, 172 (2nd Cir. 2006) [21 U.S.C.§346(a)(h)(5) provides that "any issue as to which review is or was obtainable under this subsection shall not be the subject of judicial review

under any other provision of law"]; *Inter Tribal Council Arizona, Inc. v. Babbitt,* 5 F.3d 199, 202 (9th Cir. 1995) [section 402(h)(9) of the Arizona Florida Land Exchange Act provided that "no action of the Secretary under this subsection shall be brought subject to the provisions of 5 U.S.C.§§ 701 through 706.); *Weinberger v. Salfi,* 422 U.S. 749, 761 (1978) [38 USC Sec. 211(a) provided that a decision of the Veterans Administrator "shall be final and conclusive and…no court of the United States shall have power or jurisdiction to review any such decision in an action in the nature of mandamus or otherwise."]

So also with respect to Moloney's and McIntyre's constitutional claims, judicial review may not be precluded by any statute, including Article 1§3 of the US-UK MLAT:

> "[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603.

Moloney and McIntyre have asserted colorable constitutional claims grounded in the First and Fifth Amendments at ¶¶ 91-97 of their Complaint [A217-A219]. Moloney and McIntyre have also claimed, at ¶¶ 18-20 of the Complaint [A190-A192], that their rights arise under a domestic statute. In issuing the subpoenas, the Government could not simply rely on any

provision of the US-UK MLAT, but was required to invoke the lower court's discretionary authority under 18 U.S.C. §3512, which also invokes the "reasonableness standard" under F.R. Crim.P. 17(c)(2), pursuant to which a district court may quash subpoenas if compliance would be "unreasonable or oppressive."

In its Decision of December 16, 2011, the lower court held that "a United States District Court has the discretion to review a motion to quash such a subpoena, under the statutory authority conferred by 18 U.S.C. § 3512 and the framework articulated in the UK-MLAT." Addendum at p. 10.

Moloney and McIntyre submit that, in considering the subpoena request, the lower court should have considered the discretionary factors set forth at *Intel Corp. v. Advanced Micro Devices, Inc. supra*.

Moloney and McIntyre assert that the Government's "unduly intrusive or burdensome" request and "unreasonable or oppressive" actions or inactions implicate domestic law considerations, namely the implementation of the US-UK MLAT through the prism of 18 U.S.C. §3512. The US-UK MLAT neither extinguishes their rights under domestic law, nor permits the Government to circumvent the Federal Rules in its pursuit of subpoena requests.

Moloney and McIntyre further submit that the limits on a private right of action pursuant to the US-UK MLAT must, by plain reading of the treaty provisions, be limited solely to those documents and materials which the MLAT parties already have in their custody and control, and cannot, without judicial authority, fetter private documents in the custody of third parties. These may only be obtained by subpoena, subject to the Federal Rules.

The prohibition on a private right of action in the US-UK MLAT is also limited in its application in that it is "aimed specifically at [criminal] defendants, to prevent them from making MLAT requests." See R. N. Lyman, Compulsory Process in a Globalized Era: Defendant Access to Mutual Legal Assistance Treaties, 47:1 Virginia Journal of International Law, p. 266 (Fall 2006). See also, *United Kingdom v. U.S.,* 238 F.3d 1312, 1314 (11th Cir. 2001) [There is no provision for private parties, *such as individual criminal defendants in the English (or American) court*s, to request the production of information. See MLAT, art. 1, ¶ 3." (emphasis added)]; *In Re Lavan* (E.D.Cal. 3-23-2011) *6 ("The MLAT with the United Kingdom *specifically excluded criminal defendants* from the ability to request production of information.") [Emphasis added].

Most, if not all, of the published cases dealing with the prohibition on the relief of a private right of action involve attempts by criminal defendants

to invoke rights which the requisite MLAT specifically prohibits. For example, in *U.S. v. $734,578.82 in U.S. Currency*, 286 F.3d 641, 658-659 (3d Cir. 2002), the statute at issue, 18 U.S.C. § 1955(d), had authorized seizure and forfeiture to the United States of property, including money, used in violation of the provisions of 18 U.S.C. § 1955, which prohibited illegal gambling. Accordingly, the Government in *U.S. v. $734,578.82 in U.S. Currency* was already seized of the property and could readily exchange it under the express terms of the MLAT.

In *United States v. Rommy*, 506 F.3d 108, 129 (2d Cir. 2007), the criminal defendant made no claim on appeal that the Government's investigation violated any United States law, and the *Rommy* court confirmed that "The admissibility of evidence in a United States court depends solely on compliance with United States law." Here, Moloney and McIntyre submit that, following the same rationale, the Government must be subject to the same Federal laws which pertain to every domestic subpoena request.

It is worth noting that the court in *Rommy* also stated as follows:

> "For any number of reasons, sovereigns may elect to overlook non-compliance with particular treaty requirements in given cases. Thus, a proper respect for the diplomatic choices of sovereign nations prompts courts generally to apply 'a strong presumption against inferring individual rights from

> international treaties.'" 506 F.3d at 129-130, *citing United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001).

However, whereas there is a strong presumption against inferring individual rights from international treaties, *Rommy* does not discuss the point on appeal, which is the assertion of individual rights arising under domestic law such as the APA and/or 18 U.S.C. §3512.

Furthermore, it is respectfully submitted that the District Court should have taken into account the Government's non-compliance with US-UK MLAT requirements, in circumstances where the Government seeks the favorable exercise of the Court's discretion under a domestic statute.

As the Government must pursue its subpoena request only pursuant to the District Court's discretionary authority under 18 U.S.C. §3512, and subject at least to the reasonableness standard of F.R. Crim.P.17(c)(2), then here, the District Court clearly had subject-matter jurisdiction for the purposes of Fed. R. Civ. P.12(b)(1).

B. The District Court Erred in Law in Dismissing the Compliant for Failure to State a Claim Upon Which Relief can be Granted.

a. Standard of review for Fed. R. Civ P. 12(b)(6) dismissal

The Honorable Court conducts a *de novo* review of an appeal from a denial of a Rule 12(b)(6) motion. *U.S. ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 383 (1st Cir. 2011); *Fitzgerald v. Barnstable*

School Comm., 504 F.3d 165, 176 (1st Cir. 2007); *Carnero v. Bos. Scientific Corp.*, 433 F.3d 1, 4 (1st Cir. 2006).

In deciding a motion to dismiss pursuant to Fed. R. Civ. P.12(b)(6), the allegations in the complaint are accepted as true, and all reasonable inferences must be drawn in the Plaintiffs/Appellants' favor. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). A well-pleaded complaint must contain more than mere labels and conclusions. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

The Court's function with regard to a motion to dismiss is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient."

Moloney and McIntyre can survive a Motion to Dismiss if their complaint has stated "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, supra*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, supra* at 1949. While the Court should construe the factual allegations in the light most favorable to the plaintiff, "the tenet

that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions." *Id*.

When presented with a motion to dismiss pursuant to Fed. R. Civ. P 12(b)(6), the Court may consider documents that are referenced in the complaint, documents that the plaintiff relied on in bringing suit and that are either in the plaintiff's possession or that the plaintiff knew of when bringing suit, or matters of which judicial notice may be taken.

b. The District Court Erred in Finding that the Attorney General had Acted Appropriately Regarding his Obligations under the US-UK MLAT

In the transcript of the motion hearing of January 24, 2012 pursuant to which the lower court granted the Government's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), the District Court did not directly address the Government's grounds for dismissal, or the arguments of Moloney and McIntyre in opposition, under Fed. R. Civ. P. 12(b)(6) for failure to state a cause of action upon which relief can be granted, but stated:

> "[O]n the merits, I am satisfied that the Attorney General as matter of law has acted appropriately with respect to the steps he has taken under this treaty, and I can conceive of no different result applying the heightened scrutiny that I think is appropriate for these materials were this case to go forward on the merits."

Moloney and McIntyre submit that, as a matter of both law and fact, this finding is erroneous. Had the District Court taken the allegations in the

complaint as true, and had it drawn all reasonable inferences in favor of Moloney and McIntyre, it was compelled to find that the Attorney General had not acted appropriately with respect to the steps taken under the US-UK MLAT. Indeed, the Government has never sought to assert otherwise, but rather rest on the contention that Moloney and McIntyre have no grounds of relief, arguing that Article 1 §3 of the US-UK MLAT precludes them from raising a private right of action, regardless of the Attorney General's compliance or non-compliance.

However, for the purposes of Fed. R. Civ. P. 12(b)(6), the Supreme Court has distinguished between a court's jurisdictional power to hear the case, and the sufficiency of a valid cause of action. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1988); *see also Ahmed v. DHS*, 328 F.3d 383, 386-87 (7th Cir. 2003) (distinguishing between the court's power to adjudicate the case, which is jurisdictional, and the court's power to grant relief, which is not jurisdictional). Accordingly, the failure to state a valid cause of action calls for a judgment on the merits and not for dismissal for want of jurisdiction. *Bell v. Hood*, 327 U.S. 678, 682 (1946).

Moloney and McIntyre, in their Complaint, asserted a cause of action under the APA, as well as 18 U.S.C. §3512, which gives rise to their claim for judicial review.

Moloney and McIntyre alleged that they were entitled to a review of the Attorney General's adherence to the MLAT Standards (defined *infra*), notwithstanding the preclusion of a private right of action for criminal defendants, as the Attorney General's failure to comply with the standards will cause them physical harm, and constitutional harm.

Moloney and McIntyre also allege that, in issuing the subpoenas, the Government could not rely on the provisions of the US-UK MLAT alone, but, rather, had to rely upon the Honorable Court's discretionary authority under 18 U.S.C. §3512, which in turn allows the Plaintiffs/Appellants the right to raise a challenge as interested parties whose interests are affected by the subpoena requests, and the information relied upon in the granting of the subpoena requests.

The language at Article 1, § 3 of the US-UK MLAT foreclosing any private right of action to "obtain, suppress, or exclude any evidence, or to impede the execution of a request" does not foreclose the assertion by Moloney and McIntyre of their domestic rights. These rights include their right under the APA to compel the Attorney General's compliance with the type of conduct which must necessarily inform, in the exercise of its discretion, the lower court's decision-making on the Government's subpoena

request. Accordingly, Moloney and McIntyre properly have set forth a cause of action.

i. The Attorney General Failed to Adhere to the MLAT Standards

Under § 701(a)(2) of the APA, the presumption of judicial review over agency action may be overcome where such action is committed to agency discretion by law. However, the Supreme Court has held that such circumstances are "rare," and only occur "where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 190-91 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821 at 830).

Accordingly, apart from the clearly mandatory nature of the Attorney General's duties at Article 1 sec. 1bis and Article 18 sec.1 of the US-UK MLAT, this exclusion is inapplicable where the agency has failed to follow its own standards. The Court in *Heckler v. Chaney* 470 U.S. 821 stated that any presumption of unreviewability may be rebutted "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 832-33. As the First Circuit set forth in *Taylor v. U.S. Dept. Of Labor*, 440 F.3d 1, 9 (1st Cir. 2005): "In other words, where there is a sufficient or meaningful standard provided in the governing statute, courts have something "against which to judge the agency's exercise

of discretion," and judicial review is allowed. Citing *Heckler*, 470 U.S. at 830.

Moloney and McIntyre, in their Complaint, requested that the District Court remand the matter to the Attorney General with instructions that his decision to provide legal assistance under the US-UK MLAT be reviewed in light the "MLAT Standards". See Complaint at ¶¶ 49-61.

The "agency discretion" exception is a "very narrow exception" to be "narrowly construed" and "should be invoked only where the substantive statute left the courts with no law to apply." *Id. citing Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). "If no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for abuse of discretions." *Id.*

Here, however, through the MLAT Standards, there is clearly codified law for a court to apply and "judicially manageable standards" against which to judge and evaluate the actions or inactions of the Attorney General. The MLAT Standards are "definite standards" and "judicially enforceable." See *Medellin v. Texas*, 522 U. S. 491, 550, 556, 561 (Breyer, J., dissenting)(2008). Indeed, while the ultimate decision to issue or not issue a subpoena may be discretionary pursuant to Art. 3§1, the duty to review the

request based on the MLAT Standards is not. In exercising discretion, a government official, even the Attorney General, must adhere to standards lest he exercise discretion in a vacuum, thereby raising serious constitutional due process issues.

In determining whether the actions of the Attorney General were in accordance with the law, and whether the matter should be remanded, Moloney and McIntyre submit that the District Court, pursuant to its authority at 18 U.S.C. § 3512, should have inquired if, prior to granting the request for assistance under the US-UK MLAT, the Attorney General adhered to the following requirements of the US-UK MLAT (the "MLAT Standards") and:

(i) considered whether or not a prosecution or referral realistically would take place in the U.K. against Dolours Price, a resident of the Republic of Ireland, for crimes allegedly committed in the Republic of Ireland over 40 years ago, in which case the U.K. would have neither personal jurisdiction nor subject matter jurisdiction, nor a reasonable expectation of extraditing her even if jurisdiction did exist (MLAT, Article I sec. 1bis.);

(ii) considered if the request would "impair [the United States'] sovereignty, security, or other essential interests or would be contrary to important public policy," in view of the fact that, as alleged by Moloney and McIntyre, harm would come to the Belfast Project and the peace process (Id. at Article 3 sec. 1(a));

(iii) considered if the subpoenas related to an offence that is regarded by the United States as "an offence of a political character" (Id. at sec. 1(c)(i));

(iv) considered if the United States had "rights or obligations under another bilateral or multilateral agreement relating to the subject matter of the Treaty," such as the Good Friday Agreement ("GFA") [A63-A98] and the Extradition Treaty [A164-A183], in which event the Attorney General "shall consult promptly" with the Requesting Party. *Id.* at Article 18 sec. 1 (emphasis added); or,

(v) considered whether or not granting the request would "offend a constitutional guaranty," such as the First Amendment, or if the information produced by the request "would be used in a foreign judicial proceeding that departs from our concepts of fundamental due process and fairness." *See In Re Premises Located at 840 140th Avenue NE, Bellevue, Washington*, 634 F.3d 557, 572 (9th Cir. 2011); A200-A206.

