Exhibit 2

Page 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

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WIKIMEDIA FOUNDATION,   :
                                 :
           Plaintiff,   :
                                 :   Case No.
      vs.   :
                                 :   1:15-cv-00662-TSE
NATIONAL SECURITY AGENCY,   :
et al.,   :
                                 :
           Defendants.   :
------------------------------x

Deposition of REBECCA J. RICHARDS

Monday, April 16, 2018

Washington, D.C.

Reported by:

Dawn A. Jaques

Job no: 21368

 1   Deposition of:

 2   REBECCA J. RICHARDS,

 3   the witness, was called for examination by counsel

 4   for the Plaintiffs, pursuant to notice, commencing

 5   at 9:12 a.m., at the offices of the Department of

 6   Justice, Civil Division, Federal Programs Branch,

 7   20 Massachusetts Avenue, Northwest, Washington,

 8   D.C., before Dawn A. Jaques, CSR, CLR, and Notary

 9   Public in and for the District of Columbia.

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 1   APPEARANCES:

 2   On behalf of the Plaintiffs:

 3   ALEX ABDO, ESQ.

 4   Knight First Amendment Institute

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 6   314 Low Library

 7   New York, New York 10027

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18   ALSO PRESENT on behalf of Plaintiffs:

19   Patrick Toomey, Esq., ACLU

20   Ashley Gorski, Esq., ACLU

21

22

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 1    APPEARANCES (Continued):

 2    On behalf of the Defendants:

 3            RODNEY PATTON, ESQ.

 4            JAMES J. GILLIGAN, ESQ.

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15    ALSO PRESENT FROM THE NATIONAL SECURITY AGENCY:

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 1   P R O C E E D I N G S

 2   MR. ABDO: Good morning, Ms. Richards.

 3   My name is Alex Abdo, and I'm here with the Knight

 4   First Amendment Institute and Columbia University,

 5   representing the Plaintiff in this case, Wikimedia

 6   Foundation.

 7   I think you met everyone down the

 8   line, but I'm joined by my colleagues, Patrick

 9   Toomey from the American Civil Liberties Union;

10   Devon Hanley Cook from Cooley LLP; and Ashley

11   Gorski, also from the American Civil Liberties

12   Union.

13   Would you just start out by stating

14   your full name for the record and spelling it for

15   us?

16   MR. PATTON: Could we just before we

17   begin introduce the other attorneys here just for

18   the record?

19   MR. ABDO: Please, yeah.

20   MR. PATTON: I'm Rodney Patton with

21   the Department of Justice representing the NSA.

22   MR. PADGETT: Jason Padgett, the

 1   Office of General Counsel at the National Security

 2   Agency.

 3   MR. GILLIGAN: James Gilligan with the

 4   DOJ representing the defendants.

 5   MS. ████████ Mary ████████ with the

 6   Office of General Counsel at the National Security

 7   Agency.

 8   MS. ████████ And Cathleen

 9   ████████, Office of General Counsel, National

10   Security Agency.

11   MR. ABDO: Great, I think we're done

12   with appearances.

13   Ms. Richards, would you just state

14   your full name and spell it for the record?

15   THE WITNESS: Rebecca Joan Richards,

16   R-E-B-E-C-C-A, J. Richards, R-I-C-H-A-R-D-S.

17   MR. PATTON: This is Rodney Patton on

18   behalf of Defendants in the case. The parties

19   have agreed to the following rules governing the

20   taking of this deposition.

21   One, counsel for the government may

22   make such objections as he deems in good faith to

1   be necessary to prevent the unauthorized

2   disclosure of protected, classified, or privileged

3   information.

4   Two, counsel for the government may at

5   any time direct the witness not to answer a

6   question or to stop responding to a question if he

7   deems it in good faith that it is necessary to

8   prevent the unauthorized disclosure of protected,

9   classified, or privileged information.

10   Number three, counsel for the

11   government or the witness may stop the deposition

12   at any time in order to confer privately in a

13   Secure Compartmented Information Facility, known

14   as a SCIF, for the purpose of preventing the

15   unauthorized disclosure of protected, classified,

16   or privileged information.

17   Four, nothing in the testimony of the

18   witness will constitute or be construed as a

19   waiver of the applicable protections or privileges

20   subject to the plaintiffs -- or subject to the NSA

21   reviewing the transcript.

22   Five, during the deposition, the

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1   transcript may be displayed only on the court

2   reporter's laptop, and it will not be otherwise

3   transferred to or displayed on anyone else's

4   electronic device during the deposition.

5   Six, after the deposition, the

6   transcript will be transferred from the court

7   reporter's laptop to counsel for the NSA by a CD

8   or flash drive.

9   Seven, the transcript of the

10   deposition will not otherwise be copied, except as

11   appropriate by the NSA, or transmitted from the

12   court reporter's laptop until counsel for the NSA

13   provides the Agency's approval to do so.

14   Finally, in the meantime, the NSA will

15   conduct a review of the transcript for protected,

16   privileged, and classified information, and will

17   redact any such information prior to the release

18   of the transcript to plaintiff's counsel, or

19   anyone other than the NSA and the court reporter.

20   That's all the ground rules.

21   Thank you.

22   MR. ABDO: Ms. Jaques, have you sworn

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 1   Ms. Richards in? Would you mind doing so?

 2   THE REPORTER: Raise your right hand,

 3   ma'am.

 4   (The witness was administered the oath.)

 5   Whereupon,

 6   REBECCA J. RICHARDS,

 7   was called as a witness, after having been

 8   first duly sworn by the Notary Public,

 9   was examined and testified as follows:

10   EXAMINATION BY COUNSEL FOR PLAINTIFF

11   BY MR. ABDO:

12   Q   Ms. Richards, you understand that

13   you're here today to give deposition testimony in

14   the lawsuit of Wikimedia Foundation versus NSA,

15   right?

16   A   Yes.

17   Q   And you understand that you're under

18   oath?

19   A   Yes.

20   Q   Have you been deposed before?

21   A   No.

22   Q   Okay. So you heard a portion of the

 1   procedures described by your counsel, Mr. Patton.

 2   I'll go over some other procedures for how the

 3   deposition will take place.

 4   So we'll be asking you questions. Our

 5   questions and your answers will be recorded by

 6   Ms. Jaques. For that reason, it's important that

 7   you speak up and give your answers orally so that

 8   Ms. Jaques can record them, transcribe them. She

 9   won't be able to record a nod or a shake of the

10   head.

11   Now, I may on occasion ask you a

12   question that isn't clear, or that for some other

13   reason you don't understand. If you don't

14   understand one of my questions, let me know. It's

15   my job to ask you clear questions. So if you say

16   you don't understand one, I'll try to make it

17   clearer. Do you understand that?

18   A   Yes, I do.

19   Q   Good. Your counsel may object at

20   various points. If he does, please go ahead and

21   answer the question that has been objected to

22   unless your counsel specifically instructs you not

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 1   to answer. Do you understand that?

 2   A   Yes, I do.

 3   Q   We'll be taking periodic breaks during

 4   the deposition, but if you need to take a break at

 5   any other point, let us know. We will accommodate

 6   you. And I think you see that there's some water

 7   and coffee in the corner. If you need anything,

 8   just help yourself at any point during the

 9   deposition.

10   If at any point you realize that an

11   answer you've given is incomplete or inaccurate

12   and you'd like to supplement it or correct it in

13   any way, let me know right away and we'll take

14   care of it right then. Does that sound okay?

15   A   Yes.

16   Q   And if at any point in answering our

17   questions you think of a document that would be

18   helpful in refreshing your recollection, in

19   answering the question, or in recalling what has

20   been publicly disclosed and what hasn't about

21   upstream surveillance, please tell us. We likely

22   have many of those documents here today and would

 1   be happy to provide you them. Is that okay?

 2   A   Yes, it is.

 3   Q   Great. So your counsel, Mr. Patton,

 4   outlined the process that the parties have agreed

 5   to for addressing objections based on information

 6   the NSA believes to be subject to the state

 7   secrets privilege or protected from disclosure

 8   under 50 U.S.C. § 3024(i)(1) and/or

 9   50 U.S.C. § 3605(a). We will adhere to that

10   process.

11   I'm going to use the term "classified"

12   to refer to information the NSA believes is

13   protected by any of those legal authorities. Is

14   that okay with you --

15   A   Yes.

16   Q   -- that shorthand?

17   MR. PATTON: Can we just state for the

18   record that not all of the information that will

19   be protected by 3605, for example, is necessarily

20   classified, but I understand your shorthand.

21   BY MR. ABDO:

22   Q   Please take your time when answering

1   our questions. Our goal is not to trick you into

2   disclosing protected information. We have a

3   process in place to address those sorts of claims,

4   but for that process to work, we need to make a

5   clear record concerning any information the NSA

6   believes is classified.

7   There are at least three scenarios

8   that may arise. First, if you can answer a

9   question fully without disclosing information that

10   the NSA believes to be classified, you must do so.

11   Second, if you believe that a response

12   to a question would disclose information the NSA

13   considers classified, you should clearly state

14   that for the record.

