THE LANGUAGE OF INTELLIGENCE: HOW WORD GAMES HIDE SURVEILLANCE FROM PUBLIC OVERSIGHT (2019 UPDATE)

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I. INTRODUCTION

In 2013, the American public learned, among other bombshells, that for years the federal government had been indiscriminately collecting our phone call and Internet records in bulk.[1] In addition, some of our conversations with foreigners were and continue to be collected and made available to criminal investigators.[2] Law enforcement agents can search those conversations without judicial approval or probable cause.[3] If it were not for Edward Snowden, a whistleblower who revealed to journalists highly-classified documents detailing these practices, the public would still be in the dark about these and many other policies.

Despite these public disclosures, as I detail in my 2016 book, *American Spies: Modern Surveillance, Why You Should Care, and What to*

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1. Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013), https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order [https://perma.cc/6459-NY23]; Glenn Greenwald, *NSA Collected US Email Records in Bulk for More Than Two Years Under Obama*, GUARDIAN (June 27, 2013), https://www.theguardian.com/world/2013/jun/27/nsa-data-mining-authorised-obama [https://perma.cc/CY56-53M6].

2. Jennifer Granick, *Reining in Warrantless Wiretapping of Americans*, CENTURY FOUND. (Mar. 16, 2017), https://tcf.org/content/report/reining-warrantless-wiretapping-americans/?session=1 [https://perma.cc/78XA-KGC8]; Louise Matsakis, *Congress Renews FISA Warrantless Surveillance Bill For Six More Years*, WIRED (Jan. 11, 2018), https://www.wired.com/story/fisa-section-702-renewal-congress/ [https://perma.cc/2VPU-77DZ].

3. Memorandum Opinion and Order, [REDACTED] at 26–30, No. [REDACTED] (FISA Ct. Nov. 6, 2015), https://www.intelligence.gov/assets/documents/702%20Documents/oversight/20151106-702Mem_Opinion_Order_for_Public_Release.pdf [https://perma.cc/R85Q-FVZ3] (approving NSA Section 702 targeting and minimization procedures and discussing compliance failures).

Do About It, government "word games" are a major hurdle to public oversight and reform.[4] Language shapes the way we see the world. In politics, the way we talk about policies shapes public opinion. With the ability to mold language comes the power to manipulate individual and collective values.[5] The language that intelligence agency and Department of Justice (DOJ) officials use to discuss surveillance, as well as other national security practices, masks the reality of those practices from the public.

Confusing language and counterintuitive definitions put proponents of robust democratic control of surveillance at a disadvantage. These word games have two distinct effects. One such effect is to help hide programs from democratic oversight. Actual practices are kept secret when the government can deny that something is taking place based on a secret and counterintuitive parsing of words. For example, on March 12, 2013, in response to a question from Senator Ron Wyden (D-OR), then-Director of National Intelligence James Clapper testified under oath that the National Security Agency (NSA) does not "collect" any type of data at all on millions or hundreds of millions of Americans.[6] In fact, the NSA was collecting Americans' phone records[7] and had collected Internet records[8] for years. After reporters released Snowden documents showing that Clapper's statements were false, Clapper admitted that the intelligence agencies relied on a concocted definition of the word "collect."

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4. *See* JENNIFER GRANICK, AMERICAN SPIES 27-40 (Cambridge Univ. Press ed., 2017).

5. George Orwell, POLITICS AND THE ENGLISH LANGUAGE (1946); *See generally* GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE—THE ESSENTIAL GUIDE FOR PROGRESSIVES (Chelsea Green Publ'g ed., 2004).

6. Glenn Kessler, *James Clapper's 'Least Untruthful' Statement to the Senate*, WASH. POST (June 12, 2013), www.washingtonpost.com/blogs/fact-checker/post/james-clappers-least-untruthful-statement-to-the-senate/2013/06/11/e50677a8-d2d8-11e2-a73e-826d299ff459_blog.html [https://perma.cc/9APW-84AD].

7. PRIV. AND CIV. LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 8-9 (2014), https://www.pclob.gov/library/215/Report_on_the_Telephone_Records_Program.pdf [https://perma.cc/5WE9-M5NK].

8. OFF. OF THE DIR. OF NAT'L INTEL. PUB. AFF. OFF., IC ON THE RECORD, NEWLY DECLASSIFIED DOCUMENTS REGARDING THE NOW-DISCONTINUED NSA BULK ELECTRONIC COMMUNICATIONS METADATA PURSUANT TO SECTION 402 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (2014) https://icontherecord.tumblr.com/post/94459123638/newly-declassified-documents-regarding-the [https://perma.cc/FL4Y-AL63].