Moloney and McIntyre had alleged in their Complaint that if the Attorney General had evaluated the request for legal assistance in conformity with the explicit MLAT Standards, he would not have issued the Subpoenas. For the purposes of a motion to dismiss, this allegation must be taken as true.

As discussed above, because the MLAT sets forth the standards against which this Court may evaluate the action of the Attorney General and, in view of the narrow exception of "agency discretion", the agency discretion exception is inapplicable. As set forth above at page 21, Article 1 § 3 of the MLAT does not include the express language necessary for a statute to preclude judicial review pursuant to 5 U.S.C. §701(a)(1).

For the reasons set forth above, the Attorney General has failed to meet the clearly defined and codified MLAT Standards.

(ii) If The Attorney General Had Reviewed The PSNI/UK Request For Legal Assistance In Accordance With The MLAT Standards, He Would Have Been Compelled to Deny The Request.

If the Attorney General had applied the MLAT Standards to the request for legal assistance, he would have denied such request for the following reasons:

(a) It was not reasonable to believe that a prosecution or referral would take place. MLAT Article 1 sec. 1bis.

The subject of the first round of subpoenas was Dolours Price, a resident of the Republic of Ireland. It is highly unlikely that the Republic of Ireland would readily extradite an Irish national for an alleged crime, committed in the jurisdiction of the Republic of Ireland, and related to the Troubles prior to the GFA. Additionally, common sense instructs that it would be extremely difficult to mount a prosecution for a crime committed 40 years ago. It was for just such a request as this that the MLAT provides that assistance "shall not be available for matters in which the administrative authority anticipates that no prosecution or referral…will take place." MLAT at Article 1 sec. 1bis.

(b) The request for legal assistance would impair the essential interests or would be contrary to public policy. MLAT Article 3 sec. 1(a).

For reasons of essential interests and public policy, the Attorney General must take into consideration the effect that a grant of assistance will

have on (a) innocent parties, such as Boston College, Moloney and McIntyre and others, who may be entangled by the request and (b) policies established by treaties relating to the same subject matter, in this case, the GFA and the US-UK Extradition Treaty. To suggest otherwise is to suggest that the Attorney General should be oblivious to such interests. It is not in the essential interest of the United States, or good public policy, to place individuals in the way of harm or to violate constitutional rights by granting the request for legal assistance.

The harm to be incurred by Moloney and McIntyre and the deleterious effect on policies established by the treaties is clear. Neither should be ignored by the Attorney General in making his decision to grant or deny legal assistance.

(c) The request for legal assistance relates to an offence that is of a political nature. MLAT Article 3 sec. (c)(i).

The definition of a political offence has been dramatically narrowed since the period of the alleged crime i.e. the early 1970's. At that time, however, even the crime of murder could be construed to be a political offence if it was politically motivated. In acting on the MLAT Request, the Attorney General should have made a determination with respect to which definition was applicable to the subject matter of the Subpoenas and whether or not the alleged crime was for an offence of a political nature.

> (d) Since the request for legal assistance implicates rights or obligations of the United States under other bilateral treaties, the Attorney General was required to consult with the PSNI/UK regarding the request. MLAT Article 18 sec. 1.

1. The Good Friday Agreement.

The United States was the primary force which brought the Republic of Ireland, the U.K., and all the parties across the divide in Northern Ireland together to execute the GFA. See A27¶ 6. The United States, therefore, has a substantial and essential interest in making sure that the spirit and intent of the GFA continue unabated.

One purpose of the GFA was to "wipe the slate clean." *Id.*, ¶ 7. While a general amnesty was not granted, amnesty was granted to all paramilitary prisoners and, after a period of time, prisoners convicted of serious crimes were to be released. *Id.*

Through the GFA, "Britain and Ireland have knowingly put into motion a political, legal and economic process that will ineluctably result in a united Ireland." Boyle, Francis A., *United Ireland, Human Rights, and International Law,* p. 65 (2012). In accordance with the "wipe the slate clean" policy and looking toward a unification process, the "signals from British government were that only those who continued to use violence to oppose the peace process would be pursued by the authorities." Id.

In the face of the spirit and intent of the GFA, the request for legal assistance seeks information relating to a 40-year-old alleged crime. Clearly, in view of the efforts of the United Sates to promote the GFA, the granting of a request that seeks to reopen those wounds put to rest by the GFA must be viewed as against the essential interests of the United States and contrary to public policy. At the very least, the request for legal assistance implicates these treaties, thereby requiring the Attorney General to consult with his counterpart in the U.K. Having successfully drawn the parties together, it must be an obligation of the United States to do nothing that again separates them or subverts the GFA.

2. The Extradition Treaty.

The MLAT and the Extradition Treaty are intertwined with respect to the approval/ratification process and with respect to the application to The Troubles. A138-A183.

During the Senate ratification process, the U.K. clearly affirmed that the Extradition Treaty would not be invoked to "seek the extradition of individuals convicted of terrorist offences committed" prior to the GFA. A203-A206. Accordingly, the Senate included a proviso/condition in its ratification to the effect that the treaty was not "intended to reopen issues

addressed in the" GFA "or to impede any further efforts to resolve the conflict in Northern Ireland." *Id*. See also Boyle, *supra* at pp. 151-152. Such provisos or reservations are part of the treaty and the law. See Restatement of the Law 3, Foreign Relations Law in the United States, sec. 314(b), p. 187.

With respect to pre-GFA conduct, the Extradition Treaty and the MLAT are intertwined. A138-A183. It was only after the provisos/reservations were incorporated into the Extradition Treaty that the MLAT was ratified by the Senate.

Having made clear that the Extradition Treaty was not to be utilized for pre-GFA conduct, it is not a leap to suggest that the MLAT, considered at the same time as the Extradition Treaty and intertwined therewith, was intended to treat the same pre-GFA conduct similarly beyond the bounds of the MLAT. To do otherwise would create the anomaly that, under the Extradition Treaty, a person involved in the Troubles could not be extradited but, under the MLAT, the same person could be the subject of a MLAT request.

c. The District Court was not Entitled to Rely on Ex Parte Communications in a Fed. R. Civ P. 12(b)(6) Dismissal.

When making a determination under Fed. R. Civ. P. 12(b)(6), the lower court was obliged to review the complaint to assess whether it had

stated enough facts to state a claim to relief that was plausible on its face. *See Bell Atl. Corp. v. Twombly, supra*. Such a claim will have facial plausibility where the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal, supra* at 1949. Furthermore, the lower court was compelled to construe the factual allegations in the light most favorable to Moloney and McIntyre.

When presented with a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the lower court may consider documents that are referenced in the complaint, documents that the plaintiffs relied on in bringing suit and that are either in the plaintiff's possession or that the plaintiff knew of when bringing suit, or matters of which judicial notice may be taken.

Accordingly, the lower court, in dismissing for failure to state a claim, acted improperly in taking into account *ex parte* communications and documentation which Moloney and McIntyre had no permission to access, and these materials should have formed no part of a Fed. R. Civ. P. 12(b)(1) decision.

In response to the lower court's question regarding the preclusion in the US-UK MLAT of private litigants, counsel for Moloney and McIntyre reiterated that they were "asking the Court to review the action of the

Attorney General with the ruler of the standard set forth in Article 1, Article 3, and Article 18." Addendum.

The Court then stated as follows:

> "Let me, let me ask you this question-- how do you -- this is a difficult case for lawyers and I must say for the Court because some of it's *ex parte*. They made sealed submissions to the Court. How do you know they haven't done that?"

In response to this, Appellants' counsel clearly set out the Appellants' factual pleadings and allegations from which the lower court should have drawn the reasonable inference that the Attorney General was liable for the misconduct alleged. Counsel for Moloney and McIntyre stated as follows:

> "We've alleged that, your Honor, and for purposes of this hearing those allegations are taken as true. We've had no evidence furthermore that they have made those considerations. They haven't followed the standards. In our view, your Honor, if the Attorney General had followed those standards and had asked the questions that we think he should have the subpoenas would not have issued. That, that is our case, your Honor."

The lower court the proceeded to conflate subject-matter jurisdiction with the failure to state a claim, and responded in part:

> "All right, let me follow this through with you. But in essence isn't that getting standing like, like an end run. You make these allegations. You say these allegations, on a motion to dismiss they should be taken as true. So, even, I'm not expressing any view about anything that's sealed, even if I know as the presiding magistrate that these various steps were made and indeed were detailed in the *ex parte* submissions, even if I know that, what? I should let your clients go forward when the treaty itself says there's no private right of action?"

Counsel for Moloney and McIntyre responded by addressing the APA cause of action, which is enough to both ground jurisdiction, and also to state a claim upon which relief may be granted, viewing the Appellants factual pleadings and allegations in a favorable light:

> "Well, again, your Honor, I don't think that section, Section 3 of Article 1, applies to non-defendants trying to obtain judicial relief for the Attorney General's action in issuing a subpoena or granting a request. There's no case that we're aware of that involves plaintiffs such as ours, plaintiffs who are not trying to suppress, obtain, impede, or object to evidence."

For all the reasons set forth above, in the Plaintiffs/Appellants Opposition to Government Motion to Dismiss, and in the course of the motion hearing on January 24, 2012, it is respectfully submitted that the lower court erred in finding an absence of a claim upon which relief may be granted.

C. The District Court Erred in Applying The Heightened Scrutiny Test in the Absence of All Relevant Material

a. Standard of review

The Honorable Court reviews a district court's findings of fact for clear error. *See Aponte v. Calderon*, 284 F.3d 184, 191 (1st Cir. 2002). Questions of law are reviewed *de novo. Id.* As the District Court's Decision of December 16, 2011 is in connection with its denial of the Boston College motion to quash, the Honorable Court may review the propriety of the order

for abuse of discretion. See *AMF, Inc. v. Jewett*, 711 F.2d 1096, 1100 (1st Cir. 1983).

b. The District Court Erred as a Matter of Law in that it Failed Properly to Set Forth the Test for the Court's Discretionary Authority under 18 U.S.C. § 3512.

Moloney and McIntyre respectfully submit that the District Court failed to set forth a test for the application of a court's discretionary authority under 18 U.S.C. § 3512. The Appellants submit that, for the District Court to exercise its authority under 18 U.S.C. §3512, it should have regard to the discretionary factors set forth at *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247-49, 124 S.Ct. 2466, 159 L.Ed.2d 355 (2004), including whether "the person from whom discovery is sought is a participant in the foreign proceeding"; "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance"; and whether the request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and whether the request is "unduly intrusive or burdensome." *Id.*, 542 U.S. at 264-65, 124 S.Ct. 2466 (collectively the "Intel Factors").

Moloney and McIntyre had submitted evidence in the course of this action, in the form of affidavits and other documents, which would have been of assistance to the District Court in applying the Intel Factors, and in considering a motion under Fed.R. Civ.P. 12(b)(1), the District Court was obliged to accept the material factual allegations in the complaint as true.

In particular, for the purposes of Fed.R. Civ.P. 12(b)(1), the Court should accept as true the Appellants' factual allegations at ¶¶ 79-81 of the Complaint, that the law enforcement agency responsible for investigating criminal offenses in Northern Ireland, has not made any attempts to seek the production of any interviews of Dolours Price from news reporting sources in Northern Ireland; that Dolours Price is not subject to personal jurisdiction in the United Kingdom, as she is resident in the Republic of Ireland; that in the event of a prosecution arising from the requested materials, the United Kingdom would be required to seek her extradition from the Republic of Ireland; and that, whereas the subpoenas were issued with the stated purpose of "assisting the United Kingdom regarding an alleged violation of the laws of the United Kingdom," the Republic of Ireland has subject matter jurisdiction over some or all of the alleged offenses which underpin the subpoenas requests.

Moloney and McIntyre, in their Complaint, further claimed that the District Court, in exercising its discretionary authority, should have had regard to the compliance or non-compliance of the Attorney General with the MLAT Standards, discussed above. If, as Moloney and McIntyre contend, the Attorney General has failed to comply with the requirements of the MLAT Standards, then this is a significant factor which should have informed the District Court's exercise of discretion under the Intel Factors as well as its standard of the reasonableness of the subpoenas per F.R. Crim.P. 17(c)(2) .

Notably, the Government has nowhere contended that the Attorney General was in compliance with the MLAT Standards, and accordingly the District Court's application of the test was flawed in that Government actions were not subjected to judicial scrutiny

c. Where the Government has Failed in its Obligations under the US-UK MLAT, the Balance must Weigh in Favor of the Public's Interest in the Free Flow of Information

The District Court considered academic privilege and the need for confidentiality in its decision of December 16, 2011, and determined that "heightened sensitivity" to First Amendment concerns was warranted. See *Branzburg v. Hayes*, 408 U.S. 665 (1972); *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004).

However, Moloney and McIntyre submit that the District Court then carried out the "balancing of considerations test" in the absence of information regarding the compliance of the Attorney General with his obligations under the US-UK MLAT, and that such an exercise improperly tipped the balance in favor of the Government.

It is respectfully submitted the Honorable Court view the absence of information regarding the Attorney General's compliance with his obligations under the US-UK MLAT as a factor which tips the balance in favour of the free flow of information. As the Honorable Court has set out in *United States v.LaRouche Campaign*, 841 F.2d 1176, 1181 (1st Cir. 1988):

> "We repeat an observation we made in *Bruno & Stillman, Inc. v. Globe Newspaper Co.,* 633 F.2d 583 (1st Cir. 1980), one that we think is still pertinent: Whether or not the process of taking First Amendment concerns into consideration can be said to represent recognition by the Court of a "conditional", or "limited" privilege is, we think, largely a question of semantics. The important point for purposes of the present appeal is that courts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights."

For similar reasons, the failure of the Attorney General to establish that he has complied with his obligations under the US-UK MLAT impinges upon the Appellants' First Amendment rights as asserted herein.

D. Appellants were Entitled to Intervention

(a) Applicable Standard of Review for Statutory Intervention as of Right or as a Matter of Discretion

The District Court's findings that Moloney and McIntyre were not entitled to intervention as of right is a question of law which the Honorable Court will review *de novo.* See *Aponte v. Calderon*, 284 F.3d 184, 191 (1st Cir. 2002). Insofar as the District Court also denied intervention as a matter of discretion, the Honorable Court may review the propriety of the order for abuse of discretion. See *AMF, Inc. v. Jewett*, 711 F.2d 1096, 1100 (1st Cir. 1983).

