11-2511
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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Government Appellees (the "Government") fail to counter the Appellants' argument that the District Court erred in law in dismissing their Complaint in 11-cv-12331 for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), or for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Instead, the Government urges an argument which has no Constitutional, statutory or common law basis, and is unsupported in any Federal District or Circuit Court, namely that a District Court's denial of intervention under Fed. R. Civ. P. 24(a)(2) or (b) is *res judicata* of a plaintiff's right of access to justice by way of a complaint sounding in the same causes of action.

The Government's argument must fail for several reasons. Moloney and McIntyre were not permitted to be parties to the action in 11-mc-91078, and raised additional claims for relief under the APA which had not been raised by Boston College. Furthermore, the District Court had not issued a final judgment in 11-mc-91078 at the time Moloney and McIntyre filed their original complaint in 11-cv-12331. More importantly, Moloney and McIntyre, having been denied intervention, were not given full and fair opportunity to be heard on the issues in 11-mc-91078, and in particular on their APA cause of action. Accordingly, the Government's argument that

the District Court's resolution of the intervention issue was dispositive of this consolidated appeal is unavailing.

The Government's claim that "[t]he district court acted within its discretion and properly denied intervention with respect to the claims relating to the Attorney General because appellants had no independent jurisdictional basis to challenge, on any grounds, the Attorney General's determination to provide assistance pursuant to the request under the US-UK MLAT." This ignores the clear language of the statute at Fed. R. Civ. P. 24(a)(2) which provides for a right to intervention if the necessary conditions are fulfilled, and the district court's discretion only arises under Fed. R. Civ. P. 24(b). As the Government concede, the District Court did not indicate if it denied the Appellants intervention as of right, or by permission.

Furthermore, the Appellants' challenge of the Attorney General's actions under the US-UK MLAT by way of the Administrative Procedure Act, 5 U.S.C. §701 *et seq.* ("APA"), is precisely the cause of action which the District Court was required to address in 11-cv-12331, but which the District Court improperly dismissed on the merits under Fed. R. Civ. P. 12(b)(6), even though the Appellants' cause of action had clearly been identified.

The Government posit that "neither appellant presented a substantial, legally protectable interest in the requested materials that was not adequately represented by Boston College." The Appellants have clearly set forth their interests relating to the tapes of interviews which are the subject-matter of the actions, as well as their need to protect their promises of confidentiality to the interviewees. Moloney and McIntyre and ACLUM have enunciated all the reasons why Boston College, which is not before the Honorable Court, did not adequately represent the Appellants' interests.

The Government seeks to limit the extra-territorial reach of the Constitution in urging the Honorable Court to disregard McIntyre's claims under the Fifth Amendment, and further dismisses Moloney's First Amendment rights by claiming that he does not "allege a cognizable concrete and particularized injury" when he clearly has done so. Moloney is entitled to First Amendment protection as the instigator and Project Director of the Belfast Project, and the confidant of a large number of the interviewees, as a result of his many years' work as a respected journalist in Northern Ireland. Without the trust confided in both Appellants by the IRA interviewees, and the corresponding duties of confidentiality which Moloney and McIntyre have towards their confidants, this matter would not be before

the Honorable Court, and these issues have not comprehensively been advanced by Boston College.

The Government seek to wish away the arguments by claiming that the "district court's proper denial of appellants' motion to intervene forecloses review of the merits of the court's ruling on the motion to quash, as neither Boston College nor the government appealed that ruling." Needless to say, if Moloney and McIntyre were improperly denied intervention by right or permission, or if their Complaint was improperly dismissed, then the District Court's ruling on the Boston College motion to quash is flawed, as it failed to account for the Appellants' arguments regarding the proper discretionary standards, including how the Attorney General's failure to comply with the US-UK MLAT should affect the District Court's use of discretion.

The Government makes the astonishing and desperate argument, contrary to the plain facts, that "ACLUM's arguments that the court should have applied the discretionary factors set forth in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), should be disregarded because it was not advanced by appellants and has thus been abandoned." Not only have Moloney and McIntyre specifically pleaded the *Intel* factors at Paragraphs 18 and 89 of their Complaint, but have discussed it at pages 10,

22, and 42-44 of their brief, and propounded on it in their Motion for Intervention (p.3). Furthermore, as ACLUM has eloquently addressed the propriety of the deployment of the *Intel* factors in a matter of first impression, it is respectfully submitted that the Honorable Court can derive considerable benefit from ACLUM's submissions.

