

Article Patterns of Surveillance Legitimization: The German Discourse on the NSA Scandal

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Abstract

This paper conceptualizes scandals as a special type of discourse in which the legitimacy of surveillance institutions and practices comes into question. Scandals force surveillance advocates to engage in legitimacy management practices (Suchmann 1995) and adopt legitimization strategies that can be observed. This paper presents a framework for the study of surveillance legitimizing strategies in scandal discourses that can be used for future cross-case comparisons. The aim is to analyze how the legitimacy of surveillance practices is maintained or repaired by surveillance advocates when it is contested in times of scandal. The research question is what rhetorical strategies are used to legitimize surveillance and prevent the scandal from escalating? The case under study is the reaction by the German federal Government between June and October 2013. Because of the Federal Election in September and the strong notions about privacy and data protection within Germany, this discourse is especially relevant. The surveillance legitimizing practices follow an escalation logic: from denial of knowledge to denial of participation, acknowledgment of limited participation and, finally, to complaining about the monitoring of Angela Merkel's cellphone.

Introduction

The Snowden revelations of June 2013, which are the biggest intelligence leaks in recent history, coincided with the federal elections in Germany and thus ignited a lively debate about the role of surveillance and data protection in modern democracies in the digital age. The media quickly adopted the terms the "NSA affair" or the "NSA-surveillance scandal". Most political parties, the press and advocacy groups *unisono* criticized foreign intelligence practices of this scale and demanded action from the Christian-Liberal coalition under Angela Merkel to protect the fundamental rights of German citizens as guaranteed in the German 'Grundgesetz'. Because of Germany's experience of two succeeding dictatorships in recent history, constitutional rights, privacy and data protection have become strong norms. Instead of taking initiative to uphold these norms, the government was hesitant and instead defended the practices of intelligence agencies and the legitimacy of mass surveillance. Conservative ministers systematically downplayed the severity of programs like PRISM, Tempora or Xkeyscore, denied the participation of German agencies or simply stated on public TV that "there was no massive violation of fundamental rights by American intelligence agencies on German soil" (Friedrich 2013). For the critical observer, these statements seemed to have a certain pattern or logic.

Unfortunately, there is no systematic analysis of legitimizing speech acts and argumentation repertoires in times of surveillance scandals, when the legitimacy of such institutions is in question. This paper analyzes surveillance legitimizing strategies in scandal discourses. The aim is to analyze how the legitimacy of surveillance practices is managed or repaired (Suchman 1995: 597) by surveillance advocates when it is

contested in times of scandal. The research question is: what rhetorical strategies are used to legitimize surveillance and to prevent the scandal from escalating?

To answer this question, this paper assumes a multidisciplinary perspective by drawing on scandal research, security studies and critical discourse analysis (CDA). CDA offers a rich body on legitimization in political discourses, but surveillance scandals have received little attention. If a scandal happens in an area concerning national security, it is useful to consider the special role of security legitimization or securitization (Buzan et al. 1997). I conduct a critical discourse analysis of key defending speeches by German politicians. I analyze the legitimacy management of officials (or how they downplay the scandal) and how the severity of the issue is constantly questioned with the use of legitimization strategies. To extend the validity of the study, a quantitative analysis is conducted afterwards in which the usage of different defending strategies is analyzed over time in light of new leaks and evidence. The aim is to understand how the strategies change and evolve when confronted with new contradicting evidence. It is not the primary purpose to assess the impact or the success of these strategies, but rather to provide the tools for analyzing similar scandals in the future.

First, the paper presents the theoretical background defining scandals as a special type of discourse about legitimacy, which is then conceptualized and operationalized for the discourse analysis. A list of the most common legitimization strategies is presented. After the theoretical part, the discourse analysis is introduced with methodological remarks about the text selection. The case study then analyzes the relevant legitimization strategies used by officials from June to December 2013. Afterwards the quantitative analysis provides an overview of how often and when these strategies are used.

Surveillance Legitimacy in Times of Scandals

A scandal is a disruptive transgression of shared cultural norms which is made public by a scandalizer (Adut 2004: 533). It is a process of public contestation, where a scandalized actor violates core norms of a socio-cultural context and is publicly blamed for this behavior, resulting in a strong public reaction and, often, policy change to avoid further transgressions (Bulkow and Pedersen 2011: 9). Scandals typically have different phases: the latency phase with the actual norm transgression, followed by publication and public reaction leading to different political reactions (Neckel 1989). They often uncover systemic failures and norm violating behavior (like the repeated bending of constitutional rules) and thereby help to define what appropriate or *legitimate* behavior in a given context is (Klotz 1995: 461-3.) They sharpen moral sensibilities within societies and are debates about which norms should be valid in a society. As such, scandals are a special type of discourse—a struggle about the legitimacy of ideas, norms, actors, institutions or whole political systems. "When we say that an institution is rightful, and hence legitimate, we are saying that its norms, rules, and principles are socially endorsed" (Reus-Smit 2007: 159). A scandal can lead to a corrosion of social endorsement and therefore reduce legitimacy.

Legitimacy is not an intrinsic or stable feature of an entity but rather intersubjectively ascribed by an audience and if a wider audience withdraws its legitimacy recognition, this can result in a legitimacy crisis. This is a critical turning point for actors or institutions because it can lead to disempowerment. A loss of legitimacy often translates to a loss of power and privileges, which were used to realize objectives (Reus-Smit 2007: 161-63). If a scandal reaches a critical mass (audience resonance) it can increase public demands for policy change like the introduction of safeguards, oversight or regulations that limit special privileges (Conrad 2004). If scandalized actors or institutions are beneficiaries of certain policies like little oversight or special (surveillance) privileges, they will try to maintain or defend their legitimacy. This is what Suchmann (1995) calls legitimacy management, whereby actors aim "to justify their identities, interests, practices or institutional designs" (Reus-Smit 2007: 159). This is often done via legitimization "defined in terms of a linguistic enactment of the speaker's right to be obeyed" (Cap 2008: 22). The process of legitimization is "enacted by argumentation" that explains action and justifies actions" (Reyes

2011: 782). It answers the questions: 'Why should I do this?' or 'Why should we as a society engage in surveillance practices?' and explains why the subjects of governance accept it as "binding" and thereby accept its rule (Weber 1978: 31). There are several legitimization strategies that provide these answers.

