No. 12-___

In the Supreme Court of the United States

ED MOLONEY, ANTHONY MCINTYRE,

PETITIONERS

v.

ERIC H. HOLDER, Attorney General;
JACK W. PIROZZOLO, Commissioner,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether persons with Article III standing to object to criminal subpoenas of confidential information have a First Amendment or Due Process right to be heard and to present evidence in support of their objections.

II. What legal standard governs judicial review of subpoenas issued by foreign governments pursuant to Mutual Legal Assistance Treaties and 18 U.S.C. § 3512.

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INTRODUCTION

Petitioners Ed Moloney ("Moloney") and Anthony McIntyre ("McIntyre") seek review of a decision of the United States Court of Appeals for the First Circuit that (a) directly conflicts with a decision of the Second Circuit and with decisions of this Court on the right to be heard on First Amendment objections to government subpoenas of confidential information; (b) deepened a long-standing prior circuit split on whether the First Amendment creates an evidentiary privilege applicable to government subpoenas of journalists and academics; and (c) in a first-time appellate interpretation of a federal statute, granted foreign sovereigns greater subpoena powers and broader immunity from judicial review than is afforded to domestic law enforcement authorities or to foreign litigants seeking discovery in civil actions. *See In Re Request From The United Kingdom Pursuant To The Treaty*, 11-2511 (1st Cir. July 6, 2012) (Pet. 1a-42a).

1. This case arises out of subpoenas issued pursuant to the Mutual Legal Assistance Treaty between the United States and the United Kingdom ("US-UK MLAT") and 18 U.S.C. § 3512. The subpoenas, for which the supporting documentation remains under seal, were issued on behalf of the Police Service of Northern Ireland ("PSNI"). The subpoenaed materials were confidential academic oral histories relating to the violent conflict that preceded the U.S.-brokered multi-party Belfast Agreement of April 10, 1998 (the "Good Friday Agreement"). The interview materials were compiled under the auspices of the Belfast Project, a history project sponsored by Boston College ("BC") and

designed to gather and preserve historical information and provide insight into the minds of people personally involved in violent political conflict. Moloney was the Belfast Project Director; McIntyre was the Lead Project Researcher who interviewed Irish Republican Army ("IRA") members.

2. The First Circuit held that the petitioners had Article III standing to object to the subpoenas, but had no First Amendment and/or Due Process right to intervene in proceedings determining the subpoenas' enforceability or to bring a declaratory judgment action challenging the subpoenas. As a result, even though the petitioners asserted that disclosure would threaten their personal safety and impinge on the free flow of historically important information, they were not allowed to challenge or appeal the district court's disclosure order or to challenge a second set of PSNI subpoenas seeking other interview records. The district court's first disclosure order became final when Boston College ("BC") -- the only party allowed to challenge the subpoenas -- chose not to appeal.

3. The First Circuit grounded its denial of the petitioners' right to challenge the subpoenas on its reading of *Branzburg v. Hayes*, 408 U.S. 665 (1972). The court interpreted *Branzburg* as holding that the disclosure of confidential materials sought by a subpoena in criminal proceedings "is not by itself a legally cognizable First Amendment or common law injury." *United Kingdom*, slip op. at 33 (Pet. 30a).

a. The lower court's decision directly conflicts with the holding of the Second Circuit Court of Appeals in *The New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006). *Gonzales* affirmed the right

to bring a declaratory judgment action challenging grand jury subpoenas of confidential information held by third parties. *Id*. at 165-69, 172-74. The lower court's ruling that *Branzburg* foreclosed the petitioners from pursuing a declaratory judgment action or intervening to present their case-specific objections to the subpoenas directly conflicts with the Second Circuit's *Gonzales* decision. In addition, although the circuit courts long have been split on whether *Branzburg* recognized a First Amendment evidentiary "privilege" or "special rule" for journalists, *United Kingdom,* slip op. at 34 (Pet. 31a, 33a n.23), the First Circuit created a further split within a split by holding that *Branzburg* foreclosed the right to pursue objections to government subpoenas of confidential information on a case-by-case, fact-specific basis, there being no right to do so by intervention or complaint.

b. The decision also conflicts with numerous decisions of this Court allowing First Amendment challenges to government efforts to compel the disclosure of confidential information, even in the absence of a First Amendment evidentiary privilege. *See generally NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344, 347 (1995). The stark limitation on First Amendment rights has implications far beyond this case in the modern digital age. *See generally Jones v. United States*, __ U.S. __, 132 S.Ct. 945, 957 (2012) (Sotomayor, J., concurring).

c. The lower court denied the right to present evidence that the subpoenas were issued in bad faith or without a legitimate need of law enforcement. This right was recognized in *Branzburg*, and by circuit courts that have interpreted *Branzburg*, and

applies in full force to foreign subpoenas. *See generally In re Search of Premises Located at 840 140th Ave. NE*, 634 F.3d 557, 572 (9th Cir. 2011) ("We therefore hold that, in the context of an MLAT request, a district court may not enforce a subpoena that would offend a constitutional guarantee.").

4. The petition also presents the question of whether and to what extent district courts have discretion to review objections to foreign subpoenas issued pursuant to Mutual Legal Assistance Treaties ("MLATs") and 18 U.S.C. § 3512, including whether such subpoenas can be challenged on traditional grounds of being "unduly intrusive or burdensome." The First Circuit held that, assuming district courts have *any* discretion to review MLAT subpoenas under § 3512, such discretion is far more limited than either (i) the judicial discretion established by *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241, 264-65 (2004) over foreign subpoenas issued under 28 U.S.C. § 1782; or (ii) the traditional judicial discretion over domestic subpoenas. *United Kingdom*, slip op. at 28 n.17 (Pet. 26a n.17). These sweeping restrictions on judicial discretion are not supported by the plain language of the US-UK MLAT or § 3512, unnecessarily place United States residents at the mercy of foreign sovereigns, and create substantial uncertainty in an area of important federal rights that should be resolved by the Court.

Certiorari should be granted.

OPINIONS BELOW

The First Circuit's opinion (Pet. 1a-42a) is reported at 685 F.3d 1. Its orders denying rehearing (Pet. 43a-44a) and denying a stay of the mandate (Pet. 45a-46a) are unreported. Two of the relevant

district court's decisions are reported at 831 F.Supp.2d 435 (D. Mass. 2011) (Pet. 47a-90a) and 2012 WL 194432 (D. Mass. 2012) (Pet. 91a-95a); the others are unreported.

JURISDICTION

The First Circuit entered judgment on July 6, 2012, denied a timely petition for rehearing and for rehearing *en banc* on August 31, 2012, and denied a motion to stay the mandate on September 20, 2012 (Pet. 2a, 43a-46a). On October 17, 2012, Justice Breyer granted a stay conditioned on the filing of this petition by November 16, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law … abridging the freedom of speech."

2. Relevant excerpts from 18 U.S.C. § 3512 and the Mutual Legal Assistance Treaty between the United States and the United Kingdom are at Appendix F (96a-99a).

STATEMENT

The Petitioners

Moloney has been a journalist and writer since 1978. He previously was Northern Ireland editor of the *Irish Times* and Northern Editor of the Dublin-based *Sunday Tribune* newspaper until moving to the United States in 2001. He is the author of three books dealing with the violence and politics of

Northern Ireland. He resides in New York. Intervention Cmplt. ¶ 31.

McIntyre is an author, journalist, Ph.D., and a former member of the Irish Republican Army. He resides in Ireland.

The Belfast Project

The Belfast Project was an oral history project sponsored by Boston College. The purpose of the Project was to collect and preserve for academic study the memories of members of republican and loyalist paramilitary and political organizations in the Northern Ireland conflict in the latter part of the 20th century. *United Kingdom*, slip op. at 5-6 (Pet. 5a).

The Project was conceived in discussions between Moloney and Northern Ireland historian Lord Paul Bew following the 1998 Good Friday Agreement. Moloney Aff. ¶ 4.[1] Moloney served as the Project Director for the Belfast Project, and McIntyre was the Lead Project Researcher. *United Kingdom*, slip op. at 6 (Pet. 6a); McIntyre Agreement at 1.

The Project conducted interviews of former IRA and Unionist paramilitary groups. McIntyre conducted the interviews of former IRA activists. McIntyre Aff. ¶ 4; Moloney Aff. ¶ 26. The interviews focused on foot soldiers in the conflict, to better

[1] When the 1998 Good Friday Agreement was reached, it was understood that there would be a government-run truth recovery process to cement the peace, as had occurred in South Africa. Moloney Aff. ¶ 19. Those involved in the Belfast Project viewed the oral history archive as an early version of that truth recovery process. Moloney Aff. ¶ 20.

address why ordinary people would take up arms as occurred during "The Troubles," and what persuaded them to cease hostilities. The overall goal was to provide "lessons for future generations which would help . . . to prevent the same thing happening all over again and, because human nature is universal, to understand how conflicts happen elsewhere in the world." Moloney Aff. ¶¶ 21- 23.

The Need for Confidentiality

The need for confidentiality was a central and prominent aspect of the Project. Project interviewees were required to sign a confidentiality agreement forbidding them from disclosing the existence or scope of the Project without the permission of BC. *United Kingdom*, slip op. at 6 (Pet. 6a). Interviewees also signed "Donation Agreements" requiring that access to the interview records be restricted until their death or upon their written approval. *Id.* at 8 (Pet. 7a-8a). Moloney's agreement with BC further provided that each interviewee was to be given a contract "guaranteeing to the extent American law allows" the interviews' conditions. *Id.* at 7 (Pet. 6a).[2]

The need for confidentiality was manifest. It is undisputed that the interviewees would not have participated in the Belfast Project absent assurances of confidentiality. *United Kingdom*, slip op. at 39

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[2] Although the First Circuit inexplicably viewed the quoted language as rendering the confidentiality terms of the Donation Agreements "misleading," *id.* at 38-40 (Pet. 36a-37a), the applicants did not and do not seek any protection beyond "the extent to which American law allows," including the right to be heard that is so deeply fundamental to American law.

n.26 (Pet. 36a n.26). None of the interviews with former front-line IRA members were approved by IRA commanders. There were substantial reasons to doubt that the IRA would have approved of the interviews, and even more substantial reasons to fear reprisals if the interviews were disclosed. IRA volunteers must say absolutely nothing about membership or operations. The IRA Green Book declares on its opening page: "Don't talk in public places: you don't tell your family, friends, girlfriends or workmates that you are a member of the IRA. Don't express views about military matters. In other words you say nothing to any person." Elsewhere, it describes the fifth point of guerrilla strategy as "defending the war of liberation by punishing criminals, collaborators and informers."[3]

The late Brendan Hughes, whose interview materials were produced to the government after his death pursuant to the terms of his Donation Agreement, explained the risk faced by those who speak of their IRA service:

> [T]here's a Republican repression of anyone who dares to object or who dares to question the leadership line. . . . we've been told all along that this is not a leadership-led movement, this is a movement led by the rank and file. That's a load of bollocks. This is a movement led by the nose by a leadership that refuses to let go and anyone who objects to it, anyone who

[3] Available at www.scribd.com/doc/15914572/IRA-Green-Book-Volumes-1-and-2.

> has an alternative, is either ridiculed, degraded, shot or put out of the game altogether.

E. Moloney, *Voices From the Grave* at 288 (Public Affairs 2010).

The Police Ombudsman for Northern Ireland reached a similar conclusion in a 2007 Report on collusion between the Royal Ulster Constabulary (which became the PSNI) and loyalist paramilitaries who killed hundreds of Catholic civilians :

> There are significant risks to the lives of people who are publicly revealed to be, or to have been, paramilitary informants. Northern Ireland has a history of the murder of those who were even suspected of being informants. The most recent murder is thought to be that of a self-confessed informant, who died in 2005.[4]

Based on their experience and knowledge of the participants in the conflict, the petitioners raised significant concerns about violent reprisals should the interview materials be turned over to Northern Ireland authorities. Moloney Aff. ¶ 33; McIntyre Aff. ¶ 18; 19. In the wake of the subpoena controversy,

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[4] *See* Statement by the Police Ombudsman for Northern Ireland on her investigation into the circumstances surrounding the death of Raymond McCord Junior and related matters, 22 January 2007 ("Ombudsman's 2007 Report"). (available at http://www.policeombudsman.org/publications uploads/BALLAST%20PUBLIC%20STATEMENT%2022-01-7%20FINAL%20VERSION.pdf).

BC issued the following warning to its students traveling to Northern Ireland:

> Specifically, we suggest that you: avoid political discussions regarding Northern Ireland in public settings such as restaurants and pubs, avoid wearing clothing that overtly depicts American or Boston College logos during trips to sensitive areas such as Belfast … Do not feel compelled to discuss the matter with those who may raise it. This case is a complex legal issue further complicated by the politics and history of Northern Ireland, and it is best to simply decline to discuss it.[5]

Procedural History

In March 2011, the government applied for the appointment of a commissioner to issue subpoenas pursuant to the U.S.-U.K. MLAT and 18 U.S.C. § 3512. The applications were filed *ex parte* and remain under seal. *United Kingdom*, slip op. at 9-10 (Pet. 9a).

On May 5, 2011, the government served subpoenas on the John J. Burns Library at Boston College, Robert K. O'Neill, the Burns Librarian, and Boston College University Professor Thomas E. Hachey. *Boston College*, 831 F. Supp.2d at 440 (Pet.