In an interview with NBC's Andrea Mitchell, Clapper explained that his denial that the NSA broadly collects Americans' data turned on a definition of "collect:" "There are honest differences on the semantics of what—when someone says 'collection' to me, that has a specific meaning, which may have a different meaning to him."[9] Clapper said that "collect" doesn't mean acquire or gather; it means "taking the book off the shelf and opening it up and reading it."[10]

For months, Clapper's dissembling successfully shielded problematic surveillance practices from democratic review. Had it not been for Snowden's disclosures a few months later, the public would have stayed in the dark. Once the public had accurate information, Congress passed legal reforms to end this bulk collection practice.[11] Of course, that was exactly the outcome that the intelligence agencies hoped to avoid through their word games.

Democratic oversight of surveillance is also disadvantaged when officials use banal language to describe controversial or even potentially illegal activities. Press coverage is necessarily less critical and public opposition is dampened, essentially through effective branding. Orwellian nomenclature makes controversial or even outrageous practices seem more palatable.

The United States' policy of torturing people is one example of successful manipulation of language to squelch public opposition. International and domestic law both prohibit torture.[12] Yet, in the years following the attacks of September 11th, the Central Intelligence Agency (CIA) adopted the practice of nearly drowning people to death on the grounds that these individuals were suspected of being Al-Qaeda operatives who might reveal useful information under duress.[13] This practice was labeled "waterboarding." It can

9. GRANICK, *supra* note 4, at 34 (quoting Interview by Andrea Mitchell with James R. Clapper, Director of National Intelligence, in Tysons Corner, Va. (June 8, 2013)).

10. *Id.*

11. *See, e.g.*, USA Freedom Act of 2015, Pub. L. No. 114–23, 129 Stat. 268 (2015).

12. *See, e.g.*, G.A. Res. 39/46, Convention Against Torture and Other Cruel, Unhuman or Degrading Treatment of Punishment, at 1 (Dec. 10, 1984); *see also* 18 U.S.C. § 2340 (2001) (defining torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering").

13. Julian E. Barnes & Scott Shane, *Cables Detail C.I.A. Waterboarding at Secret Prison Run by Gina Haspel*, N.Y. TIMES (Aug. 10, 2018), https://www.nytimes.com/2018/08/10/us/politics/waterboarding-gina-haspel-cia-prison.html [https://perma.cc/BTT7-CCXJ].

induce convulsions and vomiting and render the victim "completely unresponsive."[14] In addition to waterboarding, the CIA also subjected people in custody to "rectal feeding,"[15] slamming detainees against walls, shackling people in physically painful positions, locking people in coffin-like boxes, and other excruciating physical and mental torments. These and other tactics came to be called "enhanced interrogation techniques."[16]

Torture involves the infliction of "severe physical or mental pain or suffering."[17] Bush administration Department of Justice officials asserted, in a series of secret legal memoranda, that there was uncertainty as to whether use of at least some of the techniques met the legal definition of "torture" under U.S. law.[18] Additionally, these memos claimed that, if the violence was directed at protecting the country from additional attacks, "necessity or self-defense may justify interrogation methods that might violate" the criminal prohibition against torture.[19] Eventually all the "torture memos" were rescinded, and U.S. officials, including President Barack Obama immediately after taking office,[20] acknowledged that these "enhanced interrogation techniques" constituted torture.[21] But, at the time, official insistence on euphemisms for torture was very useful. Anodyne language muddied the question of whether what the CIA was doing was either immoral or illegal. It also whitewashed the gruesome nature of the practices, thereby tamping down public outrage.

By insisting on this banal terminology, the CIA put lawmakers, non-governmental organizations, and the media in a position where telling the truth felt like taking sides. Because "torture" has a

14. S. Rep. No. 113-288, at xii (2014).

15. Physicians for Hum. Rts., Medical Professionals Denounce "Rectal Feeding" as "Sexual Assault Masquerading as Medical Treatment" (Dec. 2014), *available at* https://s3.amazonaws.com/PHR_other/fact-sheet-rectal-hydration-and-rectal-feeding.pdf [https://perma.cc/NML8-NJGA].

16. S. Rep. No. 113-288, at 36-37 (2014); *see also* Anne D. Miles, Perspectives on Enhanced Interrogation Techniques 5 (Jan. 8, 2016) (citing George Tenet, *Guidelines on Interrogations Conducted Pursuant to the (Redacted)*, IG Special Review, 2003, at Appendix E).

17. 18 U.S.C. § 2340 (2001).

18. *See* Memorandum from Jay Bybee, Assistant Att'y Gen., Off. of Legal Couns., Interrogation of Al-Qaeda Operative, to John Rizzo, Acting Gen. Couns., C.I.A. (Aug. 1, 2002) (advising that certain proposed conduct, including a "facial hold," "confinement boxes," and "sleep deprivation" did not "inflict[ ] severe pain," and so would not violate Section 2340A).