Max Weber's typology of authority structures distinguishes three ideal types that answer the 'whyquestion', either by relying on tradition and norms ('because it was always done like this'), authority or charismatic leadership ('because I say so') or by giving rational-legal reasons ('because it is the most effective way to do this' or 'because it is the law'). In democratic societies the third option is considered to be the most common (ibid. 31). Legal-rationality legitimatizes practices by reference to means and ends and thus gives seemingly objective, neutral and non-personal reasons why a practice is legitimate (van Leeuwen 2007: 101). These reasons are, in principle, debatable and revisable in contrast to traditional or charismatic legitimization, which draws its force from the norm that orders are not to be questioned (Steffek 2003: 261). Authority-based legitimization strategies aim to silence oppositional statements. The aim of this paper is to analyze and categorize different legitimization strategies by advocates and supporters of surveillance practices. This is done by drawing on the works of Conrad (2004), Van Dijk (2005), van Leeuwen (2007, 2008) and Reyes (2011), which have analyzed legitimization strategies in other discourses. Using their insights, I analyze legitimization strategies, which were predominantly used during the NSA-scandal in Germany. The following strategies represent steps of escalation within an unfolding scandal discourse, starting with a lower legitimizing potential strategy like denial. If revelations continue and falsify the used strategies, then stronger ones are likely to be used in later stages of public contestation.

Denial

Denial strategies aim to prevent an escalation by denying that a transgression actually is a scandal. This is done by denying the existence of a norm transgression or by attacking the scandalizer. Often it is used to limit personal involvement in early stages of the scandal, as long as deniability is plausible (Walton 1996). The first step often is to deny knowledge of the norm transgression, which aims to prove innocence and shifts responsibility to others. If knowledge cannot be effectively denied, often participation can: 'we don't do X', where X is the norm transgression. This is a step ahead because it includes the realization that some transgression has occurred. Conrad (2004: 314) argues that rebranding or containment strategies can be used to reduce the appeal of a topic, or to exclude certain actors or to frame possible solutions in a preferred direction. By calling it 'Euro-' or 'state deficit crisis' instead of 'financial' or 'banking crisis', the problem is shifted to state deficits and not unregulated banking speculation. A scandal can be rebranded as 'speculation, allegation or a conspiracy theory'. A variant of this is backgrounding or deemphasizing the role of the scandalizer by ignoring or avoiding any judgment (van Leeuwen 2008: 29). A more proactive version is to question the reliability or trustworthiness of either the scandalizer or his/her revelations: 'nothing is proven, these are just allegations, there is no truth to it' or 'the whistleblower is a selfish traitor who hates our way of life'. Attacking the reliability and validity of sources is a common feature of rhetorical defense and aims at rational legitimization because arguments seem to be falsified by means of rational reasoning. Finally, if all allegations are falsified or symbolic problem solutions are proposed (Conrad 2004: 315), an end to the scandal can be declared, which means accepting that there was some scandalous content, but that it is now resolved. Ending strategies are most likely to occur in later stages. Basic denial strategies are more likely to occur in the very first stages of a scandal, where the validity of the norm transgression is not 100 per cent and deniability is still possible.

Shifting Responsibility & Delegation

Shifting responsibility is a form of denial but it occurs in later stages when deniability of knowledge is not plausible anymore (Walton 1996). These strategies aim to prevent personal damage by framing or blaming other responsible actors. It can be done rhetorically by using *passivity and distancing phrases* in order to increase distance between a person and the allegations. Phrases such as 'I was not informed' or 'it came to my attention' or 'it was not my job' are examples of this strategy. Alternatively, the *responsibility can be*

shifted to experts and their authority. By mentioning an expert's credentials (like titles or rank), a statement might remain unquestioned because an expert in the field gives his/her recommendation. Expert delegation is a common feature to increase one's own standing: the weight of their voices is used to support a position and to increase credibility. The second function is sharing of responsibility: "politicians share possible blame with the voices of expertise they bring into the discourse if mistakes are made in the future" (Reyes 2011: 800). This is often indicated by the word 'we' rather than 'I' and seeks to collectivize blame. This allows for political sacrifices of minor state officials instead of ministers or heads of government. A variant of this is *shifting problem solutions* to others, for example to the EU or UNO. This works well if the problem is of a *global scale* and cannot be resolved by one nation alone. Alternative versions include adopting a *wait-and-see* approach: first see what is happening and then act in the future.

Rationalization

Similarly, rationalization strategies are used to increase the personal authority and legitimacy of politicians themselves when they are under public scrutiny for their involvement in the scandal. This is not unique in times of scandal but likely to occur in the middle phase of public contestation, where some allegations cannot be denied anymore and must be dealt with. "Legitimization is enacted when political actors present the legitimization process as a process where decisions have been made after a heeded, evaluated and thoughtful procedure" (Reyes 2011: 786). By appearing thoughtful and intelligent, personal authority and integrity is increased. One can *rely extensively on numbers and statistics*, which indicate precision and exactness and therefore competence. Its function is to convey objectivity and credibility (Van Dijk 2005: 84-87). The numbers themselves must not even be accurate because numbers and facts represent objectivity: "legitimation is grounded, not in whether the action is morally justified or not, nor in whether it is purposeful or effective, but in whether it is founded on some kind of truth, on 'the way things are'" (van Leeuwen 2007: 103f.). This can also be done by *declaring facts* or by denying the rationality of others. *Declaring something as normal or natural* (normalization) serves this purpose. The primary aim is to increase the dominance of ideas and present them as unquestionable truths.

Authorization

A common answer to the question 'why should we do this?' is to refer to an authority which can say what is to be done (van Leeuwen 2007: 94). Relying on *personal authority* and power can do this. Another version is delegation to *expert authority*, which gives credibility to claims by relying on expertise. Another variant is *role model authority*: "the mere fact that these role models adopt a certain kind of behavior, or believe certain things, is enough to legitimize the actions of their followers" (ibid. 95). This is often accompanied by *attaching positive attributes* like sacredness, like-mindedness or special relations like friendship to the act. By relying on what friends are doing, one's own practices can be legitimized, which resembles *authority of conformity*: 'we do something because everyone else is doing it'. The implicit normative message is: 'if others are doing it, so should we' (ibid. 95). Alternatively, relying on the *authority of tradition or history* can produce conformity: something was done in a certain way for decades 'because we always did it like this'. In modern societies, the answer to the question what should be done is often determined by law or *impersonal authority* (Steffek 2003: 261). Words like 'policy', 'law', 'justice', 'regulation', 'mandatory' or utterances like 'we adhere to the law' are the strongest ways to legitimize an action, especially if the rule of law is a normative principle in a society. The validity of these impersonal laws remains unquestioned in these instances, simply 'because it is the law'.

