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The Snowden Files Made Public: A Material Politics of Contesting Surveillance

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In the wake of the disclosures by Edward Snowden about NSA surveillance practices, a series of public hearings was held before the Civil Liberties, Justice, and Home Affairs (LIBE) Committee of the European Parliament in 2013–2014. These hearings offer a wealth of information concerning the details of Snowden’s claims, their implications for privacy rights, and the way in which the transatlantic political dialogue on these issues is unfolding. However, they have yet to receive academic attention. This article suggests that the LIBE Hearings were an important platform that rendered the contested Snowden files into public evidence of contemporary surveillance practices. Drawing on the concept of “material publics” proposed by Noortje Marres and others, we examine how the material setting of LIBE was crucial to the ways in which the Snowden files were made public in Europe. Valid evidence was produced, legal issues were identified, technological solutions were fostered, and responsibilities were enacted and denied.

Introduction

Snowden and the Public

In the wake of the disclosures of former Booz Allen Hamilton employee Edward Snowden about the American National Security Agency’s (NSA) large-scale analysis of citizen (social media) data, the European Union (EU) has positioned itself as a critic of US security practices. EU representatives have asked the United States for clarification concerning the NSA programs, and have pressed Obama to develop EU citizen protection under US law. As then-EU Commissioner Viviane Reding said in a speech in Washington in October 2013: “[t]here are things that cannot be justified by the fight against terrorism . . . States do not enjoy an unlimited right of secret surveillance” (Reding 2013). At the same time, the NSA suggested that European secret services are complicit in these surveillance practices. US National Security Intelligence Director James Clapper famously quoted from the movie *Casablanca* when testifying before US Congress. According to Clapper, outraged European states resembled the corrupt French police chief of the movie, who shouts out “My God, there’s gambling going on here,” when he wishes to raid an illegal casino in which he actively participates. Like the French police chief, European security agencies had, according to Clapper, long known about, and indeed profited from, the NSA data analytics (Landler and Schmidt 2013).

Despite alleged European complicity in the NSA programs, we have seen important critiques of surveillance articulated in, and through, Europe. European institutions have created important political spaces in which “the Snowden files” were interpreted, discussed, analyzed, and critiqued (Harding 2014). Most

importantly, between September 2013 and January 2014, a series of hearings was held before the Civil Liberties, Justice, and Home Affairs (LIBE) Committee of the European Parliament. These hearings followed a broad mandate given to LIBE in a Resolution of the European Parliament on July 4, 2013, to engage in fact-finding concerning the Snowden disclosures, and to assess their impact on the fundamental rights of EU citizens (European Parliament 2013). The LIBE Hearings staged a public questioning of a number of important stakeholders in this issue area, including privacy officers, (former) security services staff, EU Commission officials, and IT specialists. The hearings also involved a number of important absences and silences, especially from those national European security agencies believed to be cooperating with the NSA.

This article analyzes the LIBE Mass Surveillance Hearings as a *political* space and site of discursive struggle. We argue that the LIBE Hearings constitute an important platform through which the Snowden files were publicly mediated and—at least partially—rendered into valid evidence. Susan Schuppli (2014, 292) notes the elaborate procedure required to bring objects of evidence before trials or hearings, requiring a set of “conventions” through which objects can be “unfolded, translated and transformed into legible formats that can be offered up for public consideration and debate.” We examine how the LIBE Hearings played an important role in transforming the contested Snowden files into a formalized public record within the European polity. The hearings offer a wealth of information concerning the details of Snowden’s claims, their implications for privacy rights, and the way in which the transatlantic political dialogue on these issues is unfolding. They also created an enduring online archive of expert video testimony and a set of authoritative analytical reports. The silences and absences from the hearings, furthermore, are significant in themselves, because they seek to deny claims and refute responsibilities. Despite the rich information available through these hearings, they have yet to receive academic attention within the emerging literature on Snowden and surveillance (e.g., Bauman et al 2014; Bellanova and Gonzalez Fuster 2014; Lyon 2014; Murakami Wood and Wright 2015).

The “public” is an important figure for Snowden himself and in the discussions about his disclosures. Snowden is motivated by a concern for the public, by, as he put it in an interview, exposing “that which is done *in their name* and that which is *done against them*” (Blake, Gellman, and Miller 2013, emphasis added). In a New York Times Op-Ed, Snowden praises the “power of an informed public” to hold their government to account and to challenge surveillance (Snowden 2015). Yet, the *making public* of the Snowden files has been a complex and contested process. As one of the journalists who was closely involved with the release of the files recently explained: the constitution of a public archive of the Snowden files has been restricted by the requirement that they “be released in conjunction with careful reporting that puts the documents in context” and that “the welfare and reputations of innocent people be safeguarded” (Greenwald 2016). As a result, not many of the dossiers that Snowden copied from his employer Booz Allen have been publicly released, and their meaning and significance have unfolded through journalistic work by Greenwald himself and others.

This article asks how the LIBE Hearings made public particular understandings of the issues at stake in the Snowden files, what types of solutions were put forward, and how political responsibilities were enacted and denied. A fierce “discursive battle” took place over the implications of the Snowden files for politics and regulation in Europe (Diez 2014). Diez (2014, 325) argues that “meaning production, while not being entirely volatile, takes place in a fluid process” through struggles over meaning. Such discursive battles not only seek to fill contested notions with meaning, but also work toward “setting the limits to what is considered

legitimate and practicable” (Diez 2014, 321). In this sense, participants in the LIBE Hearings, as we document below, worked hard to define the problem in particular ways and set the limits of public debate on the issues.