15   And, third, if you believe that a

16   question calls for a response that is classified

17   in part and unclassified in part, please also

18   state that clearly for the record. You must

19   answer and provide the unclassified information

20   even if that does not constitute a complete

21   response because there is also unclassified

22   information.

1   Do you understand those three

2   scenarios?

3   A   Yes, I do.

4   Q   Now, this case concerns surveillance

5   that has taken place from 2015 to the present.

6   Unless I say otherwise, my questions will apply to

7   that full period.

8   If your answer would differ based on

9   what specific portion of that period we're talking

10   about, please say so, and please explain how it

11   would differ for the relevant time frames.

12   We will do our best to make clear what

13   time frame we're talking about, and then I'm sure

14   your counsel will make sure we're making clear

15   what time frame we're talking about, but if we

16   haven't specified, please do your best to answer

17   with respect to the full period.

18   Is there any reason you can think of

19   why you would not be able to answer our questions

20   fully and accurately today?

21   A   No.

22   MR. PATTON: Other than that the

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 1   answers may be classified.

 2   THE WITNESS: Yeah.

 3   BY MR. ABDO:

 4   Q   Sorry, sorry. I mean are you taking

 5   any medications or drugs that would make it

 6   difficult for you to answer truthfully or

 7   accurately?

 8   A   No.

 9   Q   There's nothing that is affecting your

10   memory today?

11   A   No.

12   Q   Okay. You stated before that you have

13   not been deposed before; is that correct?

14   A   That's correct.

15   Q   Have you ever given testimony in a

16   case?

17   A   No, I have not.

18   Q   Okay. You understand that you're

19   appearing here today as a designated

20   representative of the NSA, right?

21   A   Yes.

22

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 1                    (Deposition Exhibit 41 was

 2                     marked for identification.)

 3                    BY MR. ABDO:

 4          Q    So you have in front of you what's

 5    been marked as Exhibit 41.  Do you recognize that

 6    document marked as 41?

 7          A    Yeah.

 8          Q    What is it?

 9          A    These are the topics for examination.

10               Do you want me to read more fully?

11          Q    No, no, no.

12          A    How detailed would you like me to be?

13          Q    I'm asking whether that's the

14    deposition notice that the plaintiff served on the

15    defendants in this case.

16          A    Oh, yes, it is.  Sorry.

17          Q    And you're appearing here today as a

18    designee of the NSA on topics 2, 3, 4a, 4d and 6

19    as set forth in Exhibit 41; is that correct?

20          A    Yes, that is correct.

21          Q    Are you prepared to testify today

22    about those topics?
```

1   A   Yes, I am.

2   Q   Can you tell us what you did to

3   prepare?

4   A   Reviewed the documents submitted, as

5   well as a number of different documents that are

6   already in the unclassified realm, ranging from

7   previous minimization procedures, the NSA Civil

8   Liberties and Privacy Office Report, the Privacy

9   and Civil Liberties Oversight Board's report on

10 702, FISC opinions, as well as NSA's submissions

11 at different points to the FISC.

12   Q   The FISC opinions that you reviewed,

13 are those all ones that have been disclosed

14 publicly?

15   A   Yes. I only reviewed the unclassified

16 versions, so the redacted versions that are

17 readily available on ODNI's website.

18   Q   Did you also review any classified

19 FISC opinions or other documents in preparing for

20 today's deposition?

21   A   No. We met with a subject -- I met

22 with a subject matter expert. We discussed what

 1   was classified and what was not classified, but

 2   otherwise I didn't review any classified

 3   documents.

 4   Q   So to the extent you talked about

 5   classified information, it was with a subject

 6   matter expert, but not reviewing any documents?

 7   A   Yes, that's correct.

 8   Q   Had you previously, unrelated to this

 9   litigation, reviewed classified versions of any of

10   the documents that you reviewed in unclassified

11   form?

12   A   Yes.

13   Q   Are you generally familiar with the

14   classified portions of those documents?

15   A   Yes, I am.

16   Q   Did you meet with your counsel in

17   preparing?

18   A   I did.

19   Q   You mentioned that you met with a

20   subject matter expert. That's an NSA employee?

21   A   Yes, it's an NSA employee.

22   Q   What role does that individual have

1   within the NSA?

2   A   An expert in upstream.

3   Q   Is that the only subject matter expert

4   within the NSA you met with?

5   A   Yes, it is.

6   Q   What's the general nature of what you

7   talked about with that individual in unclassified

8   form?

9   A   We reviewed what was in the classified

10   and in the unclassified to make sure we had a full

11   understanding of how upstream worked and we were

12   clear as to -- I was clear as to exactly where

13   those lines, in terms of classification versus

14   nonclassified information, could be discussed.

15   Q   Okay. Was the primary purpose of that

16   meeting to discuss that line between classified

17   and unclassified information?

18   A   It was more just to make sure that my

19   memory from all of the work we had done over the

20   last four years at NSA on upstream was current and

21   understanding, and that I wasn't mixing and

22   matching different activities.

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1   So it was more of a verification that

2   I knew exactly what it was, and this is what was

3   classified and this wasn't.

4   Q   Aside from preparing for this

5   deposition, have you been involved in this

6   litigation otherwise?

7   A   No, I have not.

8   Q   You've not reviewed any of the

9   government submissions in this case?

10   MR. PATTON: Objection, vague as to

11   time.

12   BY MR. ABDO:

13   Q   You can answer the question.

14   A   I reviewed all of the materials that

15   have been provided, most everything in the

16   binders. So, yes, I've read all of that material.

17   Q   Did you review any documents before

18   they were filed by the government in this case?

19   Let me try that again.

20   Did you review any of the government

21   submissions in this case prior to their being

22   filed in court?

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 1   A   I did not.

 2   Q   Have you been involved in any other

 3   litigation concerning Section 702 of the Foreign

 4   Intelligence Surveillance Act?

 5   A   No, I have not.

 6   Q   Are you familiar with other litigation

 7   concerning Section 702?

 8   A   I am.

 9   Q   What other litigation are you familiar

10   with?

11   A   There's at least one other lawsuit

12   having to do -- that goes back quite a few years,

13   sometimes referred to as the Jewel litigation.

14   Q   Okay. So what's your current position

15   at the NSA?

16   A   I'm the Director of the Civil

17   Liberties, Privacy, and Transparency Office.

18   Q   How long have you been in that

19   position?

20   A   A little over four years.

21   Q   What are your roles and

22   responsibilities in that position?

 1   A   I set up the office four years ago,

 2   and I report directly to the Director of NSA. I'm

 3   an adviser on civil liberties, privacy,

 4   transparency issues to both the Director, as well

 5   as our Senior Leadership Team.

 6   I review programs to identify civil

 7   liberties and privacy risks. I identify ways to

 8   mitigate them. I also work on transparency

 9   issues, publishing reports, meeting with civil

10   society/non-governmental organizations, and then

11   also act as the privacy advocate for NSA agency

12   employees.

13   Q   Are you responsible for that office's

14   oversight of upstream surveillance?

15   A   Could you clarify? I'm not sure what

16   you mean by oversight of that.

17   Q   Sure. Are you involved in your

18   position in reviewing the operation of upstream

19   surveillance as part of that office's mission?

20   MR. PATTON: Objection, vague.

21   You can answer.

22   THE WITNESS: My office reviews the

1   compliance incidents or other reports, oversight

2   reports, as part of our role as information goes

3   from NSA to ODNI.

4   BY MR. ABDO:

5   Q   I just want to clarify that last

6   portion. You said as part of your role,

7   information goes from --

8   A   ODNI. So -- sorry.

9   Our office is at a more strategic

10   level, so we do not review every single compliance

11   incident or every single activity specifically.

12   We have a compliance group that does those types

13   of functions.

14   My office is more strategic, so as

15   specific reports or assessments are conducted

16   either by ODNI or the Department of Justice, we're

17   in that review process.

18   I'm also the main interlocutor with

19   the Privacy and Civil Liberties Oversight Board,

20   so to the extent that there are compliance

21   incidences or changes to what -- any changes to

22   how NSA is conducting its mission as it relates to

1   counterterrorism, we provide that type of

2   information and those types of briefings to the

3   PCLOB.

4   Q   So in that role, you're not involved

5   in the implementation of upstream surveillance?

6   MR. PATTON: Objection, vague.

7   THE WITNESS: So certainly at the --

8   there are decisions that are being made, we're

9   informed, we will help decide, help with providing

10   recommendations about whether it should go A or B

11   or C, depending on specific questions that arise.

12   I'm not sure I'm answering your -- I'm

13   not sure I'm fully understanding what you're

14   trying to get at.

15   BY MR. ABDO:

16   Q   Let me try to be clear.

17   When the government applies for

18   authority from the Foreign Intelligence

19   Surveillance Court to conduct upstream

20   surveillance, is your office involved in that

21   process?

22   A   Yes.

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1   Q   And what's the nature of your office's

2   involvement in that process?

3   A   We review the minimum -- the

4   proposed -- we will review any of the procedures.

5   We will review any of the materials to ensure that

6   we think that privacy has been properly protected,

7   and civil liberties.

8   Q   And that review happens prior to

9   submission of an application to the Foreign

10   Intelligence Surveillance Court?

11   MR. PATTON: Objection, vague.

12   You can answer.

13   THE WITNESS: Ask the question again.

14   BY MR. ABDO:

15   Q   Sure. When the government is applying

16   for authority to conduct surveillance under

17   Section 702 of FISA -- are you familiar with the

18   shorthand FISA for Foreign Intelligence

19   Surveillance Act?

20   A   I am.

21   MR. PATTON: Could I just interrupt?

22   I keep objecting to vague because

1   we're talking about 702, but there's PRISM and

2   Upstream, and so if you want to be more specific,

3   that's the nature of my objection.

4   MR. ABDO: That's helpful. Thanks,

5   Rodney.

6   BY MR. ABDO:

7   Q   When the government is applying for

8   authority to conduct upstream surveillance from

9   the Foreign Intelligence Surveillance Court, does

10   your office review those applications prior to

11   their submission to the Foreign Intelligence

12   Surveillance Court?

13   A   I understand. Hold on. Sorry, I'm

14   looking for something specific to make sure I'm --

15   MR. PATTON: Take your time.

16   THE WITNESS: Can I talk -- take a

17   break to make sure?

18   MR. PATTON: Sure.

19   BY MR. ABDO:

20   Q   I just want to be clear. Just two

21   quick things. Could you please first identify

22   what you're looking at just for the record?

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 1   A   I'm looking at the Objections and

 2   Responses by Defendant National Security Agency

 3   and Admiral Michael S. Rogers, Director,

 4   Plaintiffs' First and Second Sets of Requests for

 5   Admission.

 6   Q   And could you tell us whether you're

 7   looking to take a break to discuss classified

 8   versus unclassified information, or something

 9   else? Are you looking to discuss with your

10   counsel the line between classified and

11   unclassified information?

12   A   Yes.

13   Q   Okay. I think let me actually just

14   withdraw that question. I don't think we need to

15   take the time to go there.

16   MR. PATTON: Just to be clear to

17   Mr. Abdo's point, the purpose of taking a break is

18   not to talk about whatever the response is if it's

19   not a subject of privilege.

20   The time to take a break and the need

21   to take a break is related to whether to assert

22   the privilege, and the nature and scope of the

 1   privilege.

 2   MR. ABDO: Thanks.

 3   BY MR. ABDO:

 4   Q   You said that you had been in your

 5   current position for four and a half years?

 6   A   Yes.

 7   Q   Before that, were you also with the

 8   federal government?

 9   A   Yes.

10   Q   And what position did you hold before

11   your current one?

12   A   I was the Senior Director for Privacy

13   Compliance at the Department of Homeland Security

14   in the Privacy Office.

15   Q   How long were you in that position?

16   A   Just shy of ten years.

17   Q   And what were your roles and

18   responsibilities there?

19   A   I was in charge of developing the

20   Privacy Impact Assessment process, publishing

21   Privacy Act System of Records Notices, ensuring

22   that the review of all IT systems within the

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 1   Department of Homeland Security had been reviewed

 2   for privacy considerations.

 3   Q   As part of that job, were you involved

 4   in any way in upstream surveillance?

 5   A   No.

 6   Q   As far as you know, did your roles or

 7   responsibilities in that job have any bearing on

 8   this lawsuit?

 9   A   No, not to the best of my knowledge.

10   Q   Can you just briefly explain what a

11   Privacy Impact Assessment is?

12   A   Sure. It's a requirement of both the

13   E-Government Act of 2002, as well as the Homeland

14   Security Act, Section 222, which requires that the

15   chief privacy officer ensure technology sustains

16   and does not erode privacy.

17   It's the process by which the

18   Department of Homeland Security and other federal

19   agencies review technology to ensure they

20   understand what the impact would be on privacy and

21   how they might be able to mitigate it.

22   It's also a transparency document to

1   allow the public to know and understand what the

2   agency is doing with their information.

3   Q   And you were involved in the issuance

4   of those sorts of assessments when you were at the

5   Department of Homeland Security?

6   A   Yes.

7   Q   Prior to holding that position, were

8   you also in the federal government?

9   A   No. I worked for a small nonprofit

10   called TRUSTe, which at the time was a nonprofit

11   reviewing privacy policies and issuing seals of

12   approval at the bottom of websites -- or generally

13   seen at the bottom of websites, indicating that

14   the privacy policy can be trusted.

15   Q   How long were you in that position?

16   A   I think about three years, maybe a

17   little more, maybe a little less.

18   Q   Were the two jobs within the federal

19   government that you've discussed so far the only

20   two jobs you've held in the federal government?

21   A   No. Prior to working at TRUSTe, I

22   worked at the Department of Commerce in the