Singularity

Singularity is another containment strategy, which acknowledges a norm transgression but reduces its impact by highlighting its singular nature or its *limited effects*. It means to narrow down the scope of a public problem. It undercuts popular pressure for reform by isolating a narrow problem (a decoy so to speak), which diverts attention away from systemic or more sensitive causes (Conrad 2004: 317). Rather than talking about systemic failures, norm transgressions are presented as single cases or tragic accidents narrow in scope and not as bad as they seem. This is likely to be uttered when there is no longer any

plausible deniability. This can be done by *limiting the time frame* ('we did not do it for a long time or we just started it') or by *limiting its spatial dimension* ('it is just happening in a limited area'). Global dragnet surveillance of all non-Americans becomes targeted surveillance against terrorists on German soil. Another variant is focusing on one or a few aspects of a systemic problem instead of addressing the big picture. The same legitimization narratives are repeated over and over again, which excludes other narratives from the discourse.

Legitimization through security

Constructivist international relations scholars argue that measures like surveillance instruments are a result of a process called *securitization*, which is defined as a successful speech act:

through which an intersubjective understanding is constructed within a political community to treat something as an *existential threat* to a valued *referent object*, and to enable a call for *urgent and exceptional measures* to deal with the threat.

(Buzan and Wæver 2003: 491)

Threat constructions and the claim that something (like terrorism) is existential to a valued referent object can create a situation of urgency. It aims to persuade an audience to "tolerate violations of rules that would otherwise have been obeyed" (Stritzel 2007: 361). It legitimizes transgressions (like not getting a warrant for wiretapping) that would normally be unacceptable because of an urgent threat and is based on fear (Reyes 2011: 785). Threat constructions, therefore, have high legitimizing power.

One well-studied (Jackson 2005; Van Dijk 2005) strategy is the use of negative other representation and positive self-representation, where the speaker creates two sides of a given event in which the speaker and audience are in the 'us-group' and the other social actors, depicted negatively, constitute the 'them-group'. Negative other representation often works with the attribution of characteristics towards 'them' or to discredit critics by suggesting that their critique is helping 'them, the terrorists'. Often, politicians create a pseudo-causality by relying on hypothetical future arguments (Reyes 2011: 793): 'if we don't do X, then Y will happen'. These speculative statements must not necessarily be validated and take the form of *topoi*. "Within argumentation theory, 'topoi' or 'loci' can be described as parts of argumentation which belong to the obligatory, either explicit or inferable premises. They are contend-related warrants or 'conclusion rules' which connect the argument or arguments with the conclusion, the claim." (Wodak 2002: 74). A danger or security topos would be: we are threatened (premise), therefore we must do X (claim) without giving reasons why X is the best or only solution for this particular problem. Deliberation about other possible problem solutions is immediately circumvented with topoi. If the security legitimacy is in question, as in the case of the NSA scandal, its necessity is shifted, for example by underscoring the positive effects of surveillance. Reves (2011: 787) calls this legitimacy through altruism, where actions like surveillance are presented as something 'serving' (or beneficial for the in-group). Negative consequences are backgrounded, and positive examples are highlighted, often in a narrative fashion: 'it serves to protect our nation or our children and women'. Victimization is often a feature of this 'because the weak must be protected, must be taken care of'.

Methodology

A mixed method was used to analyze the process of legitimization. First, with the help of secondary literature, public timelines (EFF 2014) and newspaper articles, the process of leaks and government reaction was traced. This helped to determine the sequence of events, the dominant actors and the most relevant primary sources like interviews, press conferences and public statements. A wide variety of publications were used: 'Der Spiegel', 'Die Zeit', 'Süddeutsche Zeitung', 'die Welt', 'the Guardian', IT-magazines 'Heise Online', 'golem.de' and the tabloid 'Bild'. Also, I included a few TV live events from the daily news 'Tagesschau' and 'Heute Journal', the TV debate between Merkel and her challenger Peer

Steinbrück (SPD) as well as a live debate between Minister Friedrich and the Opposition, the so-called 'small TV duel' before the election. All these had a big viewership and were transcribed into text. The corpus consists of 116 texts in total, out of which 86 have been analyzed more deeply (the other 30 being follow-up articles). 19 of the texts are press interviews and 13 are official press conferences. A content analysis of the primary texts was conducted in order to determine which legitimizing strategies were used by whom and which form they took. The codebook is attached (Appendix 1). I also inductively scanned the texts for untheorized elements. Afterwards, I analyzed the number of strategies used, when they were used and whether there were further developments in the scandal like new leaks. Finally I looked for co-occurrence of strategies and actors to identify which actors used which particular strategies the most (Appendix 2).

Analysis of the NSA-Surveillance scandal in the German discourse

The massive intelligence leaks by former NSA contractor Edward Snowden in June 2013 prompted the public to question the legitimacy of post-9/11 mass surveillance executed by Western intelligence agencies. The scandalizers include the NSA-whistleblower Edward Snowden, critical journalists, the opposition and several civil rights groups.

The reaction of the German government to the Snowden leaks is a good example of the use of legitimization strategies. Initially, conservative government representatives, namely the Minister for the Interior Hans-Peter Friedrich (CSU)¹, the Minister for the Chancellery Ronald Pofalla (CDU) and Chancellor Angela Merkel (CDU) systematically downplayed the severity of the scandal and legitimized surveillance practices. This becomes visible when we ask what the scandal actually consists of and what the major actors call it. What is striking is that government, press and opposition use different terminologies for describing the events. Overall, the most frequently² used terms are 'affair' and 'scandal' (both including variations like wiretapping-, spy-, PRISM, NSA-, surveillance-, intelligence-). The term crisis is only used once during the debate. The press and opposition parties also use reinforcing adjectives like ('extensive', 'outrageous', 'total', 'disproportionate'). In contrast, the government parties (CDU, FDP) use a different vocabulary, which indicates the first strategy of legitimization, namely rebranding the scandal. The conservatives mostly speak of 'allegations', 'suspicions', 'speculation', 'press reports' or 'debate'. The liberals are somewhat split, because their Foreign Minister used the metaphor "the dark clouds of the spy-affair" during an interview with the US ambassador (Westerwelle 2013a).

An analysis of the 'Google search trends' (Figure 1.) of that time indicates that by 6 June 2013, the search term 'NSA' had gained traction in German search queries. The government reaction to the scandal had roughly four different stages. The first norm transgression appeared with the revelations of the programs 'PRISM' (5 June), 'Boundless Informant' (11 June) and the GCHQ surveillance of the G20 summit (16 June) in London 2009. The Minister for the Interior gave the first government interview on June 17. US President Obama was in Berlin on the 19 June and Angela Merkel gave her first statement regarding the issue, calling the internet an uncharted territory.

¹ Christian Social Union in Bavaria (CSU) is a local sister party of the federal Christian Democratic Union (CDU). Until September 2013, both conservative parties constituted a government coalition together with the liberal FDP, Free Democratic Party. After the election on 22 September, the Social Democratic Party (SPD) joined government together with CDU/CSU. The FDP was kicked out of parliament. 'The Greens' and 'The Left' constituted the opposition during the whole time.

