No. 12-1236

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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,

Petitioner – Appellee

v.

TRUSTEES OF BOSTON COLLEGE,

Movant – Appellant

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

BRIEF OF APPELLANT TRUSTEES OF BOSTON COLLEGE

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Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1, the Trustees of Boston College state that Boston College is a nonprofit organization. It has no parent corporation and no publicly-held corporation owns ten percent or more of its stock.

Jurisdictional Statement

The district court had federal question jurisdiction under 28 U.S.C. § 1331 because the subpoenas to Boston College that are the subject of this action were issued pursuant to a treaty between the United States and the United Kingdom and 18 U.S.C. § 3512. The court of appeals has jurisdiction of this appeal under 28 U.S.C. § 1291 because this appeal is from a final decision of the district court entered on January 20, 2012 (Add. 51[*]) that disposed of all parties' claims. Boston College filed a timely notice of appeal from that decision on February 21, 2012 (Jt. App. 13[**]).

Statement of the Issues

1. Did the district court fail to strike the appropriate balance between the need to protect confidential academic research materials that have substantial value to society, against a foreign government's request to gather information about alleged criminal activities in that country forty years ago?

2. Did the district court err in declining to determine whether materials it ordered disclosed were relevant, when the First Circuit requires review of

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[*] The district court's December 16, 2011, Memorandum and Order and January 20, 2012, Findings and Order are reproduced in an Addendum to this brief. References in this brief to the pages in that addendum are preceded by the prefix "Add."

[**] References in this brief to the Joint Appendix are preceded by the prefix "Jt. App." References in this brief to the Sealed Appendix are preceded by the prefix "Sealed App."

subpoenas for confidential academic research materials with "heightened sensitivity" to determine that the information produced is "directly relevant"?

3. Did the district court err in ordering production of materials it was "virtually certain" were available elsewhere, when the First Circuit requires review of subpoenas for confidential academic research materials not to require production if the materials are readily available from a less sensitive source?

Statement of the Case

Two separate sets of subpoenas (the "May 2011 subpoenas" and the "August 2011 subpoenas") were the subject of the proceedings below. This appeal by Boston College relates only to the August 2011 subpoenas. Two individuals filed parallel appeals (Appeal Nos. 11-1251 and 12-1159), to which Boston College is not a party, that relate to both subpoenas. This Statement of the Case first describes the proceedings below that relate to the August 2011 subpoenas that are the subject of this appeal. A brief description of the proceedings below relating to the May 2011 subpoenas follows, to provide background information regarding the earlier stages of this action.

1. The August 2011 subpoenas that are the subject of this appeal.

On August 4, 2011, Commissioner's Subpoenas dated August 3, 2011, directed to the John J. Burns Library at Boston College, to Robert K. O'Neill, the Burns Librarian, and to Boston College University Professor Thomas E. Hachey

(collectively, "Boston College") were served on Boston College. The subpoenas stated that they were issued pursuant to a treaty between the United Kingdom and the United States, 18 U.S.C. § 3512, and an Order of the district court dated March 31, 2011.

The caption of the subpoenas stated that they were "in the matter of Dolours Price," and the subpoenas stated that they were issued for the purpose of assisting the United Kingdom

> "regarding an alleged violation of the laws of the United Kingdom, namely, murder, contrary to Common Law; conspiracy to murder, contrary to Common Law; incitement to murder, contrary to Common Law; aggravated burglary, contrary to Section 10(1) of the Theft Act (Northern Ireland) of 1969; false imprisonment, contrary to Common Law; kidnapping, contrary to Common Law; and causing grievous bodily harm with intent to do grievous bodily harm, contrary to Section 18 of the Offenses Against the Person Act of 1861."

The subpoenas commanded production of audiotaped or videotaped interviews, transcripts, and other documents "containing information regarding the abduction or death of Mrs. Jean McConville."

The subpoenas sought information from an oral history archive at Boston College that contains scores of interviews with people who from 1969 through the early 2000s were participants in the "Troubles" in Northern Ireland. Jt. App. 63-64, ¶ 3. Those interviews were taken under a promise of confidentiality as part of

the "Belfast Project" sponsored by Boston College between 2001 and 2006. Jt. App. 63-65, ¶¶ 3, 6.

Boston College filed a Motion to Quash the August 2011 subpoenas on August 17, 2011. Jt. App. 3. Docket No. 12. On December 16, 2011, the district court issued a Memorandum and Order that denied Boston College's motion to quash but agreed to conduct, as Boston College had requested in the form of alternative relief, an *in camera* review to determine what materials, if any, Boston College would be compelled to disclose. Add. 1. Following that *in camera* review, the district court ordered production of a total of 84 interviews with eight Belfast Project interviewees, and any materials related to those interviews, in response to the August 2011 subpoenas. January 20, 2012, Findings and Order, Add. 51, and Sealed App. 1.[*] Boston College filed its notice of appeal from that ruling on February 21, 2012. Jt. App. 11.

The district court *sua sponte* stayed production of the materials it ordered produced in response to the August 2011 subpoenas until three days after the First Circuit lifts the stay it issued in the parallel appeals (Appeal Nos. 11-1251 and 12-1159) for production of materials in response to the May 2011 subpoenas.

[*] The district court's Findings and Order refers to a total of seven interviewees but, as shown below (at 43-44), because a single transcript of an eighth interviewee was mislabeled in the Belfast Project records as the interview of one of the other seven, the total number of interviewees whose confidential interview materials the district court ordered produced was actually eight, not seven.

January 20, 2012, Findings and Order, Add. 54. Boston College moved that the stay be enlarged to remain in effect while its appeal is pending. Jt. App. 8, Docket No. 63. The district court declined to act on that motion "as it is appropriately an issue for the Court of Appeals." Jt. App. 8, Electronic Order March 26, 2012. Boston College filed the same motion in this court, and it was allowed April 24, 2012.

2. The May 2011 subpoenas that are not the subject of this appeal.

On May 5, 2011, Boston College was served with a first set of Commissioner's Subpoenas, dated May 2, 2011, for the production of materials from the Belfast Project. The May 2011 and August 2011 subpoenas bore the same caption ("In the Matter of Dolours Price"), stated that they were issued pursuant to the same treaty, statute, and prior court order, and described the same purpose. The May 2011 subpoenas sought production of "original tape recordings of any and all interviews of Brendan Hughes and Dolours Price" and related transcripts and other materials. On May 26, 2011, Boston College produced the audio recordings, transcripts, and word processing files of the interviews of the late Brendan Hughes, because the conditions pertaining to the confidentiality of his interviews had terminated with his death.