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[5] *See* Admins Alert Students of Belfast Project, *The Heights* (February 5, 2012) (available at http://www.bcheights.com/news/admins-alert-students-of-belfast-project-1.2766099).

50a). The subpoenas commanded the production of materials relating to tape recorded interviews of the late Brendan Hughes and Dolours Price, two former IRA members. *Id*.

According to the court below, the subpoenas were "part of an investigation by United Kingdom authorities into the 1972 abduction and death of Jean McConville, who was thought to have acted as an informer for the British authorities on the activities of republicans in Northern Ireland." *United Kingdom*, slip op. at 3 (Pet. 3a). Because Hughes was deceased, his interview materials were produced in accordance with his agreement with the Belfast Project, leaving only the Price interview materials in dispute. *Id*. at 11 (Pet. 10a).

BC moved to quash the subpoenas on June 7, 2011 (Pet. 10a). The government asserted the right to an evidentiary hearing if needed to oppose BC's motion. Govt. Opp. at 18 n.11. Unlike the petitioners, BC did not challenge whether the subpoenas were issued in good faith or based on a legitimate law enforcement need. The motion to quash stipulated that the PSNI's need for the interview materials was not "frivolous," despite that the government's submissions in support of the subpoenas were filed under seal. BC Mtn. 8. The motion to quash asked for the Court's "direction" on "important issues of public policy," stating that the school was acting "not as a typical advocate seeking to protect its own parochial concerns, but as an institution of higher education seeking appropriate resolution of conflicting interests of fundamental importance to academia and to society as a whole." BC Mtn. 2.

The government served a second set of subpoenas on BC on August 4, 2011. *Boston College*, 831 F. Supp.2d at 440 (Pet. 50a). The subpoenas "sought any information related to the death or abduction of McConville contained in any of the other interview materials held by BC," and implicated 176 interviews with the remaining 24 IRA interviewees. *United Kingdom*, slip op. at 3, 11 (Pet. 3a, 10a).

On August 31, 2011, the petitioners sought leave to intervene in the proceedings to raise their own claims and to support BC's motion to quash. *United Kingdom*, slip op. at 12 (Pet. 10a-11a); Mtn. Int. 1. The motion was accompanied by a Complaint for Declaratory Judgment, Writ of Mandamus and Injunctive Relief, naming as defendant the Attorney General of the United States.

On December 16, 2011, the district court denied BC's motion to quash the first set of subpoenas but granted the university's request that the court conduct an *in camera* review of responsive materials. *Boston College*, 831 F. Supp.2d at 440 (Pet. 90a). In the same ruling, the district court denied the petitioners' motion to intervene as of right, concluding that BC -- which later chose not to appeal the court's first disclosure order -- had "argued ably" and adequately represented "any potential interests" of the petitioners. *Id*. (Pet. 89a); *United Kingdom*, slip op. at 4, 13 (Pet. 12a & n.5). The district court deemed it unnecessary to address the petitioners' right to permissive intervention. *Id*.

On December 27, 2011, the district court ordered production of all transcripts sought by the first set of subpoenas. BC chose not to appeal. *Id*. at 13 (Pet. 4a). On January 20, 2012, the court ordered

production of records concerning seven additional interviews in connection with the government's second set of subpoenas. *Id*., slip op. at 4, 15 (Pet. 3a-4a, 13a-14a). Because intervention already had been denied, the petitioners were not allowed to be heard in opposition to any of the foregoing orders.

On December 29, 2011, the petitioners commenced an independent civil action challenging the enforceability of the subpoenas. The district court dismissed the petitioners' complaint on January 25, 2012. *Id*. at 14 (Pet. 12a-13a).

The court of appeals affirmed the dismissal of petitioners' complaint under Fed. R. Civ. P. 12(b)(6) on the grounds that *Branzburg* precluded petitioners from proving that enforcing the subpoenas was a "legally cognizable First Amendment or common law injury." *United Kingdom*, slip op. at 33 (Pet. 30a). As a result, the court found it unnecessary to even consider whether intervention should have been granted. *Id.* at 40 n.27 (Pet. 37a n.27). The lower court's decision prevented petitioners from contesting the first or second sets of subpoenas issued by the PSNI, and bars them from contesting any additional subpoenas that may be issued in the future.

REASONS FOR GRANTING THE PETITION

I. Since the Court's decision in *Branzburg* forty years ago, circuit courts have reached conflicting conclusions about whether, and the extent to which, the First Amendment's structural protections for information-gathering protect against the forced disclosure of confidential information. The First Circuit substantially expanded that conflict by holding that *Branzburg* precludes as a matter of law

the right to pursue a challenge to a criminal subpoena on First Amendment grounds.

First, the lower court's decision directly conflicts with the Second Circuit's recent decision in *Gonzales*, 459 F.3d 160. *Gonzales* held that a newspaper had the right to bring a declaratory judgment action to challenge a criminal subpoena of confidential information held by third parties. *Id.* at 165-67. The right to be heard recognized by *Gonzales* included the right to present evidence in support of the First Amendment objections asserted. *Id.* at 168-69, 172-74. That was the very right rejected by the First Circuit in this case, which instead established a rule denying academics, journalists, and all other persons the right to personally defend confidentiality commitments made in exchange for obtaining information on matters of legitimate public interest.

Second, the lower court's decision conflicts in principle with circuit courts that, despite having differing views of *Branzburg*, have recognized the right to be heard on a case-specific basis when objecting to subpoenas seeking the disclosure of confidential information. *See, e.g.*, *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *McKevitt v. Pallasch,* 339 F.3d 530 (7th Cir. 2003). The lower court found the First Amendment interests so wanting as to not even require consideration of the discretionary factors applicable to foreign requests for subpoenas in civil cases. *United Kingdom*, slip op. at 30 (Pet. 28a).

Third, the lower court's decision conflicts in principle with First Amendment precedent of this Court. Even in the absence of a First Amendment "privilege," the Court has held that a careful, fact-

intensive balancing process is required when compulsory process "impinge[s] upon such highly sensitive areas" as freedom of speech, political association, and academic freedom. *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957); *see also NAACP*, 357 U.S. at 462; *McIntyre*, 514 U.S. at 344, 347.

Fourth, the lower court departed from *Branzburg* and circuit courts that have applied *Branzburg* by foreclosing the right to challenge a subpoena on the First Amendment grounds of "bad faith" by law enforcement. *See generally Branzburg*, 408 U.S. at 710 ("if the newsman . . . has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered") (Powell, J., concurring). Where, as here, the objector had no private right of action under a treaty and no administrative procedure remedy, the lower court's denial of a right to be heard on a judicial claim for relief eviscerated well-established First Amendment and Due Process rights.

Instead of applying the sensitive, case-specific analysis required by other courts when First Amendment interests are at stake, the lower court held that *Branzburg* effectively adjudicated the claims not only of the reporters who came before the Court in 1972, but those of all future persons who assert that a criminal subpoena unjustifiably infringes on their First Amendment rights. The effect of the lower court's decision, moreover, is not limited to journalists and academics who gather information about domestic or foreign affairs. The decision also affects the rights of all persons who, in

this digital age, disclose information about themselves to third parties. *See generally Jones*, 132 S.Ct. at 957 ("[T]he premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties . . . is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.") (Sotomayer, J., concurring).

It is essential that those who assume confidentiality obligations in exchange for obtaining information have the right to be heard in opposition to attempts by public or private parties to compel disclosure of that information and to pursue claims of bad faith and harassment. These are recurring issues of significance to a broad range of persons entitled to the protections of the First Amendment, and should be authoritatively resolved by the Court.

II. Although "[t]his appears to be the first court of appeals decision to deal with an MLAT and [18 U.S.C.] § 3512," *United Kingdom*, slip op. at 3, the lower court's decision created additional disarray in the law governing judicial of review foreign subpoenas, additional grounds for certiorari review.

Intel Corp. v. Advanced Micro Devices, 542 U.S. at 264-65, held that district courts have discretion to review foreign subpoenas issued pursuant to 28 U.S.C. § 1782, including for undue burden and intrusiveness. The MLAT subpoena in this case was issued pursuant to 18 U.S.C. § 3512, not 28 U.S.C. § 1782. Although the First Circuit refused to decide whether § 3512 affords district courts *any* discretion to review MLAT subpoenas, it expressly held that the discretionary factors set forth in *Intel* do *not* apply to

MLAT subpoenas issued under 18 U.S.C. § 3512. *United Kingdom*, slip op. at 28-29 (citing *In re Premises,* 634 F.3d at 565, 568, 570.

Divesting the judiciary of its traditional discretionary supervisory powers over subpoenas raises grave constitutional issues by "impermissibly threaten[ing] the institutional integrity of the Judicial Branch." *Mistretta v. United States*, 488 U.S. 361, 383 (1989). The First Circuit reached its decision without addressing the permissive language found in the US-UK MLAT that grants courts authority to review foreign subpoenas or the similarly permissive statutory language of § 3512. The clear statutory language of both the US-UK MLAT and the later-enacted § 3512, like the statute at issue in *Intel*, confirms the courts' traditional discretionary power over subpoenas.

The need for a uniform, coherent standard of review of foreign subpoenas is an additional, compelling reason to grant certiorari in this case.

I. Review Should be Granted to Resolve the Circuit Split on the Right to be Heard on First Amendment Objections to Government Subpoenas of Confidential Information.

The First Circuit held that the petitioners alleged an injury sufficiently "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling" to satisfy the requirements of Article III standing. *United Kingdom*, slip op. at 31 (citation omitted) (Pet. 28a-29a). The court found that the petitioners were not permitted to challenge any alleged bad faith acts

and/or abuse of process on which their claims were based. *Id*. at 17 n.11 (Pet. 16a n.11)).

Despite the fact-specific nature of the petitioners' challenge, the court held that they had no right to be heard in opposition to the subpoenas -- either by way of a declaratory judgment action or intervention. *Id*. at 33, 40, & n.27 (Pet. 30a, 37a & n.27). The court found that *Branzburg* compelled that result by holding (in the lower court's view) that the compelled disclosure of confidential information obtained by journalists "is not by itself a legally cognizable First Amendment or common law injury." *Id*. at 33 (Pet. 30a).

A. The First Circuit's Decision Directly Conflicts with the Second Circuit's *Gonzales* Decision.

The First Circuit's decision directly conflicts with the Second Circuit's decision in *Gonzales*, 459 F.3d 160. *Gonzales* affirmed the right to bring a declaratory judgment action raising First Amendment and common law challenges to a grand jury subpoena that required a third party to disclose information identifying a confidential source. 459 F.3d at 165, 167-68. In *Gonzales*, as in this case, the government argued that the would-be plaintiff had no right under *Branzburg* to defeat a subpoena of third party records. *Id*. at 167. The Second Circuit rejected the government's argument, finding that "so long as the third party plays an 'integral role' in reporters' work, the records of third parties detailing that work are, when sought by the government, covered by the same privileges afforded to the reporters themselves and their personal records." *Id.*

at 168. The Second Circuit therefore affirmed the right to pursue a declaratory judgment action because "any common law or First Amendment protection that protects the reporters" gave them the right to challenge the third party subpoena. *Id*. at 167-68.

Gonzales reversed the trial court's order quashing the subpoenas, but only after the newspaper was given a full right to be heard -- including on a motion for summary judgment -- and only after finding that the subpoenas were directly relevant to the illegal disclosure of information concerning terrorist investigations. *Id*. at 162, 169-71. The court took great care to "in no way suggest" that similar subpoenas would be enforced "in a case involving less compelling facts." *Id*. at 171.

> In the present case, the unique knowledge of the reporters is at the heart of the investigation, and there are no alternative sources of information that can reliably establish the circumstances of the disclosures of grand jury information and the revealing of that information to targets of the investigation.

Id. *See also Local 1814, International Longshoremen's Ass'n, AFL-CIO v. Waterfront Commission*, 667 F.2d 267, 271 (2d Cir.1981) (upholding union's right to challenge corruption commission's subpoena of employers' payroll records identifying union contributors).

In contrast, the First Circuit held that the petitioners' complaint failed to state a claim because there is no First Amendment evidentiary privilege (or

"special rule") to refuse to appear and answer relevant questions in grand jury-type proceedings. (Pet. 31a). For the same reason, the court found "no need . . . to consider whether the district court acted within its discretion in denying [petitioners'] motion to intervene" without ever seeing the evidence that the petitioners would have presented. *United Kingdom*, slip op. at 33, 40, & n.27 (Pet. 30a, 37a n.27). The First and Second Circuits thus are in direct conflict on this important and, as shown below, recurring issue.[6]

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[6] The First Circuit did not (and could not) attempt to justify its decision on the grounds that BC adequately represented the petitioner's interests, finding it unnecessary even to address the issue. *Id*. at 40 n.27 (Pet. 37a n.27). The diverging interests were well-documented and extended far beyond the typical differences between faculty members and a university such as BC that is dependent on lobbying the federal government for funds. BC's motion papers, for example, asked for the lower court's "direction" on how to proceed "not as a typical advocate seeking to protect its own parochial concerns, but as an institution of higher education …." BC Mtn. 2. In keeping with its deferential stance towards the government, the university did not challenge the good faith basis for the subpoenas (as the petitioners did), and stipulated that the government's need for the subpoenaed information was not frivolous, despite not having seen the government's ex parte submission. BC Mtn. 8. BC also chose not to appeal the district court's order. *United Kingdom*, slip op. at 4 (Pet. 4a). In sum, neither BC nor the government adequately represented the petitioners' interests in being heard on their objections to the subpoenas.