```
 1    e-commerce task force helping to negotiate the

 2    Safe Harbor Accord, which is the privacy agreement

 3    between the European Commission and the Department

 4    of Commerce for companies regulated by the Federal

 5    Trade Commission or the Department of

 6    Transportation to be able to transfer data from

 7    the EU to the US if they've agreed to a set of

 8    privacy policies.

 9         Q    What was your position then?

10         A    I was the intern.

11         Q    How long did you have that internship?

12              MR. PATTON:  Don't knock it.

13              THE WITNESS:  Don't knock it, man.

14              MR. ABDO:  We all did.

15              THE WITNESS:  I was there for a year.

16    During that time frame, I went from being there

17    called a co-op student, which means I was paid, to

18    a full-time employee.

19              BY MR. ABDO:

20         Q    But the full time you were there was

21    one year?

22         A    Yeah.
```

1   Q   Okay. Is that the only other job

2   you've had in the federal government?

3   A   Yes.

4   Q   Did that job in any way concern

5   upstream surveillance?

6   A   No. It was before upstream

7   surveillance existed.

8   Q   Can you describe your training in the

9   areas of computer science, computer engineering,

10 telecommunications networks, or network

11 surveillance prior to joining the NSA?

12   A   I do not have --

13   MR. PATTON: Object. Object to form,

14 relevance.

15   MR. ABDO: You can answer.

16   MR. PATTON: You can answer.

17   THE WITNESS: Okay. I don't have any

18 specific training on those four topics prior to

19 being at NSA.

20   BY MR. ABDO:

21   Q   Do you have any formal technical

22 training from your -- let me try to be clear.

 1   Do you have any training with respect

 2   to those four topics through, you know, college or

 3   any other graduate programs?

 4   A   No, I do not.

 5   Q   Do you have any familiarity with those

 6   topics from your time prior to joining the NSA?

 7   MR. PATTON: Objection, vague.

 8   THE WITNESS: Certainly my experience

 9   of working on Privacy Impact Assessments at the

10   Department of Homeland Security, as well as

11   working through different Internet activities, has

12   given me a great deal of on-the-job experience.

13   I have no formal training to speak of

14   in computer science or the other topics you've

15   mentioned.

16   BY MR. ABDO:

17   Q   Can you describe the on-the-job

18   training you got in your position at the

19   Department of Homeland Security on those four

20   topics? And let me just be clear, on the topics

21   of computer science, computer engineering,

22   telecommunications networks, or network

1   surveillance.

2   A   The first three are all part of the

3   process by which we were having to review

4   extensively the types of technology that DHS was

5   putting forward and better understanding them to

6   ensure we understood the privacy implications. So

7   how did the computer systems work? Sort of how

8   was the information being moved? Where was the

9   information being moved?

10   I have no formal experience beyond my

11   work at NSA on network surveillance.

12   Q   For your time still at the Department

13   of Homeland Security, would you consult with

14   technologists to better understand how the conduct

15   that you were reviewing might impact privacy?

16   A   Absolutely.

17   Q   Was that a frequent part of your job?

18   A   Yes. We worked very closely with the

19   chief information officer, the chief information

20   security officer.

21   We also had external experts to the

22   Department of Homeland Security who did have

1   experience in all of these different topics who

2   would provide external expertise as part of the

3   Federal Advisory Committee Act, or FACA.

4   All of those were available if we had

5   questions to ensure that both we were fully

6   understanding the privacy impact, that we had an

7   appreciation of the information we needed to, and

8   were getting those expertise from across --

9   wherever in DHS we needed.

10   Q   You said that network surveillance was

11   not a topic on which you received on-the-job

12   training during your time at DHS?

13   A   Correct.

14   Q   Is that because there were no network

15   surveillance programs that your office was called

16   upon to review at your time at DHS?

17   MR. PATTON: Objection.

18   THE WITNESS: I need --

19   MR. PATTON: Just a second.

20   Objection. I'm not sure of the

21   relevance of that particular question, but besides

22   that, it is vague, ambiguous, but the witness can

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1   answer.

2   THE WITNESS: We're now hitting into

3   an area of classification that I would need to go

4   and discuss any further conversation on this

5   having to do with DHS activities.

6   BY MR. ABDO:

7   Q   Let me take a step back then.

8   You said before that you hadn't

9   received any on-the-job training with respect to

10   network surveillance during your time at DHS.

11   That's correct, right?

12   A   Maybe a better way would be if you

13   could explain what you mean by "network

14   surveillance," and then I can better answer that

15   question.

16   Q   Sure. I mean the use of computers to

17   monitor communications over a telecommunications

18   network.

19   A   I think what I would like to do is

20   revise what my answer is to say that, yes, I did

21   have on-the-job training associated with that, and

22   to go any further into that likely is classified.

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1   Q   Okay. I don't think we need to go

2   further.

3   A   Okay.

4   Q   I just wanted to understand the nature

5   of your technical training prior to your joining

6   the NSA.

7   A   Okay.

8   Q   So now let's move to your time at the

9   NSA. Can you describe in unclassified terms your

10 on-the-job training with respect to those four

11 areas, which again are computer science, computer

12 engineering, telecommunications networks, or

13 network surveillance?

14   MR. PATTON: Objection to the question

15 to the extent it calls for source and methods of

16 the NSA, operational details of Upstream, which

17 are protected by the state secrets privilege and

18 50 U.S.C. § 3605(a), 50 U.S.C. § 3024(i)(1).

19   The witness can answer the question to

20 the extent that it's unclassified.

21   MR. ABDO: And to be clear here, I'm

22 asking just for unclassified information.

 1   And, Rodney, can we agree on a short

 2   form of your invocation of the state secrets

 3   privilege and the other two statutory claims of

 4   protection?

 5   MR. PATTON: I will work on that. We

 6   can maybe make a deal that you will shorten your

 7   record and I'll shorten mine.

 8   But my concern with in unclassified

 9   terms is it may be very difficult for the witness

10   to separate out when it's a broad question like

11   that as opposed to a very specific question.

12   MR. ABDO: If instead of using the

13   term "classified" we used the term "protected,"

14   would that be clearer?

15   MR. PATTON: For me I think it's just

16   the tell me about everything nature of the

17   question, which is very difficult for her to come

18   up with what is classified and what is

19   unclassified on the spot, whereas specific

20   questions are much easier where she's -- you know,

21   her job is to know where the line is, and she

22   knows where the line is.

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1   This is asking about her entire thing,

2   so that's my concern.

3   BY MR. ABDO:

4   Q   Ms. Richards, do you think you can

5   answer my question without disclosing classified

6   information?

7   A   I can answer. I'm not sure it will

8   give you what you're looking for, but ...

9   Q   Why don't we start with what you can

10 do.

11   A   My answer is I have extensive ability

12 to talk to and learn from anyone within NSA about

13 how we do our job. To the extent that it means

14 I'm interacting with people in all four of those

15 categories, that's what I do.

16   Q   Do you consider yourself to be well

17 technically versed or conversant in those four

18 areas?

19   MR. PATTON: Object to the form.

20   MR. ABDO: You can answer.

21   THE WITNESS: I do.

22

 1   BY MR. ABDO:

 2   Q   I think that's fine.

 3   As part of your job at NSA, have you

 4   ever been required to learn technical concepts

 5   relating to the programs you were reviewing that

 6   you felt unable to learn or understand?

 7   MR. PATTON: Object to the form.

 8   THE WITNESS: I don't understand your

 9   question, so help me.

10   BY MR. ABDO:

11   Q   Sure, yeah. Your job at NSA involves

12   reviewing NSA surveillance programs, correct?

13   A   Correct.

14   MR. PATTON: Object to the form.

15   THE WITNESS: Correct.

16   BY MR. ABDO:

17   Q   And as part of reviewing those

18   programs, you mentioned that you talk with NSA

19   employees about how those programs work; is that

20   right?

21   A   Yes.

22   Q   When talking with those employees

1   about NSA surveillance programs, have you ever

2   felt unable to comprehend technical detail that

3   you were being explained?

4   MR. PATTON: Object to the form,

5   vague. You can answer.

6   THE WITNESS: No, I have never felt

7   like I couldn't understand what they were saying,

8   or what the concepts that they were explaining to

9   me. Is that what you're asking me?

10   BY MR. ABDO:

11   Q   Yeah, that's what I'm asking you.

12   A   Okay. No, I've never had -- they have

13   all been able to fully explain it, both in concept

14   and in fact.

15   Q   Okay, great.

16   (Deposition Exhibit 42 was

17   marked for identification.)

18   BY MR. ABDO:

19   Q   Ms. Richards, you now have in front of

20   you what's been marked as Exhibit 42.

21   Do you recognize Exhibit 42?

22   A   Yes, I do.

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 1   Q   What is it?

 2   A   It is Objections and Responses by

 3   Defendants National Security Agency and Admiral

 4   Michael F. Rogers, Director, to Plaintiff's

 5   Interrogatories.

 6   Q   Could you please turn to page 17 of

 7   Exhibit 42 and read to yourself the question

 8   identified on that page as Interrogatory No. 12?

 9   A   (Witness reviewing document.)

10   Q   Have you had a chance, Ms. Richards,

11   to read just the interrogatory, the question

12   itself, No. 12 on page 17?

13   A   I'm sorry. Yes, I have.

14   Q   Could you turn to page 18 of the same

15   document, Exhibit 42, and read the paragraph on

16   that page identified as RESPONSE, which is the

17   response to Interrogatory No. 12 provided by the

18   NSA, and let me know when you're done.

19   A   (Witness reviewing document.) Okay.

20   Q   Did you have any role in drafting or

21   reviewing the NSA's response to Interrogatory

22   No. 12?

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 1   MR. PATTON: Object to the form, vague

 2   as to time.

 3   THE WITNESS: No, I did not.

 4   BY MR. ABDO:

 5   Q   You didn't draft the response?

 6   A   I did not draft the response.

 7   Q   Did you see this response prior to its

 8   having been filed in federal court -- sorry, prior

 9   to this having been sent to the Plaintiffs in this

10   lawsuit?

11   A   No.

12   Q   Since this response was provided to

13   Plaintiff, have you reviewed this response?

14   A   Yes.

15   Q   And do you understand this response?