² I coded 80 instances of name calling or statements that explain "what this is about..." NSA affair (and variations) occur in 22.5 per cent, NSA scandal in 20 per cent of the cases. See the appendix for more details.

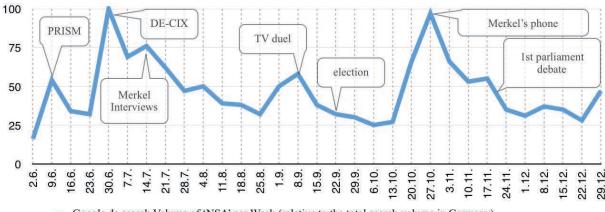


Figure 1. Unfolding of events 2013

Google.de search Volume of 'NSA' per Week (relative to the total search volume in Germany)

The second phase began at the end of June with the revelation of the British 'Tempora' program (21 June) and a Spiegel report (30 June) about a 500 million data collection of communications extracted at the German internet backbone DE-CIX (Poitras, Rosenbach and Stark 2013). This suggested a mass surveillance of German communications and interception of fiber-optic cables in Britain. The debate shifted to the question of German involvement within this intelligence system. This increased public and media attention and forced the government to act. Angela Merkel gave her first interview (11 July) since the initial leak in June and suggested solutions, for example by sending a delegation to the USA (Merkel 2013a). During this phase, several newspapers and political parties (FDP, Greens, SPD, the Left) picked up the topic as a new spin on the upcoming election campaign. The election on 22 September could be an explanation for the legitimizing practices of the government, because scandals tend to dig up inconvenient facts that might incriminate the government. Press observers noted that the government's aim was to prevent any reputational damage endangering reelection. Another reason for legitimization might have been the programmatic adherence to domestic surveillance practices like data retention of telecommunications, custom-built Trojan software and the creation of databases of suspects advocated by the Minister of the Interior and the more conservative parts of the CDU/CSU. The scandal seemed to threaten the legitimacy of surveillance instruments and the very essence of conservative law and order policy in general (which no other party adheres to as strongly).

The third phase revolved around the involvement of German agencies in the parliamentary control committee for the secret services in August and September. It was revealed that the Xkeyscore program was used by German secret services, Bundesnachrichtendienst (BND) and the Federal Office for the Protection of the Constitution (BfV). Here, the debate became rather legalistic and highly detailed, which resulted in decreased public interest.

The final phase (for 2013) began on 24 October, when the official government position changed rapidly because of a second norm transgression. Chancellor Merkel's cellphone was monitored from the US-embassy in Berlin. The perceived norm-transgression was uttered by several high-ranking officials, including Merkel: "friends do not spy on each other" (Merkel 2013b). In this final phase, the government rhetoric radically changed and most of the denial rhetoric was abandoned.

Analysis

This section qualitatively identifies the major strategies. It does so chronologically although some of the presented strategies occur also in other phases of the scandal. Key events are depicted to set the context for the speech analysis.

The first line of defense was waiting and not responding to the allegations at all. It took the government some time to respond to the PRISM leak (6 June). On 11 June the head of the German BKA³ denied "engaging in those practices" (Ziercke 2013). On 16 June two events happened. First the Guardian leaked that the British Government Communications Headquarters (GCHQ) monitored the 2009 London G20 summit, for example by tricking representatives into fake internet cafes (MacAskill et al. 2013). Secondly, der Spiegel reported that the BND wanted to increase its internet-surveillance effort by launching a 100 million Euro program to upgrade its surveillance infrastructure. In the first public appearance concerning this matter, Minister Friedrich (CSU) defended this effort arguing: "The state must compensate the loss of control over communication of criminals with new laws and technological tools" (Spiegel 2013a).

Denying knowledge

On the same, day Friedrich gave a quick interview with Reuters talking about the NSA leaks for the very first time on TV. He was questioned on the way to his office/to parliament/to wherever, therefore responding rather intuitively:

(1) Let me tell you something. **Before we even know what the Americans do,** everyone is upset and insulting them. This mix of **anti-Americanism and naivety** is really getting on my nerves.

(Reuters 2013)⁴

The first line of defense is denying any knowledge about what is happening and using this to discredit early critics with anti-Americanism and calling them naïve, resembling a negative attribution strategy. Furthermore, he adopts a waiting strategy: 'let's wait and see what is going on'. He never directly addresses the practices of the British GCHQ.

Security legitimacy

Three days later, on 19 June, Chancellor Angela Merkel welcomed US-president Barack Obama in Berlin. The NSA scandal was not the reason for the visit, but in their press conference they mentioned it briefly (11 sentences in the whole press conference). This was also the first public statement by Chancellor Merkel and therefore received a lot of media attention. Merkel said:

(2) We talked about questions of the internet in the context of PRISM. We talked at great length about the new possibilities and about also the new threats that the internet opens up to all of us. The internet is new territory, uncharted territory to all of us. And it also enables our enemies. It enables enemies of a free, liberal order, to use it, to abuse it, to bring a threat to all of us, to threaten our way of life. And this is why we value cooperation with the United States on questions of security.

(White House 2013)

Highlighting the length of a talk resembles a rationalization strategy. The uncharted territory, or in German 'Neuland'-metaphor, in combination with 'all of us' seems to indicate a justification strategy based on inexperience: 'because everything is new, we do not have sufficient experience, we cannot completely see what is going on'. This statement produced a lot of negative comments and satire in the press and on Twitter because the most powerful woman on earth appeared naïve and clueless in technical matters. As a result this topos was never used again. Its purpose was to represent the internet as an unknown space, which can be used by 'our enemies to threaten us' (we vs. they exclusion strategy) and

³ Bundeskriminalamt or Federal Criminal Police Office, which coordinates the police forces and is tasked with national security, fighting terrorism and organized crime.

⁴ All quotes, except (2), are translations by the author. Highlights in bold added by the author.

'our way of life'. Enemies and threats are referred to two times to justify security cooperation between the US and Germany. In the following three-week period, Chancellor Merkel remained silent on the issue, not giving any major interviews. Instead, her Minister for the Interior was the dominant actor. This is surprising because the coordination of the secret services is in the hands of Minister of the Chancellory, Ronald Pofalla (CDU), a close associate to Angela Merkel, who also remained silent until July.