However, we suggest that discursive struggle in this case should not be thought of as purely linguistic. Instead, political struggle is thoroughly inscribed in the material practices through which European institutions claim competence, carve out authority, and create platforms for public debate. The notion of discourse-as-practice is well rehearsed in the literature on international political sociology (e.g., Campbell 2001; Hansen 2006). In this article, we draw on the work by Noortje Marres and others, who emphasize the importance of materiality for the constitution of public debates and issues. For Marres (2010), publics do not pre-exist their materialization through a particular forum or technology; nor do they pre-exist their instantiation over particular “matters of concern” (Latour and Weibel 2005). Marres examines the infrastructure and platforms required for public issues to be able to emerge (Marres and Lezaun 2011; Walters and D’Aoust 2015).

Our analysis of the LIBE Hearings contributes to the growing literature on Snowden and surveillance in a number of ways. To date, this literature has been primarily normative. Existing analyses of the Snowden disclosures critique practices of government surveillance on the grounds of their consequences for political liberty and social cohesion. For Lyon (2014, 1), the Snowden files have uncovered the controversial effects of Big Data surveillance for individuals, as well as for citizens’ relationships with both the state and private companies. For Bauman et al. (2014, 126), they are indicative of the operation of “transnational guilds of professionals,” and an erosion of the conventional boundaries between the national and the foreign when it comes to surveillance oversight (see Bigo and Tsoulaka 2008). These literatures—though offering important political critiques—pay less attention to the concrete and situated (legal) strategies and practices through which surveillance practices become known, contested, and regulated (but see Bauman et al. 2014, 124). For Marres and Lezaun, however, “normative force” cannot be thought of as separate from the material arrangement of “experimental publics” (Marres and Lezaun 2011, 503). Rather than a purely normative public debate on the (il)legitimacy, accountability or effectiveness of “mass surveillance,” what we have in this case is a partial, unfinished, and situated coming together through the LIBE forum (Bellanova and Duez 2012; Bellanova 2014; Mitsilegas 2014; Opitz and Tellmann 2015).

Furthermore, the article contributes to debate on materiality and International Political Sociology more broadly. The “material turn” in international studies is attentive to the ways in which objects acquire political capacities in constituting new meanings, subject positions, and spaces (e.g., Barry 2013; Best and Walters 2013; Schouten 2014; Salter 2015; Magalhães 2016). Marres and Lezaun add a further dimension to our understanding of the materiality of objects: they note that it is not only particular objects that matter; but that “mediation” itself “becomes an object of scrutiny and struggle” (Marres and Lezaun 2011, 495). On the one hand, then, this approach adds *a new type of object* to the study of materiality in international studies: of importance to the matter of politics are not only the relatively visible passports, tanks, drones, or bodies; but also the more mundane files, PowerPoints, and conference rooms of political mediation. In our analysis, the very act of mediation and the material LIBE setting have become objects of deliberation, struggle, and contestation.

On the other hand, this approach involves a new appreciation of the profound interrelation of the material and the discursive. Instead of a critique of the supposedly “discourse- and speech-heavy analysis of much contemporary critical [work] in international relations” (Salter 2015, viii), our approach emphasizes the

profound interrelation between discourse and matter. It is attentive to the material infrastructure of political articulation. From this perspective, the discursive and the material are not in tension. Instead, the approach pays specific attention to “how material things, technologies and settings become invested with more or less *explicit* political and moral capacities,” including the capacity of facilitating “multiple public articulations” (Marres and Lezaun 2011, 495, emphasis in original). We consider the LIBE Hearings as a material platform that rendered possible the “open-ended circulation of information concerning the consequences” of the Snowden files (Marres 2010, 196). It did so not just through hosting the hearings in 2013–2014, but also through creating an enduring online archive of the documents and dossiers.

In this article, we analyze the concrete and materially embedded struggles and strategies of knowing, contesting, claiming, and solving the implications of what have come to be called the Snowden files. Our approach analyzes in detail how broad claims are given concrete meanings, and how they become tied to situated “experimentations” with technical or legal solutions. In the sections that follow, we focus on the elements of validity, legality, technicality, and responsibility. Before turning to the analysis of these four elements, however, we set out further our conceptual understanding of LIBE as an experimental political forum.

LIBE as an Experimental Forum

We consider the LIBE Hearings as an experimental forum, where the meaning and validity of the Snowden files was debated and affirmed, and where public attachment to the Snowden files was fostered. The Snowden disclosures set in motion a “socio-technical controversy” in the sense discussed by Callon, Lascoumes, and Barthes (2009). Such complex controversies are marked by public distrust of expertise, and a dynamic of uncertainty that is not reducible to a “simple” lack of factual risk knowledge. Uncertainty arises from “complexly codified situations,” in which the “possible states” of future worlds arising from present decisions quite simply cannot be anticipated (Callon, Lascoumes, and Barthes 2009, 20–21). To some extent, the Snowden files are fundamentally unknowable: they have been released in piecemeal fashion and through the mediation of journalists. The original NSA and Booz Allen materials as captured and copied by Snowden are not publicly available—with some exceptions, for example a selection of NSA PowerPoint slides available on the website of the *Washington Post*. Technical details of the NSA programs, the ways in which they capture, transfer, store, and analyze data, remain difficult to assess fully (but see for example Van der Velden 2015). We have insufficient knowledge about specific instances of security interventions made on the basis of NSA programs such as PRISM. Snowden (2014) himself, in his testimony to the LIBE Committee, referred to the limited availability of the files.