16   A   Yes.

17   Q   To your understanding, does the term

18   "Internet backbone" include high-speed, ultra-high

19   bandwidth data transmission lines between the

20   networks of major Internet service providers?

21   MR. PATTON: Objection, calls for

22   expert testimony of a telecommunications computer

1   expert. You can answer.

2   THE WITNESS: Certainly that is one

3   example of what might be included in the Internet

4   backbone.

5   BY MR. ABDO:

6   Q   When you say -- what do you mean by

7   "might be"?

8   A   Well, as is noted in the definition,

9   and as is actually when it first comes up in the

10   testimony to the PCLOB, Internet backbone is a --

11   sort of for want of a better word, there's not a

12   specific term that everyone turns to and says that

13   is the Internet backbone, but rather is a general

14   description.

15   And so there are a number of things,

16   as is described here, that could be included in

17   the Internet backbone. It's not yes or no.

18   Q   But your understanding is that the

19   high-speed, ultra-high bandwidth data transmission

20   lines between the networks of major Internet

21   service providers are one such example?

22   A   Those could be one such example.

 1   Q   And the Internet backbone also

 2   includes high-speed, ultra-high bandwidth data

 3   transmission lines within the networks of major

 4   Internet service providers?

 5   MR. PATTON: Objection to form, calls

 6   for expert testimony. You can answer.

 7   THE WITNESS: You're making a

 8   distinction between within versus --

 9   BY MR. ABDO:

10   Q   Between, that's right.

11   A   So with -- you're --

12   Q   Sorry. My first set of questions

13   related to data transmission lines between the

14   networks of major Internet service providers -- in

15   other words, those connecting one major Internet

16   service provider to another -- and now I'm asking

17   about the high-speed, ultra-high bandwidth data

18   transmission lines within any given major Internet

19   service provider.

20   MR. PATTON: Objection, calls for

21   expert testimony. You can answer.

22   THE WITNESS: It certainly may be. I

 1   wouldn't say -- it could be an example.

 2   BY MR. ABDO:

 3   Q   Can you give other examples of

 4   high-speed, high bandwidth data transmission lines

 5   that would be part of the Internet backbone?

 6   MR. PATTON: Objection, calls for

 7   expert testimony. You can answer.

 8   THE WITNESS: There's the terrestrial

 9   and undersea circuits are other examples.

10   BY MR. ABDO:

11   Q   Could you describe just a little bit

12   more what you mean by those?

13   MR. PATTON: Same objection.

14   THE WITNESS: So both with Internet

15   backbone, as well as terrestrial and undersea

16   circuits, NSA doesn't have a specific NSA

17   definition. It's what would be generally accepted

18   by a telecom expert. So there's nothing special

19   about what those are.

20   BY MR. ABDO:

21   Q   And I'm not asking for a special

22   definition of Internet backbone. I'm asking

1   whether your understanding of that term would

2   encompass the sort of data transmission lines we

3   were just discussing.

4   MR. PATTON: Objection to form, vague,

5   and calls for expert opinion.

6   THE WITNESS: So I guess my answer

7   hasn't changed, and to go any further would put us

8   into classified information.

9   And so to the extent that the

10   information you have in the response -- there's no

11   additional information that is -- I can switch

12   words around, but in essence, those are different

13   types of examples that could be part of what the

14   Internet backbone is, but there's no additional

15   information I can provide to you that's not

16   classified.

17   BY MR. ABDO:

18   Q   I understand that you may not be able

19   to provide an unclassified response to this

20   question, but could you state whether the NSA

21   considers high-speed, ultra-high bandwidth data

22   transmission lines between and within the networks

1   of major Internet service providers to be part of

2   the Internet backbone for purposes of upstream

3   surveillance?

4   MR. PATTON: Objection, asked and

5   answered. Objection, calls for expert testimony.

6   And also objection that it is calling for

7   classified information and information protected

8   by the previously mentioned statutes, so I'll

9   instruct the witness not to answer that question.

10   BY MR. ABDO:

11   Q   Are you going to follow your lawyer's

12   instruction not to answer the question?

13   A   Yes.

14   MR. ABDO: Rodney, can we agree that

15   every time you instruct Ms. Richards not to answer

16   a question on the basis of its classification, you

17   will consider us to have noted our objection to it

18   and we can move on?

19   MR. PATTON: Absolutely.

20   MR. ABDO: Okay.

21   MR. PATTON: I mean, there may be

22   other ways to ask the question to get around that.

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 1   That's part of the problem.

 2   MR. PADGETT: Maybe we should take a

 3   break because I think there is something that

 4   could be said, but the question is throwing it

 5   off.

 6   MR. PATTON: Right, that's what I was

 7   just saying. There may be an answer to the

 8   question, depending on how it's phrased, that we

 9   could provide an unclassified response, and so we

10   want to try and provide as much of an unclassified

11   response as possible, but the way the question is

12   framed leads us into a classified area.

13   MR. ABDO: Let me try to ask it one

14   other way.

15   BY MR. ABDO:

16   Q   Is your understanding that

17   telecommunications networks experts would consider

18   the high-speed, high-bandwidth data transmission

19   lines between and within the networks of major

20   Internet service providers to be part of the

21   Internet backbone?

22   MR. PATTON: Just take a pause.

 1   (Counsel conferring.)

 2   MR. PATTON: Just object to the form

 3   in terms of calling for expert testimony, but you

 4   can answer that question.

 5   Do you need the question read back?

 6   MR. ABDO: We can do that if that's

 7   easier.

 8   THE WITNESS: Yeah, can you read the

 9   question one more time? Sorry. Too many things.

10   (The reporter read back the question.)

11   THE WITNESS: I think generally

12   speaking, yes.

13   MR. ABDO: Rodney, if you want to take

14   a -- if there's more you think that can be

15   provided after a short break, we're happy to do

16   that now.

17   MR. PADGETT: It might be helpful.

18   MR. GILLIGAN: Actually, 30 seconds.

19   MR. ABDO: Go off the record.

20   (Off the record at 10:02 a.m.)

21   (Resume at 10:05 a.m.)

22   MR. PATTON: So we've clarified the

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1   lines as to where the privileged information in

2   that line of questioning is, so you can ask your

3   next question, hopefully get a response.

4   BY MR. ABDO:

5   Q   Sure. Is there a way that I could

6   have asked the last set of questions I was asking

7   in a way that you could answer with unclassified

8   information?

9   A   To the extent the term "Internet

10   backbone" is what is generally understood, as

11   amorphous as that definition is, by a

12   telecommunications expert, that's how NSA would

13   describe it.

14   To the extent you are connecting it in

15   some way to upstream, that's where you get to

16   classified information.

17   So they're sort of differentiating

18   between those two, but NSA doesn't have a special

19   definition.

20   Q   Right. And I think you answered the

21   question with respect to the term "Internet

22   backbone" as understood by telecommunications

1   networks professionals or experts, but just to be

2   clear, that term, as used by telecommunications

3   networks experts, includes the high-speed,

4   ultra-high bandwidth data transmission lines

5   between and within the networks of major Internet

6   service providers, right?

7   A   Yes.

8   MR. PATTON: Objection to the extent

9   it calls for an expert opinion.

10   THE WITNESS: But generally yes, that

11   would be what I believe they would say, and so

12   that would be what NSA would say.

13   BY MR. ABDO:

14   Q   Okay. Going back to the NSA's

15   response to Interrogatory 12, what does the term

16   "data transmission lines" refer to?

17   MR. PATTON: Objection, calls for

18   expert opinion.

19   THE WITNESS: Lines that transmit

20   data. I mean, beyond what a tele- -- so I'm not a

21   telecommunications expert, as we've noted. That

22   doesn't mean I don't understand how they work, but

Page 56

1   there's no special definition here that is

2   distinct to what NSA does.

3   BY MR. ABDO:

4   Q   What I'm getting at is does the term

5   "data transmission lines" refer to the physical

6   means of transmission of data, or something else?

7   MR. PATTON: Same objection.

8   THE WITNESS: I will go back to that

9   it has no special particular meaning beyond what a

10   telecommunications expert would expect.

11   BY MR. ABDO:

12   Q   Is your understanding that a

13   telecommunications network expert will use that

14   term, "data transmission lines," to refer to a

15   physical means of transmission, such as, for

16   example, a cable or a wire or an optical fiber?

17   MR. PATTON: Object. Object to the

18   form, vague, and calls for expert testimony.

19   You can answer.

20   THE WITNESS: As opposed to?

21   BY MR. ABDO:

22   Q   As opposed to logical or virtual

Page 57

 1   groupings of data transmitted from one point to

 2   another.

 3   MR. PATTON: Same objections.

 4   BY MR. ABDO:

 5   Q   I'm really just trying to understand

 6   the term that you've used in your response to

 7   Interrogatory No. 12, and the term is "data

 8   transmission lines," and what I'm trying to

 9   understand is whether that refers to physical

10   lines of transmitting data, or other ways of

11   transmitting -- other ways of understanding the

12   transmission of data.

13   A   Oh, okay.

14   Q   Do you understand that question and

15   what I'm trying to understand?

16   A   Do you want to go a little further?

17   What would be the -- I guess I'm tripping over

18   this seems to be logical on its face, and so I'm

19   not sure -- I'm having a hard time -- it sort of

20   defines itself, so ...

21   Q   So in another interrogatory response,

22   the NSA uses the term "virtual circuit." I'm

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```
 1    trying to understand whether this term, "data

 2    transmission lines," is limited to physical

 3    transmission lines or something else, like virtual

 4    circuits?

 5               MR. PATTON:  Object to the form, calls

 6    for expert testimony.

 7               THE WITNESS:  Do you want to point to

 8    where virtual circuits is so I can make sure I'm

 9    not tripping up or -- I do remember seeing virtual

10    circuits, I just don't --

11               BY MR. ABDO:

12        Q    Turn to page --

13        A    I want to make sure I'm looking at the

14    same one that you're looking at.

15        Q    If you turn to page 6 of Exhibit 42,

16    it's the response to Interrogatory No. 2,

17    designated on that page by the all caps word

18    RESPONSE.

19               Do you want to take a second to read

20    those two paragraphs to yourself?

21        A    Yeah.  (Witness reviewing document.)

22               Oh, okay.
```