(b) The standards for determining Plaintiffs' Motion to Intervene are to be applied broadly and in favor of intervention.

Moloney and McIntyre rely largely on the arguments submitted above, and on their arguments contained in 11-mc-91078 Intervenors' reply Memorandum. A117-A137.

In brief, the requirements for intervention are generally interpreted broadly in favor of intervention. *Donnelly v. Glickman*, 159 F. 3d 405, 409 (9th Cir. 1998); *Yorkshire v. Internal Revenue Service*, 26 F.3d. 942, 944 (9th Cir. 1994). Moloney and McIntyre submit that intervention cannot be "resolved by reference to the ultimate merits of the claim the Plaintiffs seek

to assert unless the allegations are frivolous on their face." *Turn Key Gaming Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999).

Additionally, the rational for intervention has particular force "where the subject matter of the lawsuit is of great public interest, the intervenor has a real stake in the outcome and the intervention may well assist the court in its determination through… the framing of issues." *Daggett v. Commission on Government Ethics*, 172 F.3d 104, 116-117 (1st Cir. 1999).

Moloney and McIntyre submit that the protection of Constitutional rights, compliance with the provisions of bilateral treaties, and the parameters of academic freedom are clearly important issues affecting many persons and institutions beyond Moloney and McIntyre, and that intervention as of right was warranted.

VII. Conclusion

For all the reasons set forth above, Moloney and McIntyre respectfully request (a) that this Honorable Court find and determine that the grant of legal assistance by the Attorney General violated the First Amendment of the United States Constitution and that the Honorable Court order the subponae at issue to be quashed, or alternatively (b) that this matter be remanded to the District Court with instructions that compel the Attorney General to follow the law by carrying out his obligations under the US-UK

MLAT and the MLAT Standards set out herein. Moloney and McIntyre further request that the Honorable Court stay the District Court's orders of December 27, 2011 and January 20, 2012 and direct that the Commissioner not to turn over to the requesting state the materials referenced in those orders until further order of the Honorable Court.

Dated: February 17, 2012
Long Island City, New York

Respectfully submitted,

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Certificate of Service

I, Eamonn Dornan, hereby certify that this document filed through the CM/ECF system was sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on February 17, 2012.

/s/ Eamonn Dornan

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Dated this 17th day of February, 2012

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ADDENDUM
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In RE: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Criminal Matters in the Matter of Dolours Price	)
UNITED STATES OF AMERICA, Petitioner, v.	)
TRUSTEES OF BOSTON COLLEGE, Movant,	)MISCELLANEOUS BUSINESS DOCKET NO. 11-91078-WGY
JOHN T. McNEIL[1], Commissioner,	)
ED MOLONEY, ANTHONY McINTYRE, Applicants for Intervention.	)

MEMORANDUM & ORDER

YOUNG, D.J. December 16, 2011

I. INTRODUCTION

The Trustees of Boston College ("Boston College") move to quash or modify subpoenae requesting confidential interviews and records from the oral history project known as the "Belfast

[1] Assistant United States Attorney John T. McNeil replaced Todd F. Braunstein as the commissioner on September 8, 2011. ECF No. 20. Attorney Braunstein no longer works for the United States Attorney. Id.

Project." The subpoenae were issued by a commissioner pursuant to 18 U.S.C. § 3512, the United Kingdom Mutual Legal Assistance Treaty ("UK-MLAT"),[2] and a sealed Order of this Court.[3] The government asserts that the terms of the UK-MLAT requires the Court to grant its order and deny any motion to quash absent a constitutional violation or a federally recognized testimonial privilege. Opp'n Gov't's Mot. Quash & Mot. Order Compel ("Gov't's First Opp'n") 8, ECF. No. 7. Boston College asks the Court to review the subpoenae under the standard set forth in Federal Rule of Criminal Procedure 17(c)(2), where "the court may quash or modify the subpoena if compliance would be unreasonable or oppressive." Mot. Trustees Boston College Quash Subpoenas ("Mot. Quash"), ECF. No. 5. This Court is asked to determine what sort of discretion an Article III court has to review or

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[2] The current bilateral mutual legal assistance instrument between the United Kingdom and the United States was signed on December 16, 2004, integrating the 2003 mutual legal assistance agreement between the European Union and United States into the 1994 mutual legal assistance agreement with the United Kingdom. Mutual Legal Assistance Agreement, U.S.-E.U., June 25, 2003, S. Treaty Doc. No. 109-13, at 350-73 (2006) ("UK-MLAT"). See also S. Treaty Doc. No. 109-13, at XXXVI (explaining in an Executive Summary how the 2003 bilateral mutual legal assistance treaty between the United States and the European Union integrates into the 1994 mutual legal assistance treaty between the United States and United Kingdom).

[3] Quite properly, this case was filed under seal. UK-MLAT art. 7, Confidentiality and Limitations on Use. When the recipient of the subpoenae in question filed its motion to quash publicly, the Court unsealed the docket in order to respond. ECF No. 4. While the Court issues this opinion publicly as there are important considerations of judicial transparency here, it discloses nothing not already in the public record.

quash a subpoena brought under the authority of the UK-MLAT.

A. Procedural Posture

On June 7, 2011, Boston College filed a motion to quash or modify the subpoenae. Mot. Quash, ECF. No. 5. The subpoenae requested documents and records connected with interviews of two individuals, Brendan Hughes and Dolours Price. Boston College complied with the requests for documents relating to Brendan Hughes as doing so did not conflict with their self-imposed conditions of confidentiality (Mr. Hughes is deceased). Boston College then filed a motion to quash or modify the subpoenae on June 6, 2011. Mot. Quash. The government opposed the motion to quash and requests that the Court enter an order compelling Boston College to produce the materials responsive to the commissioner's subpoenae. Gov't's First Opp'n 1. After the government voluntarily narrowed the subpoenae, Boston College filed a new motion to quash. Mot. Trustees Boston College Quash New Subpoenas ("New Mot. Quash"), ECF No. 12. The government continues to oppose the motions to quash. Mem. Opp'n Mot. Quash New Subpoenas, ECF No. 14.

District Court Judge Stearns and District Court Judge Tauro recused themselves from this case, and the case was transferred to this session of the Court on October 5, 2011. ECF Nos. 8, 30.

B. Facts

1. The Subpoenae

The subpoenae referenced in this case were filed under seal and all discussion of their contents is drawn from the public record. Boston College received the first set of subpoenae on May 5, 2011, which named as recipients the John J. Burns Library at Boston College, Burns Librarian Robert K. O'Neill, and Boston College Professor Thomas E. Hachey. Mot. Quash 2. The subpoenae were issued by a commissioner under the authority of 18 U.S.C. § 3512 and the UK-MLAT. Id. The subpoenae included demands for the recordings, written documents, written notes and computer records of the interviews of Brendan Hughes and Dolours Price to be produced on May 26, 2011. Id. The interview materials of Brendan Hughes were produced in a timely manner to the government because the terms of confidentiality of his interviews ended with his death. Id. at 3. By agreement with the United States Attorney's Office, the date for production of other documents was extended to June 2, 2011. Id.

A second set of subpoenae was served on August 4, 2011 to counsel for Boston College. New Mot. Quash 2. These subpoenae additionally demanded the recordings, transcripts and records of "any and all interviews containing information about the abduction and death of Mrs. Jean McConville." Id. at 2. Both sets of subpoenae requested documents gathered as part of an oral history project sponsored by Boston College. Id. at 1-2.

2. The Belfast Project

In 2001, Boston College sponsored the Belfast Project, an

oral history project with the goal of documenting in taped interviews the recollections of members of the Provisional Irish Republican Army, the Provisional Sinn Fein, the Ulster Volunteer Force, and other paramilitary and political organizations involved in the "Troubles" in Northern Ireland from 1969 forward. Mot. Quash, Ex. 6, Aff. Robert K. O'Neill ("Aff. O'Neill") 2, ECF No. 5-6. The research also sought to provide insight into the minds of people who become personally engaged in violent conflict. Mot. Quash, Ex. 5, Aff. Ed Moloney ("Aff. Moloney") 8, ECF No. 5-5 . As such, its progenitors saw it as a vital project to understanding the conflict in Northern Ireland and other conflicts around the world. Id. The Belfast Project was housed at the Burns Library of Rare Books and Special Collections at Boston College. Aff. O'Neill 3-4. Boston College sponsored the project due to its ongoing academic interest in Irish Studies and its prior role in the peace process in Northern Ireland. Id. at 2. The Burns Library serves as the archive for a variety of valuable documents, including an Irish Collection. Id. at 1. Ed Moloney, a journalist and writer, originally proposed the Project. Aff. O'Neill 7. Prior to the commencement of the Project, Robert K. O'Neill, the Burns Librarian, cautioned Moloney that although he had not spoken yet with Boston College's counsel, the library could not guarantee the confidentiality of the interviews in the face of a court order. Gov't's First Opp'n, Ex. 10, Fax from Robert K. O'Neill to Ed Moloney, May 10,

2000, ECF No. 7-10.

The Trustees of Boston College contracted in 2001 with Moloney to become the Project Director for the Belfast Project. Mot. Quash, Ex. 5, Aff. Moloney, Attach. 1, Agreement between Trustees of Boston College and Edward Moloney ("Moloney Agreement"), ECF No. 5-6 . The contract required the Belfast Project Director, interviewers and interviewees to sign a confidentiality agreement forbidding them to disclose the existence or scope of the Project without the permission of Boston College. Id. at 2. The contract also required the adoption of a coding system to maintain the anonymity of interviews. Id. Only Robert K. O'Neill and Ed Moloney would have access to the key identifying the interviewees. Id.

Originally the interviews were to be stored in Boston and in Belfast, Ireland, although ultimately the project leadership decided that interviews could only be stored safely in the United States. Id.; Aff. Moloney 4-5. The interviews were eventually stored in the Burns Library "Treasure Room" with extremely limited access. Aff. O'Neill 3.

Each interviewee of the project was to be given a contract guaranteeing confidentiality "to the extent that American law allows." Aff. Moloney, Attach. 2, Moloney Agreement 2 ("Moloney Attach. 2"), ECF No. 5-5. The contract recommended adopting guidelines for use, similar to those in Columbia University's

Oral History Research Office Guidelines.[4] Id. The Belfast Project subsequently employed two researchers to conduct interviews with members of the Irish Republican Army and the largest Protestant paramilitary group, the Ulster Volunteer Force. Aff. Moloney 9. One interviewer, Anthony McIntyre, contracted with Moloney in an agreement governed by the terms of Moloney's contract with Boston College. Moloney Attach. 2. McIntyre's contract required him to transcribe and index the interviews, as well as abide by the confidentiality requirements of the Moloney Agreement. Id. The interviewers conducted twenty-six interviews which were subsequently transcribed. Gov't's Opp'n. Mot. Quash New Subpoenas 2-3, ECF No. 14.

Although the legal agreement between Moloney and Boston College was appropriately equivocal in its guarantee of confidentiality, Boston College asserts that the promises of confidentiality given to interviewees were absolute. Mot. Quash 5-6. Interviewees apparently signed a confidentiality and donation agreement that promised that access to the interviewee's record would be restricted until after the death of the interviewee, except if the interviewee gave prior written approval following consultation with the Burns Librarian. Aff.

[4]The government points out that Columbia University oral history researchers apparently advise interviewees that their interviews are subject to release under court orders. Gov't's First Opp'n 20 (citing Jim Dwyer, Secret Archive of Ulster Troubles Faces Subpoena, N.Y. Times, May 13, 2011, at ¶ 14, ECF No. 7-4).

O'Neill, O'Neill Attach. 2, Agreement for Donation by Brendan Hughes, ECF. No. 5-6; Aff. O'Neill 3 (explaining that each interviewee signed a donation agreement largely identical to the Brendan Hughes agreement). In general, Boston College believes that interviewees conditioned their participation on the promises of strict confidentiality and anonymity. Mot. Quash 5. In an affidavit, McIntyre stated that he would not have been involved if he had understood that the interviews might be susceptible to legal process. Mot. Quash, Ex. 4, Aff. Anthony McIntyre ("Aff. McIntyre") 2, ECF No. 5-4.

Boston College further alleges that the premium on confidentiality in the Belfast Project was exacerbated by the possibility of retaliation by other Irish Republican Army members enforcing their "code of silence." Mot. Quash 5-6. Nonetheless, the existence of the Belfast Project is now widely known, and in 2010, Moloney published a book using material from two deceased interviewees. Aff. Moloney 9. Moloney also co-produced a documentary film using those interviews that is available online. Gov't's First Opp'n 4. The interviews with Dolours Price by Boston College were also the subject of several news reports published in Northern Ireland. E.g., Gov't's First Opp'n, Ex. 1, Ciaran Barnes, Adams Denies Claims that He Gave Go-ahead for McConville Disappearance, Sunday Life, Feb. 21, 2010, at 6, ECF No. 7-1.

II. ANALYSIS

A. Construing the Governing Statute and Treaty Harmoniously

The subpoenae in question were issued by a commissioner authorized pursuant to an Order of this Court, 18 U.S.C. § 3512 and the UK-MLAT. Mot. Quash, ECF No. 5. Treaties have the force of law. Medellin v. Texas, 552 U.S. 491, 505 (2008) (citing Whitney v. Robertson, 124 U.S. 190, 194 (1888)); accord id. (Breyer, J., dissenting) ("[A]ll treaties . . . shall be the supreme Law of the Land." (quoting U.S. Const. art. VI, § 1, cl. 2)). The Court has the task of interpreting Section 3512 and the UK-MLAT together.

> By the [C]onstitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other.

Whitney, 124 U.S. at 194 (establishing the "last-in-time rule"). The Court thus will analyze the two laws in chronological order.