In the case of the Snowden files, moreover, their unknowability exceeds the types of uncertainty discussed by Callon and colleagues, which arise primarily from a sliding border between the technical and the social. For Callon, Lascoumes, and Barthes, socio-technical controversies are to be remedied by recursive social learning and “progressive reconfigurations of problems and identities” (2009, 35). State surveillance programs such as those disclosed by Snowden are different: they are not unknowable just because of limited socio-scientific knowledge about their operation and implications, but also because of the deliberate and enduring exercise of state secrecy (Curtin 2014; Walters 2014; Walters and D’Aoust 2015). Throughout the LIBE Hearings, as we will document below, security services attempted to contest the validity of the materials disclosed by Snowden and appealed to state secrecy privileges. Our questions, then, pertain to

the ways in which the Snowden files became translated and presented in legible formats as evidence before the LIBE Hearings.

It is precisely in the face of complex socio-technical controversies that an attentiveness to the material infrastructures of political articulation is important. For Marres and Lezaun (2011, 492), public deliberation and political positioning cannot be understood as separate from the material setting through which they occur, and the “labour, effort and work involved in public participation.” In other words, the material arrangements of public engagement *matter* to the ways in which political claims can be articulated, enacted, or denied. We argue that the LIBE Hearings functioned as a site where evidence, knowledge, positions, responsibilities, and (proposed) solutions with regard to the Snowden files materialized.

This entails, first of all, a recognition of the difficulty and hard work involved in drawing together the LIBE forum. LIBE was not an easy nor an obvious forum for deliberation on the Snowden disclosures. Questions of surveillance and intelligence oversight are not formally within the remit of European Union competence, and thus not necessarily subject to investigation within European Union institutions (e.g., Davis Cross 2011). Before it was able to call the meetings, the LIBE Committee had to mount convincing arguments concerning the way in which the Snowden files have a bearing on public security and data protection law (European competences) *despite* legal exemptions for national security (unequivocally a national competence) (LIBE Committee 2013–2014, 82). In addition, the Committee had to spell out the potential impact of the NSA programs on existing transatlantic treaties, including Safe Harbour and the Terrorism Financing Tracking Program Treaty (TFTP), which both fall within the EU remit (LIBE Committee 2013–2014, 91–97). Earlier transatlantic disputes over the sharing of air passenger data (PNR) and financial wire transfer data were heavily influenced by the work of the LIBE Committee, which has ceaselessly questioned and debated these issues in its own institutional setting and within the European Parliament more broadly (Amicelle 2011). LIBE’s track record in shaping Parliamentary debate in the case of the transatlantic Treaty on the TFTP, for example (De Goede 2012), helped build its authority vis-à-vis the Snowden files, and helped it claim possession of the themes flowing from the Snowden disclosures (European Parliament 2014, 9).

The particular socio-material arrangements of the LIBE Hearings, their disputed legitimacy, and their absences and silences, then, *matter* to the ways in which knowledge and political positions vis-à-vis the Snowden files have taken shape in Europe. In this context, at least four elements are important. First, the LIBE Hearings created a public record concerning the implications of the Snowden files, and an enduring online archive of public testimony. Even if the meaning and validity of the Snowden files remained contested, the LIBE archive introduces authoritative dossiers into the European polity. Second, the hearings provided a platform for the discursive struggle concerning the juridical meaning and implications of the Snowden files to play out. This underscores how political discursive struggles are not ephemeral but tied to concrete (juridical) positions and the emergence of competent, expert, “speaking subjects.” Third, the hearings functioned as a “theatre of proof” in which particular legal-technical solutions were proposed and denied (Marres and Lezaun 2011, 492). Finally, the hearings provided a platform through which participants sought to enact as well as deny their juridical competence and political responsibility over mass surveillance. The remainder of the article discusses these four elements of validity, legality, technicality, and responsibility in turn. It provides empirical detail on the records, subjects, solutions, and responsibilities enacted through the LIBE Hearings.

Validity

The first element to examine when considering LIBE as an experimental, material forum, is how it constituted a public record of the Snowden files and created an enduring online archive of public testimony. As Gitelman (2014, 86) argues in her discussion of the Pentagon papers, the making public of this set of secret government security documents involved elaborate processes of copying and distribution in “a lengthy disaggregation and multiplication process.” Put simply, the visibility, accessibility, and significance of these papers (“a muddle of versions, contents, ancillary drafts”) involved complex material processes (Gitelman 2014, 87). These material processes are not just mimetic (focused on reproduction itself) but also editorial (Gitelman 2014, 89–91). The ways in which the Pentagon papers entered the public domain were dependent on selection by whistleblowers and framing by newspapers. Though the digital nature of the Snowden files is markedly different from those of the Pentagon papers, they, too, depend on material processes of making public. This section analyzes the contestations over the validity of the Snowden files and the hard work required to have Snowden’s allegations concerning mass surveillance accepted as evidence before the European Parliament.

This material process first involved the LIBE Committee commissioning a number of expert studies in relation to the Snowden files in advance of the hearings that spelled out their significance in relation to state surveillance (e.g., Bigo et al. 2013). In addition, the LIBE Committee produced five detailed working documents in which the political and juridical core issues of the inquiry are set out.¹ LIBE did not just host the hearings but, perhaps more importantly, created an enduring online archive with documents and video testimony. All debates and expert contributions can be watched online, and the fifty-one-hour video testimony brings up many issues and themes beyond those given priority in the final report of the LIBE Committee (“the Moraes report”). The online archive remains available for researchers and broader publics to examine and assess the key issues at stake.