On June 7, 2011, Boston College filed a Motion to Quash the May 2011 subpoenas to the extent they sought materials relating to Dolours Price (Jt. App. 2,

Docket No. 5), together with supporting affidavits (Jt. App. 29-71). The district court's December 16, 2011, Memorandum and Order (Add. 1) and subsequent rulings dealt with both of the two Motions to Quash Boston College had filed that addressed separately the May 2011 and August 2011 subpoenas.

On August 31, 2011, the former director of the Belfast Project, Ed Moloney, and one of the interviewers, Anthony McIntyre, who was formerly associated with the IRA and who conducted interviews with others who had ties to the IRA, filed a Motion to Intervene in the action Boston College had filed. (Jt. App. 3, Docket No. 18) The district court denied that motion at the same time that it agreed to Boston College's request to review the interview materials *in camera*. December 16, 2012, Memorandum and Order, Add. 47. Shortly thereafter, the district court ordered the production to the government of the interview materials for Dolours Price. December 27, 2012, Order, Jt. App. 195. Boston College did not appeal from that Order.[*]

Moloney and McIntyre appealed from the December 27, 2012, Order, and at their request, this court on December 30, 2011, stayed production of the Dolours Price interview materials from the United States Attorney to the United Kingdom.

[*] Boston College was aware that Dolours Price herself had already disclosed her involvement in the Belfast Project and provided much of the information about her role in the IRA and the disappearances of individuals, including Jean McConville, in public interviews, which indicated that she was not seeking to protect the confidentiality of her Belfast Project interviews. Jt. App. 74 and 76.

Following the denial of their motion to intervene in this action brought by Boston College, Moloney and McIntyre filed a separate action in the district court (No. 11-cv-12331). That action was dismissed on January 25, 2012.

Moloney and McIntyre appealed from the denial of their motion to intervene in this action and the dismissal of their separate action (Appeal Nos. 11-1251 and 12-1159, respectively). Those appeals were consolidated and argued in April 2012 and are now under advisement by this court. Those appeals and Boston College's present appeal have a degree of commonality because they all arise from the attempt to compel disclosure of information from the confidential academic research gathered by the Belfast Project. While the two appeals have some overlapping issues, Boston College's appeal is distinct from, and does not turn on the outcome of, Moloney and McIntyre's appeals. Boston College's appeal is focused on the district court's order that compels disclosure of interview materials from eight individuals formerly associated with the IRA. The appeals by Moloney and McIntyre, in contrast, are focused on whether they should have been allowed to intervene in the proceeding brought by Boston College to protect the confidential research materials gathered by the Belfast Project, whether the Attorney General properly exercised his discretion to authorize the issuance of the May 2011 and August 2011 subpoenas, and whether their individual constitutional rights have been violated.

Statement of Facts

The Belfast Project interview materials

The interview materials sought by the subpoenas are part of an oral history archive collected and preserved by Boston College that constitute a unique resource for academic research: the stories told by participants in the "Troubles" in Northern Ireland from 1969 through the early 2000's. Jt. App. 63-64, ¶ 3. Those stories were collected as part of an undertaking sponsored by Boston College called the "Belfast Project." Starting in 2001 and extending through approximately 2006, members of the Provisional Irish Republican Army, the Provisional Sinn Fein, the Ulster Volunteer Force, and other paramilitary and political organizations were interviewed regarding their involvement in the Troubles. *Id*.; Jt. App. 55, ¶ 26.

1. The purposes of the Belfast Project.

The purposes of the Belfast Project were to gather and preserve for posterity recollections that would help historians and other academicians illuminate the intricacies of the Northern Ireland conflict in studies and books, and that would advance knowledge of the nature of societal violence in general, through a better understanding of the mindset of those who played a significant part in the events in Northern Ireland. Jt. App. 30, ¶ 5, 47, ¶ 3, and 53-54,¶¶ 21-23.

2. The initiation of the Belfast Project.

The Belfast Project was conceived following the 1998 Good Friday Agreement (GFA). The GFA was negotiated by the British and Irish governments, together with the major political parties of Northern Ireland including Sinn Fein, the political wing of the Irish Republican Army (IRA). The IRA was the principal group fighting to achieve the withdrawal of Britain from Northern Ireland and seeking Irish reunification and independence. Jt. App. 47-48, ¶ 4.

Ed Moloney, a prominent Irish journalist and author, with the support of Lord Paul Bew, then a faculty member at Queens University Belfast and a visiting scholar at Boston College, recommended to Boston College the value of preserving in an oral history the recollections of those directly involved in the Troubles. Jt. App. 29, ¶ 2, 49-50, ¶¶ 10-11, and 64, ¶ 4. They believed that, with the dramatic changes in Northern Ireland following the GFA, it was essential to begin collecting and preserving the memories of those who had been combatants for over 20 years. Jt. App. 49-50, ¶¶ 10-12. Building such a resource would have great value for future historians. Jt. App. 30, ¶ 3.

3. The sponsorship of the Belfast Project by Boston College.

The Irish Collection at the Burns Library of Boston College has been recognized as one of the most comprehensive collections of Irish historical, political, and other materials outside of Ireland. Jt. App. 63, ¶ 2. Paul Bew had

been a Burns Scholar at Boston College in the late 1990s, and was therefore familiar with the institution and its importance as a principal repository of Irish history materials in the United States. Jt. App. 29, ¶ 2.

These factors made Boston College the ideal sponsor for the Belfast Project and the natural host for its archive. In fact, last year the British and Irish governments donated to Boston College highly sensitive papers regarding the GFA and its implementation, confirming that both governments view Boston College as a neutral, unbiased, and secure repository for important materials relating to this history. Jt. App. 54, ¶ 24, and 67, ¶ 15.