Finally, the Government assert that "there is no First Amendment privilege that Moloney and McIntyre can assert that permits Boston College to withhold evidence pertaining to criminal activity." This is not what the District Court determined when it applied its balancing test "beyond what the government urged was required under the treaty." Even though the government failed to appeal the District Court's ruling on the scope of the First Amendment privilege, the government now impermissibly seeks to re-litigate the matter by the back door.

The Government's reliance upon the District Court's assertion that there would be "no different result" were the Appellants' Complaint to have gone forward ignores, of course, the fact that the District Court was not entitled to dismiss a claim on the merits under Fed. R. Civ. P 12(b)(6), whether the District Court believed the result would be different or not.

ARGUMENT

I. DENIAL OF THE MOTION FOR INTERVENTION IS NOT *RES JUDICATA* OF THE ISSUES ON APPEAL

The Government submits that "Appellants appear to believe that the second proceeding did moot the intervention issue, framing their arguments almost entirely as challenges to the dismissal of the civil action." In fact, Moloney and McIntyre addressed the denial of their application for intervention at page 46 of the Appellants' Brief, clearly stating that they rely largely on the preceding arguments submitted in the body of the Brief, as well as on their arguments contained in 11-mc-91078 Intervenors' Reply Memorandum. [A117-A137].

Furthermore, the Amicus Brief filed by the American Civil Liberties Union of Massachusetts ("ACLUM") addressed the question of intervention much more eloquently, and urged the Honorable Court to consider a number of additional authorities.

In summary, Moloney and McIntyre submit that if it is found that they have standing to sue, then they were entitled to intervention as a matter of right, as their interests were not adequately advocated by Boston College. Failing that, they were entitled to intervention as a matter of discretion.

In any event, the Government's argument that "resolution of the question of whether denial of intervention was proper is dispositive of this consolidated appeal" has no basis in the Constitution, statute or common law, and it is instructive that the Government cite to no case law in support of such an ill-considered proposition. Indeed, the Government argument is so weak that it does not dare to discuss the concept of *res judicata,* but rather submits an entirely new legal theory without propounding on the idea.

Under federal law, a final judgment on the merits of an action precludes the parties from re-litigating claims that were raised or could have been raised in that action. *See Bay State HMO Management v. Tingley Systems*, 181 F.3d 174, 177 (1st Cir. 1999); *Porn v. National Grange Mut. Ins. Co.*, 93 F.3d 31, 34 (1st Cir. 1996). For a claim to be precluded, there must be: (1) a final judgment on the merits in an earlier action; (2) sufficient identity between the causes of action asserted in the earlier and later suits; and (3) sufficient identity between the parties in the two suits. *Id.*

Clearly, as Moloney and McIntyre were not permitted to intervene as parties to the action in 11-mc-91078, there could be no identity between the parties in both suits. The Appellants' claim for relief under the APA was not litigated in 11-mc-91078, as the claim had not been raised by Boston College, and there was no identity between the causes of action in both suits.

Moloney and McIntyre were not given full and fair opportunity to be heard on the issues in 11-mc-91078 and, in particular, on their APA cause of action.

Furthermore, the District Court had not issued a final judgment in 11-mc-91078 at the time Moloney and McIntyre filed their original complaint in 11-cv-12331. Accordingly, the Government argument that the District Court's resolution of the intervention issue was dispositive of this consolidated appeal is unavailing.

The Government's submissions that appellants were properly denied intervention, and because Boston College did not appeal, the challenges to that ruling are not properly before this Court and need not be addressed." [Gov'tBr: 28]

This position is entirely disingenuous. Clearly Moloney and McIntyre, in seeking review of the District Court's Order of December 16, 2011 denying their right to intervene or denial of permissive intervention, raise the reasons for that denial on appeal. As the Government concedes, that reasoning includes the District Court's finding that Moloney and McIntyre are not entitled to judicially review the US-UK MLAT.