1. The United Kingdom Mutual Legal Assistance Treaty

Mutual legal assistance treaties are bilateral treaties intended to improve law enforcement cooperation between two nations. The United States signed a mutual legal assistance treaty with the United Kingdom in 1994. Treaty with the United

Kingdom on Mutual Legal Assistance in Criminal Matters, S. Exec. Rep. No. 104-23 (1996). In 2003, the United States also signed a mutual legal assistance treaty with the European Union that added new authorities and procedures to the UK-MLAT. Mutual Legal Assistance Agreement, U.S.-E.U., S. Treaty Doc. No. 109-13 (including Message of the President transmitting the Agreement on Mutual Legal Assistance between the United States and the European Union (EU), signed on June 25, 2003). The two treaties are integrated, and the relevant parts of the UK-MLAT for purposes of this suit were not affected by the European Union MLAT. Id. at 350-51 (setting forth new articles to be applied to the 1994 UK-MLAT). Therefore, the text of the 1994 UK-MLAT applies in its original form for purposes of this analysis. See id. at XXXVI.

When the United States Senate approved the UK-MLAT, requests for assistance were to be executed under 28 U.S.C. § 1782. S. Exec. Rep. No. 104-23 (reprinting Technical Analysis of the MLAT between the United States of America and the United Kingdom ("UK-MLAT Technical Analysis")) ("It is not anticipated that the Treaty will require any new implementing legislation. The United States Central Authority expects to rely heavily on the existing authority of the federal courts under Title 28, United States Code, Section 1782, in the execution of

requests.").[5] Section 1782 has been interpreted by numerous courts, but was not invoked in this case. E.g., Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247 (2004) ("We caution, however, that § 1782(a) authorizes, but does not require, a federal district court to provide judicial assistance to foreign or international tribunals."). Instead, the government requested a commissioner under 18 U.S.C. § 3512, a new statute which provides a "clear statutory system" for handling MLAT requests. 155 Cong. Rec. S6810 (daily ed. June 18, 2009) (statement of Sen. Whitehouse); see 18 U.S.C. § 3512 (enacted Oct. 19, 2009).

Two courts of appeals have interpreted a similar question regarding what discretion an MLAT with an executing statute confers on United States district courts. In re the Search of the Premises Located at 840 140th Avenue NE, Bellevue, Wash., 634 F.3d 557 (9th Cir. 2011); In re Commissioner's Subpoenas, 325 F.3d 1287 (11th Cir. 2003), abrogation in other part recognized by In re Clerici, 481 F.3d 1324, 1333 n.12 (11th Cir. 2007). These two cases analyzed the relationship between Section 1782 and two different mutual legal assistance treaties. Although the cases are distinguishable, their reasoning is helpful in interpreting the UK-MLAT and its relationship with 18 U.S.C. §

[5] Section 1782 applies civil practice standards. For a description of the history of Section 1782, see Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 246-49 (2004).

3512.

a. Lessons from the Ninth and Eleventh Circuits

As mentioned above, neither of the courts of appeals that evaluated the incorporation of United States law into an MLAT interpreted the UK-MLAT. See In re the Search, 634 F.3d 557; In re Commissioner's Subpoenas, 325 F.3d 1287. Nor did either court interpret 18 U.S.C. § 3512. See In re the Search, 634 F.3d 557; In re Commissioner's Subpoenas, 325 F.3d 1287. When the Eleventh Circuit decided In re Commissioner's Subpoena, 18 U.S.C. § 3512 had not been passed. In In re the Search, the Ninth Circuit was not asked to interpret Section 3512. See 634 F.3d 557. Additionally, the Ninth Circuit noted the importance of the first-in-time rule in their interpretation of the MLAT. Id. at 568 ("We therefore must determine whether the treaty superseded the statute's grant of discretionary authority to the district courts."). The treaties in both of those two cases were executed well after Section 1782. Treaty on Mutual Legal Assistance Criminal in Matters, U.S.-Can., Mar. 18, 1985, S. Treaty Doc. No. 100-14 (1990); Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Russ. June 17, 1999, S. Treaty Doc. No. 106-22 (2000). Because of the last-in-time rule, the courts could conclude that the MLAT superseded Section 1782. See In re the Search, 634 F.3d at 568.

The older of these two cases is In re Commissioner's Subpoenas, in which the Eleventh Circuit concluded that the

district court did not have discretion to quash a subpoena brought under the MLAT. 325 F.3d at 1305-06. When the treaty in question referenced using "the law of the Requested State," the court concluded that the language permitted two alternative interpretations. Id. at 1297. Either the treaty would incorporate all laws of the Requested State, including laws providing standards for reviewing letters rogatory, or it "might only refer to the laws providing ways and means for executing valid MLAT requests for assistance." Id. The court chose the latter and constructed the Canadian MLAT to use "established procedures set forth in existing laws of the Requested State" but not to have adopted any substantive law of the Requested State. Id. In part, the Eleventh Circuit supported its conclusion by describing mutual legal assistance treaties as a response intended to avoid the "wide discretion" vested in federal courts in Section 1782. Compare id. at 1290, with id. at 1297. But see UK-MLAT Technical Analysis, S. Exec. Rep. No. 104-23 ("It is not anticipated that the Treaty will require any new implementing legislation. The United States Central Authority expects to rely heavily on the existing authority of the federal courts under Title 28, United States Code, Section 1782, in the execution of requests."). This interpretation was similar to that adopted by the Ninth Circuit in In re the Search, 634 F.3d at 570.

In interpreting the Russian MLAT, the Ninth Circuit also concluded that the phrase "executed in accordance with the laws

of the Requested Party except if this Treaty provides otherwise" did not have a clear meaning. Id. at 568 (citations omitted). The court noted that the phrase could mean "subject to the procedural mechanisms and substantive limitations of the laws of the Requested Party," or "carried out in accordance with the procedural mechanisms of the Requested Party." Id. at 568-69. The Ninth Circuit found both of these interpretations to be plausible, and concluded that the Treaty only incorporated procedural laws based on other evidence of the treaty parties' intent. Id. The court's final construction of the Treaty language stated that the Treaty parties intended to adopt merely the procedural mechanisms of Section 1782, but "not as a means for deciding whether or not to grant or deny the request so made."[6] Id. at 570. Thus the Ninth Circuit interpreted the term "laws of the Requested State" not to include the substantive laws of the United States. Id.

After concluding that the treaty in question removed the "traditional 'broad discretion'" of federal district courts, the Ninth Circuit nevertheless determined that the district court had discretion to review a protective order challenging an MLAT subpoena by virtue of its constitutional powers. Id. at 571.

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[6] The court conceded that this was "an unusual method of interpreting a law" as the treaty did not "expressly specify the procedure/substance distinction." In re the Search, 634 F.3d at 570-71. In the UK-MLAT, there is also no distinction made in the treaty between the procedural and substantive laws of the Requested State. See UK-MLAT.

> The enforcement of a subpoena is an exercise of judicial power. According to the government, the executive branch has the authority to exercise that power directly, because the district court is required, by virtue of an MLAT request, to compel the production of requested documents. The government's position leads to the inescapable and unacceptable conclusion that the executive branch, and not the judicial branch, would exercise judicial power. Alternatively, the government's position suggests that by ratifying an MLAT, the legislative branch could compel the judicial branch to reach a particular result—issuing orders compelling production and denying motions for protective orders—in particular cases, notwithstanding any concerns, such as violations of individual rights, that a federal court may have. This too would be unacceptable. Cf. United States v. Klein, 80 U.S. 128, 146–47 (1871).
>
> The Constitution's separation of powers does not permit either the legislative or executive branch to convert the judicial branch into a mere functionary. Instead, the Constitution requires that "no provision of law 'impermissibly threaten[ ] the institutional integrity of the Judicial Branch.'" Mistretta v. United States, 488 U.S. 361, 383 (1989) (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)).

Id. at 572.

While this Court wholeheartedly agrees that this is the logical (and unconstitutional) conclusion of the government's assertions here, this Court necessarily must carefully analyze the text of the UK-MLAT and 18 U.S.C. § 3512 to decide what discretion the Court actually has in deciding Boston College's motion to quash.

b. Analysis of the UK-MLAT

i. The Text

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." Abbott v. Abbott, -- U.S. --,

130 S. Ct. 1983, 1990 (2010) (quoting Medellin, 552 U.S. at 506 n.5). The text of the UK-MLAT sheds light on the question whether MLAT requests are intended to afford discretion to judges when reviewing applications for orders or search warrants. See UK-MLAT, art. 5, Execution of Requests. The Treaty embraces the courts as a conduit for MLAT requests in several places. For example, "[t]he courts of the Requested Party shall have authority to issue subpoenas, search warrants, or other orders necessary to execute the request." Id. ¶ 1. Within article 5, Execution of Requests, the Treaty states, "[w]hen execution of the request requires judicial . . . action, the request shall be presented to the appropriate authority by the persons appointed by the Central Authority of the Requested Party." Id. ¶ 2. "The method of execution specified in the request shall be followed to the extent that it is not incompatible with the laws and practices of the Requested Party." Id. ¶ 3. The government correctly asserts that the meaning of "law of the Requested Party" has not been interpreted in the context of the UK-MLAT. Gov't's First Opp'n 8 n.4. It is an issue of first impression in the First Circuit, particularly considering that 18 U.S.C. § 3512 is now the government's preferred authority for executing MLAT requests.

ii. Laws of the Requested State

The Eleventh Circuit concluded that the treaty language "laws of the requested state" cannot simply be read in a

mechanical manner and automatically interpreted as incorporating all of the substantive law of the Requested State. In re Commissioner's Subpoenas, 325 F.3d at 1303. Nor can the treaty be interpreted as ignoring the laws of the Requested State, as that would plainly contradict the language of the treaty. E.g., UK-MLAT art. 5, ¶ 3 ("The method of execution specified in the request shall be followed to the extent that it is not incompatible with the laws and practices of the Requested Party."); art. 8, ¶ 1 ("A person in the territory of the Requested Party from whom evidence is requested . . . may be compelled . . . by subpoena or such other method as may be permitted under the law of the Requested Party."); art. 8, ¶ 2 ("A person requested to testify or to produce documentary information or articles in the territory of the Requested Party may be compelled to do so in accordance with the requirements of the law of the Requested Party."); art. 13, ¶ 2 ("Service of any subpoena or other process by virtue of paragraph (1) of this Article shall not impose any obligation under the law of the Requested Party."); art. 14, ¶ 1 ("The Requested Party shall execute a request for the search, seizure and delivery of any article to the Requesting Party if the request includes the information justifying such action under the laws of the Requested Party, and it is carried out in accordance with the laws of that Party."); art. 16, ¶ 3 ("A Requested Party in control of forfeited proceeds or instrumentalities shall dispose

of them according to its laws."). This Court agrees with both propositions.

"A term appearing in several places in a statutory text is generally read the same way each time it appears." Ratzlaf v. United States, 510 U.S. 135, 143 (1994). This presumption may yield when there is enough variation in the context of the words to conclude that they were used "in different parts of the act with different intent." Atlantic Cleaners & Dyers Inc. v. United States, 286 U.S. 427, 433 (1932). The term "laws of the Requested States" appears multiple times in the UK-MLAT, but unfortunately these references are not clearly identical in context. Some of these references imply an incorporation of substantive law, and some of them may imply merely the incorporation of procedural protections. Compare UK-MLAT art. 8, ¶ 1 ("A person in the territory of the Requested Party from whom evidence is requested . . . may be compelled . . . by subpoena or such other method as may be permitted under the law of the Requested Party."), with art. 16, ¶ 3 ("A Requested Party in control of forfeited proceeds or instrumentalities shall dispose of them according to its laws.").

This opinion does not require the Court to reach a conclusion on every law of the United States that may or may not affect the execution of this Treaty. The Court must however answer the question of whether a federal district court has discretion under some "laws" of the United States to review a

motion to quash subpoenae executed under the UK-MLAT.

iii. Technical Analysis of the UK-MLAT

Where the text of a treaty is ambiguous, a court may look to other sources to understand the treaty's meaning. See Abbott, 130 S. Ct. at 1990. "It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight." Id. at 1993 (quoting Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982)); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."). Because the relevant MLAT text is from the UK-MLAT signed in 1994, the Senate Report and Technical Analysis of that original 1994 UK-MLAT are germane to this Court's interpretation of the Treaty. See Mutual Legal Assistance Agreement, U.S.-E.U., S. Treaty Doc. No. 109-13. The Technical Analysis of the 1994 UK-MLAT submitted to the Senate Committee on Foreign Relations by the Departments of State and Justice was prepared by the United States delegation that conducted the negotiations. UK-MLAT Technical Analysis, S. Exec. Rep. No. 104-23, at 13.

The UK-MLAT Technical Analysis openly contemplates that federal district courts will be involved in the execution of MLAT requests. The Analysis states that "when a request from the United Kingdom requires compulsory process for execution, the Department of Justice would ask a federal court to issue the

necessary process under Title 28, United States Code, Section 1782 and the provisions of the Treaty." Id. at 17. Although Section 1782 is not implicated in this case, this statement from the Analysis shows that the negotiators of the Treaty were expecting federal district courts to have a substantive role in executing requests.[7] Similarly, the Analysis provides that "if execution of the request entails action by a judicial authority, or administrative agency, the Central Authority of the Requested Party shall arrange for the presentation of the request to that court or agency at no cost to the other Party." Id.

iv. Discretion of the Court

It is inescapable that the text and context of the UK-MLAT are ambiguous. The Treaty text, Technical Analysis, and Senate Executive Report, however, all indicate some expectations that federal district courts and United States laws will have a role in executing MLAT requests. See id. at 12 ("The Committee believes that MLATs should not, however, be a source of information that is contrary to U.S. legal principles."). At the very least, "the MLATs oblige each country to assist the other to the extent permitted by their laws, and provide a framework for that assistance." Id. at 11. Overall, the Treaty language and Technical Analysis leave the door open for courts to assist in

[7]Under 28 U.S.C. § 1782, courts directly review requests for evidence from foreign individuals and authorities. Courts have wide discretion under Section 1782. See Intel, 542 U.S. at 255.

the execution of requests, and do not prevent courts from using United States law in doing so. To the contrary, the Treaty repeatedly references the laws of the Requested State. To the extent that the text of the UK-MLAT and 18 U.S.C. § 3512 might directly conflict on this point, the "last-in-time" rule would apply and 18 U.S.C. § 3512 would be last-in-time. The Court now turns to its analysis of Section 3512.