4. The importance of confidentiality to the success of the Belfast Project.

It was recognized from the very start that the success of the Belfast Project would depend entirely on the willingness of a large number of the participants to talk, and talk candidly, to interviewers for the Project. It was equally obvious that the interviewees' willingness to participate depended on giving them assurances that their identities, and what they disclosed in the interviews, would be held in strict confidence. Jt. App. 30-31, ¶¶ 6-7, 38-39, ¶ 8, and 66, ¶ 11. If the participants had not been promised confidentiality, their memories would not have been preserved and would have been lost upon their deaths. Jt. App. 66, ¶ 12.

The reason those interviewed for the Belfast Project required confidentiality was not simply their interest in not incriminating themselves or their colleagues.

Of equal or greater importance was the danger of retaliation from other IRA members. The IRA imposes a code of silence akin to the concept of "omerta" in the Mafia. Jt. App. 38-39, ¶ 8, and 55, ¶ 28. Because those who were perceived as having violated that code were subject, under IRA rules, to punishment by death, interviewers and interviewees who had been associated with the IRA were naturally unwilling to participate in the Belfast Project without assurance that the interviews would be kept locked away until the interviewees' deaths. *Id*. Potential interviewees for the Belfast Project were therefore assured that their identities and the contents of their interviews would be kept confidential and not disclosed until the earlier of their agreement to permit disclosure or their death. Jt. App. 38, ¶¶ 6-7.

The assurances of confidentiality were documented when the interviews were concluded. Each interviewee was given a form to donate his or her interview materials to the Burns Library at Boston College on the express condition that the materials would not be disclosed, absent the interviewee's permission, until after his or her death. Jt. App. 39, ¶ 9, 65, ¶ 29, and 65, ¶ 6.

5. Protection of the interview materials.

Boston College has scrupulously observed the expectations of confidentiality given to those interviewed for the Belfast Project. As required by the terms of the Belfast Project, each interviewee was assigned a letter code, and that letter,

rather than the interviewee's name, identified the person's interview materials that were sent to Boston College. Jt. App. 70. The interview materials are stored at the Burns Library of Boston College, in a secure area, monitored by cameras, with access controlled by a combination of keyed lock and entry of a security code. Only the few interviewers and academicians directly involved in the Project have been permitted to see the materials of those interviewees who have not died. Jt. App. 31, ¶ 8-9, and 65-66, ¶¶ 9 and 10.

The subpoenas

The only information that Boston College is able to glean regarding the reasons the May 2011 and August 2011 subpoenas were issued comes from the face of those subpoenas: the subpoenas state that they are to assist the United Kingdom "in the matter of Dolours Price," that they involve alleged violations of United Kingdom law for murder, conspiracy to murder, incitement to murder, aggravated burglary, false imprisonment, kidnapping, and causing grievous bodily harm with intent to do grievous bodily harm, and (from the August 2011 subpoenas that are the subject of this appeal) that they relate to "the abduction or death of Mrs. Jean McConville."

Boston College realizes that the United States Attorney filed *ex parte* and under seal additional information in support of the request that the subpoenas be issued. Boston College obviously has no access to that additional information, but

it is generally understood that the subpoenas seek information on behalf of the Police Service of Northern Ireland (PSNI). Jt. App. 32-33, ¶ 13. In its final ruling in this case, the district court at least in part confirmed that understanding, when it referred to information known to "law enforcement authorities within the requesting state." January 20, 2012, Findings and Order, Add. 52-53.

Boston College is aware that numerous media reports have described the subpoenas as the direct result of a PSNI investigation into the 1972 disappearance of Mrs. McConville and the discovery of her body in 1973. See, e.g., Ross Kerber, *Kerry Reaches Out on Northern Ireland "Troubles" Records*, REUTERS, Jan. 27, 2012, http://www.reuters.com/article/2012/01/27/us-usa-britain-ira-idUSTRE80Q27R20120127 ("In a statement on Friday, The Police Service of Northern Ireland said that 'Detectives have a legal responsibility to investigate all murders and pursue any and all lines of inquiry – for the victims, for the next-of-kin and for justice. As a result, detectives from the PSNI'S serious crime branch have asked for all the material held by Boston College."); Liam Clark, *Cold Case Team Is Behind US Terror Files Court Battle*, BELFAST TELEGRAPH, Jan. 5, 2012, http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/cold-case-team-is-behind-us-terror-files-court-battle-16099373.html.

In keeping with these reports, Boston College refers in this brief to the PSNI as the instigator of the subpoenas at issue in this appeal, and the entity that will

obtain access to the confidential academic research materials from the Belfast Project archives if the materials the district court ordered turned over have to be produced. This court, which has access to sealed materials, very likely will be able to confirm the accuracy of that characterization of the role of the PSNI in this matter.

Summary of Argument

The First Circuit has consistently and repeatedly held that confidential academic research materials are entitled to special protection when a subpoena seeks to compel disclosure of such materials (pp. 19-27). The special protection requires a court to balance the potential harm to the free flow of information from compelled disclosure against the need for disclosures from the confidential academic research (pp. 19-23). When the information gathered in the course of academic research was provided by individuals with an expectation of confidentiality, special protection is particularly warranted (pp. 23-24). Because the Belfast Project interviews were given with an expectation of confidentiality, and the personal safety of the interviewers and interviewees is at risk, the need to protect the confidentiality of those materials is especially acute (pp. 24-25). More generally, unwarranted disclosure can damage future oral history projects, because of the chilling effect such disclosure will have on the willingness of individuals to participate in such projects (pp. 25-27).

The district court found that the Belfast Project materials were the kind of confidential academic research that is entitled to special protection under First Circuit precedents, and that disclosure of them would have an effect on the free flow of information and oral history projects (pp. 28-30).

The district court made serious mistakes in applying the required balancing test to the Belfast Project materials (pp. 30-37). The First Circuit has defined "heightened sensitivity" as requiring that the production of academic research materials sought by a subpoena only be compelled if the materials are "directly relevant" to the subject of the subpoena and "not readily available from a less sensitive source" (pp. 31-33). But the district court did not demonstrate such heightened sensitivity in its *in camera* review of the Belfast Project materials (pp. 33-37). This court reviews orders on motions to quash for abuse of discretion, which includes serious mistakes in weighing relevant factors (pp. 33-34). The district court said that it did not review the Belfast Project materials to see if they were relevant, much less "directly relevant," to the subject of the August 2011 subpoenas (pp. 34-35). Not employing the test of direct relevance required by First Circuit precedents was a serious mistake requiring reversal of the district court's order that Boston College produce Belfast Project materials (pp. 35-37).