19. S. Rep. No. 113-288, at xiv (2014).

20. Exec. Order 13491, 74 Fed. Reg. 4893 (Jan. 27, 2009).

21. *See* Husayn v. United States, 938 F.3d 1123, 1123 (9th Cir. 2019).

specialized legal meaning as well as a plain-English one, and because the Department of Justice disputed that CIA agents were acting illegally, at first the New York Times did not use the word "torture" to describe CIA conduct. The Times asserted that using the plain-English word meant taking sides in the legal argument.[22] The Times initially used phrases like "harsh" in describing interrogation methods, but later graduated to "brutal." In 2014, the paper changed its practices.[23] Neither National Public Radio (NPR) nor the Washington Post followed suit, sticking with phrases like "harsh interrogation tactics."[24]

It is hard to say how much impact these word games had. We do know that those responsible were insulated from the consequences of their roles. Attorneys who wrote legal memos justifying torture[25] are now professors at well-regarded law schools[26] or federal judges.[27] Gina Haspel, who headed up a CIA torture site in Thailand in 2002, served as Director of the CIA from 2018 until 2021.[28]

22. Adam Martin, *Bill Keller on the New York Times's Definition of 'Torture'*, ATLANTIC (Apr. 26, 2011), https://www.theatlantic.com/business/archive/2011/04/bill-keller-says-calling-us-interrogation-torture-would-be-polemical/350015/ [https://perma.cc/55SY-GSQQ] (quoting the New York Times editors as saying "[s]ome of the interrogation methods may fit a legal or common-sense definition of torture. Others may not. To refer to the whole range of practices as 'torture' would be simply polemical.").

23. *See* Dean Baquet, *The Executive Editor on the Word "Torture"*, N.Y. TIMES (Aug. 7, 2014), https://www.nytimes.com/times-insider/2014/08/07/the-executive-editor-on-the-word-torture [https://perma.cc/M986-G6HK].

24. *See* Jim Naureckas, *Refusing to Take Sides, NPR Takes Sides with Torture Deniers*, FAIR (Dec. 12, 2014), https://fair.org/home/refusing-to-take-sides-npr-takes-sides-with-torture-deniers [https://perma.cc/X4CQ-KRMJ].

25. David Irvine, *LDS Lawyers, Psychologists Had a Hand in Torture Policies*, SALT LAKE TRIB. (Apr. 29, 2009), https://web.archive.org/web/20120301090557/http://www.sltrib.com/opinion/ci_12256286 [https://perma.cc/J8AD-8NMC].

26. *See, e.g.*, *John Yoo*, WIKIPEDIA (Oct. 31, 2019, 3:38 PM), https://en.wikipedia.org/wiki/John_Yoo [https://perma.cc/C7PK-WSEJ].

27. *See, e.g.*, *Jay Bybee*, WIKIPEDIA (Oct. 31, 2019, 3:38 PM), https://en.wikipedia.org/wiki/Jay_Bybee [https://perma.cc/6WBM-GBWN].

28. *See Gina Haspel*, WIKIPEDIA (Oct. 6, 2019, 4:11 AM), https://en.wikipedia.org/wiki/Gina_Haspel [https://perma.cc/TL3E-FUHY]; *see also Director of the Central Intelligence Agency*, WIKIPEDIA (Feb. 3, 2021, 8:16 PM), https://en.wikipedia.org/wiki/Director_of_the_Central_Intelligence_Agency [https://perma.cc/D4D3-QXUQ].

Obfuscation reigns in national security talk.[29] The term "extraordinary rendition" refers to kidnapping.[30] A "disposition matrix" is a "kill list" of individuals subject to assassination.[31] "Collateral damage" refers to civilians we kill during military operations.[32] Even the common term "intelligence community" is a catch-all term for seventeen agencies with very different missions[33] and a range of more to less controversial policies. Who would oppose intelligence or community?

Euphemisms convey a sense of legal and moral consensus that does not actually exist by distorting the truth and providing protection for those committing repulsive acts. This well-considered[34] Orwellian nomenclature has its impacts on democratic oversight and protection of human rights. By dictating the terms of national debate, the intelligence officials have put civil libertarians at a serious disadvantage. We struggle to learn their vocabulary so we can understand what they are saying, know what they are doing, and then make our case to the public and to the courts.

In the remainder of this article, I update "Word Games," chapter two of my book, with three additional examples of national security-related word games in the context of surveillance.

II.
SPYING ON LAWYERS

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its pur-

29. It may be that the need for euphemisms to hide official atrocities is over. President Donald Trump has lauded "torture" and "much worse." *See* Jenna Johnson, *Trump Says 'Torture Works,' Backs Waterboarding And 'Much Worse'*, WASH. POST (Feb. 17, 2016), https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html [https://perma.cc/8RDD-7W82].