2. 18 U.S.C. § 3512

In 2009, the President signed the Foreign Evidence Request Efficiency Act, 18 U.S.C. § 3512, which was intended to improve Title 18 of the United States Code and aid the Department of Justice in executing requests under mutual legal assistance treaties. 155 Cong. Rec. S6810 (daily ed. June 18, 2009) (statement by Sen. Whitehouse). The principal purpose of Section 3512 was to streamline foreign evidence requests "mak[ing] it easier for the United States to respond to requests by allowing them to be centralized and by putting the process for handling them within a clear statutory system." Id. Practically speaking, the law permits a single Assistant United States Attorney to pursue requests in multiple judicial districts, eliminating duplicative efforts. Id.; 155 Cong. Rec. H10092 (daily ed. Sept. 30, 2009) (statement of Rep. Schiff). The law therefore also gives more control to individual district court judges, who may now oversee and approve subpoenae and other orders (but not search warrants) in districts other than their

own. 18 U.S.C. § 3512(f) ("Except as provided under subsection (d), an order or warrant issued pursuant to this section may be served or executed in any place in the United States.").

To date, it appears that no court has had occasion to publish an opinion interpreting 18 U.S.C. § 3512.[8] This Court therefore is faced with an issue of first impression: whether a federal district court has the inherent or statutory discretion to review a subpoena order issued under the authority of a commissioner appointed by the court under Section 3512.

a. The Text

The text of 18 U.S.C. § 3512 is unambiguous in providing discretion to federal judges. "Upon application, duly authorized by an appropriate official of the Department of Justice, of an attorney of the Government, a Federal judge may issue such orders as may be necessary to execute a request from a foreign authority for assistance." 18 U.S.C. § 3512(a)(1) (emphasis added). "[A] "Federal judge may also issue an order appointing a person to direct the taking of testimony or statements or of the production of documents or other things, or both." Id. § 3512(b)(1) (emphasis added). "The use of a permissive verb – ["may"] – suggests a discretionary rather than mandatory review process." Rastelli v. Warden, Metro. Corr. Ctr., 782 F.2d 17, 23 (2d Cir.

[8] Searches of Westlaw and Lexis databases as of the date of this memorandum's publication yielded no cases or orders interpreting 18 U.S.C. § 3512.

1986).

The discretion explicit in the use of "may" in the UK-MLAT text is emphasized because Section 3512 also provides that "[a]ny person appointed under an order issued pursuant to paragraph (1) may – (A) issue orders requiring the appearance of a person, or the production of documents or other things, or both." 18 U.S.C. § 3512(b)(2) (emphasis added). The drafters of Section 3512 are presumed to have intended the same meaning when using the word "may" whether applied to the judiciary or to an appointed commissioner. Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 570 (1995) ("[I]dentical words used in different parts of the same act are intended to have the same meaning.") (citations omitted). Both the federal district judge and the appointed commissioner are expected to exercise their discretion in deciding which orders to issue. 18 U.S.C. § 3512. See *SEALED* Mem. Law Supp. Appl. Order 8, ECF No. 2 (describing the discretion of a commissioner under 18 U.S.C. § 3512).

b. Legislative History

Not only is the text unambiguous; the legislative history of Section 3512 strongly supports this interpretation. The law passed unanimously in the United States Senate and under the suspension of the rules in the House of Representatives. Representative Adam Schiff spoke on the floor of the House of Representatives to explain the legislation. 155 Cong. Rec. H10092 (daily ed. Sept. 30, 2009). Representative Schiff

explained how the Foreign Evidence Request Efficiency Act would "streamline the evidence collection process," notably stating that "Courts will continue to act as gatekeepers to make sure that requests for foreign evidence meet the same standards as those required in domestic cases." Id. Representative Schiff also stated that "[t]his legislation would provide clear statutory authority in one place," as "the current authority to respond to foreign evidence requests is found in the patchwork of treaties, the inherent power of the courts, and analogous domestic statutes." Id. In the Senate, Senator Sheldon Whitehouse introduced the bill and was the only senator to make relevant comments on the floor of the Senate. 155 Cong. Rec. S6810 (daily ed. June 18, 2009). Senator Whitehouse's statement supports this Court's interpretation of the text and Representative Schiff's comments:

> Of course, respect for civil liberties demands that we not suddenly change the type of evidence that foreign governments may receive from the United States or reduce the role of courts as gatekeepers for searches. The Foreign Evidence Request Efficiency Act would leave those important protections in place, while simultaneously reducing the paperwork that the cumbersome process imposes on our U.S. Attorneys.

Id. Senator Whitehouse also submitted a letter from the Department of Justice into the Congressional Record which includes similar statements about Section 3512. Letter from M. Faith Burton, Acting Assistant Attorney General, 155 Cong. Rec. S6810 (daily ed. June 18, 2009) ("The proposed legislation

addresses both of these difficulties by clarifying which courts have jurisdiction and can respond to appropriate foreign requests for evidence in criminal investigations."). Section 3512 thus passed with the intent that courts would act as gatekeepers in using their discretion to review MLAT requests.

3. Harmonizing the UK-MLAT and 18 U.S.C. § 3512

At this point in the analysis, the Court has two options: Either the Treaty and the statute can fairly be harmonized, or there is a direct conflict in which case the last-in-time rule suggests that Section 3512 must control. See Whitney, 124 U.S. at 194. Courts are encouraged to construe treaties and statutes so as to avoid conflict. Id. Given the ambiguity of the UK-MLAT terms incorporating the laws of the United States, see In re the Search, 634 F.3d at 568, and the clear meaning of Section 3512, it appears that the two sources of law can operate in harmony. This conclusion is strengthened by the fact that interpreting the two as in conflict would not change the outcome, but would require the Court to exercise the discretion expressed in the last-in-time law, 18 U.S.C. § 3512.

Just as Section 3512 confers discretion on federal district judges, the negotiators of the UK-MLAT contemplated the involvement of judges in executing requests. "When execution of the request requires judicial or administrative action, the request shall be presented to the appropriate authority by the persons appointed by the Central Authority of the Requested

Party." UK-MLAT art. 5, ¶ 3; accord UK-MLAT Technical Analysis, S. Exec. Rep. No. 104-23, at 17 ("[W]hen a request from the United Kingdom requires compulsory process for execution, the Department of Justice would ask a federal court to issue the necessary process."). Of course, the text of the Treaty also indicates that the execution of Treaty requests would require implementing statutes. See UK-MLAT Technical Analysis, S. Exec. Rep. No. 104-23, at 17 (referring to 28 U.S.C. § 1782). As Congress and the President have seen fit to add a new executing authority for the UK-MLAT in the form of 18 U.S.C. § 3512, this Court must interpret the UK-MLAT faithfully according to its original terms and in harmony with existing statutory law. As it is stated in Section 3512 and implied by the UK-MLAT, a federal district judge may issue a subpoena if she agrees the order is permissible under the laws of the United States.[9]

This Court holds that a United States District Court has the discretion to review a motion to quash such a subpoena, under the statutory authority conferred by 18 U.S.C. § 3512 and the framework articulated in the UK-MLAT.[10]

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[9] See Treaty with the United Kingdom on Mutual Legal Assistance in Criminal Matters, S. Exec. Rep. No. 104-23, at 12 ("The Committee believes that MLATs should not, however, be a source of information that is contrary to U.S. legal principles.").

[10] This Court need not, and does not, decide to what extent the laws of the United States are incorporated into the UK-MLAT. Even if the UK-MLAT terms are interpreted to include only procedural laws, those procedures as implemented by Section 3512

B. Standard of Review to Be Applied to the Motion to Quash

The Court next must decide what standard of review it should accord to requests under an MLAT.[11] Boston College requests that the Court use the standard of Federal Rule of Criminal Procedure 17(c)(2) ("Rule 17(c)(2)") to review its motion to quash. New Mot. Quash 1. Rule 17(c)(2) states that "[o]n motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive." The government denies that the Rule applies. See Gov't's Supplemental Opp'n Mot. Quash 4.

Traditionally, judges have wide discretion in reviewing subpoenae. In re Pantojas, 628 F.2d 701, 705 (1st Cir. 1980) (encouraging district courts to review even grand jury subpoenae).

When Congress adopted 18 U.S.C. § 3512, it expressly included the guidance and constraints of Federal Rule of Criminal Procedure 41 in issuing search warrants. 18 U.S.C. § 3512(a)(2)(A). Section 3512 does not otherwise mention the Federal Rules of Criminal Procedure. In conformity with the maxim expressio unius est exclusio alterius, this absence

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provide for discretion by federal district judges. See 18 U.S.C. § 3512(b).

[11] A commissioner appointed pursuant to a federal district judge's authority under 18 U.S.C. § 3512 has the discretion to issue subpoenae. The Court's discretion in this case comes into play when there is a motion to quash or other protective order requested. See supra at II.A.

suggests the Court ought decline to invoke the Federal Rules of Criminal Procedure in reviewing MLAT requests. Castro-Soto v. Holder, 596 F.3d 68, 73 n.5 (1st Cir. 2010) (noting that "when parties list specific items in a document, any item not so listed is typically thought to be excluded." (quoting Lohnes v. Level 3 Commc'ns, Inc., 272 F.3d 49, 61 (1st Cir. 2001)) (citation omitted)). This Court is not therefore bound by the Federal Rules of Criminal Procedure, however the Rules still inform the Court's standard for reasonableness.

"What is reasonable depends on the context." United States v. R. Enterprises, Inc., 498 U.S. 292, 299 (1991) (holding that the standard from United States v. Nixon, 418 U.S. 683, 700 (1974), for reviewing subpoenae does not apply in the context of grand jury proceedings (quoting New Jersey v. T.L.O., 469 U.S. 325, 337 (1985))). MLAT requests are intended to improve law enforcement cooperation between nations, and the United States' law enforcement objectives often rely on speedy and generous help from treaty signatories. As a result, the United States has also committed to responding to requests under MLATs, regardless whether a dual criminality exists, or the evidence sought would be inadmissible in United States courts. See UK-MLAT Technical Analysis, S. Exec. Rep. No. 104-23, at 15, 18. One important aspect of MLAT requests is the need for speed in processing requests by other nations, as "[s]etting a high standard of responsiveness will allow the United States to urge that foreign

authorities respond to our requests for evidence with comparable speed." 155 Cong. Rec. S6810 (daily ed. June 18, 2009) (statement of Sen. Whitehouse) (discussing 18 U.S.C. § 3512). Another important requirement of MLAT requests is confidentiality. UK- MLAT art. 7, Confidentiality and Limitations on Use; UK-MLAT Technical Analysis, S. Exec. Rep. No. 104-23, at 19 ("The United Kingdom delegation expressed particular concern that information it supplies in response to United States requests receive the same kind of confidentiality accorded exchanges of information via diplomatic channels, and not be disclosed under the Freedom of Information Act.").

These attributes and others draw an obvious comparison between MLAT subpoena requests and grand jury subpoenae. See R. Enters., 498 U.S. at 299 (noting the public's interest in "expeditious administration of the criminal laws" and the "indispensable secrecy of grand jury proceedings") (citations omitted); see also United States v. Blech, 208 F.R.D. 65 (S.D.N.Y. 2002) (declining motion to quash after comparing MLAT request to grand jury subpoena). For example, the government cannot be required to justify the issuance of a grand jury subpoena. R. Enters., 498 U.S. at 297. Under the explicit terms of the UK-MLAT, individuals are similarly precluded from challenging the propriety of MLAT requests.[12] UK-MLAT art. 1, ¶

[12] This express disavowal of individual rights to suppress evidence in the UK-MLAT does not, however, impair courts'

3; UK-MLAT Technical Analysis, S. Exec. Rep. No. 104-23, at 14. ("Thus, a person from whom records are sought may not oppose the execution of the request by claiming that it does not comply with the Treaty's formal requirements."); accord United States v. Chitron Elec. Co. Ltd., 668 F. Supp. 2d 298, 306-07 (D. Mass. 2009) (Saris, J.). Like a grand jury subpoena, MLAT subpoenae are "almost universally issued by and through federal prosecutors." Compare Stern v. United States Dist. Court for the Dist. of Mass., 214 F.3d 4, 16 n.4 (1st Cir. 2000), with 18 U.S.C. § 3512, and UK-MLAT. Another similarity between MLAT requests and the grand jury subpoena power is that its broad investigatory powers are not unlimited. Compare R. Enter., 498 U.S. at 299 ("The investigatory powers of the grand jury are nevertheless not unlimited."), with Treaty with the United Kingdom on Mutual Legal Assistance in Criminal Matters, S. Exec. Rep. No. 104-23, at 12 ("The Committee believes that MLATs should not, however, be a source of information that is contrary to U.S. legal principles.").

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discretion to review subpoenae under the UK-MLAT as codified in 18 U.S.C. § 3512. Compare UK-MLAT Technical Analysis, S. Exec. Rep. No. 104-23, at 14 ("Thus, a person from whom records are sought may not oppose the execution of the request by claiming it does not comply with the Treaty's formal requirements, such as those specified in article 4, or the substantive requirements in article 3.") (describing art. 1, Scope of Assistance), with id. at 17 ("Rather, it is anticipated that when a request from the United Kingdom requires compulsory process for execution, the Department of Justice would ask a federal court to issue the necessary process.") (describing art. 5, Execution of Requests).

Grand jury subpoenae are also similar to MLAT requests as both may be sought ex parte when appropriate. E.g., United States v. Castroneves, No. 08-20916-CR, 2009 WL 528251 (S.D. Fl. Mar. 2, 2009) (slip copy); United States v. Kern, Criminal Action No. 07-381, 2008 WL 2224941, at *1 n.2 (S.D. Tex. May 28, 2008). The Supreme Court has encouraged district courts in cases with ex parte representations to "craft appropriate procedures that balance the interests of the subpoena recipient against the strong governmental interests in maintaining secrecy, preserving investigatory flexibility, and avoiding procedural delays." R. Enters., 498 U.S. at 302. The "district court may require that the Government reveal the subject of the investigation to the trial court in camera, so that the court may determine whether the motion to quash has a reasonable prospect for success before it discloses the subject matter to the challenging party." Id. These similarities encourage this Court to adopt a standard of review that draws from the standard for reviewing grand jury subpoenae.