Methodologically, this article is based on a thorough analysis of the visual material available through the LIBE website, which involved streaming and analyzing all fifteen sessions of the debates. By making publicly available this set of video materials, the LIBE Committee offers the possibility not only to access the substance of the debate, that is, the arguments and expertise brought up during the hearings, but also to examine the setting of the hearings itself. Though not present in the European Parliament when the sessions were held, we transcribed the discussions during the entire hearings, and analyzed their settings, dynamics, arguments, and silences (Salter and Mutlu 2013).² Following each session, key arguments presented during the debates as well as in the documents were identified, mapped, and compared between the participants and the sessions. We analyzed not just the issues of debate concerning Snowden’s claims, but we also paid attention to the participants testifying, their background, and the material contributions they presented during the debates in the form of documents, formal statements, and presentation slides. We analyzed the dynamics during the question-and-answer sessions. The dedicated LIBE website publicizes a series of documents related to the hearings, from reports prepared by the experts prior to their testimony, to copies of speeches, letters, and replies sent between the LIBE Committee and invitees, and the five working papers produced by LIBE. We used this set of material

¹LIBE Committee (2013–2014). The LIBE online archive, including all relevant documents, is available at <http://www.europarl.europa.eu/committees/en/libe/subject-files.html?id=20130923CDT71796>.

²A 126-page research report analyzing the hearings, settings, and participants, and summarizing the key points of each session, was produced by the first author of this article. The report is available upon request to the authors.

contributions to compare and identify the issues that were given priority, as well as issues silenced during the debates.

Similar to the Pentagon papers, we found that journalists played a key role in mediating the Snowden files and translating them into public evidence. As Jacques Follorou of *Le Monde* stated, the role of journalists is essential, especially considering the scope of the intelligence program (first hearing, September 5, 2013). Alan Rusbridger, Editor-in-Chief of *The Guardian*, added during the same session that “there cannot be a debate unless you have information on which to base that debate . . . That debate cannot be held without journalism.” However, the journalists’ claims were sometimes denied and contested during the hearings.

Amongst the sixty-eight participants in the hearings—most of them either EU officials (fourteen participants), NGO representatives (eight), national officials (eight), business representatives (eight), or researchers (eight)—a significant proportion affirmed the validity and truthfulness of the Snowden disclosures as revealing state surveillance on a mass scale. NGO representatives, whistle-blowers, and academic researchers prominently considered the information released in the press as valid and reliable, and they presented the role of journalists and whistle-blowers as necessary for democracy. Director of Big Brother Watch Pickels notably referred to what “the NSA revelations have showed,” reflecting a broad acknowledgment among a majority of participants that the Snowden files are truthful and valid (fifteenth hearing, December 18, 2013).

The majority of the political spectrum represented by LIBE Committee members during the hearings, from GUE/NGL and the Greens to the Socialists, the Liberals, and the European People’s Party, actively relayed the information provided by the whistle-blowers and journalists, thus rendering it into valid evidence. Only the shadow rapporteur for the Conservatives, T. Kirkhope (ECR, UK), stated that he did not consider Snowden a hero (fifteenth hearing, third session, December 18, 2013). For example, MEP Morvai (non-attached, HU) eloquently suggested using “all the information given by [journalists] as evidence” in the LIBE Inquiry (fifth hearing, first session, October 3, 2013), while several MEPs incorporated ideas and arguments derived from the journalists’ reading of the Snowden files throughout the debate.

However, some experts strongly contested the veracity and validity of the Snowden files. A key strategy in the debate was the act of what we call “descaling,” whereby actors moved the overall debate to a level below political questions around mass surveillance. Several representatives of institutions and companies that have been put under the spotlight for their direct or indirect implication in mass surveillance insisted on the *alleged* characteristic and/or inaccuracy of the revelations. For example, press reports based on the Snowden files suggest that the Terrorism Financing Tracking Agreement between the EU and the United States (TFTP) had been breached by giving NSA direct access to SWIFT data (Amicelle 2011; De Goede 2012; Poitras, Rosenbach, and Stark 2013). However, EUROPOL Director Rob Wainwright insisted that the agency “does not have the mandate to investigate on *alleged* breaches with the [American] agency” (third hearing, first session, September 24, 2013). Similarly, Facebook representative Richard Allan declared a “great deal of media coverage” on the “nature and extent of government request from online providers in national security” to be “inaccurate or misleading” (November 11, 2013). In this sense, participants engage in descailing of the issues, which occurs when individuals and institutions seek to focus the LIBE Hearings on debates around veracity, while distancing themselves and the discussions from more fundamental political issues. The contested nature of the files themselves provides the necessary condition for descailing efforts. Descaling restricts the scope of discussions as they relate to mass surveillance and its implications for democracy, the rule of law, and privacy.

The uneven credibility accorded to the Snowden files illustrates that the LIBE Hearings were not simply a platform where diverging opinions were expressed, but that they were more specifically a forum through which specific knowledge was legitimized. The hearing involved a discursive battle that subjected the veracity of the Snowden files to examination, questioning, and interpretation. Participants took differing positions in relation to the Snowden disclosures by either accepting them as true, or questioning their reliability. As affirmed in its final report (the “Morales report”), the LIBE Committee members refuted the position of “those who deny the legitimacy of the information published on the grounds that most of the media reports are based on misinterpretation” (2014, 50). In this sense, the LIBE Hearings entailed a material process that transformed the Snowden files from journalistic and disputed sources, to valid evidence before a formal Committee of Inquiry.