Again, the idea proposed by the Government that because intervention was properly denied with respect to the Appellants' separate claims against

the Attorney General, it is dispositive of Appellants' rights with respect to those claims" is unavailing. The right to intervention under Fed. R. Civ. P. 24, and the Appellants' claims under the APA, invoke different statutory rights.

Accordingly, the Government's suggestion that the District Court's conclusion "preclude[s] appellants from relitigating the issue in the separate civil suit" is simply legal nonsense.

II. THE DISTRICT COURT ERRED IN DENYING THE APPELLANTS' MOTION TO INTERVENE AS OF RIGHT

A. Standard of Review of Fed.R.Civ.P. 24(a)(2)

The Government incorrectly sets out the standard of review of a motion to intervene as of right as a review for abuse of discretion. The proper standard for review of Fed.R.Civ.P. 24(a)(2) is *de novo* and incorporates more than just an abuse of discretion review, as articulated by the Honorable Court in *Maine v. U.S. Fish And Wildlife Service*, 262 F.3d 13,17 (1st Cir. 2001):

> The appellate standard of review in this Circuit is that "[w]e will reverse the denial of a motion to intervene as of right 'if the court fails to apply the general standard provided by the text of Rule 24(a)(2), or if the court reaches a decision that so fails to comport with the standard as to indicate an abuse of discretion.'" [Citations omitted]. As we have said " 'abuse of discretion'. . . may be a misleading phrase. Decisions on abstract issues of law are always reviewed *de novo;* and the

> extent of deference on 'law application' issues tends to vary with the circumstances." [Citations omitted]. "Despite its nomenclature, intervention 'as of right' usually turns on judgment calls and fact assessments that a reviewing court is unlikely to disturb except for clear mistakes. . . . [I]n practice, the district court enjoys a reasonable measure of latitude. . . ." *Daggett v. Comm'n on Governmental Ethics and Election Practices,* 172 F.3d 104, 113 (1st Cir. 1999).

The Government admits that a District Court has less discretion to deny intervention as of right, such that "an abuse of discretion review of denial of intervention as of right is more stringent than that for denial of permissive intervention." *Citing Int'l Paper Co. v. Town of Jay, Me.*, 887 F.2d 338, 344 (1st Cir 1989); *Ungar v. Arafat*, 634 F.3d 46 at 51. Accordingly, the Honorable Court will reverse a denial of intervention if the district court "fails to apply the general standard provided by the text of Rule 24(a)(2), or the court reaches a decision that so fails to comport with that standard as to indicate an abuse of discretion." *Id.*

Moreover, the Government properly set forth that "where the district court's reasons are "imprecise" or no findings are made, this Court reviews for abuse of discretion as long as the district court's findings or reasons can be reasonably inferred or are discernible from the record." *See R&G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, (1st Cir. 2009).

It is respectfully submitted that the District Court's findings on the matter of intervention are, at best, imprecise, as conceded by the

Government. [Gov'tBr: 30]. Moreover, the District Court's findings cannot reasonably be inferred from the record, as the District Court simply failed to articulate why the Appellants' APA arguments were unavailing, other than a simple reference to the US-UK MLAT Art.1§ 3.

B. The District Court Erred in Denying Intervention in Relation to the Appellants' APA Claim

Moloney and McIntyre adopt in its entirety the arguments articulated by the American Civil Liberties Union of Massachusetts in its *Amicus Curiae* Brief in Support of Appellants.

The Government correctly sets forth the test for intervention as of right i.e. that the Appellants need to demonstrate that they had an interest relating to the property or transaction that underlies the ongoing action; that the disposition of the action threatened to impair or impede their ability to protect this interest; and that Boston College did not adequately represents their interest. *See Ungar v Arafat*, 634 F.3d at 51; Gov't Reply Brief at 19; ACLUM at 3.

To qualify for permissive intervention under Rule 24(b), Moloney and McIntyre were required to show an independent ground for jurisdiction and a common question of law and fact between the Appellants' claims and the main action. *Garza v. Cnty of Los Angeles,* 918 F.2d 763, 777 (9th Cir.

1990); *see Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 52, n. 5 (1st Cir. 1979).