Unreliable sources & authority of the law

On 21 June it was revealed that the British GCHQ was physically tapping into fiber optic cables that go through its territory, therefore intercepting communication on British soil (the Tempora Program). In his first speech on this issue in parliament on 26 June, Minister Friedrich developed several legitimization strategies which provided the fundament for further discourse and which were referred to several times by other speakers. He responded to an attack by Green Party member Hans-Christian Ströbele:

(3) Mister Ströbele, all **information regarding the question** in what quantity and quality something was done there, originate from some press releases, **the content of which is disputed by those responsible** in the US. They say, **we adhere to law.—That is a fact.**(Bundesregierung 2013a)

He denounces the trustworthiness of the sources by saying "some press releases" and highlighting their disputed nature. This basically means, that anyone can claim anything, which is not valid compared to referring to the authority of "those responsible". Instead of using the word 'scandal', the situation is referred to as "the question", which resembles a rebranding strategy.

Furthermore, he argues that the secret services (in this case both British and US) obey the law and presents this as an indisputable fact. Defining something as an indisputable fact is a theoretical rationalization strategy. The phrase "Recht und Gesetz", justice and law, rationalizes the practices by referring to the special authority of the rule of law in a double sense: it is not just lawful but also rightful. Interestingly, the words are always used in this combination, there is no variation. No one says that the 'practices are lawful or just', it is always "Recht und Gesetz" and is repeated four times in this speech and again by several other actors. The exact wording appears 42 times in all coded documents, which indicates a strategic use. Another variant of this strategy includes the addendum: "adhere to justice and law on German soil". This spatial singularization is interesting because it occurs several times, and, with the Tempora program in mind, backgrounds the fact that interception does not need to happen on German soil, thus harming sovereignty but on the other end of the fiber-optic cables. Legally speaking the statement might be correct, but technically it is misleading.

Role model authority & threat of terrorism

To qualify the statement that the secret services adhere to the rule of law, he used an analogy, which is connected to the narrative of democracy and the rule of law (Esch 2010):

I know or assume that our **American friends** have a similar understanding of the law and base their laws on this understanding. To date I do not have any evidence that may raise any doubt that **one of the oldest democracies in the world has not a similar understanding of the law like the one we have in Europe. [...] Most importantly, our parliament and their parliaments, in the UK and in the USA, are democratically elected and control what the secret services do. That is a fact** that even you cannot ignore.

(Bundesregierung 2013a)

This analogy oversimplifies the different understandings of the law and different mechanisms for parliamentary control that the US and Germany have. He points to a special type of political legitimization, namely democratic elections and parliamentary control, underscoring the legal-rational

order. The notion of the 'oldest democracy in the world' implies a certain role model authority: 'the oldest democracy in the world knows what it is doing, and who are you to question what they do?' Combined with the indicator 'our American friends', the effectiveness of the analogy is increased. Germany and the USA are constructed as similar entities with a special relationship, which is emphasized all throughout the speech. The answer to the question 'why obey?' in this case is: 'because they are our friends and they have experience with democracy'. However, this strategy was quickly abandoned in light of new leaks.

Statements that indicate dependency, for example that terrorist attacks have been prevented, further increase the special role model authority of the US.

(5) There is a global network of **terrorism that threatens us**. [...] **That is a fact** no one can ignore. Fortunately, Germany has been spared by major attacks in recent years. **We owe it**, among other things, to the **tips of our American friends**.

(Bundesregierung 2013a)

The threat of terrorism is declared as an undeniable fact that cannot be questioned, a tactic that is used to increase rational authority. It includes an implicit mechanism to discredit those who might question the 'objective nature' of the threat of terrorism. Another feature appears here that has not been theorized before, which is *normative dependency* on US intelligence cooperation: 'if it did not exist, then Germany would be hit by terrorist attacks'. This is not just a causality-implying statement relying on a hypothetical future (Reyes 2011: 794), it also includes a certain normative commitment: to owe someone something indicates a special type of relationship, even dependency because 'we are required to be thankful'. This is a legitimizing practice relying on emotions and moralization (van Leeuwen 2007) and can be used against critics: 'Why aren't you thankful? If it were not for the American friends, terrorism could have happened in Germany'.

At the end of June, several leaks increased the severity of the issue: the NSA bugged EU buildings in Washington and monitored the EU from the NATO headquarters in Brussels (29 June). The government press officer responded that "If true, these allegations are unacceptable!" and "surveillance of friends is unacceptable since we are not in the Cold War anymore" (das Gupta 2013). Additionally, American agencies extracted 500 million communications per month from German internet Backbone DE-CIX (30 June). This leak was crucial because it indicated German involvement and information sharing between the BND and NSA. It therefore became one central element in the government's defending strategy. On 2 July, Edward Snowden applied for asylum in Germany and Foreign Minister Guido Westerwelle (FDP) declared publicly: "we will deal with this application strictly, in accordance with law and justice" (Westerwelle 2013b). On 8 July it became public that the NSA closely cooperated with the BND, delivering software and analysis tools for monitoring data streams, as an interview with Edward Snowden suggested (Spiegel 2013b). This was promptly denied by the BND. This debate initiated the first peak of the scandal itself. Chancellor Merkel responded on 11 July in her first big interview with the German press since the initial leaks. Because of her 'wait and see approach' the interview with the weekly newspaper 'die Zeit' gained a lot of media attention. A quick succession of several interviews with newspapers and public TV-stations followed, indicating the launch of a concerted media campaign during this second phase.

Delegation and shifting responsibility

Relying on experts aims to secure the position of the Chancellor, in case the scandal escalates and backfires. During the whole interview she delegated responsibility for action to others (experts, the Minister of the Chancellory) four times in total:

(6) My impression is that the American president takes the worries in Europe **seriously**. I am now **waiting for the results** of the **expert interviews** in Washington. After that, they are going to be evaluated and then the next steps follow.

(Merkel 2013a)

The 'seriousness', the expert interviews and the 'wait and see approach' represent rationalization strategies: 'things are evaluated and then we act upon it'. This creates the impression, that she is in control and highly systematical. When asked whether the scale of surveillance by foreign secret services surprised her she replied:

(7) Intelligence agencies work together under narrow legal requirements, which is **their duty for decades** and **serves our security**. Programs like PRISM **came to my attention by current media coverage**. The extent to which the reports are accurate **is currently being evaluated**.

(Merkel 2013a)

What is noteworthy about this statement is the rapid succession of different topics within only three sentences. The first represents naturalization and normalization of the work of intelligence agencies. By calling it 'their duty for decades', historicity is added. We also see an instance of security altruism. The key sentence, which afterwards is quickly picked up by the press, is that programs like PRISM "came to her attention because of the media coverage". By highlighting that it came to her attention, a passive position is taken which rhetorically increases the distance between her and the scandal itself. She repeated this in follow up interviews. The last line represents an evolution of the initial denial strategy: by referring to evaluation of the reports, a more progressive position is taken which aims at solving open questions rather than denying their existence. This is a central element of the second phase: the government tries to construct the image that the problem is being resolved quickly and professionally. It is also noteworthy, that in contrast to Friedrich, she never simply states that nothing is happening or that the leaks are false. Merkel's statements are more nuanced and often include rationalization and delegation strategies.