30. *Extraordinary Rendition*, WIKIPEDIA (Jan. 26, 2020, 9:59 PM), https://en.wikipedia.org/wiki/Extraordinary_rendition [https://perma.cc/D993-347U].

31. *Disposition Matrix*, WIKIPEDIA (Jan. 10, 2021), https://en.wikipedia.org/wiki/Disposition_Matrix [https://perma.cc/58XZ-3TL4].

32. *Collateral Damage*, WIKIPEDIA (Jan. 10, 2021), https://en.wikipedia.org/wiki/Collateral_damage, [https://perma.cc/V9XX-6ZTQ].

33. *Intelligence Community*, WIKIPEDIA (Jan. 10, 2021), https://en.wikipedia.org/wiki/United_States_Intelligence_Community#Members [https://perma.cc/VH4F-VZBH].

34. *See, e.g.*, Bonnie Azab Powell, *Framing the Issues: UC Berkeley Professor George Lakoff Tells How Conservatives Use Language to Dominate Politics*, BERKELEY NEWS (Oct. 27, 2003), https://www.berkeley.edu/news/media/releases/2003/10/27_lakoff.shtml [https://perma.cc/5ZTJ-N94E] ("Over the last 30 years their think tanks have made a heavy investment in ideas and in language.").

pose is to encourage full and frank communication between attorneys and their clients and thereby "promote broader public interests in the observance of law and administration of justice."[35] The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. The U.S. Supreme Court has recognized the importance of the privilege dating back to at least 1888.[36]

Does the attorney-client privilege shield individuals' conversations with their lawyers from surveillance? If the government is indeed listening in, attorneys and the people we seek to help are in a bind. This is not an uncommon scenario in the criminal wiretap context in which agents are cautioned to avoid collecting conversations when an attorney is one of the communicants.[37] But in the foreign intelligence context, the NSA maximizes the data it collects and is supposed to parse out irrelevant and protected information after the fact. For intelligence surveillance, since the up-front collection is broad, "minimization procedures" are supposed to do the work of protecting confidentiality.[38] Minimization procedures detail how investigators must take steps to limit—"minimize"—the distribution and use of collected information that is nevertheless irrelevant to the approved investigation. Foreign Intelligence Surveillance Act (FISA) minimization procedures generally do not prohibit the government's acquisition of attorney-client privileged communications but do establish procedures that should protect those attorneys' and clients' conversations nonetheless.

Section 702 of FISA permits the programmatic and warrantless acquisition of phone call, email, and other communications targeting noncitizens located overseas and includes collection of messages to, from, or about entities of foreign intelligence inter-

35. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (stating that the attorney-client privilege is the oldest evidentiary privilege and that it is necessary to "promote broader public interests in the observance of law and administration of justice").

36. Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

37. U.S. DEP'T OF JUST., ELECTRONIC SURVEILLANCE MANUAL PROCEDURES AND CASE LAW FORMS 12-13 (2005), https://www.justice.gov/sites/default/files/criminal/legacy/2014/10/29/elec-sur-manual.pdf [https://perma.cc/9F8H-WSJG] ("[B]oth the minimization language in the affidavit and the instructions given to the monitoring agents should contain cautionary language regarding the interception of privileged attorney-client conversations.").

38. 50 U.S.C. § 1801(h)(1) (2019) ("specific procedures . . . reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons . . . .").

est.[39] The 2011 minimization procedures meant to protect private messages obtained through warrantless communications surveillance under Section 702 showed disregard for the attorney-client privilege.[40] Section 4 of those 2011 procedures stated that the provisions meant to protect the attorney-client privilege do not apply unless the client is under indictment—charged with a crime and talking to their lawyer about that criminal activity.[41] This policy allowed intelligence agencies to analyze and use communications that are covered by the attorney-client privilege, as the privilege applies to both civil and criminal representation and begins with the first attorney-client conversation, not just conversations post-indictment.[42] Rather than protect the privilege, the 2011 minimization rules did the bare minimum, addressing the situation where there is a constitutional right to counsel under the Sixth Amendment but ignoring longstanding common law and evidentiary privileges.[43]

Further, the 2011 provisions did not protect privileged communications from government eyes. Rather, the materials were to be segregated to keep them from review or use in criminal proceedings. The minimization procedures nevertheless permitted the information to be used in other circumstances.[44] In 2014, for example, the public learned from the Snowden documents that the FBI targeted two attorneys from Muslim-American civil rights organizations.[45] This surveillance could have gathered substantial amounts of information about these attorneys' clients—information that the procedures appear to allow to be used in any context other than in a criminal proceeding.

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39. 50 U.S.C. § 1802 *et seq* (2019).

40. *See* OFF. OF THE DIR. OF NAT'L INTEL., MINIMIZATION PROCEDURES USED BY THE NATIONAL SECURITY AGENCY IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED (2011) (hereinafter 2011 NSA MINIMIZATION PROCEDURES), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2011oct_nsaminimizationprocedures.pdf [https://perma.cc/N7RU-LQSS].