An MLAT request for subpoena is not, however, a grand jury subpoena. Id. at 297 ("The grand jury occupies a unique role in our criminal justice system."). Notably, a grand jury is independent of all three branches of government and is intended as a "kind of buffer or referee between the Government and the people." In re United States, 441 F.3d 44, 57 (1st Cir. 2006) (quoting United States v. Williams, 504 U.S. 36, 47 (1992)). In

contrast, an MLAT request is a direct request by the executive branch on behalf of a foreign power.

Nonetheless, the compelling government interests inherent in an MLAT request suggest that requests properly authorized ought receive deference similar to grand jury subpoenae, which are granted a presumption of regularity. In re Grand Jury Proceedings, 814 F.2d 61, 71 (1st Cir. 1987) (describing the tension between grand jury independence and the court's role as watchdog to prevent prosecutorial abuse). While the UK-MLAT and 18 U.S.C. § 3512 grant federal district judges the discretion to review MLAT requests, courts ought adopt a standard of review extremely deferential to requests under an MLAT. Compare Blech, 208 F.R.D. at 68 ("The defense [] failed to show that the Government's request for witness interviews pursuant to the MLAT are an abuse of the MLAT process or are unfair so as to warrant the exercise of this Court's supervisory powers."), with In re Hampers, 651 F.2d 19, 23 (1st Cir. 1981) (suggesting that well-supported requests for grand jury subpoenae may be opposed on grounds of qualified privilege, but would be unlikely to be quashed); see also Zschernig v. Miller, 389 U.S. 429, 432 (1968) ("[T]he Constitution entrusts [the field of foreign affairs] to the President and Congress.").

In devising a standard for review of grand jury subpoenae, the Supreme Court stated that its "task [was] to fashion an appropriate standard of reasonableness, one that gives due weight

to the difficult position of subpoena recipients but does not impair the strong governmental interests" in grand juries. R. Enters., 498 U.S. at 300. In the grand jury context, the burden of proving unreasonableness is on the recipient of the subpoena, and the motion to quash ought be denied "unless the district court determines there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject" of the investigation. Id. at 301. In specific cases reviewing grand jury subpoenae, courts have looked to the particular circumstances in deciding what showing they would require from a party challenging the government. In re Grand Jury Proceedings, 814 F.2d at 71. The kinds of showings courts require and the remedies they consider vary greatly. See id.; see also In re Grand Jury Matters, 751 F.2d 13, 18 (1st Cir. 1984) ("In the absence of privilege, courts normally will ask only whether the materials requested are relevant to the investigation, whether the subpoenas specify the materials to be produced with reasonable particularity, and whether the subpoena commands production of materials covering only a reasonable period of time.").

This Court therefore rules that the appropriate standard of review is analogous to that used in reviewing grand jury subpoenae. There are thus strong factors in favor of the government in any subpoena requested pursuant to an MLAT. In

most MLAT cases, the information contained in the government's application for a commissioner or order pursuant to an MLAT will be sufficient to meet its burden and cause the court to approve the requested order or subpoena, subject to the court's review of constitutional issues and potential privilege. Here Boston College asserts a privilege.

C. Academic Privilege and the Need for Confidentiality

Boston College argues that the First Circuit recognizes protections for confidential academic research material and that these protections apply to the targets of the commissioner's subpoenae. Mot. Quash 9-10 (citing Cusumano v. Microsoft Corp., 162 F.3d 708 (1st Cir. 1998)). The First Circuit has decided several cases regarding the issue of academic or journalistic confidentiality in the face of subpoenae.

1. The Precedents

In three cases, the First Circuit explained the limits on the use of subpoenae to obtain confidential sources or information: Cusumano v. Microsoft Corp., 162 F.3d 708, United States v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988), and Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980). These three cases require a "'heightened sensitivity' to First Amendment concerns and invite a 'balancing' of considerations." In re Special Proceedings, 373 F.3d 37, 45 (1st Cir. 2004) (describing recent First Circuit precedents as "in principle somewhat more protective" than Branzburg First Amendment

protections (citing Branzburg v. Hayes, 408 U.S. 665 (1972))). In sum, the First Circuit's balancing approach prevents compulsory disclosure of a reporter's confidential sources unless it is "directly relevant to a nonfrivolous claim or inquiry undertaken in good faith; and . . . where the same information is readily available from a less sensitive source." Id.

a. Cusumano v. Microsoft Corp.

In Cusumano v. Microsoft Corp., the First Circuit denied a motion to compel two academic researchers to disclose interviews, research materials and correspondence pursuant to a civil subpoena. 162 F.3d at 717 (denying motion to compel under Federal Rule of Civil Procedure 45). The researchers in question had interviewed employees of Netscape (a Microsoft competitor in the internet browser market) for a then-unpublished book about the "browser wars" that preceded civil antitrust charges against Microsoft. Id. at 711. Microsoft sought the interviews and related records through a civil subpoena on the ground that they were necessary to its defense in the antitrust suit. Id. at 712-13.

Before denying the motion to compel, the First Circuit stated that "[a]cademicians engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalists." Id. at 714. According protection commensurate to that which the law provides for journalists is necessary because the research of both journalists and academics raise

similar concerns about chilling speech. Cusumano, 162 F.3d at 714. For example, withholding protection from journalists would chill speech, and "undermine their ability to gather and disseminate information," while an academic "stripped of sources, would be able to provide fewer, less cogent analyses." Id. at 714. A researcher's work would be deemed protected if the researcher intended "'at the inception of the newsgathering process' to use the fruits of his research 'to disseminate information to the public.'" Id. at 714 (quoting von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987)). The First Circuit held that the two researchers at issue in the case were entitled to at least a "modicum of protection." Id. at 715.

Protections for academics apply if the information in question was confidential. Id. Both confidential sources and confidential information deserve this protection, and determinations of "how confidential" something must be are made in view of the totality of the circumstances. Id. at 715; see also In re Bextra & Celebrex Mktg. Sales Practices and Prod. Liab. Litig., 249 F.R.D. 8, 15 (D. Mass. 2008) (Sorokin, M.J.) (holding a "very significant" interest in confidentiality tipped the scales in favor of denying a motion to compel). The First Circuit's charge to district courts requires balancing "the potential harm to the free flow of information that might result against the asserted need for the requested information." Cusumano, 162 F.3d at 716 (holding that when "unthinking" approval of requests could

impinge on First Amendment rights, courts must use a balancing test (quoting Bruno & Stillman, 633 F.2d at 595-96)).

In Cusumano, the court preserved the confidentiality of the research materials in question because it found the researchers' needs outweighed that of Microsoft. Id. at 716-17. In particular, the First Circuit gave weight to evidence that Microsoft had access to the information through other means, including the time, ability and knowledge to directly subpoena individuals responsible for the information in question. Id. The court also accorded weight to the respondents' role as non-parties to the antitrust litigation for which Microsoft sought discovery. Id. at 717 ("[C]oncern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs.").

Notably, the First Circuit continued to avoid the question of whether the protection afforded to journalists or academics is a privilege. Id. at 716 (declining to decide whether there is a privilege, while noting that Judge Coffin in Bruno & Stillman similarly avoided the question).

b. In re Special Proceedings

The court seemingly answered this question for criminal cases in In re Special Proceedings, where it expressed skepticism that even a general reporter's privilege would exist in criminal cases absent "a showing of a bad faith purpose to harass." 373 F.3d 37, 45 (1st Cir. 2004). In In re Special Proceedings, a

special prosecutor was appointed to investigate the leak and publication of videos by an investigative television reporter. Id. at 44. As the videos were subject to a protective order intended to protect a high profile grand jury investigation of corruption (and therefore involved government prosecutors), the district court appointed a special prosecutor to investigate the disclosure and prosecute for criminal contempt any appropriate persons. Id. at 41.

After multiple interviews and depositions, the special prosecutor concluded he had exhausted all other means of obtaining the necessary information, and requested a subpoena requiring the reporter's presence for a deposition. Id. The reporter, James Taricani, claimed he had given his source a pledge of confidentiality and refused to answer any questions about his source for the tape. Id. at 40. The district court subsequently held Taricani in civil contempt, id. at 41, and the First Circuit affirmed, noting briefly that the information was highly relevant to a criminal investigation, and reasonable efforts had been made to obtain the information elsewhere. Id. at 45.

In rejecting Taricani's claim for a reporter's privilege, the court relied in part on Branzburg v. Hayes, the landmark

opinion requiring newsmen to testify before grand juries.[13] Id. at 44-45 (citing Branzburg, 408 U.S. 665). In re Special Proceedings is analogous to the case before this Court because the First Circuit also held that Branzburg governs cases involving special prosecutors as well as grand juries. Id. at 44-45 (citing McKevitt v. Pallasch, 339 F.3d 530, 531, 533 (7th Cir. 2003); United States v. Smith, 135 F.3d 963, 971 (5th Cir. 1998); In Re Shain, 978 F.2d 850, 852 (4th Cir. 1992)). In particular, three factors from Branzburg cut against a privilege when subpoenae are issued by a special prosecutor. Id. at 44. These factors are "the importance of criminal investigations, the usual obligation of citizens to provide evidence, and the lack of proof that news-gathering required such a privilege." Id. In section II.B. above, this Court explained the similarities between this UK-MLAT request and the grand jury. See R. Enters., 498 U.S. at 298; Blech, 208 F.R.D. 65, 67.

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[13] As one scholar noted:

> While courts have consistently declined to confer privileged status upon the gathering of news, they have rejected many subpoenas – some because they were excessively burdensome, others because the nexus was not firmly established between the information and the party's needs, and still others because the information could be obtained through alternative and less intrusive channels. Thus, over the years, journalists have fared far better than anyone reading only the Branzburg decision could have expected.

Robert M. O'Neil, A Researcher's Privilege: Does Any Hope Remain?, 59 Law & Contemp. Probs. 35, 44 (1996).

Nonetheless, the court in In re Special Proceedings applied both the Branzburg and Cusumano balancing tests to the special prosecutor's motion to compel. 373 F.3d at 45 (acknowledging First Circuit precedents as "in principle somewhat more protective" than Branzburg First Amendment protections). Accordingly, Branzburg and its First Circuit progeny also govern this case which involves a commissioner.

c. In Camera Review

In its first motion to quash, Boston College proposed an in camera inspection of the Dolours Price interviews. Mot. Quash 16. In camera review is one method by which courts respond to First Amendment concerns. LaRouche, 841 F.2d at 1183. In Larouche, the First Circuit encouraged district courts to conduct in camera reviews in criminal cases where one party seeks to compel evidence from journalists. Id.; accord Cusumano, 162 F.3d at 717 (approving the district court's decision to reserve the right to view materials in camera). By requiring an in camera review, this Court may balance the competing interests, and limit the chilling effect on researchers. Larouche, 841 F.2d at 1183.

2. Boston College's Claim for Protection

This Court agrees that subpoenae targeting confidential academic information deserve heightened scrutiny. "The Supreme Court has recognized that '[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendental value to all of us.'" Asociación de Educación Privada de P.R., Inc. v.

García-Padilla, 490 F.3d 1, 8 (1st Cir. 2007) (quoting Keyishian v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967)).

a. Threshold Questions

The First Circuit requires this Court to ensure that any compulsory disclosure is "directly relevant to a nonfrivolous claim or inquiry undertaken in good faith." In re Special Proceedings, 373 F.3d at 45. Nor can materials be compelled if they are "readily available from a less sensitive source," although the party seeking compulsion does not need to exhaust non-confidential sources. Id. This Court, having reviewed the government's submissions on the public record and under seal, as well as Boston College's affidavits and motions, is confident the subpoenae are in good faith, and relevant to a nonfrivolous criminal inquiry. Nor are the materials readily available from a less sensitive source. See Mot. Quash 5-7 (explaining that the Belfast Project research only exists due to the strictest assurances and beliefs in confidentiality). For example, publicly released statements by Belfast Project interviewee Brendan Hughes include a statement that he admitted his affiliation with the Irish Republican Army for the first time only because of his personal trust in Project interviewer Anthony McIntyre. Jim Dwyer, Secret Archive of Ulster Troubles Faces Subpoena, N.Y. Times, May 13, 2011, at ¶ 18, ECF No. 7-4.

This Court must analyze whether the information at issue is

confidential and therefore merits protection by examining the totality of the circumstances. Cusumano, 162 F.3d at 715. Prior to the start of the Belfast Project, Boston College and Robert K. O'Neill acknowledged the legal limits of promises of confidentiality. These statements do not minimize the numerous steps taken by Boston College to preserve the confidentiality of the materials once received. Overall, the facts of this case indicate that Boston College considered the interviews and content of the Belfast Project to be confidential.

Satisfied that these threshold conditions are met, this Court then turns to balancing the government's need for the requested information against the potential harm to the free flow of information. The resolution of such disputes "depends heavily on the particular circumstances of the case." Lovejoy v. Town of Foxborough, No. Civ.A.00-11470-GAO, 2001 WL 1756750, at *1 (D. Mass. Aug. 2, 2001) (O'Toole, J.).

b. The Need for the Information

The subpoenae in question were issued by the commissioner appointed by this Court pursuant to 18 U.S.C. § 3512 and the UK-MLAT. The UK-MLAT is a binding federal law. U.S. Const. art. VI, cl. 2. See Medellin, 552 U.S. at 505. The terms of the UK-MLAT obligate the United States executive branch to provide assistance to the United Kingdom for criminal proceedings. UK-MLAT art. 1, ¶ 1 ("The parties shall provide mutual assistance, in accordance with the provisions of this Treaty.") (emphasis

added). The designated Central Authority of the Requested Party (in this case, the United States Attorney General) may only refuse assistance for certain specific reasons, such as when the request "would impair its sovereignty, security, or other essential interest or would be contrary to important public policy."[14] Id. art. 3, ¶ 1(a). The Attorney General found no reason to deny the United Kingdom's request in this case. Gov't's First Opp'n 8. Unlike the motion to compel, the executive decision that the request is not subject to a specific limitation is not reviewable by this Court. See UK-MLAT art. 1, ¶ 3. The Treaty explicitly prohibits persons from whom records are being sought from opposing a request based on the substantive and procedural requirements of articles 3 or 4. Id. See UK-MLAT

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[14] The text of the UK-MLAT includes several limitations on requests:

> ARTICLE 3 Limitations on Assistance
> 1. The Central Authority of the Requested Party may refuse assistance if:
> (a) the Requested Party is of the opinion that the request, if granted, would impair its sovereignty, security, or other essential interests or would be contrary to important public policy;
> (b) the request relates to an offender who, if proceeded against in the Requested Party for the offence for which assistance is requested, would be entitled to be discharged on the grounds of a previous acquittal or conviction; or
> (c) the request relates to an offence that is regarded by the Requested Party as:
> (i) an offence of a political character; or
> (ii) an offence under military law of the Requested Party which is not also an offence under the ordinary criminal law of the Requested Party.