1. The District Court's Denial of Intervention in Relation to the Appellants' APA claims was Erroneous.

The Government claims that denial of intervention for Appellants' claims against the Attorney General was proper "because Moloney and McIntyre had no legally protectable interest in the proceedings, as required under Fed. R. Civ. P. 24(a)(2)." *Citing Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 638 (1st Cir. 1989).

Moloney and McIntyre agree with ACLUM when it states that the Applicants' interest in protecting their pledge of confidentiality "presents a 'textbook case' for intervention." *See In re Grand Jury Subpoena*, 274 F.3d 563 (1st Cir. 2001) ["Colorable claims of attorney-client and work product privilege qualify as sufficient interests to ground intervention as of right"]; *In re Sealed Case*, 237 F.3d 657, 663-64 (D.C. Cir. 2001)[parties with an interest in maintaining confidentiality meet the requirements for intervention as of right].

ACLUM has comprehensively set forth the authorities for the proposition that the First Amendment protects the right to gather information on matters of legitimate public concern, and affords "qualified protections against forced disclosure of confidential information held by those who

gather and disseminate newsworthy information, whether those individuals are traditional members of the press or academics." ACLUM Brief ("AmBr") at p4-5.

The First Amendment considerations should, standing alone, highlight the "legally protectable interests" which Moloney and McIntyre have in the subject matter, and is "direct and 'significantly protectable'" as discussed in *Ungar*, 634 F.3d at 51.

The Government contends that Moloney and McIntyre "could not show that their claims for judicial review of the Attorney General's actions under the treaty bore 'a sufficiently close relationship to the dispute between the original litigants.'" Clearly, this argument is futile. Any failure of the Attorney General to comply with his obligations under the treaty has direct relevance to both the issuance of the subpoenae in dispute, as well as the District Court's exercise of discretion in its determination of the motions to quash.

The Government claims that Moloney and McIntyre were "not entitled to intervention, either permissive or as of right, to assert the claims in their proposed complaint under the US-UK MLAT, the APA, or the Constitution" because the "district court had no jurisdiction to entertain such claims."

First, the District Court always has jurisdiction to entertain colourable claims of Constitutional rights, which Moloney and McIntyre have properly asserted, and which they have standing to assert, as discussed in their brief and in ACLUM's *amicus curiae*.

Second, despite the Government assertions to the contrary, the APA provides a right of action and waiver of sovereign immunity for challenges to the Attorney General's failure to comply with the law. Combined with Federal Question jurisdiction, this grants the District Court jurisdiction in any civil action "arising under the Constitution, laws, or treaties of the United States" which includes the US-UK MLAT.

The only salient argument, then, which the Government can mount is that Moloney and McIntyre have no private rights to challenge the provision of assistance under the US-UK MLAT, because it contains an ouster clause at Art.1 § 3 prohibiting judicial review. The problem for the Government is that Art.1 § 3 of the US-UK MLAT contains no such express preclusion of judicial review. A claim for judicial review differs from a claim that seeks to obtain, suppress or exclude evidence or to impede the execution of a request.

2. Appellants' Claims under the APA have not Been Expressly Foreclosed by the US-UK MLAT.

As set forth in their Brief at p. 19, and 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") at Article 3(5), contains the language that an MLAT shall not "expand or limit rights otherwise available under domestic law." A329. The Government, in claiming that this agreement is inapplicable to the United Kingdom, must fail in this argument in the absence of any evidence that the United Kingdom has somehow seceded from the European Union. In any event, this language is simply a reflection of a common sense approach.

Under the APA 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). 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.

Furthermore, whereas the Government continues to cite to all the published decisions which involved attempts by criminal defendants to invoke rights which are specifically prohibited by the MLAT in question, they still fail to grasp that Moloney and McIntyre rely on rights under domestic law, not least the Constitution, but also the APA and the

requirements of 18 U.S.C. §3512 which invokes the lower court's discretionary authority to grant or deny the subpoenae.

Clearly, when the District Court exercises its discretionary authority, it does so on behalf of private parties with discernible interests, such as Moloney and McIntyre. In the exercise of its discretion, the District Court is entitled to know if the Attorney General has complied, or not complied, with his solemn treaty obligations. Accordingly, if Moloney and McIntyre cannot review those actions, then the Attorney General is immune from bad acts which have a direct bearing on the Appellants Constitutional and statutory rights. The framers of the US-UK MLAT did not intend to immunise the Attorney General from the "reasonableness" standards of subpoenae requests which implicate domestic law, otherwise the MLAT would grant foreign law enforcement a means to circumvent domestic laws with which U.S. law enforcement agencies are obliged to comply.