A-Legality, or the Struggle over the Scope of Law

Second, we examine how LIBE staged an important struggle over the meaning, implications, and repercussions of the Snowden files for EU legal issues. Such struggles are significant not purely because they produce meaning and truth, but because they pursue the goal of drawing the boundaries around what is considered to be (il)legal in relation to government surveillance. In fact, the definition of, and boundaries around, il/legal practices was one of the most contentious themes throughout the hearings. Although the positioning of participants vis-à-vis the infringements of law evidenced in the Snowden files varied, there was a broad consensus on the urgency to take action and to develop adequate instruments. For example, MEP Albrecht referred to the “risk . . . that the acceptance of this issue becomes a precedent for future laws” (seventh hearing, third session, October 14, 2013). However, positions ranged widely as to which legal provisions were at stake and how, and what the most urgent focus for reform is. Put differently, the meaning, boundaries, and definition of the legal itself became subject to discursive struggle in the hearings (e.g., Cloatre 2013). Again, we emphasize that this struggle is not purely linguistic, but intimately tied to the materiality of LIBE as a platform and the specific subject positions thus enabled. As a material platform, LIBE configures and enacts, in powerful ways, public articulations and participation by “materially and physically implicated actors” (Marres and Lezaun 2011, 496). Integrating discursive and material approaches, we investigate how political subjectivity is formed in and through the hearings and emphasize that the act of truth-telling is key to the formation of subjectivity (Foucault 2011).

The first and most prominent approach to the question of law sought to establish the extent to which existing legal standards were breached, and to reinscribe mass surveillance within existing legal frameworks. A significant number of references were made to legal frameworks that regulate and restrain the collection, use, processing, and transfer of data, at the national, European, and transatlantic levels. Much discussion was dedicated to the “impact of the US surveillance programs on the American Safe Harbour” (sixth hearing, first session, October 7, 2013). LIBE members from the Greens, the Socialists, the Liberals, and the EPP questioned whether Safe Harbour offered adequate citizen protection in transatlantic data exchange. Noteworthy was the different stance taken between European institutions on the one hand, and representatives and political groups on the other. While Commissioner Reding urged improvement of the Safe Harbour Agreement, MEPs called for its suspension. A number of shortcomings and weaknesses of Safe Harbour were contained in a public report presented to the Inquiry underlining, *inter alia*, its limited scale and lack of enforceability (Connolly testimony, sixth hearing, first session, October 7, 2013). Eventually,

legal actions would oblige the European Commission to suspend Safe Harbour. In its 2015 verdict in the *Schrems* case, the European Court of Justice echoed the concerns raised by the MEPs, and declared Safe Harbour invalid. The framework for EU-US data exchange has been reformed since then, with the adoption of the Privacy Shield Agreement in July 2016. This provides a new framework for transatlantic data exchanges for commercial purposes. However, Privacy Shield is still contested, and the European Parliament called on the European Commission to address the deficiencies of the new mechanism in a non-binding resolution on “Transatlantic Data Flows” in May 2016 (European Parliament, 2016).

A second, quite different, position on the relation between mass surveillance and existing legal frameworks emphasized less a *breach* of the law, but suggested that the programs disclosed by Snowden operate *beyond* the law. Here, the hearings became a forum where the applicability and scope of the legal was tested and, to some extent, redefined. A number of panelists have understood the Snowden files to indicate practices that are *a-legal* instead of strictly illegal. It was argued that intelligence services’ activities could not be understood through any current legal framework because they involve a profoundly novel set of arrangements and practices. For example, French journalist Follorou lamented the weak legal framework that regulates secret intelligence gathering, amounting to “a parallel system without proper scrutiny” (first hearing, first session, September 5, 2013). He deplored how intelligence agencies defended that “what they do is not illegal, but outside the law, namely not covered by legislation.” Other panelists also evoked this notion of the a-legality of mass surveillance, for example ex-NSA executive Thomas Drake (fourth hearing, second session, September 30, 2013), who referred to “undersight” committees to discuss the process by which the activities of intelligence services are regulated in the US context. Gus Hosein of Privacy International for his part signaled the *failure* of the rule of law, arguing that contemporary technical possibilities, including the exploitation of cables, networks, and protocols to gain access to personal data, significantly challenge existing legal frameworks (eighth hearing, third session, November 7, 2013).

The arguments brought before the hearings on the a-legality of surveillance practices as disclosed by Snowden connect to a substantial literature that has understood post-9/11 security practices as exceptional and extra-legal. These literatures (e.g., Edkins, Pin-Fat, and Shapiro 2004; Agamben 2005) have noted that novel security practices in the name of fighting terrorism operate *beyond* the law, in a space where normal legal protections (for example, proportionality) are suspended and judged to be inapplicable. Here, the reference to national security exceptions justifies security measures that might imply a “normative vacuum” where the rule of law is suspended to the benefit of exceptional measures (Schmitt 1985; Huysmans 2004). We do not have the space here to engage fully with the debates and contestations over the question of exceptionalism (but see for example Connolly 2004; Amooore 2008; Neal 2012).