B. The First Circuit's Decision Creates a Split within a Split Concerning *Branzburg*.

The First Circuit acknowledged that "there is a circuit split on whether under *Branzburg* there can ever be a reporter's privilege of constitutional or common law dimensions." *United Kingdom*, slip op. at 36 n.23 (citing *McKevitt*, 339 F.3d at 532) (Pet. 33a n.23). There indeed is a circuit split concerning *Branzburg*, as discussed *infra*. Prior to the First Circuit's decision, however, the split had not included whether persons who object to a subpoena -- whether reporters, academics or "lonely pamphleteers" -- have a right to be heard on their objections. *See Branzburg*, 408 U.S. at 707-708 ("grand juries must operate within the limits of the First Amendment"); *id*. at 710 (those who "believe that [their] testimony implicates confidential source relationship without a legitimate need of law enforcement…will have access to the court on a motion to quash") (Powell, J., concurring). *See, e.g., McKevitt*, 339 F.3d at 533 ("rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas"); *In re Grand Jury Proceedings*, 5 F.3d 397, 401 (9th Cir. 1993) ("where a grand jury inquiry is not conducted in good faith, or where the inquiry does not involve a legitimate need of law enforcement, or has only a remote and tenuous relationship to the subject of the investigation then,

the balance of interests struck by the *Branzburg* majority may not be controlling").[7]

This conflict is not limited to cases involving journalists or academics. As shown below, the right to be heard on First Amendment objections to government disclosure requirements never has been limited to cases involving a journalistic privilege, further demonstrating the need for the Court to resolve the conflict created by the lower court's ruling.

C. The Lower Court's Decision Conflicts with Decisions of this Court.

Assuming, *arguendo*, that the First Circuit correctly interpreted *Branzburg* as rejecting a First Amendment evidentiary privilege *per se*, the right to be heard on objections to government efforts to compel the disclosure of confidential information,

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[7] *See also In re Grand Jury Proceedings*, 810 F. 2d 580, 586 (6th Cir. 1987) (rejecting constitutional privilege but ruling that "courts should . . . make certain that the proper balance is struck between freedom of the press and the obligation of all citizens to give relevant testimony, by determining whether the reporter is being harassed in order to disrupt his relationship with confidential news sources, whether the grand jury's investigation is being conducted in good faith, whether the information sought bears more than a remote and tenuous relationship to the subject of the investigation, and whether a legitimate law enforcement need will be served by forced disclosure of the confidential source relationship"); *In re Shain*, 978 F. 2d 850, 852 4th Cir. 1992); "absent evidence of governmental harassment or bad faith, the reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution")

even in the absence of a First Amendment "privilege," is clearly established by pre- and post-*Branzburg* decisions of this Court. For example:

1. There is no First Amendment "privilege" that protects the contents of a professor's lecture to college students, but the professor has the right to object to a government subpoena requiring him to testify about a lecture because the "power of compulsory process [must] be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community." *Sweezy* , 354 U.S. at 245.

2. There is no First Amendment "privilege" to withhold the membership list of a political advocacy group, but where disclosure of the list might cause members to face "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," the First Amendment is implicated and there is a right to be heard. *NAACP*, 357 U.S. at 462.

3. There is no First Amendment "privilege" that applies to receiving foreign political propaganda, but requiring recipients to disclose their interest in receiving such information is "almost certain to have a deterrent effect" and "amounts . . . to an unconstitutional abridgment of the addressee's First Amendment rights." *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

4. There is no First Amendment "privilege" to distribute "unsigned documents designed to influence voters in an election," but the First Amendment permits an individual to require that government

efforts to compel such disclosures satisfy an "exacting scrutiny" requiring that the law be narrowly tailored to serve an overriding state interest. *McIntyre*, 514 U.S. at 344, 347.

5. Finally, there is no First Amendment "privilege" to secretly contribute to political campaigns, yet this Court repeatedly has acknowledged a right to challenge financial disclosure requirements by proving a "reasonable probability" that disclosure will subject donors to "threats, harassment, or reprisals from either Government officials or private parties." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 198 (2003) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)).

By denying the petitioners the right to be heard and present evidence in support of their objections to the subpoenas, the decision below contravened longstanding precedent of this Court, and raises grave First Amendment and Due Process concerns that warrant certiorari review. *See generally Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 303 (1986) (citing Monaghan, *First Amendment "Due Process*," 83 Harv.L.Rev. 518, 520-524 (1970)).[8]

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[8] This Court never has suggested that *Branzburg* relieved district courts of the need to hear an interested person's objection to a government request for confidential information. For example, in *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182 (1990) -- relied on by the lower court -- the Court rejected a claim of special constitutional privilege for academic peer review materials relevant to charges of racial or sexual discrimination in tenure decisions, yet underscored the right of persons to be heard in opposition to such subpoenas. *See id.* at 199 ("That the burden of which the University complains is neither content-

D. Denying the Petitioners Their Right to be Heard Was Prejudicial and Unfairly Skewed the Lower Courts' Decision-Making Process.

1. The petitioners were denied the opportunity to present evidence supporting their claims that the subpoenas were issued in bad faith, amounted to an abuse of process, and posed an unnecessary risk to their personal safety and those of their families and their sources. *United Kingdom*, slip op. at 31 & n.19 (Pet. 29a n.19). In the proceedings below, the government did not dispute the history of violent retaliation for IRA informers, but claimed that the petitioners' concerns were not well-founded and that, in any event, the subpoenas must be enforced regardless of the risk of retaliation. This cavalier disregard of the effects of harassment and retaliation on First Amendment rights cannot be reconciled with cases such as *NAACP v. Alabama*, 357 U.S. at 462 (considering "threat of physical coercion, and other manifestations of public hostility") and *Bates v. Little*

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based nor direct does not necessarily mean that petitioner has no valid First Amendment claim . . . burdens that are less than direct may sometimes pose First Amendment concerns"); *id.* at 191 ("when a court is asked to enforce a Commission subpoena, its responsibility is to satisfy itself that the charge is valid and that the material requested is relevant to the charge ... and more generally to *assess any contentions by the employer* that the demand for information is too indefinite or has been made for an illegitimate purpose") (internal quotations and citation omitted) (emphasis added). *See also Zurcher v. Stanford Daily*, 436 U.S. 547, 564-67 (1978) (rejecting special First Amendment privilege, but emphasizing the obligations of courts to be sensitive to First Amendment interests when reviewing such claims).

Rock, 361 U. S. 516, 524 (1960) (noting evidence that "public identification of persons in the community as members of the organizations had been followed by harassment and threats of bodily harm"). *See also United Kingdom*, slip op. at 30 ("we think it clear that the Constitution does not compel the consideration under the treaty of discretionary factors [applicable to foreign discovery requests in civil cases]") (Pet. 28a).

2. The First Circuit dismissed the petitioners' claim that the subpoenas were issued for improper reasons, *United Kingdom*, slip op. at 34 n.22 (Pet. 32a n.22), but, as the concurring opinion noted, blinded itself to the history of the Northern Ireland conflict, as well as the longstanding "non-investigation" of the McConville murder, by refusing to permit the petitioners to prove that the subpoenas were issued for improper reasons.

"Ignoring the underlying and pervasive political nature of the 'Troubles,' as the Irish–British controversy has come to be known in Northern Ireland, is simply ignoring one hundred years of a well-documented history of political turmoil." *United Kingdom*, slip op. at 45 n.28 (Torruella, J., concurring) (citing *Northern Ireland Politics* (Arthur Aughley & Duncan Morrow eds.) (1996)) (Pet. 41a n.28).

> That the academic investigations carried out by [petitioners] in this case, and the evidence sought by the United Kingdom involve 'offenses of a political nature' irrespective of how heinous we may consider them, is borne out by the terms of the Belfast Agreement (also known as

> the "Good Friday Agreement") entered into by the Government of the United Kingdom and the Irish Republican Army, whereby almost all prisoners were released by the British government, including many who had been convicted of murder.

Id. (citing Karl S. Bottigheirmer & Arthur H. Aughley, *Northern Ireland*, Encyclopaedia Britannica (2007)).

The point is *not* that the petitioners have a private right of action under MLAT. Rather, the point is that these facts are directly relevant to the balancing of the First Amendment interests at stake, and to the exercise of the district court's discretion, and cannot be adjudicated on a motion to dismiss.

3. The First Circuit's statement that it would have affirmed "for the same reasons" even if *Branzburg* permitted the court to apply a balancing test is unavailing. *See United Kingdom*, slip op. at 36 n.24 (citing *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998)) (Pet. 34a n.24). If the district court is deprived of evidence going to the balance of interests, its discretion cannot be fully informed no matter what the governing legal standard.

Denying the petitioners the right to be heard was gravely prejudicial. The First Circuit's terse statements that "[t]here is no plausible claim here of a bad faith purpose to harass," *id.* at 34 n.22, and that the order enforcing the subpoenas "was not an abuse of discretion, assuming such discretion existed," *id.* at 29-30 (Pet. 27a), are simply a function of excluding the petitioners from the proceedings.

II. Review Is Warranted to Resolve the Longstanding Circuit Split Concerning *Branzburg*.

The First Circuit recognized the split in the circuits concerning whether, and the extent to which, *Branzburg* recognized constitutionally based protections for confidential sources. *United Kingdom*, slip op. at 36 n.23 (Pet. 33a n.23). The longstanding difference of opinion about the scope of *Branzburg* perhaps is not surprising given the number of separate opinions issued by this Court of 40 years ago.

Although *Branzburg* rejected a constitutional privilege that would have provided a "virtually impenetrable constitutional shield, beyond legislative or judicial control," 408 U.S. at 697, and which would have prevented reporters who were percipient witnesses to alleged crimes from appearing and answering "relevant and material questions asked during a good-faith grand jury investigation," *id*. at 708, the majority opinion left no doubt that "[g]rand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." *Id*. at 707-708 (emphasis added).

As Justice Powell explained in his concurring opinion:

> Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source

> relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 710 (Powell, J. concurring).

In *United States v. Cuthbertson*, for example, the Third Circuit held that "journalists possess a qualified privilege not to divulge confidential sources and not to disclose unpublished information in their possession in criminal cases." The court concluded that "the interests of the press that form the foundation of the privilege are not diminished because the nature of the underlying proceeding out of which the request for the information arises is a criminal trial." 630 F.2d at 147. *See also In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc) (grand jury investigation).

The Second Circuit similarly has concluded that "*Branzburg* recognized the need to balance First Amendment values even where a reporter is asked to testify before a grand jury." *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (citation omitted). The

court found "no legally-principled reason" for distinguishing between civil and criminal cases when applying the privilege, *see Burke*, 700 F.2d at 77, but has indicated that the threshold to overcome the privilege may be "lower" in criminal cases. *See also Gonzales*, 194 F.3d at 34 n.3. The Eleventh Circuit is in accord with the Third and the Second Circuits, as previously appeared to be the case in the First Circuit. *See United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (applying *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980)), *cert. denied*, 483 U.S. 1021 (1987); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir.1988).

Other circuits have held that *Branzburg* forecloses First Amendment protection in criminal cases. *See In re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 968 (D.C. Cir.), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir.), *cert. denied*, 545 U.S. 1150 (2005); *McKevitt*, 339 F.3d 530 (MLAT subpoena); *United States v. Smith*, 135 F.3d 963, 968-72 (5th Cir. 1998); *Shain*, 978 F.2d at 852; *In re Grand Jury*, 810 F.2d at 584.

This circuit split on an important issue of constitutional law warrants certiorari review:

First, this case implicates the constitutional rights of those who gather information on matters of public interest to object to attempts by foreign governments to compel the disclosure of confidential information. On the one hand, as the lower court recognized, the "federal interest in cooperating in the criminal proceedings of friendly foreign nations is obvious." *United Kingdom*, slip op. at 37 (citing *McKevitt*, 339 F.3d at 532). On the other hand, *Branzburg's*

admonitions that "news gathering is not without its First Amendment protections" and that "[g]rand juries are subject to judicial control and subpoenas to motions to quash," raise unique challenges when a judge is faced with a subpoena issued by a foreign power. 408 U.S. at 707, 708. Resolving the circuit split concerning the meaning of *Branzburg* is essential if courts are to properly balance the interests of the executive branch and the interests of the individual in cases involving subpoenas issued by foreign powers.

Second, because subpoenas issued pursuant to an MLAT involve requests made by a foreign sovereign and reviewed only by the executive branch, those who are subject to subpoenas are left without the protections of the grand jury, "a primary security to the innocent against hasty, malicious and oppressive persecution," *Branzburg*, 408 U.S. at 687 n.23 (quotations and citations omitted), and an important "buffer or referee between the government and the people." *United States v. Williams*, 504 U.S. 36, 47 (1992). *See generally Branzburg*, 408 U.S. at 686-87 ("The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury…."). Contrary to the lower court's reasoning, the absence of grand jury protections thus increases, not decreases, the need for judicial oversight over MLAT subpoenas, and further supports the need for certiorari review.