The district court itself documented the effect of its serious mistake. It acknowledged that only one interviewee provided information "responsive to the

subpoena[s]," yet ordered production of seven additional interviewees' interviews (pp. 37-42). A review of the specific interview materials that the district court ordered produced demonstrates that they contain information that does not meet the First Circuit's directly relevant test, and in two cases involve information the district court itself said was likely available from a less sensitive source (pp. 43-54.)

Because of the district court's serious mistakes, its order compelling production of the Belfast Project materials should be reversed (p. 54)

ARGUMENT

In its initial ruling on Boston College's motion to protect the Belfast Project materials, the district court acknowledged that compelled disclosure of confidential research materials has a chilling effect on the free flow of information, and that, as a result, the district court must undertake a balancing of competing interests to find the appropriate balance between protecting confidential academic research and the need for this information by law enforcement. December 16, 2011, Memorandum and Order, Add. 40. In addition, the district court expressly recognized that, as part of this balancing test, settled precedent in the First Circuit required the district court to apply a "heightened scrutiny" standard that limits what must be produced to information that is "directly relevant" and not "readily available from a less restrictive source." *Id*. at 40-41; January 20, 2012, Findings and Order, Add. 53.

Boston College advocated these principles and that standard of review, and supports the district court's adoption of them. As the government noted in its Brief as Appellee in the appeals filed by Moloney and McIntyre (Appeal Nos. 11-1251 and 12-1159), Doc. 00116346243 at 41 and 44 n.25, the government did not appeal the district court's ruling that set out the standard of review, and so, as the government acknowledged there, the "merits of that ruling . . . [were] not properly before this Court." *Id*. at 41. For the same reason, the merits of that ruling are not before this court in Boston College's appeal, either.

Boston College fully supports the decision of the district court, in principle, to accept responsibility for carrying out the balancing test and utilizing the standard of review required by First Circuit precedents. Boston College contends in this appeal, however, that the district court made serious mistakes in applying these requirements in its *in camera* review of the confidential Belfast Project interview materials. There is no evidence that the district court in fact gave weight to the need to protect the confidentiality of persons interviewed who, unlike Dolours Price (see Jt. App. 74 and 76.), have not chosen to disclose publicly their roles with the IRA or their participation in the Belfast Project. Nor is there evidence that the district court gave adequate weight to the harm to the free flow of information caused by the forced disclosure of confidential research information given by individuals, who, unlike Dolours Price, have maintained confidentiality

regarding their involvement in this project. Indeed, the evidence, far from indicating that an appropriate balancing test was conducted, reveals instead that the standard of review employed by the district court to determine what should be produced was incorrect.

Most grievously, after acknowledging its duty under First Circuit precedents to order production only of materials it found "directly relevant" to the subject matter of the August 2011 subpoenas, *i.e.*, the abduction or death of Mrs. Jean McConville, the district court said that it did not apply a relevance test, but instead determined only whether materials were within the "scope" of the subpoenas. January 20, 2012, Findings and Order, Add. 53. Even under that test, the district court stated that it found only one interviewee's information "responsive to the subpoena." Yet it ordered production of interviews from seven additional interviewees. *Id*., Add. 47, and Sealed App. 1.

Because of the serious mistakes the district court made in applying the First Circuit precedents, the district court's Findings and Order should be reversed.

I. SETTLED FIRST CIRCUIT PRECEDENTS REQUIRE BALANCING THE NEED TO PROTECT THE FREE FLOW OF INFORMATION AND HEIGHTENED SENSITIVITY IN REVIEWING SUBPOENAS SEEKING CONFIDENTIAL ACADEMIC RESEARCH MATERIALS.

It is well-settled in the First Circuit that academic research materials are entitled to special protections when subpoenas, whether in civil or criminal proceedings, seek to compel their disclosure.

A. The First Circuit has consistently and repeatedly stated that academic research materials are entitled to special protection.

More than a decade ago, the First Circuit held that "when a subpoena seeks divulgement of confidential information compiled by a[n] . . . academic researcher in anticipation of publication, ***courts must apply a balancing test*** . . . ." *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716 (1st Cir. 1998) (emphasis added).

In *Cusumano* the First Circuit established that to determine whether, and to what extent, to enforce a subpoena for the compelled disclosure of academic research materials, the reviewing court must balance the "need for the information on one pan of the scales and those that reflect the objector's interest in confidentiality and the potential injury to the free flow of information that disclosure portends on the opposite pan." *Id*. (citations omitted).

The First Circuit in *Cusumano* explained that the balancing test was required because "[a]cademicians engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalists." 162 F.3d at 714. Academic research materials deserve such protection because:

> "scholars . . . are information gatherers and disseminators. If their research materials were freely subject to subpoena, ***their sources likely would refuse to confide in them***. As with reporters, a drying-up of sources would sharply curtail the information available to academic researchers and thus would restrict their output. Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses."

Id. (emphasis added).

Given the importance of protecting and fostering academic research, the First Circuit concluded that "courts ***must balance*** 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 (emphasis added), quoting *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583, 595-96 (1st Cir. 1980).

The government argued in the district court that no special protection should be accorded to academic research materials, citing the United States Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), as rejecting any journalistic, and therefore any analogous academic research, privilege in criminal proceedings. Boston College does not contend that there is an absolute privilege that protects all academic research materials from any compelled discovery in a criminal matter.

Boston College does contend that, based on First Circuit precedents, the academic research materials that the Belfast Project gathered are subject to special protection. As the First Circuit itself notes, "our own cases are in principle somewhat more protective" than *Branzburg*. *In re: Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004). In *In re: Special Proceedings*, a case involving a subpoena to a reporter to discover the source that disclosed sealed materials in a criminal investigation, the First Circuit held that "[t]he three leading cases in this circuit

require 'heightened sensitivity' to First Amendment concerns and invite a 'balancing' of considerations (at least in situations distinct from *Branzburg*). *Id.* (citing *Cusumano*, 162 F.3d at 716-17, a civil subpoena case, *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182-83 (1st Cir. 1988), a criminal case, and *Bruno & Stillman, Inc.*, 633 F.2d at 596-99, a civil case).