41. *Id.* at 7-8.

42. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (Am. Law. Inst. 2000); LAURA K. DONOHUE, THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE 114 (2017) ("[A]s a matter of ordinary civil or criminal law, an individual may have privileged communications with an attorney prior to [indictment].").

43. 2011 NSA MINIMIZATION PROCEDURES, *supra* note 40, at § 4.

44. *Id.*

45. *See* Kim Zetter, *Latest Snowden Leaks: FBI Targeted Muslim-American Lawyers*, WIRED (July 9, 2014), https://www.wired.com/2014/07/snowden-leaks/ [https://perma.cc/Q2KE-X72M].

After public outcry, in 2017, the provisions were changed to apparently broaden the attorney-client protections.[46] Still, large portions of those minimization procedures have been withheld from the public. Without seeing them, we cannot know whether attorney-client communications are sufficiently shielded from the government.

III.
AVOIDING NOTICE

Another word game is the way in which intelligence agencies have misinterpreted FISA in a manner that enables them to withhold notice to defendants who have been surveilled by foreign intelligence authorities. This trick involves a novel—and classified—definition of the phrase "derived from."

FISA requires that the United States notify individuals who have been subject to electronic surveillance before that information is disclosed or submitted as evidence in a case.[47] Notice not only preserves defendants' constitutional right to confront the evidence against them, it also gives the public an opportunity to learn of government policies and see them challenged in court—a critical part of our governmental system of checks and balances. For this reason, FISA requires the government to notify aggrieved parties of surveillance before introducing any information obtained or derived from FISA surveillance into any legal proceeding.[48]

Solicitor General Donald Verrilli told the Supreme Court that this notice provision would ensure that courts would be able to re-

46. OFF. OF THE DIR. OF NAT'L INTEL., MINIMIZATION PROCEDURES USED BY THE NATIONAL SECURITY AGENCY IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED 7-9 (2017), https://www.dni.gov/files/documents/icotr/51117/2016-NSA-702-Minimization-Procedures_Mar_30_17.pdf [https://perma.cc/2ZGQ-QADV] (applying special procedures for the acquisition and handling of attorney-client communications, defined as communications "between an attorney . . . and a client").

47. 50 U.S.C. § 1806(c) ("Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.").

48. 50 U.S.C. § 1806(b)(c) (2019).

view the lawfulness of Section 702 surveillance. He offered this assurance during litigation of *Amnesty International v. Clapper*, a challenge to the constitutionality of Section 702 by journalists and human rights lawyers.[49] Recall that Section 702 establishes procedures by which the government can conduct surveillance targeting non-Americans located overseas without getting a search warrant approved by a judge.[50] In *Clapper*, the American Civil Liberties Union (ACLU) argued that the regime inevitably obtained Americans' conversations too, and that that warrantless acquisition violated the Fourth Amendment.[51] But the Supreme Court never reached the substantive question of whether Section 702 violated the Fourth Amendment. Rather, it dismissed the case on standing grounds, holding that the plaintiffs were only speculating that they would be spied on under this top-secret program.[52]

But how could any plaintiffs ever know if they were secretly surveilled, unless the government decided to tell them? The government assured the Supreme Court that defendants in criminal prosecutions, in which the government would provide notice of Section 702 surveillance, would have standing to challenge the law, thereby providing courts with the opportunity to review the law's constitutionality.[53] Justice Sonia Sotomayor asked the Solicitor General if anyone would have standing to challenge Section 702 or if the ruling he was asking the Supreme Court to make would completely insulate the statute from judicial review altogether.[54] Mr. Verrilli, referring to Section 1806(c), told the Justices that if the government wants to use information gathered under the surveillance program in a criminal prosecution, the source of the information would have to be disclosed.[55] The subjects notified of such surveillance, Verrilli continued, *would* have standing to challenge the program.[56]

In reality, it was the policy of the DOJ's National Security Division to use parallel construction techniques to hide the fact that evidence had been derived from warrantless surveillance—and

49. *See* Transcript of Oral Argument at 27–55, Amnesty Int'l v. Clapper, 568 U.S. 398 (2013) (No. 11-1025).

50. 15 U.S.C. § 1881(a).

51. Amnesty Int'l v. Clapper, 568 U.S. 398, 407 (2013).

52. *Id.* at 422.

53. See Brief of Petitioners at 15, Amnesty Int'l v. Clapper, 568 U.S. 398 (2013) (No. 11-1025).

54. Transcript of Oral Argument at 7, Amnesty Int'l v. Clapper, 568 U.S. 398 (2013).

55. *Id.* at 4:12-17.