Third, as the lower court noted, the *Branzburg* Court "left open . . . the prospect that in certain situations -- e.g., a showing of bad faith purpose to harass -- First Amendment protections might be invoked by the reporter." *United Kingdom*, Slip Op. at 34 n.22. *See also Branzburg*, 408 U.S. at 710 ("if

the newsman . . . has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered") (Powell, J., concurring). Whether the "bad faith" exception to *Branzburg* properly may be applied without allowing interested parties to be heard and present evidence supporting their claims is another important constitutional issue raised by the lower court's decision. *United Kingdom*, slip op. at 17 n.11 (Pet. 16a n.11).

III. Review Is Warranted to Establish the Standard of Judicial Review under § 3512.

As the First Circuit noted, this appears to be the first court of appeals decision addressing an MLAT subpoena issued pursuant to 18 U.S.C. § 3512. *United Kingdom*, slip op. at 3 (Pet. 3a). Although the court declined to decide whether or not § 3512 affords district courts *any* discretion to review MLAT subpoenas, it expressly held that the discretionary factors for judicial review of foreign requests for evidence under 28 U.S.C. § 1782 and set forth in *Intel*, 542 U.S. 241, do not apply to MLAT subpoenas issued under §3512. *United Kingdom*, slip op. at 28-29 n.17 (Pet. 26a-27a & n.17).

1. As a matter of first principles, orders enforcing subpoenas issued on behalf of foreign powers raise significant individual liberty concerns. *See generally* Declaration of Independence (protesting that the King had "combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws…."). There is a

compelling federal interest in a uniform standard governing judicial review of all such subpoenas. The First Circuit's decision created substantial additional uncertainty by holding that even if some undefined level of judicial discretion exists (albeit more limited than in *Intel*), foreign subpoenas may be enforced even without providing interested parties the right to be heard.

2. In *Intel*, this Court held that courts have judicial discretion to review foreign subpoenas issued pursuant to 28 U.S.C. § 1782. 542 U.S. at 264-65. The Court noted that § 1782(a) provides that a district court "may order" a person to give testimony or evidence for use in a foreign criminal investigation. *Id*. at 246 (quoting 28 U.S.C. § 1782(a)) (emphasis added). The Court also noted that the statute expressly shielded only privileged materials from its provisions. *Id*. at 260 (citing 28 U.S.C. § 1782(a)). The Court nevertheless held that district courts were entitled to consider discretionary factors such as whether the subpoena is "unduly intrusive or burdensome," the nature of the foreign tribunal, the character of the proceedings underway abroad, and whether foreign proceedings were pending or imminent. 542 U.S. at 264-65.

3. In this case, the lower court expressly held that the discretionary factors set forth in *Intel* for judicial review of foreign requests for evidence do *not* apply to MLAT subpoenas issued under 18 U.S.C. § 3512. *United Kingdom*, slip op. at 28-29 & n.17 (Pet. 26a-27a & n. 17) (citing *In re Premises*, 634 F.3d at 565, 568, 570). The First Circuit reached its decision despite that the statutory language construed in *Intel* as granting judicial discretion is remarkably similar to the permissive language in the US-UK MLAT as

well as the language of § 3512 (enacted after, and therefore controlling over, the US-U.K. MLAT):

a. The court relied heavily on the provision of the US-UK MLAT stating that the treaty does not "give rise to a right on the part of any private person . . . to impede the execution of a request." US-UK MLAT, art. 1, ¶ 3. *United Kingdom*, slip op. at 25. The question presented for certiorari review, however, is not whether the petitioners have a private right of action under the treaty. Rather, the question presented is whether the treaty and § 3512 strip courts of their traditional discretionary supervisory powers over subpoenas. They do not.

b. Article 5, ¶ 1 of the treaty provides that the courts "shall have the authority to issue subpoenas, search warrants, or other orders necessary" to execute an MLAT request. US-UK MLAT, art. 5, ¶ 1. Such a grant of judicial authority implies the existence, not the absence, of discretion. See 1 H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 162 (Tent. ed.1958) (defining discretion as "the power to choose between two or more courses of action each of which is thought of as permissible"); *see also Intel*, 542 U.S. at 264 ("a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so") (emphasis added).

c. Moreover, the treaty expressly uses the language of discretion with respect to the power to compel testimony or the production of documents:

- "A person in the territory of the Requested Party from whom evidence is requested pursuant to this treaty *may be compelled*, if necessary, to appear in

order to testify or produce documents, records, or articles of evidence by subpoena or such other method as may be permitted by the law of the Requested Party." US-UK MLAT, art. 8, ¶ 1 (emphasis added).

- "A person requested to testify or produce documentary information or articles in the territory of the Requested Party *may be compelled* to do so in accordance with the law of the Requested Party." US-UK MLAT, art. 8, ¶ 2 (emphasis added).

4. Section 3512(a) does not differ in any relevant respect from the provisions of § 1782 on which the *Intel* discretionary factors rest. Section 3512(a) provides that a district court "*may* issue such orders as may be necessary to execute a request from a foreign authority for assistance in the investigation or prosecution of criminal offenses…." 18 U.S.C. § 3512(a)(1) (emphasis added). The statute further provides that any order so issued "*may include* the issuance" of an order "requiring the production of documents…." *Id.* § 3512(a)(2)(d) (emphasis added). *Compare Intel*, 542 U.S. at 246, 260.

5. The need for a uniform, coherent standard of review of foreign subpoenas is a compelling reason to grant certiorari in this case. It is for this Court, not the Executive, to interpret the plain meaning of treaties and congressional statutes. "The Constitution's separation of powers does not permit either the legislative or executive branch to convert the judicial branch into a mere functionary." *In re Premises*, 634 F.3d at 572. That is particularly true where, as here, the lower court found that the

interest in enforcing an MLAT subpoena arguably is stronger than the grand jury's interest in *Branzburg*, thus granting foreign governments greater subpoena powers than domestic law enforcement authorities.

In sum, the First Circuit's decision that the *Intel* discretionary factors do not apply to MLAT subpoenas issued pursuant to § 3512 injects substantial additional uncertainty into the standard of review governing a sensitive area of civil rights and executive power which should be resolved by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 16, 2012

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT.

No. 11–2511

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.

ED MOLONEY; ANTHONY MCINTYRE,
Movants, Appellants.

No. 12–1159

ED MOLONEY; ANTHONY MCINTYRE,
Plaintiffs, Appellants,

v.

ERIC H. HOLDER, JR., Attorney General; JACK W. PIROZZOLO, Commissioner,
Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. William G. Young, U.S. District Judge]

Before

Lynch, Chief Judge,
Torruella and Boudin, Circuit Judges

Eamonn Dornan, with whom Dornan & Associates PLLC and James J. Cotter III were on brief, for appellants.

Barbara Healy Smith, Assistant United States Attorney, with whom Carmen M. Ortiz, United States Attorney, and John T. McNeil, Assistant United States Attorney, were on brief, for appellee.

July 6, 2012.

LYNCH, Chief Judge.

These consolidated appeals are from the denial, in two cases, of the efforts of two academic researchers to prevent the execution of two sets of subpoenas issued in May and August of 2011. The subpoenas were issued to Boston College ("BC") by a commissioner appointed pursuant to 18 U.S.C. § 3512 and the "US–UK MLAT," the mutual legal assistance treaty between the United States and the United Kingdom. The subpoenas are part of an investigation by United Kingdom authorities into the 1972 abduction and death of Jean McConville, who was thought to have acted as an informer for the British authorities on the activities of republicans in Northern Ireland. This appears to be the first court of appeals decision to deal with an MLAT and § 3512.

The May 2011 subpoenas sought oral history recordings and associated documentation from interviews BC researchers had conducted with two former members of the Irish Republican Army ("IRA"): Dolours Price and Brendan Hughes. BC turned over the Hughes materials because he had died and so he had no confidentiality interests at stake. BC moved to quash or modify the Price subpoenas. The second set of subpoenas issued in August 2011 sought any information related to the death or abduction of McConville contained in any of the other interview materials held by BC. BC moved to quash these subpoenas as well.

The district court denied both motions to quash. *In re: Request from the U.K.,* 831 F.Supp.2d 435 (D.Mass.2011). And after undertaking in camera review of the subpoenaed materials it ordered produc-

tion. Order, *In re: Request from the U.K.,* No. 11–91078 (D.Mass. Dec. 27, 2011), ECF No. 38 (ordering production of Price interviews pursuant to May subpoenas); Findings and Order, *In re: Request from the U.K.,* No. 11–91078, 2012 WL 194432 (D.Mass. Jan. 20, 2012) (ordering production of other interviews pursuant to August subpoenas). BC has appealed the order regarding the August subpoenas, but that appeal is not before this panel. BC chose not to appeal the order regarding the Price materials sought by the May subpoenas.

The appellants here, Ed Moloney and Anthony McIntyre, who unsuccessfully sought to intervene in BC's case on both sets of subpoenas, pursue in the first appeal a challenge to the district court's denial of their motions to intervene as of right and for permissive intervention. Their intervention complaint largely repeated the claims made by BC and sought declarations that the Attorney General's compliance with the United Kingdom's request violates the US–UK MLAT and injunctive relief or mandamus compelling him to comply with the terms of that treaty. The effect of the relief sought would be to impede the execution of the subpoenas.

Having lost on intervention, Moloney and McIntyre then filed their own original complaint, essentially making the same claims as made in this intervenor complaint. The district court dismissed the complaint, stating that even assuming the two had standing, the reasons it gave in its reported decision for denial of BC's arguments and denial of intervention applied to dismissal of the complaint. *See* Order of Dismissal, *Moloney v. Holder,* No. 11–12331 (D.Mass. Jan. 25, 2012), ECF No. 15; Tr. of Mot. Hr'g, *Moloney v. Holder,*

No. 11–12331 (D.Mass. Jan. 24, 2012), ECF No. 18. Appellants freely admit that their complaint "essentially set forth the same claim" as their complaint in intervention. In the second appeal they challenge the dismissal of their separate civil complaint for lack of subject matter jurisdiction and for failure to state a claim.

I.

The factual background for these suits is not disputed.

A. *The Belfast Project at Boston College*

The Belfast Project ("the Project") began in 2001 under the sponsorship of BC. An oral history project, its goal was to document 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. The purpose was to gather and preserve the stories of individual participants and provide insight into those who become personally engaged in violent conflict. The Project is housed at the John J. Burns Library of Rare Books and Special Collections at BC.

The Project was first proposed by appellant Ed Moloney, a journalist and writer. He later contracted with BC to become the Project's director. Before the Project started, Robert K. O'Neill, the Director of the Burns Library, informed Moloney that, although he had not yet conferred with counsel on the point, he could not guarantee that BC "would be in a position to refuse to turn over documents [from the Project] on a court order without being held in contempt."

Against this background, the Project attempted to guard against unauthorized disclosure. The agreement between Moloney and BC directed him as Project Director to require interviewers and interviewees to sign a confidentiality agreement forbidding them from disclosing the existence or scope of the Project without the permission of BC. The agreement also required the use of a coding system to maintain the anonymity of interviewees and provided that only the Burns Librarian and Moloney would have access to the key identifying the interviewees. Although the interviews were originally going to be stored in Belfast, Northern Ireland, as well as Boston, the Project leadership ultimately decided that the interviews could only be safely stored in the United States. They were eventually stored in the "Treasure Room" of the Burns Library, with extremely limited access.

The agreement between Moloney and BC requires that "[e]ach interviewee is to be given a contract *guaranteeing to the extent American law allows* the conditions of the interview and the conditions of its deposit at the Burns Library, including terms of an embargo period if it becomes necessary" (emphasis added). The agreement, in this clause, expressly acknowledged that its protections could be limited by American law. The agreement also directs that the Project adopt an "appropriate user model, such as Columbia University's Oral History Research Office Guidelines statement." [1]

[1] As the district court noted in its opinion, researchers for Columbia University's oral history projects apparently advise interviewees that whatever they say is subject to release under court orders and subpoenas. See In re: Request from the U.K., 831 F.Supp.2d 435, 441 n. 4 (D.Mass.2011).

The Project employed researchers to interview former members of the Irish Republican Army and the Ulster Volunteer Force. Appellant Anthony McIntyre, himself a former IRA member, was one of those researchers. McIntyre worked for the Project under a contract governed by the terms of the agreement between Moloney and BC. McIntyre's contract required him to transcribe and index the interviews he conducted and to abide by the confidentiality requirements of the Moloney agreement. McIntyre conducted a total of twenty-six interviews of persons associated with the republican side of the conflict for the Project by the time it ended in 2006. In addition, the Project contains interviews with fourteen members of Protestant paramilitary groups and one member of law enforcement. There are a total of forty-one interview series (each series may contain multiple interviews with a single person).

Interviewees entered into donation agreements with BC, which were signed by the interviewees and by O'Neill, the Burns Librarian. The donation agreements transfer possession of the interview recordings and transcripts to BC and assign to the school "absolute title" to the materials, "including whatever copyright" the interviewee may own in their contents. The donation agreements have the following clause regarding access to the interview materials:

> Access to the tapes and transcripts shall be restricted until after my death except in those cases where I have provided prior written approval for their use following consultation with the Burns Librarian, Boston College. Due to the sensitivity of content, the ultimate power of release shall rest with me. After my death the Burns Librarian of

> Boston College may exercise such power exclusively.