Technical Analysis, S. Exec. Rep. No. 104-23, at 14 ("Thus, a person from whom records are sought may not oppose the execution of the request by claiming that it does not comply with the Treaty's formal requirements, such as those specified in article 4, or the substantive requirements set out in article 3."). The Treaty obligations are strong enough that a party nation cannot refuse assistance under the UK-MLAT even when the volume of requests from one party is unreasonable.[15] Id. at 28.

These legal commitments that the United States made in approving the Treaty coincide with the general legal rule preventing journalistic or academic confidentiality from impeding criminal investigations. See Branzburg, 408 U.S. at 692 (rejecting "the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it"); United States v. Smith, 135 F.3d 963, 971 (5th Cir. 1998) ("Branzburg will protect the press if the government attempts to harass it. Short of such harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen."). "'[T]he public . . . has a right to every man's

[15] The United States delegation agreed that consultations between Central Authorities would be appropriate in such circumstances, but did not agree that this was adequate grounds to refuse formal requests that do not fall under article 3. UK-MLAT Technical Analysis, S. Exec. Rep. No. 104-23, at 28.

evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege." United States v. Nixon, 418 U.S. 683, 709 (1974) (quoting Branzburg, 408 U.S. at 688). Here, there is no recognized privilege. In re Special Proceeding, 373 F.3d at 44-45.

As the subpoenae state, the information is sought in reference to alleged violations of the laws of the United Kingdom, namely murder, conspiracy to murder, incitement to murder, aggravated burglary, false imprisonment, kidnapping, and causing grievous bodily harm with intent to do grievous bodily harm. Mot. Quash 2. Although there is no principle of dual criminality in MLAT requests, the crimes being investigated are also recognized in the United States. See UK-MLAT Technical Analysis, S. Exec. Rep. No. 104-23, at 15. These are serious allegations and they weigh strongly in favor of disclosing the confidential information.

c. Harm to the Free Flow of Information

In general, the compelled disclosure of confidential research does have a chilling effect. LaRouche, 841 F.2d at 1181 ("[D]isclosure of such confidential material would clearly jeopardize the ability of journalists and the media to gather information and, therefore, have a chilling effect on speech."). Boston College may therefore be correct in arguing that the grant of these subpoenae will have a negative effect on their research into the Northern Ireland Conflict, or perhaps even other oral

history efforts. United States v. Doe, 460 F.2d 328, 333 (1st Cir. 1972) ("His privilege, if it exists, exists because of an important public interest in the continued flow of information to scholars about public problems which would stop if scholars could be forced to disclose the sources of such information."); see Branzburg, 408 U.S. at 693 ("The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational."). In an affidavit submitted on behalf of Boston College, the past president of the Oral History Association warned of a fear of reprisals that could impoverish future oral history projects. Mot. Quash, Ex. 3, Aff. Clifford M. Kuhn 2, ECF No. 5-3.

In opposition, the government argues that compelling production in this unique case is unlikely to "threaten the vast bulk of confidential relationships" between academics and their sources. See Branzburg, 408 U.S. at 691. It bears noting that there would be no harm to the free flow of information related to the Belfast Project itself because the Belfast Project stopped conducting interviews in May 2006. See Aff. Moloney 9. Additionally, while a compelled disclosure here might be premature under the terms of the Belfast Project confidentiality agreements, the Burns Library's original intent was to disseminate this information. Id. at 8. That process has already begun, as Moloney published a book and television

documentary using two interviews from the Belfast Project in 2010. Id. at 1, 9.

D. Motion to Intervene

Ed Moloney and Anthony McIntyre move to intervene pursuant to Federal Rule of Civil Procedure 24(a) or (b). Mot. Leave Intervene 1-3, ECF No. 18. These intervenor applicants claim an interest in view of their duty of confidentiality to their sources and their personal safety and that of their sources. Id. Courts must permit intervention as of right in two scenarios: either when an applicant is given an unconditional right to intervene by a federal statute, or when an applicant claims an interest relating to the action that may impair or impede the applicant's ability to protect its interest, "unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a); Ungar v. Arafat, 634 F.3d 46, 50-51 (1st Cir. 2011). Here, Moloney and McIntyre do not have a federal statutory right, and the UK-MLAT prohibits them from challenging the Attorney General's decisions to pursue the MLAT request. UK-MLAT art. 1, ¶ 3. Without devoting discussion to the rule that "[a]n interest that is too contingent or speculative . . . cannot furnish a basis for intervention as of right," Arafat, 634 F.3d at 50-51 (citations omitted), this Court concludes that Boston College adequately represents any potential interests claimed by the Intervenors. Boston College has already argued ably in favor of protecting Moloney, McIntyre and the interviewees.

III. CONCLUSION

In this case, this Court must weigh significant interests on each side. The United States government's obligations under the UK-MLAT as well as the public's interest in legitimate criminal proceedings are unquestioned. The Court also credits Boston College and the Burns Library's attempts to ensure the long term confidentiality of the Belfast Project, as well as the potential chilling effects of a summary denial of the motion to quash on academic research. With such significant interests at stake, the Court will undertake an in camera review of the interviews and materials responsive to the commissioner's subpoenae.

This Court DENIES the motions of the Trustees of Boston College to quash the commissioner's subpoenae, ECF Nos. 5, 12, and GRANTS Boston College's request for in camera review of materials responsive to the subpoenae to the Court. This Court ORDERS Boston College to produce copies of all materials responsive to the commissioner's subpoenae to this Court for in camera review by noon on December 21, 2011, thus allowing time for Boston College to request a stay from the Court of Appeals. Absent a stay, this Court promptly will review the materials in camera and enter such further orders as justice may require.

The Court DENIES both the motion to intervene as of right and the motion for permissive intervention under Federal Rule of Civil Procedure 24(b). ECF No. 18.

SO ORDERED.

/s/ William G. Young
William G. Young
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In RE: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Criminal Matters in the Matter of Dolours Price	
UNITED STATES OF AMERICA, Petitioner, v.	
TRUSTEES OF BOSTON COLLEGE, Movant,	MISCELLANEOUS BUSINESS DOCKET NO. 11-91078-WGY
JOHN T. McNEIL, Commissioner,	
ED MOLONEY, ANTHONY McINTYRE, Applicants for Intervention.	

ORDER

YOUNG, D.J. December 27, 2011

After carefully reviewing the transcripts of thirteen interviews of "H", this Court finds and rules, pursuant to its opinion issued December 16, 2011, and the balancing procedure explained from the bench, see Transcript of Hearing, ECF No. 35, December 22, 2011, that the Commissioner's initial subpoena must be enforced according to its terms. Accordingly:

1. On or before noon, Friday, December 30, 2011, Boston

College shall produce to the Commissioner:

a. The original tape recordings of any and all interviews of Dolours Price.

b. Any and all written documents, including but not limited to any and all transcripts, relating to any and all tape recordings of any and all interviews of Dolours Price.

c. Any and all written notes created in connection with any and all interviews of Dolours Price.

d. Any and all computer records created in connection with any and all interviews of Dolours Price.

2. This Court likewise will turn over to the Commissioner the materials it has been reviewing in camera pertaining to the initial subpoena of Boston College dated May 2, 2011. See Mot. Quash Subpoenas 2, ECF No. 5. The Commissioner shall give receipt for such materials.

3. The Commissioner shall hold such materials in confidence and shall cause to be made (at government expense) copies of the original materials turned over by Boston College (tape for tape and transcript for transcript), save only that transcripts which have already been duplicated need not again be copied. The complete set of the copied materials shall be returned to Boston College for its archives.

4. The Commissioner shall report to the Court the copying and return of the copies for archiving.

5. This done, the Commissioner may turn over the materials responsive to this subpoena to the requesting state.

Upon review of the materials provided pursuant to the second subpoena, the Court will issue further orders.

SO ORDERED.

/s/ William G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No.
11-12331-WGY

* * * * * * * * * * * * * * * *
ED MOLONEY, *
ANTHONY MCINTYRE, *
*
Plaintiffs, *
v. * **MOTION HEARING**
*
ERIC HOLDER, JR., *
As U.S. Attorney General, *
JOHN T. MCNEIL, *
*
Defendants. *
* * * * * * * * * * * * * * * *

BEFORE: The Honorable William G. Young,
District Judge

APPEARANCES:

JAMES J. COTTER, III, ESQ., P.O. Box 270, North Quincy, Massachusetts 02171, on behalf of the Plaintiffs

GEORGE B. HENDERSON, III and BARBARA HEALY SMITH, Assistant United States Attorneys, 1 Courthouse Way, Suite 9200, Boston, Massachusetts 02210, on behalf of the Defendants

Boston College Law School
Newton, Massachusetts

January 24, 2012

THE CLERK: Calling Civil Action 11-12331, Moloney, et al. v. Holder, et al.

MR. COTTER: Good afternoon, your Honor. James Cotter representing the plaintiffs.

MR. HENDERSON: George Henderson, Assistant U.S. Attorney, representing the defendants.

MS. HEALY SMITH: Barbara Healy Smith for the Attorney General and the Commissioner.

THE COURT: I'm delighted to see you all. I see, Mr. Henderson, you managed to be here today.

Mr. Cotter, here's my -- let me say something first to focus your argument and then give you what I think is my major concern.

You will have seen that I recently entered an order in the cognate case, the case in which your clients have obtained a stay from the Court of Appeals. I did that pursuant to my written decision in that case performing the heightened scrutiny that I tried to detail in a public order that I entered from the bench. Your clients were denied intervention in that case. So let me say that I entered that order, I made it purposefully subject to the stay the Court of Appeals has entered in that case, without regard to the individual claims of your clients. So, do not think I have prejudged the matter we're going to argue. I have not. I have entered the order in that case, I'm repeating,

without regard to the rights of your clients. I knew we would get together here this afternoon.

Now, I also see the briefing schedule that the Court of Appeals has issued in that case. And that briefing schedule does not instruct me but suggests to me I might, or if I were of a mind to bring this case to an end, this case would be on the same briefing schedule as that case.

And I have to tell you my big problem is with the standing of your clients. So, let's go to that. Why do your clients have standing in this separate action to bring the complaints that they do since what I had before me in the other case is a solemn treaty between two sovereign states.

MR. COTTER: Our clients, your Honor -- and first let me preface this by saying that we appreciate the Court's order from last week with respect to honoring the stay.

With respect to our clients' standing in this case, your Honor, we believe we have met the modest standard for standing. We believe we've met the modest standard to survive a motion to dismiss.

THE COURT: Well --

MR. COTTER: Our clients --

THE COURT: -- the treaty says there shall no private right of action.

MR. COTTER: That's correct, your Honor. However,

all the cases that have been cited to our knowledge have involved defendants or potential defendants. The, the issue that we're trying to raise, your Honor, is not trying to obtain, suppress, impede, or exclude evidence. That's not what we are asking the Court to do. We are asking the Court to review the action of the Attorney General with the ruler of the standard set forth in Article 1, Article 3, and Article 18. The, the technical analysis to the treaty itself, your Honor, talks about --

THE COURT: Let me, let me ask you this question. I -- how do you -- this is a difficult case for lawyers and I must say for the Court because some of it's ex parte. They made sealed submissions to the Court. How do you know they haven't done that?

MR. COTTER: We've alleged that, your Honor, and for purposes of this hearing those allegations are taken as true. We've had no evidence furthermore that they have made those considerations. They haven't followed the standards. In our view, your Honor, if the Attorney General had followed those standards and had asked the questions that we think he should have the subpoenas would not have issued. That, that is our case, your Honor.

THE COURT: All right, let me follow this through with you. But in essence isn't that getting standing like, like an end run. You make these allegations. You say these

allegations, on a motion to dismiss they should be taken as true. So, even, I'm not expressing any view about anything that's sealed, even if I know as the presiding magistrate that these various steps were made and indeed were detailed in the ex parte submissions, even if I know that, what? I should let your clients go forward when the treaty itself says there's no private right of action?

MR. COTTER: Well, again, your Honor, I don't think that section, Section 3 of Article 1, applies to non-defendants trying to obtain judicial relief for the Attorney General's action in issuing a subpoena or granting a request. There's no case that we're aware of that involves plaintiffs such as ours, plaintiffs who are not trying to suppress, obtain, impede, or object to evidence.

THE COURT: Oh, no.

MR. COTTER: This is different.

THE COURT: I appreciate that.

MR. COTTER: This is different.

THE COURT: But how are you, how are you situated any differently -- your clients are not citizens and I don't know what turns on that.

MR. COTTER: Mr. Moloney is a citizen.

THE COURT: Mr. Moloney is a citizen.

MR. COTTER: Yes.

THE COURT: All right. So Mr. Moloney is a

citizen. How are you situated any differently than any citizen who says this appropriation act didn't follow the rules of the senate, or which says this statute was not properly inscribed. We don't normally allow those suits to go forward.

MR. COTTER: That's correct. I think this is different. And I think it's different because Mr. Moloney's interest and the harm is in the zone of interest from that statute. He is going to be harmed as a result we allege of the issuance of the subpoenas, unlike any taxpayer who may or may not be harmed by an appropriation.