56. *Id.* at 5:5-8.

thereby ensure that courts did not have the opportunity to review it, nor the public to critique it.[57] Faced with revelations about the controversial Section 702 surveillance program,[58] intelligence surveillance supporters wanted to defend the law. Senator Dianne Feinstein (D-CA), under pressure to identify cases in which Section 702 surveillance had been effective, told the press about a pending criminal case against Adel Daoud, a mentally ill young man accused of planning to bomb a Chicago bar. The government had initially told Daoud's lawyers that the evidence against their client came from traditional FISA surveillance and not from warrantless surveillance under Section 702.[59] In at least three additional prosecutions, warrantless Section 702 surveillance supposedly preempted terrorist plots, but the defendants in these prosecutions were not told that the government's evidence was obtained under that controversial provision of law.[60] This fact runs directly contrary to the argument presented to the Supreme Court in *Clapper*. After this reporting, Solicitor General Verrilli raised questions with his government colleagues, as he realized that the National Security Division had led him to inadvertently misrepresent the facts to the Supreme Court.[61]

In response to the ensuing outcry, the Department of Justice appeared at first to change its policy, issuing five notices in criminal cases.[62] But hardly anyone has received one of these notices. In 2017, journalists at *The Intercept* searched federal court records and found that only ten defendants received notice of Section 702 sur-

57. Patrick Toomey, *Government Engages in Shell Game to Avoid Review of Warrantless Wiretapping*, ACLU (June 25, 2013, 3:51 PM), https://www.aclu.org/blog/national-security/secrecy/government-engages-shell-game-avoid-review-warrantless-wiretapping [https://perma.cc/D3JC-R3EC].

58. *See* Glenn Greenwald, *NSA Prism Program Taps in to User Data of Apple, Google and Others*, GUARDIAN (June 6, 2013), https://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data [https://perma.cc/6JXT-4EYL].

59. Ellen Nakashima, *Chicago Federal Court Case Raises Questions about NSA Surveillance*, WASH. POST (June 21, 2013), https://www.washingtonpost.com/world/national-security/chicago-federal-court-case-raises-questions-about-nsa-surveillance/2013/06/21/7e2dcdc8-daa4-11e2-9df4-895344c13c30_story.html?noredirect=ON&utm_term=.9f7b6ea85453 [https://perma.cc/KZ9P-SLUD].

60. Ramzi Kassem, *Unprecedented Notice of Warrantless Wiretapping in a Closed Case*, JURIST (March 24, 2014), https://www.jurist.org/commentary/2014/03/ramzi-kassem-warrantless-wiretapping/ [https://perma.cc/MV3H-R6BV].

61. *See* Savage, *infra* note 64.

62. Sari Horwitz, *Justice is Reviewing Criminal Cases that Used Surveillance Evidence Gathered Under FISA*, WASH. POST (Nov. 15, 2013), https://www.washingtonpost.com/world/national-security/justice-reviewing-criminal-cases-that-used-evidence-gathered-under-fisa-act/2013/11/15/0aea6420-4e0d-11e3-9890-a1e0997fb0c0_story.html [https://perma.cc/8ZMP-P4AS].

veillance, even though a July 2014 report from the Privacy and Civil Liberties Oversight Board cited "well over 100 arrests on terrorism-related offenses" thanks to the provision.[63] How are prosecutors getting away with denying notice, when the statute requires it? It appears that the government may have a secret legal interpretation of the statute. This secret definition amounts to a word game with the definitions of "obtained from" and "derived from."

Based on public reporting and an ACLU Freedom of Information Act (FOIA) lawsuit, it appears that, from 2008 to 2013, National Security Division lawyers chose to define "derived" in a way that eliminated notice of Section 702 surveillance altogether.[64] According to ACLU National Security Project attorney Patrick Toomey, the DOJ may have decided that evidence is "derived from" Section 702 surveillance only when the DOJ expressly relies on that information in later court filings. It "could then avoid giving notice to defendants simply by avoiding all references to Section 702 information in those court filings, citing information gleaned from other investigative sources instead—even if the information from those alternative sources would never have been obtained without Section 702."[65] Again, these word games allow intelligence agencies to avoid public debate and constitutional review, and because the games themselves take place in secret and behind closed doors, they are almost impossible to combat.

IV.
"WEB TRAFFIC" DOES NOT MEAN "WEBSITES"

In March 2015, the ACLU filed a lawsuit challenging the constitutionality of the NSA's mass interception and searching of Americans' international Internet communications. The lawsuit, *Wikimedia v. NSA*,[66] challenges "Upstream" surveillance, under which the NSA installed surveillance devices on the network of

63. Trevor Aaronson, *NSA Secretly Helped Convict Defendants in U.S. Courts, Classified Documents Reveal*, INTERCEPT (November 30, 2017), https://theintercept.com/2017/11/30/nsa-surveillance-fisa-section-702/ [https://perma.cc/3XRELKDG].

64. Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES (Oct. 16, 2013), https://www.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-secret-wiretaps.html [https://perma.cc/59WK-VFWT].

65. Patrick Toomey, *Why Aren't Criminal Defendants Getting Notice of Section 702 Surveillance — Again?*, JUST SECURITY (Dec. 11, 2015), https://www.justsecurity.org/28256/arent-criminal-defendants-notice-section-702-surveillance-again/ [https://perma.cc/9Y7R-4QP8].

66. ACLU, *Wikimedia v. NSA – Challenge to Upstream Surveillance Under the FISA Amendments Act* (Sep. 6, 2018), https://www.aclu.org/cases/wikimedia-v-nsa-chal-

high-capacity cables, switches, and routers across which Internet traffic travels. Recall that in *Clapper* the Supreme Court held that the plaintiffs did not have standing to contest the legality of Section 702 because they could not prove that their communications would be intercepted pursuant to warrantless wiretapping conducted under that provision of law.[67] They did not, the Supreme Court ruled, have standing to challenge the law.

In this latest case, however, Wikimedia is the plaintiff. The Department of Justice has been fighting the case by claiming that Wikimedia cannot prove its communications have been intercepted, so it does not have standing to sue.[68] Wikimedia has responded that it does have standing because it is virtually certain that the NSA is copying and reviewing at least some of Wikimedia's trillions of Internet communications.[69] Wikimedia's communications traverse every circuit carrying public Internet traffic on every cable connecting the U.S. with the rest of the world.[70] Further, the NSA monitors communications at one or more of these "international Internet link[s]."[71]

The Department of Justice nevertheless has successfully held off any review of the merits of Wikimedia's case on standing grounds.[72] The ACLU filed the lawsuit on behalf of Wikimedia and

lenge-upstream-surveillance-under-fisa-amendments-act [https://perma.cc/ES6W-5YTY].

67. Amnesty Int'l v. Clapper, 568 U.S. 398, 422 (2013).

68. Memorandum in Support of Defendants' Motion to Dismiss at 17–31, Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. May 29, 2015), https://www.aclu.org/legal-document/wikimedia-v-nsa-memo-support-defendants-motion-dismiss [https://perma.cc/7YMC-Z8EQ].

69. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 16–49, Wikimedia Found. v. NSA, No 1:15-cv-00662 (D. Md. Sept. 3, 2015), https://www.aclu.org/legal-document/wikimedia-v-nsa-plaintiffs-memorandum-law-opposition-defendants-motion-dismiss [https://perma.cc/3H6R-E2HP]. *See also* Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 68.

70. Wikimedia hosts Wikipedia, approximately the thirteenth largest website in the world. THE TOP 500 SITES ON THE WEB, ALEXA, https://www.alexa.com/topsites [https://perma.cc/AW8G-SGCM].

71. *See* PRIV. AND CIV. LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF FISA 41 n.157 (quoting [Case Title Redacted], 2011 WL 10945618, at *11 (FISA Ct. 2011) ("[T]he government readily concedes that NSA will acquire a wholly domestic "about" communication if the transaction containing the communication is routed through an international Internet link being monitored by NSA or is routed through a foreign server.")).

72. The case was filed in March of 2015. The district court dismissed the case in October 2015 for lack of standing to sue. In May 2017, the Fourth Circuit Court of Appeals reversed, ruling that Wikimedia plausibly pled standing and was enti-

other plaintiffs in March 2015.[73] The district court dismissed the case in October 2015, concluding that the plaintiffs did not have standing because they had not sufficiently alleged that their communications had been intercepted.[74] The ACLU appealed to the Fourth Circuit Court of Appeals,[75] which, in May 2017, unanimously reversed a part of the lower court's dismissal, ruling that Wikimedia, but not the other plaintiffs, has standing to pursue its challenge.[76] On remand, the district court in December 2019 again ruled that Wikimedia did not have standing in December of 2019.[77] Wikimedia appealed again on February 21, 2020.[78]

In the most recent summary judgment litigation, the government argued that, even if one believes that the NSA is conducting collection on at least one international backbone link, something it claims is a state secret that cannot be litigated, Wikimedia did not present sufficient evidence that the NSA is copying all of the data transiting that link.[79] The agency could be blacklisting or whitelisting particular types of internet traffic.[80] Perhaps the agency does not collect traffic to or from Wikimedia's websites. The organization has not, the DOJ argues, proved otherwise.[81]

In response, Wikimedia pointed to the fact that the DOJ has already admitted in a filing before the Foreign Intelligence Surveil-

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tled to limited discovery. In December 2019, the district court granted summary judgment for the government, again on standing grounds. *See* Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. Dec. 16, 2019).

73. Complaint, Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. Mar. 10, 2015), https://www.courtlistener.com/docket/4287483/wikimedia-foundation-v-national-security-agencycentral-security-service/ [https://perma.cc/D8F5-E4GV].