When asked about what she thinks of Edward Snowden, she replied with a backgrounding strategy: "I allow myself no personal judgment about a man about whom I only read in the newspaper" thus keeping her distance to the sensitive issue. This is indicated by not judging at all and by using the phrase 'a man' instead of 'him' or the actual name, which is a common rhetorical device used for creating distance.

In a following interview (19 August), the traditional summer interview with several press agencies, a reporter asked whether there indeed is a strategy to prevent any reputational damage from Merkel and she replied, somewhat annoyed, that the Government is a collective agency which is coordinated by her and that responsibility lies with the ministers (ZDF 2013a).

Singularization

On 12 July, Minister Friedrich gave a prime-time live interview with the German public TV station ZDF, where he presented the preliminary results of his talks with officials in Washington about (and only about) the PRISM program. The main points were that 'it is only used in limited cases of terrorism, spread of weapons of mass destruction and organized crime'. This resembles a singularization strategy: instead of speaking of mass surveillance, the focus is shifted towards singular instances.

(8) It is **not about the nation-wide scanning** of communication, but a targeted search of a **quantitatively limited number of streams** of communications.

(ZDF 2013b)

He downplayed the scale of mass surveillance by pointing to the fact that individual instances are filtered (ignoring the fact that filtering requires a large amount of data to filter through). He repeated this argument four times during the whole interview. When asked by the interviewer, "Is it used to search several million German emails and phone calls?" Friedrich explained that "this program basically is comparable to those used by intelligence agencies worldwide." He claimed that it is what everyone else does as well. This resembles a legitimization strategy based on conformity. Another example of this singularization strategy is the adherence to this single case: Friedrich talks only about PRISM, but not about all the other leaks like the allegations that the EU Commission, the United Nations, several European embassies or South-American heads of government were monitored, which was already known at the time.

Several government interviews followed and several initiatives were started that aimed to resolve the issue, like drafting a common European Data Protection directive or working on a No-Spy agreement with the US Government. Intelligence experts quite early on pointed to the fact that the US will not abandon the privileges for data interception in Germany, based on the G10 law and NATO Status of Forces Agreement (Foschepoth 2013) and that the initiative is rather symbolic.

The third phase was about the question of German involvement. On 16 July, Friedrich declared in an interview "that no one in Germany knew about PRISM" (Welt 2013) and that "security is a super-basic law" (ZDF 2013c). One day later, the German armed forces and the BND admitted having used a tool called PRISM since 2011 (Zeit 2013). Following a leak on 11 June, the BND also admitted (25 July) having used a tool called Xkeyscore since 2007, which allows the searching of a mass storage of internet meta-data and real-time interception of internet users (Veit and Wittrock 2013). At this point German involvement was clear and deniability was not possible anymore. As a result, the legitimizing strategies were changed and the BND started to singularize the use of the surveillance software: 'it is only used for foreign satellite reconnaissance and the mere existence of the program does not mean that it is part of the U.S. network'. They also insisted that it was not used for data collection but only for analysis in accordance with the law (Veit and Wittrock 2013). The FDP demanded a reform of the intelligence agencies (implementing effective oversight and judicial control) while Friedrich stated in an interview that it is "absurd to think that thousands of Americans would read our mails" (Heise 2013a). On August 2nd, the government formally canceled an administrative agreement between German and allied security agencies which had not been used since 1990.

To protect our soldiers

Since deniability was not possible anymore, new arguments were developed. The BND states that the 'program is used in adherence to German laws' and:

(9) ...is an important building block for the **fulfillment of duty**, especially for reconnaissance of the situation in crisis areas, **to protect stationed German soldiers** in the war on terrorism and to protect and **to rescue abducted German citizens**.

(NTV 2013)

In the German version the BND spokesperson highlights both male and female soldiers, which could either represent political correctness, or it could be seen as a method of victimization because females are often presented as weak and especially in need for protection. Whatever the motivation, the phrases 'to protect our soldiers in crisis areas like Afghanistan' and 'to rescue abducted citizens', becomes a standard strategy and is used almost with the exact wording on several instances by different actors. It presents a commensurable argumentation, which is somewhat vivid and has a certain rational and emotional appeal: it is hardly deniable that the protection of soldiers and solving abduction cases is a good thing. This represents positive attribution of own practices backed up with relying on crisis and urgency in the fight against them, the terrorists (security altruism).

Ending the affair

August 12 marked another key point in the debate. On this day, the parliamentary control committee for the intelligence agencies had its second session (the first was in July). In both cases, Ronald Pofalla gave a press conference and thus appeared as a defender of surveillance for the first time since the beginning of the leaks in June. In his speech, he highlighted several bullet-points, which indicates a certain systematic approach and seems to give him credibility. The NSA assured, as he claims, that there was no nation-wide data analysis of German citizens (denial) and that the intelligence agencies (German and foreign) adhere to the law (this phrase occurs 8 times during the speech). In his fifth bullet-point he clarified an issue where the BND gave 500 million communication data to the NSA, which was leaked in June:

(10) This data is collected by the BND within the framework of its laws, and is transmitted to the NSA on the basis of the agreement of 28 April 2002. German data, to say it clearly once again, German data is filtered in a multistage process. In addition, the data obtained by the BND is controlled by a G-10 commissioner, who is qualified as a judge. The allegation of putative total spying in Germany is, according to the NSA, the British Services and our intelligence services, off the table. In Germany there is no millionfold violation of fundamental rights, as is often claimed falsely.

(Phoenix 2013a)

This statement combines several of the aforementioned strategies. What is new is the claim, "that the allegation of putative total spying in Germany is off the table". The press and opposition quickly adopted this phrase, reformulating it as 'Pofalla declares an end to the NSA-affair'. This statement was picked up and repeated by Minister Friedrich in a follow up interview on 16 August: "In any case, much ado about false claims and the suspicions have vanished into thin air" (RP Online 2013). The filter remark in Pofalla's quote indicates a singularization while the reference to the G-10⁵ commissioner and that he is qualified as a judge points to the authority of the law (backgrounding the fact that G-10 commissioner is no legal body of the legislative and therefore no independent instance of executive control.)