What is important to note in the context of our analysis of the LIBE Hearings is that the arguments concerning a-legality open a broader discussion about reform and politics than perhaps the arguments on illegality are able to do. The discussions of the illegality of mass surveillance as disclosed by Snowden focused on quite concrete points for reform. In their strictest sense, these included the renegotiation and reform of the Safe Harbour Decision for the transatlantic exchange of commercial data. More broadly, agendas for reform address the definitions of necessity, proportionality, and the scope of the national security exception. These are incredibly important and contentious points for (transatlantic) negotiation. However, they are largely focused on “fixing” the legal framework. These reform agendas signal the extent to which participants charged with institutional oversight within the EU polity—for example the EU Data Protection

Supervisor—were willing to arrive at concrete legal and technical solutions. Others, most notably speakers from academia, largely *avoided* bringing up practical solutions, in order to foster a broad, open, fundamental debate about the relation between democracy, law, and surveillance. The focus on a-legality, in this sense, can open up a productive political space that refuses to define concrete (technical) solutions, but that instead stakes out the necessity for a broad debate on the consequences for democracy.

Technicality

A third element that comes into focus through our approach is how the LIBE Hearings functioned as what Marres and Lezaun (2011, 492) call a “theatre of proof,” in which participants developed and demonstrated concrete techno-legal solutions, and suggested specific, pragmatic ways forward. Expert testimony proposed specific pathways to action, and sought to carve out competencies and responsibilities for themselves or others in enabling these pathways. In this sense, the LIBE Hearings constitute a “form of intervention” through which particular (technical) solutions and pathways were made more or less possible and politically attractive (Marres and Lezaun 2011, 502). The hearings experimented with proposals for future policy and pathways, not just in juridical terms (as explored in the previous section), but also in terms of technological solutions. This section explores the discussions concerning concrete, technological solutions that were put forward during the hearings, how, and by whom.

Three sessions of the Hearings were devoted to IT security of the European institutions and technological means of protecting privacy, gathering eleven experts, of whom two were introduced as IT specialists, out of the sixty-eight panelists. In their presentations, these specialists placed emphasis on the lack of properly trained staff and personnel (Florian Walther, thirteenth hearing, first session December 5, 2013; Bart Preneel, fifteenth hearing, second session, December 17, 2013). Concrete technical solutions mentioned included the use of encryption and the development of technologies with “privacy by design” (Preneel, *ibid.*). Overall, however, panelists broadly rejected a security *versus* privacy debate, with IT specialists and representatives of civil society underlining that privacy is a necessary condition for security (Annie Machon, fourth hearing, second session, September 30, 2013). The IT specialists and several scholars stressed that the idea of promoting “privacy by design” technologies aim to foster both security and privacy together (Zampaglione, tenth hearing, first session, November 14; Walther, *ibid.*).

A key strand in the debate where technical solutions and market power collide was MEPs’ active examination of the possibility for, and benefits of, EU cloud technologies. MEPs Moraes and in ’t Veld raised questions about the technological possibilities and legal implications of building a “European cloud”—understood as the technological and commercial development of data storage services that do not fall within US jurisdictional space. National officials, such as Isabelle Falque-Pierrotin of the French data protection office, stressed that the EU has to be more united to “defend its values,” and supported the idea of a “100% European cloud” where foreign legislation would not apply (sixth hearing, second session, October 7, 2013). Supporters of an EU cloud, such as the Director of the Institute for the Protection and Security of the Citizens, Stephan Lechner, understood the Snowden revelations through an economic and technological lens, as an opportunity for the EU to develop its own technologies independently from the United States (fifteenth hearing, second session, December 17, 2013; also Bowden, third hearing, fourth session, September 24, 2013). However, MEP in ’t Veld emphasized that “an EU cloud will not solve the

problem, the debate is political or legal, but not technical” (sixth hearing, second session, October 7, 2013). Similarly, Kreissl argued that “there is no surveillance technology, there only is technology used for surveillance purposes, and this is what needs to be regulated” (third hearing, fourth session, September 24, 2013).

In contrast, officials from EU institutions and companies, as well as the former security officer, predominantly focused on juridical-technical shortcomings, and on proposing (limited) solutions. Two examples serve to illustrate this point. First was a set of responses holding out the possibility for limited, expert, oversight of surveillance practices. In his presentation, former MI5 director David Bickford focused on the responsibility and pressure weighing on the shoulders of all the agents involved in counterterrorism who work for the sake of public safety. To him, the solution resides in the appointment of a judge who would be directly involved in intelligence services and determine whether surveillance activities are necessary and proportionate or not. During the Q&A session, Bickford referred to the complex tasks and high integrity of intelligence agencies and the need to have a “loose” framework of oversight (eighth hearing, third session, November 7, 2013). At another moment in the debates, Reinhard Priebe, formerly of the European Commission Home Affairs division, suggested that the problem should be worked out “progressively, like in the case of PNR,” for example through first creating an “ombudsman” (eighth hearing, fourth session, November 7, 2013).

A second set of technical responses emphasized the implementation of data security standards in the EU and by European agencies. These responses contested the allegations that illegal data access had taken place at all and seemed to deliberately obfuscate the political issues with technical and cryptic responses. For example, in relation to the TFTP, Director of Home Affairs Priebe at the European Commission notably refused to tell whether direct access by intelligence services to SWIFT data would be considered a violation of the agreement and of EU law (third hearing, first session, September 24, 2013), despite MEPs’ repeated questions. For their part, both EUROPOL and ENISA directors underlined that their organizations implement the highest security standards and supervision. Olivier Burgersdijk, Head of Strategy of the European Cybercrime Centre at EUROPOL, made several references to the “robust data protection and security framework” that EUROPOL has, which is “highly regulated and supervised” (thirteenth hearing, first session, December 5, 2013).