 1   Q   Having read that, do you now

 2   understand what I'm asking with respect to the

 3   term "data transmission lines"?

 4   A   Yeah, it's physical data transmission

 5   lines. There's nothing -- there's nothing virtual

 6   or -- there's nothing -- it's a physical

 7   transmission line.

 8   Q   Okay, okay. Would a fiberoptic cable

 9   qualify as a data transmission line as that term

10   is understood by telecommunications network

11   experts?

12   MR. PATTON: Objection, calls for

13   testimony by a telecommunications expert.

14   You can answer.

15   THE WITNESS: Yes, it would. That

16   would be one example. I'm not saying that's the

17   only example, but it's certainly an example of

18   what might be included in that.

19   BY MR. ABDO:

20   Q   Okay. Would it also include -- let me

21   phrase the question fully.

22   Would the term "data transmission

Page 60

1   line" also include optical fibers within a

2   fiberoptic cable as that term is used by

3   telecommunications networks and network

4   professionals?

5   MR. PATTON: Objection to the extent

6   it calls for testimony by those telecommunications

7   experts. You can answer.

8   THE WITNESS: To the extent that's an

9   example of what might be included in that, yes.

10   BY MR. ABDO:

11   Q   Would a fiberoptic cable be a data

12   transmission line as that term is understood by

13   the NSA?

14   MR. PATTON: Same objection.

15   THE WITNESS: Can you repeat the

16   question? I'm not sure I understood.

17   BY MR. ABDO:

18   Q   Sure. Does the term "data

19   transmission line," as the NSA has used it in

20   response to Interrogatory 12, include fiberoptic

21   cables?

22   MR. PATTON: Objection to the extent

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 1   it calls for expert testimony. You can answer.

 2   THE WITNESS: Yes.

 3   BY MR. ABDO:

 4   Q   Okay. And the same is true of --

 5   A   It's an example. I mean, all of these

 6   are examples. NSA doesn't have a special

 7   definition for "Internet backbone" or these other

 8   well-known telecom-like words that you're bringing

 9   up, data transmission line or fiberoptic line.