Courts in many other jurisdictions have similarly acknowledged the need to protect materials academic researchers gather from sources that have a reasonable expectation of confidentially. "Federal courts interpreting the discovery rules have frequently denied or limited discovery absent claims of formal privilege, based upon reasons of public policy." *Plough, Inc. v. Nat'l Academy of Sciences*, 530 A.2d 1152, 1157 (D.C. 1987) (citation omitted). *See also Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1548 (11th Cir. 1985) (protection of confidential research information "does not depend upon a legal privilege").

In *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1274 (7th Cir. 1982), the Seventh Circuit considered the assertion that subpoenas seeking scholarly research materials "touch[] directly upon interests of academic freedom." Noting the long line of precedents, including many at the level of the United States Supreme Court, that hold academic freedom to be a core First Amendment value, the Court concluded that "to prevail over academic freedom ***the interests of government***

must be strong and the extent of the intrusion carefully limited" (672 F.2d at 1275 (emphasis added)).

This Court recently reaffirmed that the First Amendment protects the right to gather information on matters of legitimate public concern:

> It is firmly established that the First Amendment's aegis . . . encompasses a range of conduct related to the gathering and dissemination of information. . . . [It] "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978); see also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is . . . well established that the Constitution protects the right to receive information and ideas."). An important corollary to this interest in protecting the stock of public information is that "[t]here is an undoubted right to gather news 'from any source by means within the law.'" *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681– 82 (1972)).

Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011).

These protections are particularly important when the materials gathered in the course of academic research were provided by sources with an expectation of confidentiality. As the court in *Richards of Rockford, Inc.* v. *Pacific Gas & Elec. Co.*, 71 F.R.D. 388, 389 (N.D. Cal. 1976), recognized, "society has a profound interest in the research of its scholars, work which has the unique potential to facilitate change through knowledge." That court went on to acknowledge that

> "[m]uch of the raw data on which research is based simply is not made available except upon a pledge of confidentiality. Compelled disclosure of confidential information would without question severely stifle research into questions of public policy, the very subjects in which the public interest is the greatest."

(71 F.R.D. at 389-90). *See also United States* v. *Doe*, 460 F.2d 328, 333 (1st Cir. 1972), *cert. denied*, 411 U.S. 909 (1973) (acknowledging "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").

When federal funds are used to support research that gathers confidential personal information, Congress has memorialized the same principle in statutes. See 42 U.S.C. 3789g(a) (2006) (federally-sponsored research regarding criminal records in the hands of researchers "shall be immune from legal process"). See also 42 U.S.C. § 241(d) (2006) (if Secretary of Health and Human Services so authorizes persons engaged in biomedical, behavioral, clinical, and other federally-sponsored research, they "may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceedings to identify" research subjects).

The need to protect confidentiality in the case of the Belfast Project materials is particularly pressing, because of the personal safety concerns of the participants, as Boston College has previously documented (see pp. 11-12, above).

IRA loyalists who still follow that organization's practices may seek to take vengeance against those whose involvement in the Belfast Project is now revealed and yields new disclosures. Jt. App. 57, ¶ 33. The interviewers for the Belfast Project have also expressed their own apprehensions, and one experienced what appeared to be retribution aimed at him and his family and became aware of death threats against him, when his involvement in the Belfast Project was first disclosed. Jt. App. 32, ¶ 12, 40-41, ¶ 18, and 57, ¶ 33.

A 2009 decision of the High Court of Belfast that Boston College presented to the district court in support of its Motion to Quash, *In re: Application by D/Inspector Galloway* (Jt. App. 13), demonstrates the real and persistent danger to those making disclosures about the IRA. In that case, the court declined to require a journalist to produce information relevant to a horrific crime that the journalist had gathered regarding the activities of the Real IRA. The decision was based not only on grounds of journalistic privilege, but also on the conclusion that there was a demonstrable risk to her life if she was required to disclose the information. Jt. App. 23 This decision confirms that concerns about the safety of those who participated in the Belfast Project are not merely speculative.

The need to protect the Belfast Project materials from unwarranted disclosure is broader than the obligation to keep faith with the interviewees and to protect the participants in the Project, the interviewees and those who interviewed

them, from harm, as important as those considerations are. The compelled disclosure of confidential oral history materials will inevitably have a chilling effect on future academic research and oral history projects, because potential participants who seek reasonable assurances of confidentiality and privacy will be less likely to receive those assurances, and as a result less likely to participate.

Courts have cited their concern that compelled disclosures of confidential materials will inhibit other research as a primary reason why it is essential to protect such materials. In *Farnsworth* v. *Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985), the Eleventh Circuit upheld protection of confidential patient information obtained from "a population willing to submit to in-depth questioning" out of concern that production "could seriously damage this voluntary reporting." Similarly, in *Snyder* v. *Amer. Motors Corp.*, 115 F.R.D. 211, 215-16 (D. Ariz. 1987), the court quashed a subpoena to avoid what it saw as "[t]he potential for a chilling effect on research [that] appears great." The court in *Snyder* expressed particular concern about the impact of compelled disclosure on "members of the public who volunteer, under a promise of confidentiality, to provide information for use in such studies [citation omitted]." *See also Harris* v. *Upjohn Co.*, 115 F.R.D. 191, 192 (S.D. Ill. 1987) (protective order crafted for identities of reporting physicians in order to prevent "a deterrent on efforts to conduct research in the medical and science community").

Those concerns are directly relevant in this case. When the stories people tell may expose them to risk of personal harm, criminal prosecution, or disclosure of secrets they do not want revealed during their lifetimes, the people who can tell those stories naturally expect confidentiality. If confidentiality is breached by force disclosure through the use of a subpoena, oral history projects dealing with sensitive or controversial subjects in the future will inevitably become more difficult to pursue. Jt. App. 40, ¶ 17, 54-55, ¶ 25, 57, ¶ 32, and 67, ¶ 16.

Oral historians are aware of, and deeply troubled by, the news that the confidential materials held by Boston College from the Belfast Project may be ordered disclosed to governmental authorities despite the fact the interviews were given with the expectation they would be kept sealed until the interviewee's death. Jt. App. 31-32, ¶¶ 10 and 11. The former president of the Oral History Association attested to the fact that the mandated disclosure of the confidential materials sought under the subpoenas from Boston College will harm the ability of others in the field to obtain essential historical materials. Jt. App. 36, ¶ 5. If the confidence promised to interviewees in the Belfast Project is breached, potential interviewees in future oral history projects may decline to participate in such projects, and vital historical work will be diminished. *Id*., ¶¶ 6-7.