In this sense, the LIBE Inquiry sometimes appeared as a performance where representatives of companies and institutions delivered a speech that defended the organization they represented, despite some MEPs pushing for their engagement with the Snowden disclosures. Several shadow rapporteurs, especially from the left and center political groups, expressed their frustration on occasions when representatives of companies that had allegedly participated in mass surveillance did not acknowledge their responsibility or provide further information. The exchange of views between MEP in ’t Veld and experts from Microsoft, Google, and LinkedIn is illustrative in this regard (ninth hearing, third session, November 11, 2013). In ’t Veld complained that company representatives only provided “carefully prepared legal statements” and stated, as a matter of fact, that those companies have been cooperating with governments under pressure. During this session, Microsoft representative expert Dorothee Belz replied that the LIBE Committee “cannot expect companies to make statements infringing laws and bringing the CEO into jail.”

Keeping the issue of mass surveillance on the agenda of European leaders became quite a challenge, especially considering that several representatives of the EU Commission called for the necessity to carry out further investigations, sometimes refusing to defend a clear position on matters raised by the Parliamentarians. High-level representatives from the European Commission,

moreover, deliberately attempted to keep the issues surrounding the Snowden files separate from ongoing transatlantic treaty negotiations, in particular the so-called “Umbrella agreement” concerning data protection.

Responsibility

Finally, the hearings provided an important platform where political responsibility and competences were enacted and denied. We have already discussed the hard work that LIBE had to engage in to be recognized as a competent forum to host the proceedings and call authorities to account. In addition, some participants in the hearings issued statements to the effect that they did not recognize a relation between the Snowden disclosures and their institutional practices, and that they had no legal competence over the issues raised in the hearings. It is furthermore significant that a number of invitees, including US security authorities themselves, but also the French, German, Dutch, and Polish ministers responsible for oversight of national intelligence services, refused participation in the LIBE Hearings. These parties generally claimed that the issues arising from the Snowden files are purely national and outside EU competences. They refused to be maneuvered into a position of expertise and truth-telling concerning the Snowden files.

In total, seven experts and officials declined the invitation to appear before the LIBE Committee, including intelligence officials from European member states and the United States. Some of the letters received by the LIBE representatives, and added to the LIBE online material, reveal that those officials considered other channels more appropriate for addressing this issue, such as the Ad Hoc Working Group in which the United States, the EU, and member states were engaged (R. S. Litt, General Counsel of the Office of the Director of National Intelligence, September 19, 2013)—this forum being, however, closed to the public eye. When declining the invitation of the European Parliament to testify before the Committee, the UK stated for example that “national security is the sole responsibility of Member States. The activities of intelligence services are equally the sole responsibility of each Member State and fall outside the competence of the Union intelligence and secret services” (as quoted in [Carrera, Guild, and Parkin 2014](#), 1). In a sense, they resisted the “*entanglement*” that is generated through public debate. Participating in a public issue, for Marres and Latour, always entails a risk to the participants which, as [Marres \(2010, 190\)](#) puts it, “may well put one’s mode of existence at risk.”

It is important to note that the sheer novelty and the juridico-technological complexity of the surveillance practices as disclosed by the Snowden files fundamentally challenged pre-existing structures of political accountability. Instead of a debate in which responsible actors give their views, the LIBE Hearings are better understood as a platform *through which* responsibility was enacted, disclaimed, positioned, and denied. We do not claim, here, that those enactments and denials were fully successful (debates continue on these issues), but we argue that it is important to understand how claims to responsibility were articulated and denied at the hearings.

The absence of national officials and representatives from intelligence agencies contributed to the suspicion of several MEPs toward state representatives who refused to take a position. For example, MEP Albrecht stated that “it is unacceptable that no representative of the GCHQ is present . . . we [the Committee] should call governments to react to this” (fifth hearing, first session, October 3, 2013). Commissioner Reding stated that the Snowden revelations were a “necessary wake-up call, but it seems that some member states do not want to hear it” (fourteenth hearing, first session, December 9, 2013).

Not only was the validity of the Snowden information subject to debate, as discussed above, but these doubts and contestations also served as a means for disclaiming responsibility and competence by EU officials and company representatives. During the hearing, Europol Director Rob Wainwright insisted that the agency “does not cooperate directly with the NSA” and that it “does not have the mandate to investigate on alleged breaches with the [American] agency” (third hearing, first session, September 24, 2013). Representatives from ENISA and EUROPOL also disclaimed competence over mass surveillance and state espionage, pointing out that they can address an issue only at the explicit request of European member states (Wainwright, third hearing, second session, September 29, 2013). As ENISA Executive Director Helmbrecht put it, “Member states look carefully that ENISA has nothing to do that would step on their sovereignty” (thirteenth hearing, first session, December 5, 2013). Both ENISA and Europol argued that their respective mandate does not make them competent over the issue of the alleged surveillance practices. Several MEPs, including in ’t Veld and Albrecht, criticized these formalistic positions, and alleged that they did not accurately reflect reality. Albrecht stated that the issues were indeed within the competences of EU cybersecurity agency ENISA and EU crime agency EUROPOL, asking both agencies to “get (their) priorities right” given that “more than organized crime, it is about economic crime” and “crime against information security.” He specifically called on these agencies to “actively bring forward these investigations and even ask the authorities in the member states if they should not start investigations on it” (thirteenth hearing, first session, December 5, 2013).