10   Q   Does the term "data transmission

11   line," again as used in the response to

12   Interrogatory 12, include individual wavelengths

13   of light carried over fiberoptic cables?

14   MR. PATTON: Object to the form to the

15   extent it calls for expert testimony.

16   You can answer.

17   THE WITNESS: Certainly it is an

18   example.

19   BY MR. ABDO:

20   Q   Would the term include any

21   subdivisions of a wavelength of light carried over

22   a fiberoptic cable?

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1   MR. PATTON: Same objections.

2   You can answer.

3   THE WITNESS: Would the subdivision of

4   the light?

5   BY MR. ABDO:

6   Q   Would any subdivisions of a wavelength

7   of light carried over a fiberoptic cable

8   constitute a data transmission line as the NSA has

9   used that term in responding to Interrogatory 12?

10   MR. PATTON: Objection to the extent

11   it calls for expert testimony. You can answer.

12   THE WITNESS: So to the extent that

13   any of those are an example of what might be part

14   of the Internet backbone, in which case it's

15   providing high-speed, ultra-high bandwidth data

16   transmission lines, the answer would be yes.

17   MR. ABDO: Okay. Do you mind if we

18   take a five-minute break to use the restroom?

19   MR. PATTON: No.

20   (A break was taken at 10:15 a.m.)

21   (Resume at 10:25 a.m.)

22

 1   BY MR. ABDO:

 2   Q   Ms. Richards, where do you acquire

 3   your understanding of the term "Internet

 4   backbone"?

 5   A   From both experts within NSA, as well

 6   as talking to -- or actually reading what's, you

 7   know, sort of been written on it in

 8   telecommunications just sort of generally.

 9   Q   Did you talk to anyone at the NSA

10   about the meaning of the term "Internet backbone"

11   in preparing for this deposition?

12   MR. PATTON: Objection to the question

13   to the extent it calls for attorney-client

14   privilege or any classified information, but you

15   can answer to the extent that it is not

16   attorney-client privileged.

17   THE WITNESS: Certainly in preparation

18   for this we reviewed the definitions that have

19   been provided to ensure that I understood them and

20   that nothing had changed.

21   BY MR. ABDO:

22   Q   Did you talk with any subject matter

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1   experts at the NSA about the meaning of the term

2   "Internet backbone"?

3   A   Yes, I did.

4   Q   Did you talk to them about anything

5   beyond what was provided by the NSA in response to

6   Interrogatory 12 asking for the definition of

7   "Internet backbone"?

8   MR. PATTON: Object to the form,

9   vague.

10   THE WITNESS: We discussed the

11 definition and understood it to be the same as the

12 definition that a subject matter expert in the

13 telecommunications industry would use.

14   I'm not sure I'm understanding or

15 answering what you're asking me.

16   BY MR. ABDO:

17   Q   Did you talk about the terms used in

18 the definition provided of the term "Internet

19 backbone"?

20   A   Yes.

21   Q   You understand that the definition of

22 the term "Internet backbone" is one of the terms

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 1   listed in topic 2 of the deposition notice of the

 2   case?

 3   A   Yes.

 4   Q   And you understand that the NSA has an

 5   obligation under the federal rules to provide

 6   somebody for this deposition who knows the

 7   Agency's understanding of that term?

 8   A   Yes.

 9   MR. PATTON: Object to the extent it

10   calls for a legal conclusion.

11   Just wait for my objection --

12   THE WITNESS: Sorry.

13   MR. PATTON: -- or non-objection.

14   BY MR. ABDO:

15   Q   So you understand what I'm asking

16   about? When I'm asking about the NSA's

17   understanding of certain terms, I'm asking for the

18   NSA's understanding, as you're a designee of the

19   NSA today.

20   A   Yes.

21   Q   Okay. I want to move to a different

22   term used in your definition.

1   The definition or use of the term

2   "large, strategically interconnected computer

3   network," what does that term mean?

4   MR. PATTON: Objection to the extent

5   it calls for expert testimony. You can answer.

6   THE WITNESS: The words have no

7   specific meaning beyond what you would expect from

8   a telecommunications expert.

9   They're large, they're strategically

10 connected, and they're computer networks. Perhaps

11 when we --

12   BY MR. ABDO:

13   Q   Is that the -- well, let me ask by

14 example. Would that term, "large, strategically

15 interconnected computer networks," include the

16 networks of major Internet service providers

17 inside the United States?

18   MR. PATTON: Objection to the extent

19 it calls for expert testimony. You can answer.

20   THE WITNESS: To the extent that that

21 might be one example of what would be included in

22 the Internet backbone, yes, that's an example.

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 1                 BY MR. ABDO:

 2          Q    I'm not sure I understood the first

 3   part of your response.  Is it or is it not --

 4   sorry, let me start that over.

 5                 Would or would not a network of a

 6   major Internet service provider constitute a

 7   large, strategically interconnected computer

 8   network as the NSA has used that term?

 9                 MR. PATTON:  Object to the form to the

10   extent it calls for expert testimony.

11                 You can answer.

12                 THE WITNESS:  Let me clarify what I

13   think you're asking to make sure I understand.

14                 You're saying would a large --

15   I'm sorry, a communications provider in the

16   United States be considered a strategically

17   interconnected computer network?

18                 BY MR. ABDO:

19          Q    Yes.

20          A    Yes.

21          Q    Okay.  Approximately how many data

22   transmission lines are there that satisfy the
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 1   definition of "Internet backbone" given by the

 2   NSA?

 3                MR. PATTON:  Object to the form to the

 4   extent it calls for expert testimony.

 5                You can answer.

 6                THE WITNESS:  If you go back and look

 7   at -- I believe it's the request for admission.

 8                BY MR. ABDO:

 9        Q    You're welcome to refresh your

10   recollection using that document, but I'd like

11   your answer to that question.

12        A    Okay, so could you ask your question

13   one more time?

14        Q    Sure.  Approximately how many data

15   transmission lines are there that satisfy the

16   definition of "Internet backbone" given by the

17   NSA?

18                MR. PATTON:  Objection to the extent

19   it calls for expert testimony.

20                THE WITNESS:  How many data

21   transmission lines meet the definition --

22   I'm sorry?
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 1   BY MR. ABDO:

 2   Q   Yeah, sorry, let me say it one more

 3   time. Approximately how many data transmission

 4   lines are there that satisfy the definition of

 5   "Internet backbone" given by the NSA?

 6   MR. PATTON: Just object, first again

 7   to the extent it calls for expert testimony, and

 8   second, to the extent it is beyond the 30(b)(6)

 9   deposition notice.

10   Just to be clear, to the extent it's

11   beyond the deposition notice, she'll be answering

12   in her personal capacity as opposed to her

13   capacity as a 30(b)(6) NSA designee.

14   I'll shorten that next time.

15   MR. ABDO: Just for the record, would

16   you let us know what you're looking at?

17   THE WITNESS: I am looking at the

18   Request for Admission response -- Request for

19   Admission No. 1 and No. 2, just to try and make

20   sure I'm -- I don't think that this -- how many

21   data transmission lines are there that satisfy the

22   definition.

 1   MR. PATTON: The definition is

 2   Interrogatory Response 12; is that right?

 3   THE WITNESS: Correct.

 4   BY MR. ABDO:

 5   Q   If you don't know the answer, you

 6   don't know the answer. I'm asking whether you

 7   know the answer.

 8   A   I don't know the answer. I'm sorry.

 9   Q   Is there anyone at the NSA who would

10   know the answer to that question?

11   A   So to the extent that the answer to

12   that question is available to the public -- so I

13   guess to the extent that that information may be

14   available in the public, we didn't -- I don't

15   know, I mean, actually.

16   Q   Do you know whether anyone at the NSA

17   would know the answer to that question even if

18   based on information not available to the public?

19   MR. PATTON: Well, object.

20   THE WITNESS: So I think --

21   MR. PATTON: Object to the form to the

22   extent it calls for classified and otherwise

 1   protected information.

 2   The witness can answer the question if

 3   she's confident that the answer is unclassified.

 4   I'm not. I am not.

 5   THE WITNESS: The answer to your

 6   question, to the extent it's unclassified, and to

 7   the extent it is known, would be in the public

 8   sphere and not something specific to NSA's -- to

 9   how NSA functions or what NSA does.

10   BY MR. ABDO:

11   Q   Just so I understand it, is your

12   response then that there's a further answer you

13   could give, but will refuse to on the basis of its

14   classification?

15   In other words, is there more you

16   would say but for your belief that answering my

17   question would disclose classified information or

18   protected information?

19   MR. PATTON: Objection. The answer I

20   believe calls for classified information and

21   information otherwise protected by the statutory

22   privileges, and I instruct the witness not to

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 1   answer.

 2   BY MR. ABDO:

 3   Q   Are you going to follow your --

 4   A   I am going to follow my lawyer's --

 5   Q   -- instruction not to answer?

 6   A   -- instruction not to answer.

 7   Q   Is your understanding then that even

 8   answering my question of whether providing an

 9   answer to my question would disclose classified

10   information is itself classified?