The Government's best challenge is to the Appellants argument that the US-UK MLAT's negation of a private right is inapplicable as Moloney and McIntyre do not seek to "obtain, suppress, or exclude any evidence, or to impede the execution of a request." [Br:14-15; *see* C.Tr. 1/24/12 at 5]. The Government assert that this is nonsense because "[a] lawsuit challenging issuance of the subpoenas and seeking 'remand' to the Attorney

General and a stay of enforcement of the subpoenas until he reports back to the district court on his 'consultation' with the UK by definition 'impedes the execution of [the] request.'"

The problem for the Government in this argument, however, is that the subpoena request has been executed. It just has not been enforced. The Government conflates the *request* for a subpoena with its *enforcement* by a Federal District Court, which would of course obviate any judicial inquiry under the Constitution, 18 U.S.C. §3512 or, as Moloney and McIntyre submit, under the APA.

The Government raises the point that the MLAT "recognize[s] there might be sensitive investigations requiring requests for assistance to be made in confidence, Article 7 [A148-49], and 'urgent cases' requiring a response by 'expedited means.'" [Gov'tBr: 38, A146]. Given that the request for assistance in this case was made *ex parte*, it is respectfully submitted that the Attorney General must be held to a standard of *uberrimae fides* in his confidential disclosures to the District Court. *See In Re Grand Jury Subpoenas v. United States*, 144 F.3d 653, 678 (10th Cir. 1998) ("In support of its position, the government simultaneously filed an *in camera*, *ex parte* good faith statement of evidence as to the alleged criminal activity, which Doe, Roe, The Hospital, and Intervenor have not been permitted to view.")

Moloney and McIntyre must be entitled to demonstrate that he has neglected that duty.

3. The US-UK MLAT does not Expressly Preclude Private Actions under the APA.

The Government concedes that "the APA provides only a limited waiver of sovereign immunity in §702 for claims that are not for money damages, where those claims are not expressly or impliedly barred." The Government cites to *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158-59 (D.C. Cir. 1999) as "noting that the Administrative Conference of the United States, which had proposed the specific language enacted as §702(1), explained that courts would still refuse "to decide issues about foreign affairs, military policy and other subjects inappropriate for judicial action." However, Moloney and McIntyre did not ask the District Court to decide issues about foreign affairs, but rather to compel the Attorney General to review those matters within his domain before seeking the District Court's imprimatur on a subpoena request implicating domestic law.

Moloney and McIntyre do not argue that the Declaratory Judgment Act, 28 U.S.C. §2201 provides an independent basis of jurisdiction for their claims, but rely on Federal Question jurisdiction at 28 U.S.C. §1331. Moloney and McIntyre agree with the Government assertions that a writ of mandamus is considered extraordinary and will issue "only where the duty

to be performed is ministerial and the obligation to act peremptory, and plainly defined." *See United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931). Moloney and McIntyre submit that the language of the US-UK MLAT clearly imposes certain nondiscretionary legal duties on the Attorney General pursuant to which Moloney and McIntyre are entitled to the extraordinary writ of mandamus. Article 1§1bis states that "assistance shall not be available for matters in which the administrative authority anticipates that no prosecution or referral…will take place." Article 18§1states that "the Parties… shall consult promptly… concerning the implementation of this Treaty… in relation to a particular case" and that "such consultation may in particular take place…if either Party has rights or obligations under another bilateral or multilateral agreement relating to the subject matter of this Treaty."

4. The Appellants Interests were not Adequately Represented by Boston College.

The District Court's finding that the Appellants' interest in the protection of the materials subject to subpoena were adequately represented by Boston College. As ACLUM set forth in its *amicus curiae* brief at p. 12, an intervenor need only show than that his interest "*may* be" inadequately

represented by other parties, and this burden is to be "treated as minimal." *See Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972).