Most of the arguments presented so far were repeated in the last two major media appearances by Friedrich on 29 August in a prime-time live debate with politicians of the opposition and in the TV-Interview between Merkel and her challenger Peer Steinbrück on 2 September. Until the election, the government gave only a few statements regarding the NSA affair. Apart from the revelation that the NSA and GCHQ actively plant backdoors and break encryption (06 September), there were only a few minor leaks. The election was held on 22 September and the conservatives won with even more votes than in 2009, almost gaining an absolute majority. This and several popularity ratings indicated that the NSA affair did no damage to the reputation of CDU/CSU and that the legitimization strategies were successful. Until mid-December, the coalition talks between the CDU/CSU and SPD occupied most of the press coverage, with one exception.

The fourth stage of the scandal was initiated on 24 October when it became public that the NSA spied on Chancellor Merkel's cellphone, allegedly from the US embassy in Berlin. A harsh reaction occurred from all sides, including actors that had previously been silent or defensive about the issue. Friedrich demanded an apology from the Americans (Spiegel 2013c). Foreign Minister Guido Westerwelle (FDP) called in the US ambassador in Berlin and highlighted this 'severe diplomatic act' (Westerwelle 2013c). The new Minister for the Interior, Thomas de-Maizière (CDU), replied in an interview that he assumed that his cellphone would be monitored but had not expected the Americans to do it (Heise 2013b). Acting Minister Pofalla declared in a press statement, that these were "grave allegations" and, if true, "that would represent a completely new quality" (Bundesregierung 2013b). Also, "all statements from the NSA during

⁵ The G-10 law from 1968 regulates the legal surveillance done by intelligence agencies. G-10 refers to article 10 in the German basic law which deals with the privacy of information.

the past few months would shine in a new light" and "will be evaluated again" (ibid.). "It would represent a totally unacceptable behavior of our close allies" (ibid.). Chancellor Merkel responded to the allegations during the EU-summit on 25 October with the statements that "spying among friends is not acceptable [...] trust has been shattered" and "true change is necessary" (Bundesregierung 2013c). The breach-of-trust metaphor is mentioned five times in her speech and is used by several government officials and also by the opposition, which indicates a consensus on this particular norm transgression. When asked during a Q&A press conference in Berlin, Merkel's press officer Georg Streiter explained "that the government has never declared this story to be over" and that this was a "misinterpretation" which produced visible irritation among the journalists (Phoenix 2013b). Also noteworthy is the intensive use of rationalization strategies like "we will push for clarification with all force" (ibid.)

The harsh reaction from all parties and the language they used (breach of trust), indicated that the federal government finally perceived a norm-transgression by the American intelligence agencies as well. The demarcated line that had been drawn in the months before had been stepped over. At this point, the strongest defenders of the agencies now had to admit that they did not adhere to German law on German soil and that their statements were basically empty words. On 28 October it was decided, that the newly elected Bundestag would hold a session on this issue on 18 November 2013.

In this session both Pofalla and Merkel repeatedly argued, 'that the allegations and the statements of the NSA must be reevaluated in the light of new evidence' and 'that going back to normal everyday politics is not possible' and that 'the US-German partnership must be rebuilt' (Bundestag 2013). This debate is also interesting because it is in stark contrast to the previous singularization strategies. The new coalition partner SPD, together with the opposition, engaged in counter-singularization, pointing to other instances and leaks, such as data interception on British soil, the question of data-sharing between US, British and German services (listening to each other's population, avoiding 4th amendment laws in their respective country), and the need to reform the current G-10 law to allow better democratic control of these agencies with real judicial oversight. They also discussed whether Snowden should be granted asylum in Germany, although the government publicly declared the bilateral relationship with the US as the dominant good in this question. The opposition demanded stopping the construction of a new NSA building in Wiesbaden ('on German soil') and declaring known foreign spies personae non gratae (a policy that was eventually realized in the summer of 2014). The SPD pointed to the fact that firms with close links to the NSA operated the data connection of key companies and also the German Bundestag and that there was huge potential for economic espionage. Some moderate conservatives agreed and also used the word scandal or affair for the first time. Members of the far right such as Hans-Peter Friedrich still questioned the validity of the leaks and denied the millionfold breach of basic laws. One bipartisan topos was the question of how to recover German digital sovereignty, which was perceived to be lost as a result of this scandal. Solutions included a Schengen-routing system and an EU-cloud. However, no one was able to explain how this technically should work. On December 17, the newly elected CDU/SPD government took office and promised a more proactive resolution of the issue.

Findings and Conclusion

The aim of this paper was to provide an overview of the different surveillance legitimizing practices that were used by politicians and intelligence agencies when their core business of surveillance came into question. The general findings are threefold.

First, different actors play different roles. Minister Friedrich was the first in line, constantly questioning the leaks' validity (even after the Merkelphone incident), denying the practices and claiming everything happened according to the law. He mostly used authority and terror based arguments and his perspective seemed not to be altered by the leaks at all. It appears as if he was chosen as a pawn sacrifice. He gave the most interviews (Friedrich 10, Merkel 4, Westerwelle 2, Pofalla 0) and was also talked about in the press

more frequently than Merkel. Indeed, the press speculated about his frequent appearance relative to the Chancellor's several times and commented on his rather "clueless" behavior (Welt 2013) in dealing with the issue. He was given the Farming Minister position in the newly elected government, which was perceived as a downgrade. He eventually resigned from his position over an unrelated issue.

Chancellor Merkel constantly distanced herself from the scandal, relying on expert authority and delegating problem solutions to her ministers, which suggested that she was kept outside the line of fire. She maintained plausible deniability by avoiding any risky statements such declaring something as fact. Additionally, she often used rationalizing strategies that implied that she takes everything seriously and pointed to a more progressive and solution-oriented stance in the second stage of the scandal. She also proposed some longer-term initiatives such as a common EU data-protection policy. This strategy was highly successful because it was compatible with her style of governance and her popularity did not suffer, although the actual results remain to be seen.

Pofalla appeared only in the third stage on one singular issue. He tried to counter the leaks' impact with the help of rational counter arguments and by providing limited insight into German participation in the NSA programs in front of the parliamentary control committee. The idea seemed to be to reveal some comfortable facts and thereby try to end the public speculation about the DE-CIX data extraction leak (and only this). He also used securitization in order to legitimize the practices he revealed. This strategy was not very successful because it backfired in the press when he declared an end to the allegations. Pofalla did not take a position in the new government and left politics.

Second, the deployment of strategies followed the escalation logic of the leaks. A strategy was maintained until a new Snowden leak falsified it. Although this seems like a deny-response pattern by the press, one reporter I asked about this said it was merely coincidental. Denial of knowledge was adopted first and became replaced by denial of participation, until newer leaks indicated the opposite. As soon as participation was not deniable anymore, it was downplayed and singularized. By focusing the debate on questions relating to 'German soil', Merkel's and Pofalla's statements were legally well gauged. Spying embassies are legally not located on German soil and if GCHQ wiretaps German communications in England, sovereignty is not violated, at least legally. When that was insufficient, the logic of justifying extraordinary or legally questionable measures in light of existential threats was adopted.