11   MR. PATTON: Same objection.

12   Just a second.

13   (Counsel conferring.)

14   THE WITNESS: I think it would --

15   MR. PATTON: Just a second.

16   MR. PADGETT: Could you read back the

17   question?

18   THE WITNESS: I just wanted to read

19   back the question, yeah, or you can restate the

20   question.

21   BY MR. ABDO:

22   Q   Let me restate the question. I'll go

 1   back to what I think started us down this path.

 2   I originally asked whether there's

 3   somebody at the NSA who knows how many data

 4   transmission lines there are that satisfy the

 5   definition of "Internet backbone" provided by the

 6   NSA. I believe you said you don't know the

 7   answer, so I asked whether somebody at the NSA

 8   would know the answer to that question.

 9   Then I believe you said, please

10   correct me if I'm wrong, that to the extent

11   there's an answer that you can provide publicly to

12   that question, it was provided in the NSA's

13   responses to our requests for admission.

14   A   Can we go out on a classified -- could

15   we take a --

16   Q   Sure.

17   MR. PATTON: Yes. I just want to say

18   before we go off the record that object to the

19   extent it misstates the prior testimony, and that

20   she also said that it doesn't mean anything

21   different in an unclassified sense than what

22   telecommunications experts would say.

1   BY MR. ABDO:

2   Q   Okay. You understand that I was

3   asking about knowledge that the NSA has

4   irrespective of whether that information is

5   available to the general public.

6   A   I did understand. What I said was I

7   was not answering about what NSA knew or didn't

8   know because there's a classification issue, but

9   to the extent there was an answer to your

10 question, it would be whatever you could find in

11 the public.

12   And so similar to what you see in

13 response to RFA 1, where we give the information

14 that TeleGeography publishes, to the extent they

15 have information that would say -- provide the

16 answer to this question, but I don't think that

17 the answer to RFA 1 was the same as what you were

18 asking.

19   MR. PATTON: And so we'll go off the

20 record and see if there's more information that

21 can be provided unclassified.

22   MR. ABDO: That's fine, although I'm

 1   also trying to establish whether there's somebody

 2   at the NSA who would be able to provide a

 3   classified response, even if not here today,

 4   whether there's somebody who could provide that

 5   response if we were to move to compel that

 6   response.

 7   It sounds as though you're not that

 8   person from what you're saying. I'm trying to

 9   understand if there's somebody else who is that

10   person.

11   THE WITNESS: And so could we

12   please --

13   MR. PATTON: Wait a second.

14   And we're trying to figure out whether

15   we can tell you that.

16   THE WITNESS: Yes, so let us go have

17   that --

18   MR. ABDO: We'll go off the record for

19   a few minutes.

20   (Off the record at 10:38 a.m.)

21   (Resume at 10:47 a.m.)

22   MR. PATTON: Have we got a question

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1   pending?

2   MR. ABDO: Yes, we have a question

3   pending, and as I understand it, Ms. Richards, you

4   went out to consult with counsel about whether you

5   could respond to my question without disclosing

6   classified information.

7   Have you arrived at a conclusion?

8   MR. PATTON: Yes. It's like a jury,

9   we have arrived at a verdict.

10   So just to put my objections on the

11   record, one is that it calls for expert testimony;

12   two, it is beyond the 30(b)(6) notice, and

13   therefore the witness's answer, if she were to

14   give one, would be in her personal capacity as

15   opposed to her capacity as a 30(b)(6) witness.

16   And if I understand the question

17   correctly, anything beyond the unclassified

18   information that's already been provided in the

19   RFA, we can neither confirm nor deny whether or

20   not --

21   MR. PADGETT: I'm sorry.

22   (Counsel conferring.)

 1   MR. PATTON: So striking the last

 2   part, whether NSA has any nonpublic information

 3   going beyond what's already in the RFA we can

 4   neither confirm nor deny, so on that basis,

 5   instruct the witness not to answer the pending

 6   question.

 7   BY MR. ABDO:

 8   Q   And you'll follow your lawyer's

 9   instruction not to answer?

10   A   I will follow my lawyer's advice not

11   to answer.

12   Q   Okay. Could you please turn to page 5

13   of Exhibit 42 -- sorry, page 6 of Exhibit 42. You

14   were here a moment ago, but if you need to, would

15   you please re-read the two paragraphs designated

16   as "RESPONSE" on that page.

17   A   I'm sorry, to clarify, we're on the

18   interrogatories?

19   Q   Yes. Exhibit 42 are the NSA's

20   Responses and Objections to Plaintiff's First Set

21   of Interrogatories, page 6.

22   A   Page 6, yes.

1   Q   If you need to, just refresh your

2   memory of that response.

3   A   Yes.

4   Q   Is an international submarine cable

5   that connects two stations a circuit as the NSA

6   has defined that term in response to Interrogatory

7   No. 2?

8   MR. PATTON: Objection to the extent

9   it calls for expert testimony.

10   THE WITNESS: As with Internet

11   backbone, "circuit" has no specific NSA meaning.

12   It is the meaning that a telecommunications expert

13   would expect it to mean. There's nothing

14   something special. So I just want to make sure

15   that that's clear, there's not some other

16   definition out there.

17   To the extent that you asked whether

18   two submarine cables would be -- I'm sorry, I just

19   want to make sure.

20   BY MR. ABDO:

21   Q   Whether an international submarine

22   cable that connects two stations is a circuit.

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1   A   Yeah.

2   MR. PATTON: Same objection.

3   THE WITNESS: Yes.

4   BY MR. ABDO:

5   Q   Okay. Is an international submarine

6 cable that connects two stations a circuit on the

7 Internet backbone?

8   MR. PATTON: Object to the form,

9 vague. Objection to the extent it calls for

10 expert testimony.

11   THE WITNESS: Say it one more time.

12   BY MR. ABDO:

13   Q   Do you want me to repeat that?

14   A   Yes, please.

15   Q   Sure. Is an international submarine

16 cable that connects two stations a circuit on the

17 Internet backbone?

18   MR. PATTON: Objection to the extent

19 it calls for expert testimony.

20   THE WITNESS: Yes.

21   BY MR. ABDO:

22   Q   Okay. Is each optical fiber within an

 1   international submarine cable that connects two

 2   stations a circuit?

 3   MR. PATTON: Objection. Same

 4   objection as before.

 5   THE WITNESS: Each of these is an

 6   example of what might be a circuit and what might

 7   be considered the Internet backbone.

 8   So to the extent an optical fiber is

 9   given as an example of a circuit, then the answer

10   would be yes, but they're an example.

11   BY MR. ABDO:

12   Q   That's right. I'm not asking -- let

13   me try to be clear.

14   A   Okay.

15   Q   Each of these questions is asking

16   whether a particular data transmission line

17   connecting two stations constitutes a circuit.

18   I'm not asking for you to confirm that that's the

19   only sort of circuit out there.

20   A   Okay.

21   Q   So I am asking whether these are

22   examples of a circuit, not whether they are the

1   sum total of what might be a circuit.

2   A   Okay.

3   Q   With that understanding, is your

4   answer to my last question -- what is your answer

5   to my last question, which was is each optical

6   fiber within an international submarine cable that

7   connect two stations a circuit?

8   MR. PATTON: Objection to the extent

9   it mischaracterizes the prior testimony.

10   Objection, calls for expert testimony.

11   THE WITNESS: Circuit could -- the

12   definition of "circuit" being two stations,

13   instruments transmitting information, could be an

14   example of -- could be an example. So it could

15   be, yes.

16   BY MR. ABDO:

17   Q   When you say it could be, you're

18   referring again to an optical fiber within an

19   international submarine cable?

20   A   Yes, it could be.

21   Q   If an optical fiber within an

22   international submarine cable has been

1   multiplexed, would each of the subdivisions

2   created by that multiplexing be a circuit?

3   MR. PATTON: Objection to the extent

4   it calls for expert testimony. You can answer.

5   THE WITNESS: It could be.

6   BY MR. ABDO:

7   Q   In what circumstance would it be, and

8   in what circumstance would it not be?

9   A   I'm trying to think if there's an

10   example where it wouldn't be. I think the

11   definition --

12   MR. PATTON: Same objection to that

13   question and this line of questioning.

14   THE WITNESS: Yeah. So a

15   telecommunications expert would undoubtedly

16   consider it to be a circuit.

17   BY MR. ABDO:

18   Q   Would the NSA also consider it to be a

19   circuit?

20   A   To the extent that there's no --

21   MR. PATTON: Object. Objection to the

22   form to the extent it calls for expert testimony.

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 1                    THE WITNESS:  To the extent that

 2    there's no difference in the definition that NSA

 3    takes versus what a telecommunications expert

 4    takes, there's no special meaning to the word

 5    "circuit."  So if they would consider it to be a

 6    circuit, then NSA would consider it to be a

 7    circuit.

 8                    BY MR. ABDO:

 9        Q    Okay.  Can a single circuit span

10    multiple physical paths between two stations?