This clause does not contain the term "confidentiality" and provides only that access will be restricted. But it does recite that the ultimate power of release belongs to the donor during the donor's lifetime. The donation agreements do not contain the "to the extent American law allows" language that is contained in the agreement between Moloney and BC. A copy of the donation agreement for Brendan Hughes, but not one for Dolours Price, is in the record, but we assume both signed one.[2]

In 2010 Moloney published a book and released a documentary, both entitled "Voices from the Grave, Two Men's War in Ireland," based on Belfast Project interviews with Hughes and with David Ervine, a former member of the Ulster Volunteer Force.[3] In addition, news reports in Northern Ireland revealed that Price had been interviewed by academics at a Boston-area university and that she had admitted to being involved in the murder and "disappearances" of

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[2] An affidavit from McIntyre, who interviewed Price, states that Price did sign a donation agreement, which McIntyre states that he witnessed and also signed, and that he sent the donation form to BC. The affidavit from O'Neill, the Burns Librarian, states that a search of the Project's archives for Price's executed donation agreement failed to locate it, but that there is no reason to doubt that Price did in fact execute a donation agreement just like the one executed by Hughes.

[3] At the time the book was published, both Hughes and Ervine had died, so under the terms of their donation agreements their interviews could be released to the public.

four persons targeted by the IRA, including Jean McConville.

B. *The US–UK MLAT Subpoenas*

On March 30, 2011, the United States submitted an application to the district court ex parte and under seal pursuant to the US–UK MLAT and 18 U.S.C. § 3512, seeking the appointment of an Assistant United States Attorney as commissioner to collect evidence from witnesses and to take such other action as necessary to effectuate a request from law enforcement authorities in the United Kingdom. That application remains under seal. The application resulted from a formal request made by the United Kingdom, pursuant to the US–UK MLAT, for legal assistance in a pending criminal investigation in that country involving the 1972 murder and kidnapping of Jean McConville. The district court granted the government's application on March 31, 2011, and entered a sealed order granting the requested appointment.

The commissioner issued two sets of subpoenas for Belfast Project materials. The first set of subpoenas were received by BC on May 5, 2011, and were directed to the Trustees of Boston College; Robert K. O'Neill, Director of the Burns Library; and Thomas E. Hachey, Professor of History and Executive Director of the Center for Irish Studies at BC. The subpoenas were issued for the purpose of assisting the United Kingdom "regarding an alleged violation 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 cause such harm. The subpoenas did not state the identity of the victim or

victims of these crimes, and sought recordings, written documents, written notes, and computer records of interviews made with Brendan Hughes and Dolours Price, to be produced on May 26, 2011.

BC produced responsive materials related to Hughes; the conditions of his donation agreement pertaining to the release of his interviews had terminated with his death. The time to produce the Price materials was extended by agreement with the U.S. Attorney's Office until June 2, 2011.

The second set of subpoenas were received by counsel for BC on August 4, 2011. The August subpoenas sought recordings of "any and all interviews containing information about the abduction and death of Mrs. Jean McConville," along with related transcripts, records, and other materials. The August subpoenas were directed at the 176 interviews with the remaining 24 republican-associated interviewees who were part of the Project. These subpoenas directed production no later than August 17, 2011.

C. *The Litigation Initiated by BC*

On June 7, 2011, BC moved to quash the May subpoenas. In the alternative, BC requested that the court allow representatives from BC access to the documents that describe the purposes of the investigation to enable BC to specify with more particularity in what ways the subpoenas were overbroad or that the court conduct such a review in camera. The government opposed the motion. After receiving the August subpoenas, BC filed a new motion to quash addressed to both sets of subpoenas, which the government also opposed.

On August 31, 2011, appellants Moloney and McIntyre filed a motion to intervene as of right and for permissive intervention, *see* Fed.R.Civ.P. 24, along with their intervention complaint. That pleading tracked the arguments made in BC's motion to quash and also alleged that the Attorney General's compliance with the United Kingdom's request violated the US–UK MLAT and that enforcement of the subpoenas would violate Moloney and McIntyre's First and Fifth Amendment rights. Moloney and McIntyre sought declarations that the Attorney General was in violation of the US–UK MLAT and injunctive relief or mandamus compelling him to comply with the terms of that treaty, the effect of which would be to impede the execution of the subpoenas. The government opposed the motions to intervene.

On December 16, 2011, the district court issued an opinion denying BC's motions to quash the May and August subpoenas for the reasons stated in its opinion. *In re: Request from the U.K.,* 831 F.Supp.2d at 459. As to BC's alternative request, the court ordered BC to produce materials responsive to the two sets of subpoenas for the court to review in camera.[4] *Id.*

The district court also denied Moloney and McIntyre's motion to intervene as of right and their motion for permissive intervention. *Id.* The court stated that no federal statute gave Moloney and McIntyre an un-

[4] During a hearing held on December 22, 2011, the court explained that it would engage in a two-part analysis, first determining whether the produced materials fell within the scope of the subpoenas, and second engaging in a balancing test. *See* Tr. of Conf., *In re: Request from the U.K.,* No. 11–91078 (D.Mass. Dec. 22, 2011), ECF No. 35.

conditional right to intervene under Rule 24(a)(1), "and the US–UK MLAT prohibits them from challenging the Attorney General's decisions to pursue the MLAT request."[5] *Id.* at 458. The district court "conclude[d] 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." *Id.* The court did not separately analyze permissive intervention. Moloney and McIntyre timely appealed the denial of their motion to intervene on December 29, 2011.

Having reviewed in camera the interviews of Dolours Price sought by the May subpoenas, the district court on December 27, 2011 ordered that the May subpoenas be enforced according to their terms. *See* Order, *In re: Request from the U.K.,* No. 11–91078 (D. Mass. Dec. 27, 2011), ECF No. 38. BC and the other recipients of the May subpoenas did not appeal this order.[6]

Having been denied intervention, Moloney and McIntyre filed a separate civil complaint in the district court on December 29, 2011. The same legal

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[5] The district court also mentioned but did not analyze the rule that "[a]n interest that is too contingent or speculative ... cannot furnish a basis for intervention as of right." *In re: Request from the U.K.,* 831 F.Supp.2d at 458 (quoting *Ungar v. Arafat,* 634 F.3d 46, 50–51 (1st Cir.2011)) (internal quotation marks omitted).

[6] On December 30, 2011, this court granted Moloney and McIntyre's motion to stay the portion of the district court's order of December 27, 2011 permitting the government to turn over the Price interview materials to the United Kingdom, pending the resolution of this appeal.

theories were stated in this complaint as had been in the intervention complaint. The government moved to dismiss plaintiffs' separate complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6).

The district court held a hearing on the motion to dismiss on January 24, 2012, and dismissed the case from the bench. *See* Tr. of Mot. Hr'g at 11, *Moloney v. Holder,* No. 11–12331 (D. Mass. Jan. 24, 2012), ECF No. 18. The district court "rule[d] that neither Mr. McIntyre nor Mr. Moloney under the Mutual Legal Assistance Treaty and its adoption by the [S]enate and the treaty materials has standing to bring this particular claim." *Id.* The district court also stated:

> Beyond that, on the merits, I am satisfied that the Attorney General as [a] matter of law has acted appropriately with respect to the steps he has taken under this treaty, and I can conceive of no different result applying the heightened scrutiny that I think is appropriate for these materials were this case to go forward on the merits.[7]

Id. Moloney and McIntyre timely appealed the dismissal of their complaint on January 29, 2012.

As to BC's motion to quash the August subpoenas, on January 20, 2012, the district court ordered BC to

[7] It is evident from the transcript of the hearing that the district court considered Moloney and McIntyre's constitutional claims as being the same as those raised by BC's motions to quash and that the court dismissed Moloney and McIntyre's claims for the same reasons that it denied BC's motions. Tr. of Mot. Hr'g at 8–11, *Moloney v. Holder,* No. 11–12331 (D. Mass. Jan. 24, 2012), ECF No. 18.

produce to the government the full series of interviews and transcripts of five interviewees and two specific interviews (but not the full interview series) with two additional interviewees, along with transcripts and related records.[8] *See* Findings and Order, *In re: Request from the U.K.,* No. 11–91078, 2012 WL 194432 (D.Mass. Jan. 20, 2012). The court determined that the remaining interviews were not within the subpoenas' scope.[9] BC has appealed this order, and that appeal is not before this panel. *See* Appeal No. 12–1236.

The American Civil Liberties Union of Massachusetts (ACLUM) has filed an amicus curiae brief in support of appellants Moloney and McIntyre.[10]

II.

Dismissal of the Civil Complaint's Claims Under the US–UK MLAT and 18 U.S.C. § 3512

We review de novo the dismissal of the appellants' complaint. *See Abdel–Aleem v. OPK Biotech LLC,* 665 F.3d 38, 41 (1st Cir.2012) (dismissal for lack of subject matter jurisdiction reviewed de novo); *Feliciano–*

[8] The court made production contingent on the lifting of the stay entered by this court on December 30, 2011.

[9] No party raises on appeal any question whether the district court had discretion to review the materials to determine whether they fell within the scope of the subpoenas or acted within any discretion it had.

[10] The brief states three interests: support of the First Amendment claim, expression of concern about disclosure of confidential information held by others, and an expression of concern about the government's interpretation of the US–UK MLAT.

Hernández v. Pereira–Castillo, 663 F.3d 527, 532 (1st Cir.2011) (dismissal for failure to state a claim reviewed de novo), *cert. denied,* 132 S.Ct. 2742 (2012). We "accept[ ] as true all well-pleaded facts, analyz[e] those facts in the light most hospitable to the plaintiff's theory, and draw [ ] all reasonable inferences for the plaintiff." *New York v. Amgen Inc.,* 652 F.3d 103, 109 (1st Cir.2011) (quoting *United States ex rel. Hutcheson v. Blackstone Med., Inc.,* 647 F.3d 377, 383 (1st Cir.2011)), *cert. dismissed,* 132 S.Ct. 993. We are not bound by the district court's reasoning but "may affirm an order of dismissal on any basis made apparent from the record." *Cook v. Gates,* 528 F.3d 42, 48 (1st Cir.2008) (quoting *McCloskey v. Mueller,* 446 F.3d 262, 266 (1st Cir.2006)).

Moloney and McIntyre essentially make several arguments of statutory error and one constitutional claim. They argue that (1) they state a claim under the US–UK MLAT and 18 U.S.C. § 3512; in any event, (2) they have a claim under the Administrative Procedure Act, 5 U.S.C. § 702, and 28 U.S.C. § 1331; and that, regardless, (3) the district court had residual discretion which it abused in not quashing the subpoenas. They also argue that their claim under the First Amendment of the U.S. Constitution, brought under federal question jurisdiction, 28 U.S.C. § 1331, was improperly dismissed, an argument we address in part III.

Moloney and McIntyre contend they may bring suit on the claims that the Attorney General failed to fulfill his obligations under the US–UK MLAT and that they have a private right of action to seek a writ of mandamus compelling him to comply with the treaty or to

seek a declaration from a federal court that he has not complied with the treaty.[11]

The appellants' claims under the US–UK MLAT fail because appellants are not able to state a claim that they have private rights that arise under the treaty, and because a federal court has no subject matter jurisdiction to entertain a claim for judicial review of the Attorney General's actions pursuant to the treaty.

A. *Explanation of the Treaty and Statutory Scheme*

The United States has entered into a number of mutual legal assistance treaties ("MLATs") which typically provide for bilateral, mutual assistance in the gathering of legal evidence for use by the requesting state in criminal investigations and proceedings. A description of the history and evolution of such MLATs may be found in the Ninth Circuit's decision in *In re 840 140th Ave. NE,* 634 F.3d 557, 563–64 (9th Cir.2011).

The MLAT between the United States and the United Kingdom was signed on January 6, 1994, and entered into force on December 2, 1996. *See* Treaty Between

[11] Appellants assert that the Attorney General's actions violate the US–UK MLAT because it was not reasonable to believe that a prosecution would take place in the underlying case; he failed to take into account certain "essential interests" and "public policy" in deciding whether to comply with a request under the treaty; the crimes under investigation by the United Kingdom were "of a political character;" and he did not consider the implications for the peace process in Northern Ireland of complying with the United Kingdom's request. The federal courts may not review this decision by the Attorney General.

the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters, U.S.–U.K., Dec. 2, 1996, S. Treaty Doc. No. 104–2. In 2003, the United States signed a mutual legal assistance treaty with the European Union ("US–EU MLAT") that made additions and amendments to the US–UK MLAT; the latter is in turn included as an annex to the US–EU MLAT. *See* Agreement on Mutual Legal Assistance Between the United States of America and the European Union, U.S.–E.U., June 25, 2003, S. Treaty Doc. No. 109–13. Both MLATs are self-executing treaties. S. Treaty Doc. No. 109–13, at vii ("The U.S.-EU Mutual Legal Assistance Agreement and bilateral instruments [including the annexed US–UK MLAT] are regarded as self-executing treaties under U.S. law....").

Article 1 of the US–UK MLAT provides that the parties to the agreement shall assist one another in taking testimony of persons; providing documents, records, and evidence; serving documents; locating or identifying persons; transferring persons in custody for testimony or other purposes; executing requests for searches and seizures; identifying, tracing, freezing, seizing, and forfeiting the proceeds and instrumentalities of crime; and providing other assistance the parties' representatives may agree upon. *See* US–UK MLAT, art. 1, ¶ 2.

Importantly, article 1 further states: "This treaty is intended solely for mutual legal assistance between the Parties. The provisions of this Treaty shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request." US–UK MLAT, art. 1,

¶ 3. This treaty expressly prohibits the creation of private rights of action.