B. The facts found by the district court confirm that the Belfast Project materials are entitled to the special protection afforded by First Circuit precedents to confidential academic research.

In order for the interviews gathered by the Belfast Project to qualify for the special protection afforded by the First Circuit precedents, they must meet the criteria set out in those precedents for confidential academic research. The facts found by the district court clearly establish that the Belfast Project interviews constitute confidential academic research, and are therefore entitled to such protection.

The district court expressly found that the Belfast Project is a "wholly legitimate academic exercise," and that the interview materials the court examined are "an important repository of significant historical records." Jt. App. 201. The district court explained in detail the nature of that historical significance as follows:

> . . . it's clear to the Court, and this is where I've, I've spent more of my analysis and looked at these materials more carefully, these materials are of interest. They are of interest – 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. And I'm sure others.

Jt. App. 174.

The district court also found that "the facts of this case indicate that Boston College considered the interviews and content of the Belfast Project to be confidential." December 16, 2011, Memorandum and Order, Add. 42. After starting to read the transcripts as part of its *in camera* review, the district court said it was "perfectly clear to me" that the information would not have been disclosed if it was known the information would be disclosed to the British authorities in Northern Ireland. Jt. App. 174. Because the interview information would not have been given, the district court concluded that it would have been lost to historians. *Id*.

Based on these findings, the district court expressly found that "it really does look like revealing this [information from a Belfast Project interview], contrary to what people understood [was a promise of confidentiality], that it would have some effect on the free flow of ideas." Jt. App. 175.

Finally, the district court recognized that "the compelled disclosure of confidential research does have a chilling effect," and could "have a negative impact on . . . [Boston College's] research into the Northern Ireland Conflict, or perhaps even other oral history efforts." December 16, 2011, Memorandum and Order, Add. 45-46.

These findings by the district court confirm that the materials gathered by the Belfast Project are the kinds of confidential academic research that the First

Circuit and other courts recognize warrant special protection from compelled disclosure in response to subpoenas.

II. THE DISTRICT COURT MADE SERIOUS MISTAKES IN APPLYING THE BALANCING TEST THE FIRST CIRCUIT REQUIRES WHEN A SUBPOENA SEEKS CONFIDENTIAL RESEARCH MATERIALS.

The First Circuit has clearly stated that a balancing test applies when a subpoena seeks confidential academic research materials, because of the need for "heightened sensitivity" to First Amendment concerns. Although the district court acknowledged its obligations under those precedents, it made serious mistakes in carrying out those obligations in its *in camera* review of the academic research materials in the Belfast Project sought by the August 2011 subpoenas. A review of the interviews that the district court ordered produced provides little evidence that any weight was given to First Amendment concerns in balancing confidentiality interests against the government's need for the information. To the contrary, it appears that whenever the district court found some mention, however tenuous, to Jean McConville in an interview, it compelled production of all of that interviewee's interviews (except in the case of two interviewees where, apparently applying some degree of heightened sensitivity, only single interviews were ordered produced).

In addition to not correctly applying the balancing test, the district court made serious mistakes in deciding, contrary to clear First Circuit precedent, not to

limit the interview materials it ordered produced to those "directly relevant" to the subject matter of the August 2011 subpoenas, which sought information concerning the abduction or death of Jean McConville, and to require production of materials that were "readily available from a less sensitive source."

A. In the review of subpoenas seeking academic research materials with heightened sensitivity, the First Circuit requires that the materials ordered produced must be "directly relevant" and "not readily available from a less sensitive source."

In *In re: Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004), the First Circuit cited the "three leading cases in this circuit [that] require 'heightened sensitivity' to First Amendment concerns and invite a 'balancing' of considerations . . . ." One of those cases, *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998), was the seminal case that established the protection afforded academic research materials in this Circuit.

The court in *Cusumano* only described the process that protection entailed: to balance the "need for the information on one pan of the scales and those that reflect the objector's interest in confidentiality and the potential injury to the free flow of information that disclosure portends on the opposite pan." 162 F.3d at 716 (citations omitted). In *In re: Special Proceedings*, the First Circuit went further, and explained in specific detail what heightened sensitivity means when reviewing subpoenas for protected materials like confidential academic research. The court said that disclosure

> ***may not be compelled*** unless ***directly relevant*** to a nonfrivolous claim or inquiry undertaken in good faith, and disclosure ***may be denied*** where the ***same information is readily available from a less sensitive source***.

373 F.3d at 45 (citations omitted, emphasis added).

The district court quoted this very language in its decision when it allowed Boston College's request that the district court conduct an *in camera* review of the Belfast Project materials. More generally, the district court acknowledged that it had to conduct its *in camera* review with "a sensitivity to the importance of the free flow of information in our society and the essential role that our institutions of higher education help play in that." Jt. App. 173-74.

B. The district court did not conduct its *in camera* review of the Belfast Project materials with the heightened sensitivity the First Circuit requires when subpoenas seek production of confidential academic research materials.

Although the district court acknowledged its responsibilities under the First Circuit's heightened-sensitivity standard, it made serious mistakes in applying that standard in its *in camera* review, and did not in fact strike the balance weighing First Amendment concerns with the heightened sensitivity the First Circuit requires. Boston College acknowledges with gratitude the extraordinary effort the district court expended in reviewing 176 transcripts of Belfast Project interviews with 24 interviewees, amounting to over 1,000 pages of materials. January 20, 2012, Findings and Order, Add. 51; Jt. App. 200-01. But the district court's

January 20, 2012, Findings and Order requires the production of materials that, if a heightened sensitivity review had been correctly made, should not have been ordered disclosed to the government.

1. This court should review the district court's January 20, 2012, Findings and Order to determine whether the district court made serious mistakes in determining what materials Boston College was required to disclose.