Doubts regarding adequacy of representation should be resolved in favor of the proposed Intervenor because it allows the court to resolve all related disputes in a single action. *Federal Savings and Loan Insurance Corp. v. Falls Chase Special Taxing District*, 983 F.2d 211, 216 (11th Cir. 1993). Where the goals of the applicant are the same as those of the plaintiff or defendant, adequacy of representation as of right is presumed, although that presumption can be rebutted. *Daggett v. Comm'n on Govt'l Ethics & Election Practices*, 172 F.3d 104, 109 (1st Cir. 1999). Additionally, the presumption is "weak." *Stone v. First Union Corp*., 371 F.3d 1305 (11th Cir. 2004).

The Appellants set forth in their Intervenors' Reply Memorandum why, as integral participants in the Belfast Project, they have a substantial and personal stake in the release of the subject materials, which if released and made public, will affect their lives and safety and/or the lives and safety of their confidantes. D. 18 ¶¶ 27, 29, 55, pp. 13, 22. Their interests, therefore, exceed the "modest" requirement of Fed. R. Civ. P. 24(a)(2). The test for whether the disposition of an action might have an adverse effect on

the ability of intervenors to protect their interest is "practical." *Daggett*, *supra,* 172 F.3d at 110. Even a "small threat" will suffice. *Cotter*, *supra* 219 F.3d at 35.

While both Boston College and the Appellants seek to quash the subpoenas on constitutional grounds, only Moloney and McIntyre sought the separate relief requesting an order remanding this matter to the Attorney General with instructions to consider the request for legal assistance in light of clearly defined standards under the US-UK MLAT. (Intervenors' Complaint, D. 18, para. 51, pp. 20-21.) It is indisputable that if the subpoenae were to be enforced and the materials released, the Intervenors' claims in relation to the Attorney General's duties would be moot, and their interests irreparably impaired.

To overcome a presumption of adequacy of representation based on an identity of goals, an intervenor "need only offer an adequate explanation as to why it is not sufficiently represented by the named party." *B. Fernandez & Hnos., Inc. v. Caribbean Warehouse Logistics, Inc.*, 440 F.3d 541 (1st Cir. 2000). While the goals of Moloney and McIntyre and Boston College coincide, "similar" does not mean "identical." *Stone*, *supra* 371 F.3d at 1312. The presumption described in *Daggett* therefore, is readily rebutted. Based on the "modest" standard required for a showing of inadequacy of

representation, it is clear that, with respect to the claims based on the constitutional right to life, the First Amendment and on the failure of the Attorney General to comply with terms of the MLAT, the Appellants' interests were not adequately represented by Boston College.

a. The Appellants' Constitutional Claims.

The Government continues to argue that "there is no constitutional 'right to life' that encompasses speculative harm to a non-U.S. citizen from non-U.S. government, third-party actors outside the United States." This assertion does not follow the Second Circuit's reasoning in *Doherty v. Thornburgh*, 943 F.2d 204, 208:

> "The fifth amendment provides, 'No person shall…be deprived of life, liberty or property, without due process of law' U.S. Const. amend. V. The term used to define those entitled to protection under the due process clause, i.e., 'person,' does not differentiate between citizens and non-citizens, but is broad and inclusive. [Citations omitted]."

Moreover, the question is best formulated as to whether the agency has adhered to due process, not whether a non-citizen should be excluded. In this regard, Moloney and McIntyre rely on the U.S. Supreme Court's formulation in *Mathews v. Eldridge* 424 U.S. 319, 334–35 (1976):

> "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances … [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the

> official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Accordingly, the Fifth Amendment to the Constitution is sufficiently flexible to afford extra-territorial protection to McIntyre in circumstances where the actions of the Attorney General will have a direct effect on his right to life.

In a similar vein, the Government casually dismisses Moloney's allegations of both the threat to his safety, and injury to his First Amendment rights in the free-flow of information associated with the Belfast Project, as well as the threat to future oral history projects and oral historians. Incredibly, the Government state that "[n]either establishes a colorable constitutional claim."

The Government appears to ignore entirely the District Court's finding that "[i]n general, the compelled disclosure of confidential research does have a chilling effect" and that "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." Addendum at 46, *citing United States v. Doe*, 460

F.2d 328, 333 (1st Cir. 1972); *Branzburg v. Hayes*, 408 U.S. 665, 693 (1972).