THE COURT: Well, my problem with that is, you say he's going to be harmed because of the failure of the requesting state to protect its citizens all of which matters are political matters that would seem to me to be beyond the purview of this Court.

MR. COTTER: What we are saying is that Mr. Moloney's going to be harmed because of the action of the Attorney General and not applying the standards before issuing or granting the request for legal assistance.

THE COURT: But how is he going to be harmed?

MR. COTTER: He's going to be harmed with respect to First Amendment rights, your Honor. He's an author. He's a writer. I think his claim is similar though not identical to the claim of Boston College. And I would

suggest, your Honor, that with respect to the relief we're seeking that same balancing the Court talked about in its December order is applicable here.

THE COURT: But these are not his materials.

MR. COTTER: He was part of the project. He was, yes, an employee, but he was the director. He does not have title, but his work was in the project, his reputation is in the project. Involved are other individuals who but for him would have not gone to the sessions where they were taped. Individuals who are also going to be harmed we allege because the Attorney General failed to apply the standards before granting the request for legal assistance. I think that is the zone of interest that Lujan is talking about with respect to Mr. Moloney.

THE COURT: Assuming that you're right, that your clients have standing, does your argument fail if in fact now, in fact, the Attorney General did do the things that he was supposed to do under the treaty?

MR. COTTER: With respect to the APA claim, the claim for judicial review, the government said it's the intent of our client to quash the subpoena. And that's true. That was the intent of Boston College.

THE COURT: Yes.

MR. COTTER: That's their intent. All I can ask this Court to do is to grant the plaintiffs that which they

are entitled to as a matter of law. That's a long answer to your question. If this Court determines that the Attorney General prior to granting legal assistance applied Article 1, considered Article 3, considered Article 18, then yes, that's the scope of review for an APA review.

THE COURT: And there's nothing else here, is there?

MR. COTTER: What do you mean nothing else, your Honor, I'm sorry?

THE COURT: You have no other claim?

MR. COTTER: We have the First Amendment claim. And with respect to Mr. Moloney's First Amendment claim the --

THE COURT: So assume -- but if you say -- all right. All right, I'm following. And you're arguing it very ably. If you have standing then under your Administrative Procedure Act claim the question is whether the Attorney General has done what he's supposed to do. If he has, the Administrative Procedure Act claim fails. You concede that?

MR. COTTER: If the Court so finds, upon review.

THE COURT: Well, I understand.

Then you say you have a First Amendment claim. And while arguably more attenuated than Boston College, having read thousands of pages of these transcripts, it's very

clear to the Court that this was a bona fide academic exercise of considerable intellectual matter. Now I'll go so far as to say that. But if, if your clients' standing is, is present and is the same as that of Boston College, then in the cognate case, for right or wrong, I've made that determination. I have subjected the materials to the heightened scrutiny that I think was appropriate, it shouldn't be personal, that I believe the law requires, and I have refused to order certain things to be produced and I've ordered certain other things to be produced, and the Court of Appeals will have a chance to scrutinize that. There's nothing more that I would do in this case, is there?

MR. COTTER: I think there is, your Honor. If I understand the Court's order from December correctly, the Court did apply additional scrutiny. The Court also made the balancing test, the needs of the government for the information versus the free flow of information. We --

THE COURT: I tried to. I think -- yes.

MR. COTTER: You did.

THE COURT: I accept that. That's what I had thought I was doing --

MR. COTTER: Yes.

THE COURT: -- in working with both these subpoenas.

MR. COTTER: And I'm not quarreling, your Honor,

with the Court's action in that case. What I am saying, your Honor, if we go forward on the merits, we would present evidence that was not presented to the Court in the BC case that goes to the balancing test. We would present evidence, your Honor, to show that in terms of the balancing it should fall on the side of the free flow of information, not --

THE COURT: Such as, such as what?

MR. COTTER: Such as testimony, your Honor, from four or five organizations that deal with oral history who will testify that it is important to keep oral histories secret.

THE COURT: But I have little doubt of that. That's what I tried to say. It seems to me that this is a legitimate academic exercise. It's resulted in materials of significant intellectual historical interest, and I listed other interests from the bench when I was saying how I was going to balance things. I've done the balancing. There's law enforcement interests. I've balanced them. And now I stand to be reviewed on that. And you seem, I express no opinion on it, successfully to have dealt yourself into that review. And that's fine. I just wonder what I should do here.

All right, I think I understand the argument.

Mr. Henderson, your chief position is they don't have standing here, right?

MR. HENDERSON: That's our opening position, yes, your Honor.

THE COURT: That is. The Court accepts that. The Court rules that neither Mr. McIntyre nor Mr. Moloney under the Mutual Legal Assistance Treaty and its adoption by the senate and the treaty materials has standing to bring this particular claim. That's my ruling and I can be tested on that on appeal. Beyond that, on the merits, I am satisfied that the Attorney General as matter of law has acted appropriately with respect to the steps he has taken under this treaty, and I can conceive of no different result applying the heightened scrutiny that I think is appropriate for these materials were this case to go forward on the merits.

Now, I think I've touched all of the elements. Judgment for the United States, and an appeal may be taken.

MR. HENDERSON: Thank you, your Honor.

MR. COTTER: Thank you.

THE COURT: Thank you, Mr. Cotter, and the defendants.

That's it?

THE CLERK: That's it.

THE COURT: We'll recess.

THE CLERK: All rise.

(Whereupon the matter concluded.)

C E R T I F I C A T E

I, Donald E. Womack, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

_____

DONALD E. WOMACK
Official Court Reporter
P.O. Box 51062
Boston, Massachusetts 02205-1062
womack@megatran.com

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No: 11cv12331WGY

MOLONEY et al
Plaintiff

v.

HOLDER et al
Defendant

ORDER OF DISMISSAL

YOUNG, D.J.

After a hearing held on January 24, 2012, this Court Orders that Defendants' Motion to Dismiss is Allowed and for the reasons stated on the record the above entitled action be and hereby is Dismissed.

Sarah Thornton
Clerk

By: /s/ Jennifer Gaudet
Deputy Clerk

January 25, 2012

Notice mailed to counsel of record.

5 U.S.C. § 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that —

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter —

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include —

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections **1738**, **1739**, **1743**, and **1744** of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section **1641(b)(2)**, of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section **551** of this title.

(Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 103–272, Sec. 5(a), July 5, 1994, 108 Stat. 1373; Pub.L. **111-350**, Sec. 5(a)(3), Jan. 4, 2011, 124 Stat. 3841.)

Historical and Revision Notes

Derivation	U.S. Code	Revised Statutes and Statutes a
(a)	5 U.S.C. 1009 (introductory clause).	June 11, 1946, ch. 324, Sec. 10 (introductory 243 .

In subsection (a), the words "This chapter applies, according to the provisions thereof," are added to avoid the necessity of repeating the introductory clause of former section 1009 in sections 702–706.

Subsection (b) is added on authority of section 2 of the Act of June 11, 1946, ch. 324, 60 Stat. 237, as amended, which is carried into section **551** of this title.

In subsection (b)(1)(G), the words "or naval" are omitted as included in "military".

In subsection (b)(1)(H), the words "functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947" are omitted as executed. Reference to the "Selective Training and Service Act of 1940" is omitted as that Act expired on Mar. 31, 1947. Reference to the "Sugar Control Extension Act of 1947" is omitted as that Act expired on Mar. 31, 1948. References to the "Housing and Rent Act of 1947, as amended" and the "Veterans' Emergency Housing Act of 1946" have been consolidated as they are related. The reference to former section **1641(b)(2)** of title 50, appendix, is retained notwithstanding its repeal by Sec. 111(a)(1) of the Act of Sept. 21, 1961, Pub.L. 87–256, 75 Stat. 538, since Sec. 111(c) of the Act provides that a reference in other Acts to a provision of law repealed by Sec. 111(a) shall be considered to be a reference to the appropriate provisions of Pub.L. 87–256.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

REFERENCES IN TEXT

Sections 1891-**1902** of title 50, appendix, referred to in subsec. (b)(1)(H), were omitted from the Code as executed.

AMENDMENTS

2011 — Subsec. (b)(1)(H). Pub.L. **111-350**, Sec. 5(a)(3), struck out "chapter 2 of title 41;" after "title 12;".

1994 — Subsec. (b)(1)(H). Pub.L. 103-272 substituted "subchapter II of chapter 471 of title 49; or sections" for "or sections 1622,".

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, Sec. 1, Oct. 21, 1976, 90 Stat. 2721.)

Historical and Revision Notes

Derivation	U.S. Code	Revised Statutes and Statutes at Large
. . . . .	5 U.S.C. 1009(a).	June 11, 1946, ch. 324, Sec. 10(a), 60 Stat. 243 .

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976— Pub.L. 94-574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 2 sections 501, 502; title 7 section 2143; title 16 section 839f; title 18 sections 843, 3625; title 19 section 1677c; title 21 section 1906; title 25 section 954; title 28 section 2631; title 41 section 422; title 42 section 5405; title 43 section 1337; title 50 App. sections 16, 2412.

5 U.S.C. § 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, Sec. 1, Oct. 21, 1976, 90 Stat. 2721.)

Historical and Revision Notes

Derivation	U.S. Code	Revised Statutes and Statutes at Large
. . . . .	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, Sec. 10(b), 60 Stat. 243 .

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976— Pub.L. 94-574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 2 sections 501, 502; title 7 section 2143; title 16 section 839f; title 18 sections 843, 3625; title 25 section 954; title 41 section 422; title 42 section 5405; title 50 App. section 2412.

5 U.S.C. § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

Historical and Revision Notes

Derivation	U.S. Code	Revised Statutes and Statutes at Large
. . . . .	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, Sec. 10(c), 60 Stat. 243 .

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 2 sections 501, 502; title 7 section 2143; title 15 sections 78l, 78s, 78ccc; title 16 section 839f; title 18 sections 843, 3625; title 25 section 954; title 41 section 422; title 42 sections 5405, 7174, 7194; title 50 App. section 2412.

United States Code

United States Code
TITLE 5 — GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I — THE AGENCIES GENERALLY
CHAPTER 7 — JUDICIAL REVIEW

5 U.S.C. § 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Historical and Revision Notes

Derivation	U.S. Code	Revised Statutes and Statutes at Large
. . . . .	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, Sec. 10(d), 60 Stat. 243 .

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 2 sections 501, 502; title 7 section 2143; title 15 sections 78y, 1262, 1474, 3416; title 16 sections 839f, 1855, 3636; title 18 sections 843, 3625; title 25 section 954; title 41 section 422; title 42 sections 5405, 7172; title 50 App. section 2412.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

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

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

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

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

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

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

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

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Historical and Revision Notes

Derivation	U.S. Code	Revised Statutes and Statutes at Large
. . . . .	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, Sec. 10(e), 60 Stat. 243 .

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub.L. 85-791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: "This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title]."

United States Code

18 U.S.C. § 3512. Foreign requests for assistance in criminal investigations and prosecutions

(a) Execution of Request for Assistance

(1) In general — Upon application, duly authorized by an appropriate official of the Department of Justice, of an attorney for the Government, a Federal judge may issue such orders as may be necessary to execute a request from a foreign authority for assistance in the investigation or prosecution of criminal offenses, or in proceedings related to the prosecution of criminal offenses, including proceedings regarding forfeiture, sentencing, and restitution.

(2) Scope of orders — Any order issued by a Federal judge pursuant to paragraph (1) may include the issuance of —

(A) a search warrant, as provided under Rule 41 of the Federal Rules of Criminal Procedure;

(B) a warrant or order for contents of stored wire or electronic communications or for records related thereto, as provided under section 2703 of this title;

(C) an order for a pen register or trap and trace device as provided under section 3123 of this title; or

(D) an order requiring the appearance of a person for the purpose of providing testimony or a statement, or requiring the production of documents or other things, or both.

(b) Appointment of Persons To Take Testimony or Statements

(1) In general — In response to an application for execution of a request from a foreign authority as described under subsection (a), a Federal judge may also issue an order appointing a person to direct the taking of testimony or statements or of the production of documents or other things, or both.

(2) Authority of appointed person — Any person appointed under an order issued pursuant to paragraph (1) may —

(A) issue orders requiring the appearance of a person, or the production of documents or other things, or both;

(B) administer any necessary oath; and

(C) take testimony or statements and receive documents or other things.

(c) Filing of Requests — Except as provided under subsection (d), an application for execution of a request from a foreign authority under this section may be filed —

(1) in the district in which a person who may be required to appear resides or is located or in which the documents or things to be produced are located;

(2) in cases in which the request seeks the appearance of persons or production of documents or things that may be located in multiple districts, in any one of the districts in which such a person, documents, or things may be located; or

(3) in any case, the district in which a related Federal criminal investigation or prosecution is being conducted, or in the District of Columbia.

(d) Search Warrant Limitation — An application for execution of a request for a search warrant from a foreign authority under this section, other than an application for a warrant issued as provided under section **2703** of this title, shall be filed in the district in which the place or person to be searched is located.

(e) Search Warrant Standard — A Federal judge may issue a search warrant under this section only if the foreign offense for which the evidence is sought involves conduct that, if committed in the United States, would be considered an offense punishable by imprisonment for more than one year under Federal or State law.

(f) Service of Order or Warrant — Except as provided under subsection (d), an order or warrant issued pursuant to this section may be served or executed in any place in the United States.

(g) Rule of Construction — Nothing in this section shall be construed to preclude any foreign authority or an interested person from obtaining assistance in a criminal investigation or prosecution pursuant to section **1782** of title 28, United States Code.

(h) Definitions — As used in this section, the following definitions shall apply:

(1) Federal judge — The terms "Federal judge" and "attorney for the Government" have the meaning given such terms for the purposes of the Federal Rules of Criminal Procedure.

(2) Foreign authority — The term "foreign authority" means a foreign judicial authority, a foreign authority responsible for the investigation or prosecution of criminal offenses or for proceedings related to the prosecution of criminal offenses, or an authority designated as a competent authority or central authority for the purpose of making requests for assistance pursuant to an agreement or treaty with the United States regarding assistance in criminal matters.

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