Boston College recognizes that it must show that the district court committed an "abuse of discretion" in its rulings to warrant reversal of the district court's decision on a motion to quash a subpoena. See, *e.g.*, *Bogosian v. Woloohojian Realty Corp*. 323 F.3d 55, 66 (1st Cir. 2003). While that standard is a high one, the First Circuit has not hesitated to reverse for abuse of discretion "if . . . [this court is] left with 'a definite and firm conviction that the court below committed a clear error of judgment.'" *Tang v. State of R.I., Dep't of Elderly Affairs*, 163 F.3d 7, 13 (1st Cir. 1998) (quoting *Schubert v. Nissan Motor Corp. in U.S.A.*, 148 F.3d 25, 30 (1st Cir. 1998)).

The First Circuit through repeated and consistent rulings has defined the abuse of discretion standard to include cases in which the lower court:

> ignored a factor deserving significant weight, relied upon an improper factor, or evaluated all the proper factors (and no improper ones), but made a serious mistake in weighing them.

Spooner v. Een, Inc., 644 F.3d 62, 66 (1st Cir. 2011), quoting *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 292–93 (1st Cir. 2001) (review of attorneys' fees award). See also *Mulero-Abreu v. Puerto Rico Police Dep't*, No. 11-1501, 2012 WL 1058535 (1st Cir. March 29, 2012) (sanction of dismissal); *Downey v. Bob's Discount Furniture Holdings, Inc.*, 633 F.3d 1, 5 (1st Cir. 2011) (exclusion of expert testimony).

Applying these principles to the district court's January 20, 2012, Findings and Order, it is clear that the Order should be reversed. The district court abused its discretion because it used the wrong test in its *in camera* review to determine which Belfast Project interviews to disclose to the PSNI in response to the August 2011 subpoenas that seek information about the abduction or death of Jean McConville.

2. The district court erred by not determining whether the materials it ordered produced were "directly relevant" as required under the heightened sensitivity review required by First Circuit precedents.

When it described the nature of its *in camera* review of the Belfast Project interviews, the district court said that it would not determine whether the information was relevant to the subject of those subpoenas: "I am not reviewing for any issue of relevance as we attorneys would think of it in terms of an in-court proceeding"; "I don't think it is the role of this Court to perform a relevancy inquiry." Jt. App. 172 and 192. Instead, the district court defined its role as

follows: "I must look over the materials to see whether, fairly read, they fall within the scope of the subpoena." Jt. App. 173. See also Jt. App. 171-72 ("I conceive of what I am doing is reviewing the materials on the one hand to see that they fall within the scope, fairly construed[,] of the subpoena" and Jt. App. 173 ("[a]ll I'm doing is checking to see whether the data produced conforms to the subpoena").

By not performing a relevancy review, the district court failed to carry out a key component of what the First Circuit has prescribed as the court's duty in reviewing confidential academic research materials with heightened sensitivity. The First Circuit has defined heightened sensitivity to mean, *inter alia*, that disclosure of such materials "may not be compelled unless ***directly relevant*** to a nonfrivolous claim or inquiry undertaken in good faith . . . ." *In re: Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) (emphasis added). The district court's decision not to review the Belfast Project materials for direct relevance to the subject of the August 2011 subpoenas, the abduction or death of Jean McConville, was a serious mistake that warrants reversal of the January 20, 2012, Findings and Order.

In its decision that it would conduct the *in camera* review of the Belfast Project materials that Boston College sought, the district court said it would utilize the lenient standard of review that courts afford to grand jury subpoenas. December 16, 2011, Memorandum and Order, Add. 33-34. But that lenient

standard did not, in the district court's view, mean it should abjure the requirement to find materials directly relevant in order to order their production. To the contrary, in the same decision, the district court expressly acknowledged that "[t]he First Circuit requires this Court to ensure that any compulsory disclosure is ***'directly relevant'*** . . . ." Add. 41 (emphasis added). The district court did not conclude that the direct relevancy test was obviated by the standard of review afforded grand jury subpoenas. Nor has this court made any such suggestion. In *In re: Special Proceedings*, which established the "directly relevant" requirement, the court cited grand jury cases with no suggestion that the requirement applied any differently when the subpoena in question was one from a grand jury. 373 F.3d at 45 nn. 5 and 6.

The district court appears to have concluded that the direct relevance test did not apply because the August 2011 subpoenas were issued pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters (S. Treaty Doc. No. 109-13) (the US-UK MLAT). But that Treaty requires no such deferential treatment. On the contrary, it expressly recognizes that constitutional and other recognized protections that weigh against compelled disclosure are factors to be taken into account when an American court is asked to subpoena information for the United Kingdom: the

Treaty states that a person may be "compelled to . . . [produce evidence] ***in accordance with the requirements of the law*** of the Requested Party [in this case, the United States; emphasis added]." UK-US MLAT Art. 8(2). The "requirements of the law" in the First Circuit include determining if the materials are directly relevant to the subject of the subpoena. The district court's decision not to make that determination was a serious mistake requiring reversal of its January 20, 2012, Findings and Order.

III. THE DISTRICT COURT'S DECISION RESULTED IN AN ORDER TO DISCLOSE INFORMATION THAT SHOULD NOT BE PRODUCED UNDER THE FIRST CIRCUIT'S HEIGHTENED SENSITIVITY STANDARD.

As noted earlier (see pp. 33-34), the First Circuit reviews the decision of the district court on a motion to quash a subpoena to determine if the district court:

> ignored a factor deserving significant weight, relied upon an improper factor, or evaluated all the proper factors (and no improper ones), but made a serious mistake in weighing them.

By not reviewing the August 2011 subpoenas' application to the Belfast Project materials with the heightened sensitivity required under the First Circuit's precedents (see pp. 31-32), the district court "ignored a factor deserving significant weight" and "made a serious mistake" in carrying out its review.

A. The district court itself documented the effect of its serious mistakes.

The consequences of the district court's serious mistakes are manifest in that court's own descriptions of the bases for compelling Boston College to disclose the confidential Belfast Project interview materials of the interviewees encompassed in its January 20, 2012, Findings and Order.

First, the district court itself expressly said that it found that only "***[o]ne*** interviewee provides information responsive to the subpoena." January 20, 2012, Findings and Order, Add. 52 (emphasis added). Another interviewee, the district court found, had information that was responsive to the subpoena only if the information was "broadly read." *Id*. For three interviewees, the only information the district court found was "passing mention of the incident," and in two of those cases, the district court noted that the passing mention was made only in response to "leading questions." *Id*. For all three, the district court acknowledged that it was "impossible" to discern whether the information was "from hearsay, or are merely repeating local folklore," as opposed to personal knowledge. *Id*. Yet even with all those disclaimers, the district court ruled that all of the interview materials of those interviewees had to be disclosed to the PSNI.