The District Court further noted that the interview materials collected by Moloney and McIntyre pursuant to a promise of confidentiality have "valid academic interests. They're of interest to the historian, sociologist, the student of religion, the student of youth movements, academics who are interested in insurgency and counterinsurgency, in terrorism and counterterrorism. They're of interest to those who study the history of religions." (Dec. 22, 2011 transcript at p. 8).

As ACLUM has stated: "prohibiting academics from defending their pledges of confidentiality - even when their own personal safety is at risk - would be an alarming and unprecedented infringement on First Amendment interests." [AmBr: 4]. ACLUM then proceeds to explain how "the Applicants' First Amendment interests in protecting their confidential relationships with sources gives them a stake in this action entitling them to intervene as of right." [AmBr: 3-8]. The ACLUM also elaborates on how the release of the materials will affect the personal rights of the Appellants. [AmBr: 8-10].

The Government, in dismissing the relevancy of Moloney's "beliefs, opinions, and subjective predictions," fails to address its own findings of fact

that "Boston College filed a motion to quash those portions of the subpoenas related to Price, relying in large part on detailed affidavits from Moloney and McIntyre." [Gov'tBr: 6].

III. THE APPELLANTS CHALLENGE TO THE DISTRICT COURT'S RULING ON THE MOTION TO QUASH ARE PROPERLY BEFORE THIS COURT.

The Government concedes that the District Court made specific findings with respect to its discretion to evaluate MLAT subpoenas under 18 U.S.C. §3512. [Gov'tBr: 42]. Specifically, the Government concedes that the District Court concluded that it had discretion –"analogous to that used in reviewing grand jury subpoenae" – to evaluate the subpoenas issued in this case, and that it proceeded to do so "under a hybrid standard crafted from cases addressing subpoenas in domestic civil and criminal cases."

As Moloney and McIntyre and ACLUM have set out in their briefs, the District Court only went so far, but failed properly to formulate the proper test for the use of its discretion, and in particular failed to employ the *Intel* factors to the inquiry. The Government seeks to row back from this position, and having failed to appeal the District Court's formulation, now seek to re-litigate the balancing test. [Gov'tBr:44 fn 25].

The Government also engages in a desperate attempt to excise the *Intel* factors as proper grounds for an inquiry under 18 U.S.C. §3512 by

making the ludicrous assertion that the Appellants' argument is undeveloped and unsupported and should be rejected as waived. Moloney and McIntyre specifically have pleaded the *Intel* factors at Paragraphs 18 and 89 of their Complaint, and have discussed it at pages 10, 22, and 42-44 of their brief, as well as in their Motion for Intervention (p.3). Furthermore, ACLUM has eloquently addressed the propriety of the deployment of the *Intel* factors in a matter of first impression.

The Government claims that "the notion that §3512 was intended to grant district courts the broad discretion of Intel, is directly contrary to the stated purpose of the statute." [Gov'tBr: 59]. However, the District Court recognized that "[a]lthough 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." [D:32 at 20].

Moreover, the argument that the District Court does not enjoy broad discretion directly contradicts the express language of the statute at 18 U.S.C. §3512. As the District Court set forth: "The text of 18 U.S.C. § 3512 is unambiguous in providing discretion to federal judges." [D:32 at 22]. The lower court further found that "Section 3512 thus passed with the intent that courts would act as gatekeepers in using their discretion to review MLAT

requests." [D:32 at 25]. It then concluded that "[t]his 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." [D:32 at 26].

That being the case, it is the Appellants contention that the *Intel* factors remain the preeminent test of reasonableness of applications for legal assistance from foreign countries pursuant to treaty.

Regarding the District Court's view of the *Intel* factors, the Government mischaracterises the lower court's analysis as providing "persuasive support for the conclusion that the Intel discretionary factors should not be employed when the government invokes §3512." [Gov't Brief at 47- 48]. The District Court in fact cautioned that "neither of the courts of appeals that evaluated the incorporation of United States law into an MLAT interpreted the UK-MLAT…Nor did either court interpret 18 U.S.C. § 3512."