Third, the political parties acted according to their role: the conservatives in government used authority and law and order based arguments. The liberals were split between liberal ideals and the governmental realpolitik that is required of a Foreign Minister. The social-democratic led opposition tried to widen the debate, pointing to rhetorical inconsistencies and constantly questioning the assertions of the government that no one was aware of the norm transgressions.

There are some shortcomings in this study that have to be discussed. Combining different methods required a balance between in-depth analysis of core texts and a broad overview of the debate in general, which was not a straightforward task. I therefore could not analyze the entire process in fine detail. Other legitimizations that were interesting, like the declaration of security as a 'super-fundamental right' by Minister Friedrich, the allegation by challenger Peer Steinbrück (SPD) that Chancellor Merkel violated her oath to protect the fundamental rights of German citizens, and the constantly appearing theme of a 'balance between security and liberty' could not be addressed adequately in this paper. Furthermore, analyzing the whole discourse and contrasting government with oppositional speech acts would have been interesting. By focusing on the speech and rhetoric of surveillance legitimizers alone, actual practices could not be analyzed adequately to see if the rhetoric had any consequences. An interesting follow-up question would be: did any of the proposed solutions to the scandal, like international initiatives or talks about a no-spy agreement, produce actual results or were they just symbolic politics? Additionally, the debate within the newly established parliamentary control committee and the obstructive behavior of the

new government therein in 2014 would be an interesting topic. It would reveal in what ways rhetoric and subsequent practice can diverge.

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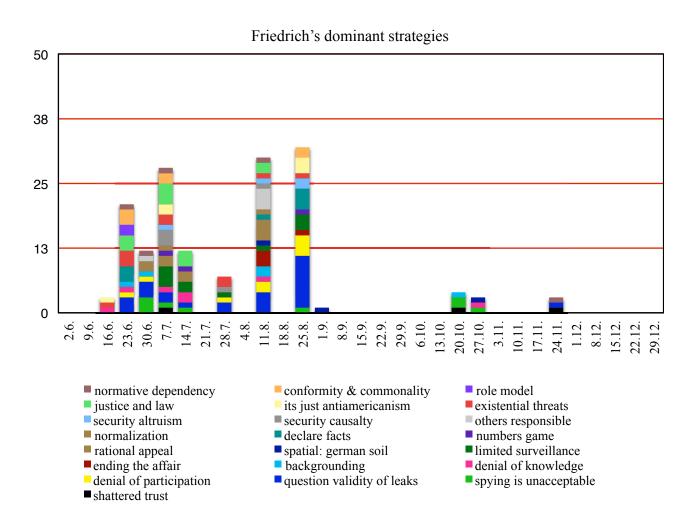
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Appendix 1. Codebook

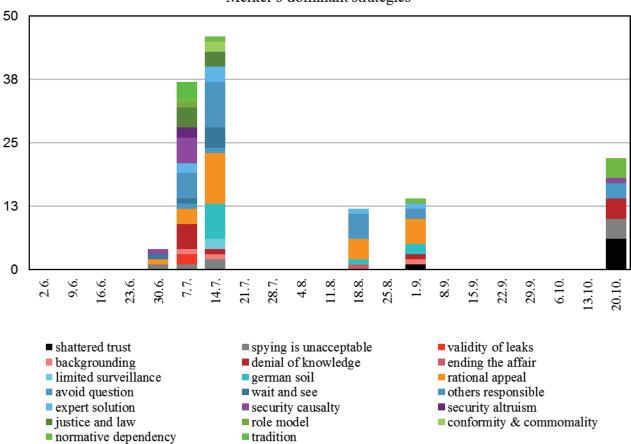
Table 1. Legitimization strategies per actor and over time						
Category	Strategy	times coded	example	strategy predominantly used by		
Denial	question validity of leaks	37	- words like 'allegations', 'allegedly', 'nothing is proven', 'there is no evidence', 'it is just speculation or conspiracy theories'	Friedrich Pofalla		
	denial of participation	23	- 'we don't do it', 'surveillance is not happening', 'there is no mass violation of fundamental rights'	Friedrich Pofalla Secret Services		
	denial of knowledge	34	 - 'we did not know anything' - 'I heard it from the news', 'I was not aware of it' 	Friedrich Merkel Pofalla Secret Services		
	ending the affair	11	- 'from the table', 'vanished into air'	Pofalla Friedrich		
	backgrounding	5	- 'I allow myself no judgement about a person'	Merkel Friedrich		
Rationalization	rational appeal	56	- 'we take the issue seriously', 'we evaluate', 'we check', 'we talked in great length', 'we draw conclusions', 'we talk intensively"	Merkel Pofalla Friedrich		
	declare facts	9	- 'it is fact that'	Friedrich		
	normalization	5	- 'it is what secret services do'	Friedrich Merkel		
	numbers game	9	- 'prevention of 50 terror attacks'	Friedrich Pofalla		
Authorization	justice and law	56	- 'we adhere to the law', 'wiretapping needs a warrant', 'the practices of intelligence agencies are covered under the G10 law	Friedrich Merkel Pofalla		
	conformity and commonality	12	- 'the NSA is basically doing what all other intelligence agencies are doing'	Friedrich Merkel		
	tradition	4	- 'it is their duty for decades'	Friedrich Merkel Pofalla		
	role model	7	- 'oldest democracy'	Friedrich		

Table 1. Legitimization strategies per actor and over time						
Category	Strategy	times coded	example	strategy predominantly used by		
	normative dependency	21	- 'we depend on information from the americans'			
delegation	others responsible	49	- 'I trust my experts', 'as Minister X already said'	Merkel Pofalla		
	global solutions	12	- 'require an EU solution'	Merkel		
	wait and see	15	- 'we wait for the results of experts talks and then act'	Merkel		
Securitization	security altruism	19	- it serves to protect citizens' or to 'protect German soldiers', 'their noble duty'	Friedrich Pofalla Secret Services		
	security causality	21	- 'without intelligence agencies cooperation or surveillance, terrorism cannot be prevented'	Merkel Pofalla		
	existential threats	13	- 'our way of life is threatened by them'	Friedrich Merkel		
Singularity	limited surveillance	41	- 'quantitatively limited', 'tailored search'	Friedrich Secret Services Pofalla		
	spatial limitiation	18	- 'only in Afghanistan', 'on German soil'	Friedrich Pofalla		

Appendix 2. Dominant Strategies per actor per week



Merkel's dominant strategies



Pofalla's dominant strategies