The district court's own description of the basis for its decision on four of those interviewees shows that it did not find the information in their interviews "directly relevant" to the abduction or death of Jean McConville, the subject of the

August 2011 subpoenas. By not making that finding, the district court demonstrated that it not review the interview materials with the heightened sensitivity the First Circuit requires when subpoenas seek to compel disclosure confidential academic research.

The district court also required the production of single transcripts from each of two other interviewees. The district court described the information they contained as not related to the abduction or death of Jean McConville, but instead as references made "at a vague level of generality" relating to a "shadowy sub-organization" within the IRA. *Id*. By definition, such information is not directly related to the subject of the August 2011 subpoenas, which sought information only about the abduction or death of Jean McConville.

Moreover, the district court noted that it was "virtually inconceivable" that the information in those transcripts about the shadowy sub-organization was not already known to the "law enforcement authorities within the requesting state," *i.e.*, the PSNI. *Id*. This statement demonstrates that the district court did not consider whether these two interview transcripts should not be produced because "the information is readily available from a less sensitive source," which is another factor that the First Circuit said must be taken into account under the heightened sensitivity standard. *In re: Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004).

Indeed, the district court in effect acknowledged that its decision to order the production of these two interviewees' information was not consistent with the First Circuit's heightened scrutiny standard: the district court said that, "[e]xamined under the magnifying glass of 'heightened scrutiny,' these transcripts might not be produced to domestic law enforcement absent a specific showing of further need by the government." January 20, 2012, Findings and Order, Add. 53. That candid acknowledgment is further evidence of the serious mistakes the district court made in ordering production of these two interviewees' information.

B. The impact of the district court's serious mistakes is made obvious on examination specific interviews that the district court ordered disclosed to the PSNI.

FILED UNDER SEAL

Conclusion

For the reasons set forth in this brief, the January 20, 2012, Findings and Order should be reversed.

Respectfully submitted,

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Certificate of Compliance with Fed. R. App. P. 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,188 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

/s/ Jeffrey Swope
Jeffrey Swope

Certificate Of Service

I hereby certify that on May 3, 2012, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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Eamonn S. Dornan

/s/ Jeffrey Swope
Jeffrey Swope

ADDENDUM

ADDENDUM TABLE OF CONTENTS

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

[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.	

FINDINGS AND ORDER

YOUNG, D.J. January 20, 2012

In making its decision as to the enforcement of the Commissioner's second subpoena, the Court has now thoroughly reviewed the transcripts of 176 interviews of the 24 interviewees identified as most likely to have information responsive to the subpoena. The Court has made its review pursuant to its opinion issued December 16, 2011, United States v. Trustees of Boston College, --- F. Supp. 2d. ---, 2011 WL 6287967 (D. Mass. Dec. 16,

2011), and the balancing procedure explained from the bench, see Transcript of Hearing, ECF No. 35, Dec. 22, 2011, sensitive that the requesting state desires the subpoena to be read expansively. The Court has done so.

Even so, only six interviewees even mention the disappearance of Jean McConville that constitutes the target of the subpoena. One interviewee provides information responsive to the subpoena. Another proffers information that, if broadly read, is responsive to the subpoena. Three others make passing mention of the incident, two only in response to leading questions. It is impossible to discern whether these three are commenting from personal knowledge, from hearsay, or are merely repeating local folklore. In context, the sixth interviewee does nothing more than express personal opinion on public disclosures made years after the incident. The Court concludes that the full series of interviews of the five interviewees first mentioned above must be disclosed and that the interview with the sixth need not be produced.

Morever, two other interviewees mention a shadowy sub-organization within the Irish Republican Army that may or may not be involved in the incident (the time period and the geographical location within Northern Ireland are generally congruent with the incident). Still, the references made are at such a vague level of generality that it is virtually inconceivable to this Court that the law enforcement authorities within the requesting state

do not already have this information. The Court is mindful of both the delicate balancing demanded by a subpoena that may infringe on academic freedom, and the Court's natural reticence to substitute its own investigatory judgment for that of knowledgeable law enforcement officials. See Trustees of Boston College, --- F. Supp. 2d ---, 2011 WL 62879667; Transcript of Hearing, ECF No. 35, Dec. 22, 2011. Examined under the magnifying glass of "heightened scrutiny," these transcripts might not be produced to domestic law enforcement absent a specific showing of further need by the government. See In re Special Proceedings, 373 F.3d 37, 45 (1st Cir. 2004) ("[D]isclosure may be denied where the same information is readily available from a less sensitive source" (citing Cusumano v. Microsoft Corp., 162 F.3d 708, 716-17 (1st Cir. 1988)). Under the circumstances of this case, the Court determines that the two specific interviews where such mention is made (together with sufficient identifiers to ascertain the identity of the interviewees) shall be produced but the full series of interviews of these two interviewees need not be produced.

No other materials from Boston College's archive need be produced in response to this second subpoena and in view of the paucity of information unearthed after extensive review by this Court, it declines to review the "very few" audiotapes not yet transcribed.

A sealed appendix to this Order identifies the specific

materials to which it applies.

ACCORDINGLY:

1. On or before the third business day after the United States Court of Appeals lifts the stay of December 30, 2011 on the materials produced in response to the first subpoena, Boston College shall produce to the Commissioner:

   a. The original tape recordings of any and all interviews designated in the sealed appendix.

   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 designated in the sealed appendix.

   c. Any and all written notes created in connection with any and all interviews designated in the sealed appendix.

   d. Any and all computer records created in connection with any and all interviews designated in the sealed appendix.

2. This Court at the same time will turn over to the Commissioner the materials it has been reviewing in camera which have been designated in the sealed appendix. 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 this Court has designated as responsive to second subpoena to the requesting state.

6. This Court will retain for 60 days in camera the materials it has declined to order produced. Should no appeal eventuate in that time, the Court will return all such materials to Boston College.

This constitutes the Court's final order in this matter.[1]

SO ORDERED.

William G. Young

WILLIAM G. YOUNG
DISTRICT JUDGE

[1] Naturally, the Court presumes full compliance by the parties with the Court's order. It retains jurisdiction to assure such compliance.