Article 2 concerns Central Authorities: each party's representative responsible for making and receiving requests under the US–UK MLAT. US–UK MLAT, art. 2, ¶ 3. The treaty states that the Central Authority for the United States is "the Attorney General or a person or agency designated by him." US–UK MLAT, art. 2, ¶ 2.

Article 3 sets forth certain conditions under which the Central Authority of the Requested Party may refuse assistance.[12] Before the Central Authority of a Requested Party denies assistance for any of the listed reasons, the treaty states that he or she "shall consult with the Central Authority of the Requesting Party to consider whether assistance can be given subject to

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[12] Article 3, paragraph one states that

> [t]he 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 offense for which assistance is requested, would be entitled to be discharged on the grounds of previous acquittal or conviction; or
>
> (c) the request relates to an offense that is regarded by the Requested Party as:
>
> (i) an offense of a political character; or
>
> (ii) an offense under military law of the Requested Party which is not also an offense under the ordinary civilian law of the Requested Party.

US–UK MLAT, art. 3, ¶ 1.

such conditions as it deems necessary." US–UK MLAT, art. 3, ¶ 2.

In article 18, entitled "Consultation," the treaty states that

> [t]he Parties, or Central Authorities, shall consult promptly, at the request of either, concerning the implementation of this Treaty either generally or in relation to a particular case. Such consultation may in particular take place if ... either Party has rights or obligations under another bilateral or multilateral agreement relating to the subject matter of this Treaty.

US–UK MLAT, art. 18, ¶ 1.

The requests from the United Kingdom in this case were executed under 18 U.S.C. § 3512, which was enacted as part of the Foreign Evidence Request Efficiency Act of 2009, Pub. L. No. 111–79, 123 Stat. 2086. When the US–UK MLAT was entered into, requests for assistance were to be executed under a different statute, 28 U.S.C. § 1782. *See* S. Exec. Rep. No. 104–23, at 13 (1996) (report of the Senate Committee on Foreign Relations accompanying the US–UK MLAT). Among other differences, § 3512 provides for a more streamlined process than under § 1782 for executing requests from foreign governments related to the prosecution of criminal offenses.[13] Enforcement of

[13] Section 1782 effectively requires the Attorney General as Central Authority to respond to requests for evidence from foreign governments by filing requests with the district court in every district in which evidence or a witness may be found. *See* 155 Cong. Rec. S6810 (daily ed. June 18, 2009) (letter from Acting Assistant Att'y Gen. Burton to Sen. Whitehouse). In practice this requires involving multiple U.S. Attorneys' Offices and district

similar MLATs under the provisions of § 1782 was the subject of consideration in *In re 840 140th Ave. NE,* 634 F.3d 557 (9th Cir.2011); *In re Commissioner's Subpoenas,* 325 F.3d 1287 (11th Cir.2003), *abrogated in part by Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241 (2004); and *In re Erato,* 2 F.3d 11 (2d Cir.1993).

B. *Appellants Have No Enforceable Rights Derived from the US–UK MLAT*

Interpretation of the treaty takes place against "the background presumption ... that '[i]nternational agreements, even those directly benefitting private persons, generally do not create rights or provide for a private cause of action in domestic courts.'" *Medellín v. Texas,* 552 U.S. 491 (2008) (alteration in original) (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907 cmt. a, at 395 (1986)). The First Circuit and other courts of appeals have held that "treaties do not generally create rights that are privately enforceable in the federal courts." *United States v. Li,* 206 F.3d 56, 60 (1st Cir.2000) (en banc); *see also Mora v. New York,* 524 F.3d 183, 201 & n. 25 (2d Cir.2008) (collecting cases from ten circuits holding that there is a presumption that treaties do not create privately enforceable rights in the absence of express language to the contrary). Express language

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courts in a single case. *Id.* Section 3512, on the other hand, permits a single Assistant United States Attorney to pursue requests in multiple judicial districts, *see* 18 U.S.C. § 3512(a)(1); 155 Cong. Rec. S6809 (daily ed. June 18, 2009) (statement of Sen. Whitehouse), and allows individual district court judges to oversee and approve subpoenas and other orders (but not search warrants) in districts other than their own, *see* 18 U.S.C. § 3512(f).

in a treaty creating private rights can overcome this presumption. *See Mora,* 524 F.3d at 188.

The US–UK MLAT contains no express language creating private rights. To the contrary, the treaty expressly states that it does not give rise to any private rights. Article 1, paragraph 3 of the treaty states, in full: "This treaty is intended solely for mutual legal assistance between the Parties. The provisions of this Treaty shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request." US–UK MLAT, art. 1, ¶ 3. The language of the treaty is clear: a "private person," such as Moloney or McIntyre here, does not have any right under the treaty to "suppress ... any evidence, or to impede the execution of a request."

If there were any doubt, and there is none, the report of the Senate Committee on Foreign Relations that accompanied the US–UK MLAT confirms this reading of the treaty's text:

> [T]he Treaty is not intended to create any rights to impede execution of requests or to suppress or exclude evidence obtained thereunder. 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 set out in article 3.
>
> S. Exec. Rep. No. 104–23, at 14.

Other courts considering MLATs containing terms similar to the US–UK MLAT here have uniformly ruled that no such private right exists. *See In re Grand Jury Subpoena,* 646 F.3d 159, 165 (4th

Cir.2011) (subject of a subpoena issued pursuant to an MLAT with a clause identical to the US–UK MLAT's article 1, paragraph 3 "failed to show that the MLAT gives rise to a private right of action that can be used to restrict the government's conduct"); *United States v. Rommy,* 506 F.3d 108, 129 (2d Cir.2007) (defendant who argued that evidence against him was improperly admitted because it was gathered in violation of US–Netherlands MLAT could not "demonstrate that the treaty creates any judicially enforceable right that could be implicated by the government's conduct" in the case); *United States v. $734,578.82 in U.S. Currency,* 286 F.3d 641, 659 (3d Cir.2002) (article 1, paragraph 3 of US–UK MLAT barred claimants' argument that seizure and subsequent forfeiture of money violated the treaty); *United States v. Chitron Elecs. Co. Ltd.,* 668 F.Supp.2d 298, 306–07 (D.Mass.2009) (defendant's argument that service of criminal summons was defective under US–China MLAT, which contained a clause identical to article 1, paragraph 3 of US–UK MLAT, failed because "the MLAT does not create a private right of enforcement of the treaty").

Moloney and McIntyre attempt to get around the prohibition on the creation of private causes of action with three arguments based on the treaty language. Appellants appear to argue that the text of the US–UK MLAT only covers requests for documents in the possession of the Requested Party but not for documents held by third persons who are merely under the jurisdiction of the government which is the Requested Party. This is clearly wrong. Article 1, paragraph 2 of the treaty states that a form of assistance provided for under the treaty includes "providing documents, records, and evidence." US–UK MLAT, art. 1, ¶ 2(b). As the Senate report explains, the treaty "permits a State

to compel a person in the Requested State to testify and produce documents there." S. Exec. Rep. No. 104–23, at 7.

Appellants' second argument is that article 1, paragraph 3 applies only to criminal defendants who try to block enforcement. This argument has no support in the text of the treaty. The US–UK MLAT plainly states that the treaty does not "give rise to a right on the part of *any private person* ... to impede the execution of a request." US–UK MLAT, art. 1, ¶ 3 (emphasis added). This prohibition by its terms encompasses all private persons, not just criminal defendants.

Appellants finally contend that they do not seek to "obtain, suppress, or exclude any evidence, or to impede the execution of a request," but instead merely to enforce the treaty requirements before there can be compliance with a subpoena. Their own requests for relief make it clear they are attempting to do exactly what they say they are not.

Because the US–UK MLAT expressly disclaims the existence of any private rights under the treaty, appellants cannot state a claim under the treaty upon which relief can be granted.[14]

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[14] We reject their broader contention that the US–EU MLAT provides a basis for applying U.S. domestic law. That treaty has a provision that reads: "The provisions of this Agreement shall not ... expand or limit rights otherwise available under domestic law." US–EU MLAT, art. 3, ¶ 5. Not only is appellants' reliance on this provision question begging, it is also misplaced. By its terms the provision applies only to the US–EU MLAT and not to any of the related bilateral agreements, such as the US–UK MLAT at issue in this case.

C. *The APA Does Not Provide a Claim for Judicial Review*

Appellants attempt to circumvent the US–UK MLAT's prohibition on private rights of action by framing their suit as one of judicial review under the APA.[15] *See* 5 U.S.C. § 702.

It is true that § 702 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id.* However, § 701(a)(1) withdraws the right to judicial review to the extent that "statutes preclude judicial review." *Id.* The treaty here by its express language precludes judicial review. Further, "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved" all dictate that no judicial review is available under the APA. *Block v. Cmty. Nutrition Inst.,* 467 U.S. 340, 345 (1984). Section 701(a)(1) thus bars federal court jurisdiction

[15] The government argues that Moloney and McIntyre lack prudential standing to bring their claims under the APA because their asserted interests fall outside the zone of interests meant to be protected or regulated by the US–UK MLAT. *See Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak,* 132 S.Ct. 2199, 2210 (2012) (describing the prudential standing test). The zone-of-interests standing question "is an issue of *statutory* standing," not Article III standing. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 97 (1998). We may and do bypass the question of appellants' statutory standing and resolve the issue of whether the APA provides them with a cause of action on the merits. *See id.* at 97 & n. 2 (merits questions may be decided before statutory standing questions).

here.[16] *Accord Comm. of U.S. Citizens Living in Nicar. v. Reagan,* 859 F.2d 929, 943 (D.C.Cir.1988) ("[T]he APA does not grant judicial review of agencies' compliance with a legal norm that is not otherwise an operative part of domestic law." (citing 5 Davis, *Administrative Law Treatise* § 28.1, at 256 (2d ed. 1984))).

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[16] Appellants admit they cannot invoke the Declaratory Judgment Act, 28 U.S.C. § 2201, as an independent basis for jurisdiction over their claims. *See Alberto San, Inc. v. Consejo De Titulares Del Condominio San Alberto,* 522 F.3d 1, 5 (1st Cir.2008) (Declaratory Judgment Act "merely 'makes available an added anodyne for disputes that come within the federal courts' jurisdiction on some other basis.' " (quoting *Ernst & Young v. Depositors Econ. Prot. Corp.,* 45 F.3d 530, 534 (1st Cir.1995)) (citing *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 671 (1950))).

Nor are appellants entitled to a writ of mandamus under 28 U.S.C. § 1361. "Mandamus is regarded as an extraordinary writ reserved for special situations. Among its ordinary preconditions are that the agency or official have acted (or failed to act) in disregard of a clear legal duty and that there be no adequate conventional means for review." *In re City of Fall River, Mass.,* 470 F.3d 30, 32 (1st Cir.2006). Such clear legal duty must be "nondiscretionary." *Eveland v. Dir. of Cent. Intelligence Agency,* 843 F.2d 46, 51 (1st Cir.1988) (per curiam) (quoting *Heckler v. Ringer,* 466 U.S. 602, 616 (1984)). Here, the plain text of article 1, paragraph 3 of the US–UK MLAT precludes any legal duty—discretionary or nondiscretionary—under the treaty on the part of the Attorney General to any private party.

D. *The District Court Did Not Abuse Its Discretion, in Any Event, in Denying Relief*

The district court reasoned that it had discretion, under the laws of the United States, particularly 18 U.S.C. § 3512, to quash the subpoenas, and concluded that it would exercise its discretion not to do so. The appellants, accordingly, argue that they may take advantage of that discretion and that the district court abused its discretion in not granting relief.[17] The government in this case has chosen not to address the question of whether there is any such discretion, or, if so, the scope of it or who may invoke it. By contrast, in

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[17] Appellants' reliance on *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241 (2004), fails. Moloney and McIntyre argue that the district court should have evaluated the subpoenas by applying the discretionary factors set forth in *Intel*. In that case the Supreme Court set out "factors that bear consideration in ruling on a § 1782(a) request" for the production of evidence for use in a foreign tribunal. *Id.* at 264.

The *Intel* factors are not applicable in this case for two reasons, whether or not § 3512 provides any residual discretion. The request here was brought under 18 U.S.C. § 3512, not 28 U.S.C. § 1782(a). In addition, the United Kingdom's request was made pursuant to an MLAT. The Court developed the *Intel* factors to apply to a situation where 28 U.S.C. § 1782(a) provided the only substantive standards for evaluating a request, but here such substantive standards are provided by the US–UK MLAT. *See In re 840 140th Ave. NE,* 634 F.3d 557, 571 (9th Cir.2011) (MLAT requests brought pursuant to § 1782 use that statute's procedural mechanisms "without importing [its] substantive limitations"); Nanda & Pansius, *Litigation of International Disputes in U.S. Courts* § 17:53 ("The [MLAT] provides at least three advantages: reciprocity; the reduction (if not elimination) of the court's discretion under § 1782; and the streamlining of evidence processes.").

a case under the US–Russia MLAT and 28 U.S.C. § 1782, the government argued that the district court lacked discretion to quash the subpoena. *In re 840 140th Ave. NE,* 634 F.3d at 565, 568. The Ninth Circuit agreed with the government's position, and noted that at most the statute provides "a procedure for executing requests, but not ... a means for deciding whether or not to grant or deny a request so made." *Id.* at 570 (quoting *In re Commissioner's Subpoenas,* 325 F.3d at 1297) (internal quotation mark omitted). In doing so, it agreed with the Eleventh Circuit in *In re Commissioner's Subpoenas.*

By contrast, here, for purposes of this appeal, the government has assumed arguendo that the district court had discretion to quash (going beyond the issue of whether the documents were responsive to the terms of the subpoenas) and has argued that the court acted properly within any discretion it may have had. So we have no occasion to pass on these assumptions and caution that we are not deciding any of these issues. The issues before us are more limited.