The Government rejects the idea that the District Court, in utilizing its discretion under 18 U.S.C. §3512, should assess whether the authorities in the U.K. sought the information requested from less sensitive sources. [Gov'tBr: 49]. Unfortunately for the Government, the District Court already found that it should make just such as assessment:

> "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.'" [D:32 at 33, *citing Branzburg v. Hayes*, 408 U.S. 665 (1972)]

The Government confuses the Belfast Project interviews with the interviews provided to the news reporting sources in the U.K. [A039-40, 047]. Indeed, one of the grounds of bad faith which Moloney and McIntyre allege is that the Requesting State made no attempt to obtain the news reporting sources on which the subpoenae were grounded. The Government also dismiss the allegations that Price is not subject to personal jurisdiction in the U.K., is not subject to extradition to the U.K., and is criminally liable in the Republic of Ireland as involving "complex assessments of U.K. and Irish law which §3512 eschews." *Contra proferentem*, the Government states that "those questions are fundamentally matters for law enforcement authorities in the U.K. and the Republic of Ireland, not for third parties to litigate in an American court." Moloney and McIntyre could not agree more, and the absence of any criminal procedure in either jurisdiction is a clear ground for the quashing of a subpoena under 18 U.S.C. §3512 and the US-UK MLAT .

The Government complains that "with respect to the First Amendment 'balancing analysis,' nowhere do appellants explain why the Attorney

General's discretionary decisions play any role in such an analysis." To the contrary, Moloney and McIntyre explained very clearly that the Attorney General's conduct should inform the District Court's discretion. The fact that the District Court "reviewed materials properly submitted by the government *ex parte* in connection with the motion to quash…and concluded that the subpoenas were issued, 'in good faith, and relevant to a nonfrivolous criminal inquiry'" begs the question as to how the District Court can assess whether the subpoenae were issued in good faith in the absence of evidence that the Attorney General complied with his obligations under the MLAT, or whether the criminal inquiry is nonfrivolous, without reviewing factual allegations that there no criminal proceedings are extant.

IV. THE APPELLANTS AND AMICUS CLEARLY SET FORTH THE DISTRICT COURT'S ERRORS.

The Government's assertions that ACLUM'S arguments go to issues not properly before the Court essentially revisit the same arguments addressed above in relation to the standards for intervention under Rule 24(a); the First Amendment rights which would be impaired absent intervention; and whether or not the Appellants interests are adequately represented by Boston College.

Whereas the Government recognizes that Boston College's resistance to the subpoenae were grounded in large measure on the affidavits of both

Moloney and McIntyre, the Government contends in the same breath that the Appellants have no interest worth protecting.

ACLUM's suggestion that enactment of 18 U.S.C. §3512, after the ratification of the US-UK MLAT injected *Intel's* discretionary standards into a District Court's consideration of MLAT subpoenas is entirely reasonable and consistent with case law. In contrast, the Government seeks to define "efficiency" in such requests not with an adherence to domestic standards, but rather with an evisceration of those tried and tested standards for the employment of discretionary decision-making to a foreign government's subpoena request.

V. THE DISTRICT COURT ERRED IN FINDING ON THE MERITS THAT THE ATTORNEY GENERAL PROPERLY HAD DISCHARGED HIS OBLIGATIONS .

The Government's claim that the civil complaint in 11-cv-12331 was properly dismissed for all the same reasons intervention was properly denied, namely, that the US-UK MLAT precludes any rights for any private party; review under the APA was not available; and that McIntyre cannot invoke the constitution; Moloney could not demonstrate standing to assert his First Amendment claims as the First Amendment interest put forth by him was "too contingent or speculative" to provide "a basis for intervention as of right."

All of the above ignores the statutory provisions of Fed. R. Civ. P. 12(b)(6) which permits dismissal upon failure to state a claim upon which relief can be granted. Moloney and McIntyre properly had asserted causes of action under the Constitution, the APA, as well as 18 U.S.C. §3512, and which gave rise to their claims for judicial review. Accepting all factual allegations in their Complaint as true, and as discussed above, Moloney and McIntyre had alleged sufficiently colourable claims to survive a motion to dismiss.

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 subpoenae 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: March 19, 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 March 19, 2012.

/s/ Eamonn Dornan

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Dated this 19th day of March, 2012

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