The representatives of Google, Microsoft, and Facebook similarly sought to deny responsibility: they explained that their companies have complied with data requests in response to legal orders and that they have “not given the US government access to the servers not directly or via backdoors,” contrary to press allegations (Nicklas Lundblad, Director of Public Policy at Google, ninth hearing, third session, November 11, 2013). Likewise, the SWIFT company argued that it has respected the highest standards of IT security protection and that there has been “no evidence to suggest that there is unauthorized access to data” (Blanche Petre, General Counsel of SWIFT, third hearing, first session, September 24, 2013).

The absence of government officials at the hearings gave room for the EU to step in and present itself as competent and responsible on issues of mass surveillance. EU Data Protection Supervisor Peter Hustinx notably emphasized the specifically European obligations and values in protecting data and privacy. Hustinx advocated the development of a “European data protection culture” in which the EU would reinforce its data protection legislation and use it for international leverage (sixth hearing, first session, October 7, 2013). These positions, then, claimed EU competence over data protection issues, not just in the juridical sense but also through a specific appeal to European values and culture. In this sense, we argue that the LIBE Hearings also constituted a site of European identity building, where the EU’s normative commitments were affirmed in contrast to both the American “other” and the secret services of individual member states (Diez 2005).

Conclusion

We have analyzed the LIBE Hearings as a material site where the Snowden files were rendered into evidence, and where discursive struggles took place over their validity and the implications for legality, technicality, and responsibility. This approach renders possible a number of conclusions concerning the situated ways in which normative politics concerning surveillance and liberties play out in Europe. First, we have shown how the LIBE Hearings were able to render the Snowden

files from contested press reports into material evidence before a public inquiry. The final European Parliament report, delivered after the hearings (the Moraes report), provides a formalization of the Snowden disclosures as evidence, and an in-depth overview of the main challenges to Europe. This report judges the Snowden “revelations” to amount to “compelling evidence of the existence of far-reaching, complex and highly technologically advanced systems . . . to collect, store and analyze communication and location data . . . of all citizens around the world” (European Parliament 2014, 16).

Second, we have shown how European institutions and experts experimented with relatively limited juridical and technical solutions. The political space for broad debates concerning the implications for freedom and democracy of mass surveillance was relatively quickly narrowed by a focus on concrete solutions. Such concrete proposals ranged from the legal reform of Safe Harbour to developing technologies for “privacy by design.”

Third, and perhaps most importantly, we have shown how the LIBE hearings have functioned as a site through which political responsibilities were claimed, authorized, and denied. On the one hand, national security authorities evaded entanglement in the politics of mass surveillance altogether. They denied the competence of LIBE to hold these proceedings, and refused to testify. On the other hand, many companies and EU agencies (including Europol, SWIFT, and Microsoft) did participate, but they sought to “descale” the political issues away from discussions on freedom, democracy, and surveillance. Finally, this opened space for the European Parliament itself to claim authority over the issues, by emphasizing privacy as an important aspect of European identity and power. In this sense, the LIBE Hearings functioned to position the European Parliament to some extent as a competent, responsible, and knowledgeable authority in relation to the Snowden files, and *in extenso* surveillance practices. LIBE was able to develop a broad interpretation of its mandate, and the LIBE Hearings are the first (European) site where a formal and broad debate on the Snowden files was enabled.

More broadly, we have shown the material *difficulty* of contesting surveillance practices politically. As William Walters has shown, it requires hard work to bring secret practices, like surveillance and drone warfare, “into the public sphere and entangled in a politics of body counts, international law and war crimes” (Walters 2014, 107). With regard to secret security issues, a lot of the work of politics is in drawing together a public platform in the first place. Before political dialogue can take place, there needs to be a material platform for discussion, a basic set of shared assumptions, and a language in which to speak. Normative critiques of surveillance often overlook the difficult, material, work needed to stage such political dialogue in the first place. Our contribution has been to analyze the material politics of drawing together the LIBE platform, and entangling state surveillance in the politics of democratic freedom and political responsibility. If LIBE was relatively successful in doing the former, we have shown how the latter was easily drowned out by denials and technicalities.

The Moraes report released as a result of the LIBE Hearings concludes that the Snowden files signal “yet another step towards the establishment of a fully-fledged preventative state” (European Parliament 2014, 17). The report “strongly rejects the notion that these issues are purely a matter of national security and therefore the sole competence of Member States” (European Parliament 2014, 18). It offers a number of concrete policy suggestions, of which perhaps the suspension of the TFTP Agreement has received the most (press) attention, but which also include Safe Harbour reform, progress in the “umbrella agreement,” and adherence by all members to the European Convention on Human Rights, and especially the privacy rights therein. The European Parliament is likely to follow LIBE’s position

and give its consent to the EU-US *Umbrella* agreement (signed in June 2016) with MEP Albrecht, as rapporteur of LIBE's draft recommendation, calling in favor of adopting the agreement.

Our analysis has suggested that the LIBE Hearings were important not so much because of the (in)efficacy of their recommendations, but above all for the way in which they provide a platform for validating truths, establishing subject positions, and enacting responsibilities in relation to the Snowden files. As analyzed in this article, surveillance practices are subject to the exercise of state secrecy, where struggles about the validity of information are as important as debating the functioning of the surveillance apparatus. Therefore, the materiality of the ways in which partial documents on secret surveillance practices are rendered into (public) evidence both enables and conditions the possibility for political contestation. In our case, LIBE has built upon its competences surrounding the Snowden files to claim an active role in the negotiations on Privacy Shield. In March 2016, LIBE organized another hearing to assess the robustness of Privacy Shield, and has actively engaged since the LIBE Hearings in upholding strong European data privacy standards and the protection of whistle-blowers.

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