Even assuming arguendo the district court had such discretion, a question we do not address, we see no basis to upset the decision not to quash. The district court concluded that the balance of interests favored the government. *See* Order, *In re: Request from the U.K.,* No. 11–91078 (D. Mass. Dec. 27, 2011), ECF No. 38; Findings and Order, *In re: Request from the U.K.,* No. 11–91078, 2012 WL 194432 (D.Mass. Jan. 20, 2012). The court's finding that any balancing favored the government was not an abuse of discretion, assuming such discretion existed.

III.

The Constitutional Claims Were Properly Dismissed

Moloney and McIntyre's civil complaint alleged violations of their constitutional rights under the First Amendment.[18] We have jurisdiction under 28 U.S.C. § 1331.

It is undisputed that treaty obligations are subject to some constitutional limits. *See Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 417 & n. 9 (2003) (treaty obligations are "subject ... to the Constitution's guarantees of individual rights"). Like the Ninth Circuit in *In re 840 140th Ave. NE,* we think it clear that the Constitution does not compel the consideration under the treaty of discretionary factors such as those contained in § 1782, although Congress may choose to enact some in statutes. 634 F.3d at 573.

We affirm the dismissal for failure to state a claim, after disposing of some of the government's initial arguments.

A. *The Government's Standing Objections*

The government attempts to short stop any analysis of whether a claim is stated by arguing that neither appellant has standing under Article III to raise a

[18] Although the complaint alludes to a Fifth Amendment claim, based on alleged risk to appellants, no such claim is pled or briefed, and it fails. *See Marrero–Rodríguez v. Municipality of San Juan,* 677 F.3d 497, 501 (1st Cir.2012) (dismissing as not properly pled a Fourth Amendment claim which was only mentioned on the first page of the complaint, and was not even pled as a claim).

constitutional claim. Standing has both an Article III component and a prudential component. *Katz v. Pershing, LLC,* 672 F.3d 64, 71–72 (1st Cir.2012). If the government's objections went only to prudential standing, they could easily be bypassed in favor of a decision on the merits. *Nisselson v. Lernout,* 469 F.3d 143, 150 (1st Cir.2006) (challenges to plaintiff's standing to sue "must be addressed first only if they call into question a federal court's Article III power to hear the case").

"Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms,* 130 S.Ct. 2743, 2752 (2010). At this stage, under *Iqbal* we credit plaintiffs' allegations of threatened harm.[19] *See Katz,* 672 F.3d at 70; *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). On their face, the pleadings appear to allege the requisite Article III injury that is fairly traceable to the issuance of the subpoenas and redressable by a favorable ruling. To the extent the government asserts that the appellants lack prudential standing, we bypass the arguments.

B. *Failure to State a First Amendment Claim*

We affirm the dismissal, as we are required to do by *Branzburg v. Hayes,* 408 U.S. 665 (1972). As framed, the claim is one of violation of appellants' individual "constitutional right to freedom of speech, and in par-

[19] We add that the government disputes these allegations of threatened harm to appellants, which also makes any final resolution of the standing issue at this stage inadvisable.

ticular their freedom to impart historically important information for the benefit of the American public, without the threat of adverse government reaction." They support this with an assertion that production of the subpoenaed interviews is contrary to the "confidentiality" they say they promised to the interviewees. They assert an academic research privilege,[20] to be evaluated under the same terms as claims of a reporter's privilege. *See Cusumano v. Microsoft Corp.,* 162 F.3d 708, 714 (1st Cir.1998) ("Academicians engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalists.").

Our analysis is controlled by *Branzburg,* which held that the fact that disclosure of the materials sought by a subpoena in criminal proceedings would result in the breaking of a promise of confidentiality by reporters is not by itself a legally cognizable First Amendment or common law injury. *See* 408 U.S. at 682, 690–91, 701. Since *Branzburg,* the Court has three times affirmed its basic principles in that opinion. *See Cohen v. Cowles Media Co.,* 501 U.S. 663 (1991) (First Amendment does not prohibit a plaintiff from recovering damages, under state promissory estoppel law, if the defendant newspaper breaches its

[20] The Supreme Court, for First Amendment purposes, has distinguished between "academic freedom" cases, on the one hand, involving government attempts to influence the content of academic speech and direct efforts by government to determine who teaches, from, on the other hand, the question of privilege in the academic setting to protect confidential peer review materials. *Univ. of Pa. v. EEOC,* 493 U.S. 182, 197–98 (1990). We view appellants' claim as falling into the second category. As such, it is far attenuated from the academic freedom issue, and the claimed injury as to academic freedom is speculative. *Id.* at 200.

promise of confidentiality); *Univ. of Pa. v. EEOC,* 493 U.S. 182 (1990) (First Amendment does not give a university any privilege to avoid disclosure of its confidential peer review materials pursuant to an EEOC subpoena in a discrimination case); *Zurcher v. Stanford Daily,* 436 U.S. 547 (1978) (First Amendment does not provide any special protections for newspapers whose offices might be searched pursuant to a search warrant based on probable cause to look for evidence of a crime).

In *Branzburg,* the Court rejected reporters' claims that the freedoms of the press[21] and speech under the First Amendment, or the common law, gave them the right to refuse to testify before grand juries under subpoena with respect to information they learned from their confidential sources. The Court held that the strong interests in law enforcement precluded the creation of a special rule granting reporters a privilege which other citizens do not enjoy:

> Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in

[21] No claim of freedom of the press is involved here.

> the course of a valid grand jury investigation or criminal trial.

408 U.S. at 690–91; *accord Cohen,* 501 U.S. at 669. The *Branzburg* Court "flatly rejected any notion of a general-purpose reporter's privilege for confidential sources, whether by virtue of the First Amendment or of a newly hewn common law privilege."[22] *In re Special Proceedings,* 373 F.3d 37, 44 (1st Cir.2004). And as the Court said in *Zurcher,*

> Nor are we convinced, any more than we were in *Branzburg*, that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. Whatever incremental effect there may be in this regard if search warrants, as well as subpoenas, are permissible in proper circumstances, it does not make a constitutional difference in our judgment.

436 U.S. at 566 (citation omitted). As in *Branzburg,* there is no reason to create such a privilege here.

The Court rejected a similar claim of First Amendment privilege in *University of Pennsylvania.* The claim rejected there was that peer review materials produced in a university setting should not be disclosed in response to an EEOC subpoena in an investigation of possible tenure discrimination. The Court

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[22] The *Branzburg* Court "left open ... the prospect that in certain situations—*e.g.,* a showing of bad faith purpose to harass—First Amendment protections might be invoked by the reporter." *In re Special Proceedings,* 373 F.3d 37, 45 (1st Cir.2004) (citing *Branzburg v. Hayes,* 408 U.S. 665, 707–08 (1972)). This suit does not fall within that premise. There is no plausible claim here of a bad faith purpose to harass.

rejected the University's claims of First Amendment and of common law privilege. It also rejected a requirement that there be a judicial finding of particularized relevance beyond a showing of relevance. 493 U.S. at 188.

The issue of defending against court proceedings requiring disclosure of information given under a promise of confidentiality has come up in a variety of circumstances in this circuit. Some cases involved underlying criminal proceedings as in *Branzburg. See In re Special Proceedings,* 373 F.3d 37 (1st Cir.2004) (upholding order finding reporter in civil contempt for refusing to reveal to a special prosecutor the identity of the person who leaked a videotape in violation of a protective order entered in a criminal proceeding). One case did not invoke grand jury or government criminal investigations, but rather a request from criminal defendants. *United States v. LaRouche Campaign,* 841 F.2d 1176 (1st Cir.1988) (upholding order finding television network in civil contempt for refusing to comply with criminal defendants' subpoena seeking "outtakes" of an interview with a key government witness).[23]

Two of our precedents dealt with claims of a non-disclosure privilege in civil cases, in which private parties both sought and opposed disclosure; as a result, the government and public's strong interest in inves-

[23] As the Seventh Circuit recognized in *McKevitt v. Pallasch,* 339 F.3d 530, 532 (7th Cir.2003), there is a circuit split on whether under *Branzburg* there can ever be a reporter's privilege of constitutional or common law dimensions. This circuit has recognized such a possibility in *United States v. LaRouche Campaign,* 841 F.2d 1176, 1181–82 (1st Cir.1988).

tigation of crime was not an issue. *See Cusumano,* 162 F.3d 708;[24] *Bruno & Stillman, Inc. v. Globe Newspaper Co.,* 633 F.2d 583 (1st Cir.1980).

This case is closer to *Branzburg* itself, buttressed by *University of Pennsylvania,* than any of our circuit precedent. The *Branzburg* analysis, especially as to the strength of the governmental and public interest in not impeding criminal investigations, guides our outcome.

The fact that a U.S. grand jury did not issue the subpoenas here is not a ground on which to avoid the conclusion that *Branzburg* controls. The law enforcement interest here—a criminal investigation by a foreign sovereign advanced through treaty obligations—is arguably even stronger than the government's interest in *Branzburg* itself. Two branches of the federal government, the Executive and the Senate, have expressly decided to assume these treaty obligations. In exchange, this country is provided with valuable reciprocal rights. "The federal interest in cooperating in the criminal proceedings of friendly foreign nations is obvious." *McKevitt v. Pallasch,* 339 F.3d 530, 532 (7th Cir.2003). The strong interests of both the United States government and the requesting foreign government is emphasized by language in the treaty itself, which prohibits private parties from attempting to block enforcement of subpoenas. *See* US–UK MLAT, art. 1, ¶ 3.

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[24] Even if *Branzburg* left us free, as we think it does not, to engage in an independent balancing utilizing the test articulated in our decision in *Cusumano,* we would still affirm, for the same reasons.

The Supreme Court in *Branzburg* stressed that "[f]air and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government." 408 U.S. at 690. "The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection." *Id.* at 691. The court also commented that "it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy." *Id.* at 696. In doing so, it relied on legal history, including both English and United States history outlawing concealment of a felony. *Id.* at 696–97.

Branzburg weighed the interests against disclosure pursuant to subpoenas and concluded they were so wanting as not to state a claim.[25] The opinion discussed the situation, not merely of reporters who promised confidentiality, but also of both informants who had committed crimes and those innocent informants who had information pertinent to the investigation of crimes. The interests in confidentiality of both kinds of informants did not give rise to a First Amendment interest in the reporters to whom they had given the information under a promise of confidentiality. These insufficient interests included the fear, as here, that disclosure might "threaten their job security or personal safety or that it will simply result

[25] *Branzburg* also rejected arguments of First Amendment protection based on a notion that the press was being used as an investigative arm of the government, imposing burdens on it. 408 U.S. at 706–07.

in dishonor or embarrassment." *Id.* at 693. If the reporters' interests were insufficient in *Branzburg*, the academic researchers' interests necessarily are insufficient here.

It may be that compliance with the subpoenas in the face of the misleading assurances in the donation agreements could have some chilling effect, as plaintiffs assert. This amounts to an argument that unless confidentiality could be promised and that promise upheld by the courts in defense to criminal subpoenas, the research project will be less effective.[26] *Branzburg* took into account precisely this risk. So did the Court in rejecting the claim in the academic peer review situation in *University of Pennsylvania. See* 493 U.S. at 188, 194. The choice to investigate criminal activity belongs to the government and is not subject to veto by academic researchers.

We add that this situation was clearly avoidable. It is unfortunate that BC was inconsistent in its application of its recognition of the limits of its ability to promise confidentiality. But that hardly assists the appellants' case. Burns Librarian O'Neill informed Moloney before the project commenced that he could not guarantee that BC "would be in a position to re-

[26] McIntyre, but not Moloney, in his affidavit states that neither he nor the people he interviewed would have participated in the Belfast Project had they thought that the interviews would be subject to disclosure before their deaths and without their permission. Burns Librarian O'Neill states in his affidavit that "[h]ad the assurances of confidentiality not been made, it is doubtful that any paramilitary would have participated in this oral history project. Their stories would have died with them, and an opportunity to document and preserve a critical part of the historical record would have been lost forever."

fuse to turn over documents [from the Project] on a court order without being held in contempt." In keeping with this warning, Moloney's agreement with BC directed that "[e]ach interviewee is to be given a contract guaranteeing *to the extent American law allows* the conditions of the interview and the conditions of its deposit at the Burns Library, including terms of an embargo period if this becomes necessary" (emphasis added). Despite Moloney's knowledge of these limitations, the donation agreements signed by the interviewees did not contain the limitation required to be in them by Moloney's agreement with BC.

That failure in the donation agreement does not change the fact that any promises of confidentiality were necessarily limited by the principle that "the mere fact that a communication was made in express confidence ... does not create a privilege.... No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice." *Branzburg,* 408 U.S. at 682 n. 21 (quoting 8 Wigmore, *Evidence* § 2286 (McNaughton rev. 1961)) (internal quotation marks omitted).