74. Order Granting Defendants' Motion to Dismiss, Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. Oct. 23, 2015), https://www.courtlistener.com/recap/gov.uscourts.mdd.308766.95.0.pdf [https://perma.cc/9MQX-SM6N].

75. Notice of Appeal, Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. Dec. 15, 2015); *See also*, Wikimedia Foundation v. NSA/CSS, 857 F.3d 193 (4th Cir. 2017).

76. *Wikimedia v. NSA—Challenge to Upstream Surveillance Under the FISA Amendments Act*, ACLU (Sept. 6, 2018), https://www.aclu.org/cases/wikimedia-v-nsa-challenge-upstream-surveillance-under-fisa-amendments-act [https://perma.cc/RPH9-DW8Y].

77. Wikimedia Found. v. NSA/CSS, No. 1:15-cv-00662, 427 F. Supp. 3d 582 (D. Md. Dec. 13, 2019).

78. Brief for Plaintiff-Appellant, Wikimedia Found. v. NSA/CSS, No. 20-1191 (4th Cir. Jul. 1, 2020), 2020 WL 3884763 (appeal filed Feb. 21, 2020).

79. Brief in Support of Defendants' Motion for Summary Judgment (Nov. 13, 2018) pp. 21-23, Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. Nov. 13, 2018).

80. *Id.* at 24–26.

81. *Id.* at 26–27.

lance Court (FISC) that it collects "web activity."[82] In response, the DOJ makes the incredible claim that "web activity" need not include communications with Wikimedia's website. Rather, the DOJ lawyers assert that, "[t]he NSA's reference in a FISC filing to collection of 'web activity' is entirely consistent with targeted collection (through combined black- and whitelisting) of specific types of web activity, such as webmail or chat, but not websites such as Wikimedia's."[83] Even more incredibly, the DOJ says that perhaps—in a detailed, highly-technical, top secret, court-ordered response to a FISA judge's precise questions about Section 702 surveillance—NSA attorneys used the phrase "web activity" as a colloquialism referring to Internet activity as a whole.[84] Because "web activity" is fancifully susceptible to an interpretation that excludes websites, the government says that Wikimedia has no evidence that the NSA's collection at Internet nodes includes traffic to or from Wikimedia websites.[85] The district court granted summary judgement in favor of the government, based in part on its claim that white- or blacklisting could theoretically exclude Wikimedia traffic, and the organization cannot prove otherwise.[86]

Wikimedia's lawyers have fought for four years, not on the merits of the constitutionality of Section 702, but merely for the right to ask the court to determine the question in the first place. Obfuscating and dissembling about the meaning of phrases such as "web activity" has enabled the government to avoid judicial scrutiny thus far.

CONCLUSION

Surveillance law and technology are complicated to begin with, but the intelligence world's language games exacerbate the lack of trust between the public and the government. The public is alien-

82. Response in Opposition to Motion for Summary Judgment at 22–23, citing Declaration of Scott Bradner, app. at 30, Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. 2018); Government's Response to the Court's Briefing Order of May 9, 2011, FISC Submission (June 1, 2011) (referencing "total take of Section 702 upstream collection of web activity").

83. Reply Brief in Support of Defendant's Motion for Summary Judgment at 11, Wikimedia Found. v. NSA, No. 11:15-cv-00662 (D. Md. Feb. 15, 2019).

84. Appendix to Reply Brief in Support of Defendants' Motion for Summary Judgment, Response to Plaintiff's Statement of Material Facts at 3–4, Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. Feb. 15, 2019).

85. Reply Brief in Support of Defendants' Motion for Summary Judgement at 17, Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. Feb. 15, 2019).

86. Wikimedia Found. v. NSA, No. 1:15-cv-00662, Memorandum Opinion at 27–30 (D. Md. Dec. 16, 2019).

ated and excluded from the discussion. Congress is confused and distracted. Courts cannot exercise their constitutional role of reviewing Executive Branch activities. Everyone is misled.

"Unfortunately, getting meaningful answers to these questions is a lot like getting a genie to grant your wishes," once said Matt Blaze, an associate professor and security expert at the University of Pennsylvania.[87] Trying to avoid the realm of the magical and esoteric, and in a climate of extreme secrecy, only with extensive documentation, pressure for declassification, and access to multiple sources of information can United States citizens obtain some level of confidence that we know what kind of spying is going on in our names. Until then, suspicion of government—and the way it uses language—is mandatory.

87. Matt Pearce, *NSA Does Not Collect Cellphone Location Data, Officials Say*, L.A. TIMES (June 24, 2013), https://www.latimes.com/nation/nationnow/la-na-nn-nsa-phone-location-data-20130624-story.html [https://perma.cc/7S6Q-DZTS].