To be clear, even if participants had been made aware of the limits of any representation about non-disclosure, Moloney and McIntyre had no First Amendment basis to challenge the subpoenas. Appellants simply have no constitutional claim and so that portion of the complaint was also properly dismissed.[27]

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[27] Appellants' intervention complaint raised the same claims as their separate civil complaint. We have affirmed that there is no cause of action under the treaty and under the Constitution, so there is no need for us to consider whether the district court acted

IV.

We uphold the denial of the requested relief for the reasons stated and affirm. No costs are awarded.

TORRUELLA, Circuit Judge (Concurring in the judgment only).

I reluctantly concur in the judgment in this case, doing so only because I am compelled to agree that the Supreme Court in *Branzburg v. Hayes,* 408 U.S. 665 (1972), and subsequent cases has most likely foreclosed the relief that the Appellants in these consolidated appeals seek. I write separately to emphasize my view that, while the effect of *Branzburg* and its progeny is to forestall the result that the Appellants wish to see occur, none of those cases supports the very different proposition, apparently espoused by the majority, that the First Amendment does not provide *some* degree of protection to the fruits of the Appellants' investigative labors. *Cf. Branzburg,* 408 U.S. at 681. It is one thing to say that the high court has considered competing interests and determined that information gatherers (here, academic researchers) may not refuse to turn over material they acquired upon a premise of confidentiality when these are requested via government subpoena in criminal proceedings. It is entirely another to eagerly fail to recognize that the First Amendment affords the Appellants "a measure of protection ... in order not to un-

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within its discretion in denying appellants' motion to intervene. *Cf. In re Grand Jury Proceedings,* 708 F.2d 1571, 1575 (11th Cir.1983) (per curiam) (holding that the district court's denial of a petition to intervene was harmless error because the merits of the appellant's claim were eventually considered on appeal).

dermine their ability to gather and disseminate information." *Cusumano v. Microsoft Corp.,* 162 F.3d 708, 714 (1st Cir.1998).

"It is firmly established that the First Amendment's aegis extends further than the text's proscription on laws 'abridging the freedom of speech, or the press,' and encompasses a range of conduct related to the gathering and dissemination of information." *Glik v. Cunniffe,* 655 F.3d 78, 82 (1st Cir.2011). Confidentiality or anonymity, where prudent, naturally protects those who seek to collect or provide information. Accordingly, it is similarly well-settled that the First Amendment's protections will at times shield "information gatherers and disseminators," from others' attempts to reveal their identities, unveil their sources, or disclose the fruits of their work. *See Cusumano,* 162 F.3d at 714; *see also McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 342 (1995) (noting "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment"); *Talley v. California,* 362 U.S. 60, 64 (1960) (noting City's ordinance banning distribution of handbills lacking names and addresses of authors and distributors "would tend to restrict freedom to distribute information and thereby freedom of expression"); *United States v. LaRouche Campaign,* 841 F.2d 1176, 1182 (1st Cir.1988) ("We discern a lurking and subtle threat to journalists ... if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly compelled.").

The Appellants in these consolidated cases are academic researchers and, as such, axiomatically come

within the scope of these protections, as recognized by this Circuit's settled law. *See Cusumano,* 162 F.3d at 714 ("The same concerns [that advise extending First Amendment protections to journalists] suggest that courts ought to offer similar protection to academicians engaged in scholarly research."). It is also beyond question that the content of the materials that the government wishes to obtain may properly be characterized as confidential: the Appellants and the Belfast Project's custodians have gone to great lengths to prevent their unsanctioned disclosure. *See* Maj. Op. at 4–5. The question then becomes one concerning the degree of protection to which they are entitled. The manner in which this inquiry unfolds necessarily depends on context, not on "semantics"—the "unthinking allowance" of discovery requests in these circumstances, we have warned, will inevitably "impinge upon First Amendment rights." *Cusumano,* 162 F.3d at 716 (quoting *Bruno & Stillman, Inc. v. Globe Newspaper Co.,* 633 F.2d 583, 595–96 (1st Cir.1980)). Consequently, balancing the interests on either side of such a request is both proper and essential. *See id.* ("[C]ourts must balance the potential harm to the free flow of information that might result against the asserted need for the requested information." (quoting *Bruno & Stillman, Inc.,* 633 F.2d at 595–96)).

Fortunately for this Court's panel—but unfortunately for the Appellants—the Supreme Court has already done the lion's share of the work for us. Under the mutual legal assistance treaty between the United States and the United Kingdom, the federal government has assumed an obligation to assist the United Kingdom in its prosecution of domestic criminal matters—here, a homicide—to the extent permitted by U.S. law. *See* UK–MLAT Technical Analysis, S. Exec.

Rep. No. 104–23, at 11 (noting "MLATs oblige each country to assist the other to the extent permitted by their laws, and provide a framework for that assistance").[28]

In my view, the Appellants cannot carry the day, not because they lack a cognizable interest under the First Amendment, but because any such interest has been weighed and measured by the Supreme Court and found insufficient to overcome the government's paramount concerns in the present context.

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[28] Appellants also claim that the Attorney General's actions are not in compliance with the US–UK–MLAT, among other reasons, because "the crimes under investigation by the United Kingdom were of 'a political nature.' " Pursuant to Article 3, ¶ 1(c)(i) of the treaty the United States may refuse assistance to the United Kingdom's request if it relates to "an offense of a political nature." Ignoring the underlying and pervasive political nature of the "Troubles," as the Irish–British controversy has come to be known in Northern Ireland, is simply ignoring one hundred years of a well-documented history of political turmoil. These came into focus when Ireland was partitioned, and six of its Ulster counties were constituted into Northern Ireland as an integral part of the United Kingdom by virtue of the Government of Ireland Act of 1920. *See generally* Northern Ireland Politics (Arthur Aughley & Duncan Morrow eds.) (1996). That the academic investigations carried out by Appellants in this case, and the evidence sought by the United Kingdom involve "offenses of a political nature" irrespective of how heinous we may consider them, is borne out by the terms of the Belfast Agreement (also known as the "Good Friday Agreement") entered into by the Government of the United Kingdom and the Irish Republican Army, whereby almost all prisoners were released by the British government, *including many who had been convicted of murder*. *See* Karl S. Bottigheirmer & Arthur H. Aughley, *Northern Ireland,* Encyclopedia Britannica (2007). Unfortunately for Appellants, they are foreclosed from pursuing their claim by virtue of Article 1, ¶ 3 of the treaty, which prohibits private parties from enforcing any rights thereunder.

Finally, with regards to the district court's denial of the Appellants' motion to intervene as of right under Rule 24(a), I harbor doubts as to whether Boston College could ever "adequately represent" the interests of academic researchers who have placed their personal reputations on the line, exposing both their livelihoods and well-being to substantial risk in the process. Because, for the reasons explained above, I am constrained to agree that the Appellants are unable to assert a legally-significant protectable interest, as Rule 24(a) commands, *see Donaldson v. United States,* 400 U.S. 517, 531 (1971), any concerns I may have in that regard are regrettably moot. *See Ungar v. Arafat,* 634 F.3d 46, 51 (1st Cir.2011) ("Each of [Rule 24(a)(2)'s] requirements must be fulfilled; failure to satisfy any of them defeats intervention as of right.").

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 11-2511

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.

ED MOLONEY; ANTHONY MCINTRYE
Movants - Appellants

No. 12-1159

ED MOLONEY; ANTHONY MCINTYRE,
Plaintiffs, Appellants,

v.

ERIC H. HOLDER, JR., Attorney General; JACK W. PIROZZOLO, Commissioner,
Defendants, Appellees.

Before

Lynch, Chief Judge
Torruella, Boudin, Howard and Thompson,
Circuit Judges

ORDER OF COURT

Entered: August 31, 2012

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en bane having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/Margaret Carter,
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 11-2511

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.

ED MOLONEY; ANTHONY MCINTYRE
Movants - Appellants

No. 12-1159

ED MOLONEY; ANTHONY MCINTYRE,
Plaintiffs, Appellants,

v.

ERIC H. HOLDER, JR., Attorney General;
JACK W. PIROZZOLO, Commissioner,
Defendants, Appellees.

ORDER OF COURT

Entered: September 20, 2012

Appellants' motion to stay mandate is denied for failure to meet the applicable criteria; however, we hereby grant a temporary stay of ten days, until October 1, 2012, to permit appellants the opportunity to seek a stay in the Supreme Court.

By the Court:

/s/Margaret Carter, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT,
D. 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,

John T. McNeil[1], Commissioner,
Ed Moloney, Anthony McIntyre, Applicants for Intervention.

No. 11–91078–WGY.
Dec. 16, 2011.

Jeffrey Swope, Edwards Wildman Palmer LLP, Boston, MA, for Movant.

John T. McNeil, United States Attorney's Office, Boston, MA, for Petitioner.

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[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.*

James J. Cotter, III, Quincy, MA, for Ed Moloney.

MEMORANDUM & ORDER

YOUNG, District Judge.

I. INTRODUCTION

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

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

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

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 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 rec-ord. 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 on-going 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, inter-viewers 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 Re-search Office Guidelines.[4] *Id*. The Belfast

[4] The government points out that Columbia University oral history re-searchers 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).

Project subsequently employed two re-searchers 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. 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 in-

> strument 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

[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).

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. § 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 super-

seded 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 accord-

ance 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.

The enforcement of a subpoena is an exercise of judicial power. According to the government, the executive

[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.

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*, 13 Wall. 128, 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*, 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 under-stand 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 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.

[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.

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

[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.

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.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 re-duce 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]

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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.").

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]

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).

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[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 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.

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 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, ¶ 3; UK–

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

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.").

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.

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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).

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 com-missioner'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.

[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,

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.

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.

> 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).

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 Ke*yishian 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 avail-

able 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).

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[14] The text of the UK–MLAT includes several limitations on re-quests:

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

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 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.

(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.

[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. UKMLAT Technical Analysis, S. Exec. Rep. No. 104–23, at 28.

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 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 per-missive intervention under Federal Rule of Civil Procedure 24(b). ECF No. 18.

SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT,

D. 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,

John T. McNeil, Commissioner,
Ed Moloney, Anthony McIntyre, Applicants for Intervention.

Miscellaneous Business Docket No. 11–91078–WGY.

Jan. 20, 2012.

FINDINGS AND ORDER

YOUNG, District Judge.

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.

Moreover, 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 re-

sponse 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.

D.Mass.,2012.

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

APPENDIX F

CONSTITUTIONAL, STATUTORY AND TREATY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law … abridging the freedom of speech."

2. 18 U.S.C. § 3512 provides in relevant part:

> (a) Execution of Request for Assistance.
>
> (1) In general. Upon application, duly authorized by an appropriate official of the Department of Justice, of an attorney for the Government, a Federal judge may issue such orders as may be necessary to execute a request from a foreign authority for assistance in the investigation or prosecution of criminal offenses, or in proceedings related to the prosecution of criminal offenses, including proceedings regarding forfeiture, sentencing, and restitution.
>
> ***
>
> (2) Scope of orders.
>
> Any order issued by a Federal judge pursuant to paragraph (1) may include the issuance of . . . (D) an order requiring the appearance of a person for the purpose of providing testimony or a statement, or requiring the production of documents or other things, or both.

3. The Mutual Legal Assistance Treaty between the United States and the United Kingdom provides in relevant part:

ARTICLE 1

Scope of Assistance

1. The Parties shall provide mutual assistance, in accordance with the provisions of this Treaty, for the purpose of proceedings as defined in Article 19 of this Treaty.

1bis. Mutual legal assistance shall also be afforded to a national administrative authority, investigating conduct with a view to a criminal prosecution of the conduct, or referral of the conduct to criminal investigation or prosecution authorities, pursuant to its specific administrative or regulatory authority to undertake such investigation. Mutual legal assistance may also be afforded to other administrative authorities under such circumstances. Assistance shall not be available for matters in which the administrative authority anticipates that no prosecution or referral, as applicable, will take place. Requests for assistance under this paragraph shall be transmitted between the Central Authorities designated pursuant to Article 2 of this Treaty, or between such other authorities as may be agreed by the Central Authorities. …

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;

***

(c) the request relates to an offence that is regarded by the Requested Party as:

(i) an offence of a political character;

***

2. Before denying assistance pursuant to this Article, the Central Authority of the Requested Party shall consult with the Central Authority of the Requesting Party to consider whether assistance can be given subject to such conditions as it deems necessary. If the Requesting Party accepts assistance subject to these conditions, it shall comply with the conditions.

ARTICLE 5

Execution of Requests

1. As empowered by this Treaty or by national law, or in accordance with its national practice, the Requested Party shall take whatever steps it deems necessary to give effect to requests received from the Requesting Party. The courts of the Requested Party shall have authority to issue subpoenas, search warrants, or other orders necessary to execute the request.

ARTICLE 8

Taking Testimony and Producing Evidence in the Territory of the Requested Party

1. A person in the territory of the Requested Party from whom evidence is requested pursuant

to this Treaty may be compelled, if necessary, to appear in order to testify or produce documents, records, or articles of evidence by subpoena or such other method as may be permitted under the law of the Requested Party.

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. If such a person asserts a claim of immunity, incapacity or privilege under the laws of the Requesting Party, the evidence shall nonetheless be taken and the claim be made known to the Requesting Party for resolution by the authorities of that Party