11                    MR. PATTON:  Objection, vague.

12    Objection, calls for expert testimony.

13                    THE WITNESS:  Can a single --

14                    BY MR. ABDO:

15        Q    Can a single circuit span multiple

16    physical paths between two stations?

17                    And I understand you'll make the same

18    objections.

19                    MR. PATTON:  Same objections.  And I

20    would just add beyond the scope of 30(b)(6), and

21    therefore the witness will be testifying in her

22    personal capacity as opposed to her 30(b)(6)
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 1   designee capacity.

 2   MR. ABDO: Rodney, if it's okay with

 3   you, can we shorten that objection to it's beyond

 4   the scope?

 5   MR. PATTON: As long as you understand

 6   that what that means here is that she's testifying

 7   as Becky Richards and not testifying as a 30(b)(6)

 8   witness for the NSA.

 9   MR. ABDO: Thanks. I will so

10   understand it.

11   THE WITNESS: And I will --

12   BY MR. ABDO:

13   Q   Let me restate the question.

14   A   I've now lost what the question is as

15   Becky answering.

16   Q   Let me restate it, okay?

17   Can a single circuit span multiple

18   physical paths between two stations?

19   MR. PATTON: Objection, calls for

20   expert testimony. Objection, beyond the scope of

21   30(b)(6).

22   THE WITNESS: I'm going to answer I

1   don't know.

2   BY MR. ABDO:

3   Q   Do you know whether there's anybody

4   else at the NSA who would know the answer to that

5   question?

6   MR. PATTON: You can answer if you

7   have an unclassified --

8   THE WITNESS: I don't know.

9   BY MR. ABDO:

10   Q   You don't know whether there's

11   somebody else at the NSA who would know the answer

12   to that question?

13   A   Correct.

14   Q   Did you talk to any subject matter

15   experts at the NSA about the meaning of the term

16   "circuit" prior to this deposition?

17   A   I did.

18   Q   As part of that conversation, did you

19   do anything beyond reviewing the definition of

20   "circuit" provided by the NSA in response to our

21   Interrogatory No. 2?

22   MR. PATTON: Objection, vague.

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 1                     THE WITNESS:  We discussed generally

 2    what is meant by "circuit" in the context of a

 3    telecommunications expert.

 4                     We did not get to the specific

 5    whatever you just asked of a single circuit having

 6    multiple physical paths.

 7                     BY MR. ABDO:

 8         Q    Okay.  What's your understanding of

 9    the term "virtual circuit"?

10                     MR. PATTON:  Object to the form, calls

11    for expert testimony, and beyond the scope of

12    30(b)(6).

13                     THE WITNESS:  As described in the --

14    are we still on the interrogatories on page 6 in

15    response to No. 2?

16                     BY MR. ABDO:

17         Q    Yes.  Let me try to be clear.

18                     What is your understanding of the term

19    "virtual circuit" as used by the NSA in its

20    response to Interrogatory No. 2?

21         A    My understanding is that there's a way

22    in which to use different techniques to divide the
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1   circuits so that you have more than one --

2   multiple circuits on one circuit.

3   Q   Let me just try to understand that.

4   Do virtual circuits -- let me start

5   over. Can a virtual circuit traverse multiple

6   physical circuits?

7   MR. PATTON: Objection to the extent

8   it calls for expert testimony, and beyond the

9   scope of 30(b)(6).

10   THE WITNESS: I'll respond I don't

11   know.

12   BY MR. ABDO:

13   Q   Is there anyone at the NSA who would

14   know the answer to that question?

15   A   I don't know.

16   Q   Did you talk with any subject matter

17   experts at the NSA about the definition of or the

18   meaning of the term "virtual circuit" as used in

19   the NSA's response to Interrogatory No. 2?

20   A   I did.

21   Q   Is there anything about the meaning of

22   the term "virtual circuit" that you can provide

 1   beyond what is in the NSA's response to

 2   Interrogatory No. 2?

 3   A   Since I'm not the telecommunications

 4   subject matter expert, my answer is confined to

 5   what you see on the piece of paper.

 6   Q   Is there a telecommunications subject

 7   matter expert at the NSA who could more fully

 8   answer that question?

 9   Let me restate the question.

10   Is there anyone at the NSA who could

11   more fully define what the term "virtual circuit"

12   means as used by the NSA in response to

13   Interrogatory No. 2?

14   MR. PATTON: To the extent that the

15   answer is yes or no, she can answer, but I'll note

16   for the record that she's testified multiple times

17   that the NSA does not mean anything different by

18   the term "virtual circuit" other than what is

19   understood within the telecommunications industry.

20   BY MR. ABDO:

21   Q   What is the meaning of "virtual

22   circuit" as understood within the

 1   telecommunications industry?

 2   MR. PATTON: I'm going to object to

 3   the question to the extent it calls for expert

 4   testimony, and beyond the scope of 30(b)(6).

 5   BY MR. ABDO:

 6   Q   You can answer.

 7   A   I don't have anything further to

 8   define for you.

 9   Q   Is there anyone at the NSA who better

10   understands the definition of "virtual circuit" as

11   used by those in the telecommunications industry?

12   MR. PATTON: You can answer the

13   question if it's unclassified.

14   THE WITNESS: I don't know.

15   MR. PATTON: You can't provide a name.

16   THE WITNESS: I don't know.

17   BY MR. ABDO:

18   Q   You don't know whether there's anyone

19   at the NSA?

20   A   Correct.

21   Q   It's true -- well, let me ask you.

22   Is it true that each Internet protocol

 1   packet sent on the Internet is routed to its

 2   destination independently?

 3   MR. PATTON: Object to the form of the

 4   question to the extent it calls for expert

 5   testimony, and outside the scope of 30(b)(6).

 6   You can answer.

 7   THE WITNESS: I'm sorry, can you ask

 8   the question again?

 9   BY MR. ABDO:

10   Q   Sure. Is it true that each Internet

11   protocol packet sent on the Internet is routed to

12   its destination independently?

13   MR. PATTON: Same objections.

14   THE WITNESS: Generally speaking, yes,

15   that is my understanding.

16   BY MR. ABDO:

17   Q   Are there circumstances you can think

18   of where Internet protocol packets would not be

19   routed independently on the Internet?

20   MR. PATTON: Object to the form to the

21   extent it calls for expert testimony, and beyond

22   the scope of 30(b)(6). You can answer.

1   THE WITNESS: Not off the top of my

2   head, but I'm sure there are examples.

3   BY MR. ABDO:

4   Q   Why are you sure there are examples?

5   A   Just because every rule seems to have

6   some sort of exception to it, so to say something

7   is hard and fast to be always the case is not

8   something I would like to do.

9   Q   Okay. When Internet packets that

10   constitute a single communication take different

11   paths to a common destination, are those packets

12   traversing different circuits or the same circuit?

13   MR. PATTON: Object to the form, lacks

14   foundation, object to the vagueness of the term

15   "single communication." Object that it calls for

16   expert testimony, and it is beyond the scope of

17   30(b)(6). You can answer.

18   THE WITNESS: The question was if

19   packets take a different path, are they on

20   different circuits?

21   BY MR. ABDO:

22   Q   Yes.

 1   A   I would say it depends. There's not,

 2   again, a hard and fast rule. Depending, it might

 3   be on the same circuit, it might be on a different

 4   circuit.

 5   Q   What does it depend on?

 6   MR. PATTON: Same set of objections.

 7   THE WITNESS: I guess it would depend

 8   on how -- what would it depend on?

 9   It would depend on the nature of the

10   circuit.

11   BY MR. ABDO:

12   Q   What do you mean by the nature of the

13   circuit?

14   MR. PATTON: Same objections.

15   THE WITNESS: Depending on how the

16   packets were going and how you -- how is it

17   routed? Do they take different paths, or are they

18   on the same circuit?

19   So to the extent the circuit can be

20   meant in a big sense or in a small sense, it's

21   going to decide whether it's on the same circuit

22   or not.

 1   So you asked in a separate set of

 2   line, had a whole bunch of distinctions as to what

 3   was data transmission line and what were they, and

 4   was it a wavelength, or something further into

 5   that. So it will depend on how you define

 6   "circuit," which is why you were asking me to

 7   define "circuit."

 8   BY MR. ABDO:

 9   Q   Let me just try to understand.

10   Does the answer to my question depend

11   on whether the separate paths being taken by

12   packets are being routed over one physical circuit

13   or not?

14   MR. PATTON: Same set of objections.

15   THE WITNESS: One physical circuit?

16   BY MR. ABDO:

17   Q   Suppose two packets that are part of

18   the same communication traverse different optical

19   fibers.

20   A   Okay. Are those different circuits?

21   Q   Yes, that's my question.

22   MR. PATTON: Object to the extent it

1   calls for expert testimony in a hypothetical, and

2   also beyond the scope of 30(b)(6).

3   THE WITNESS: So --

4   MR. PATTON: Also asked and answered.

5   THE WITNESS: So if it's on two

6   different circuits, then it's on two different

7   circuits. I feel like I'm having a circular

8   conversation, so I'm not sure. Can two packets be

9   on the same circuit and take different paths?

10   MR. PATTON: I don't think that's the

11   question.

12   THE WITNESS: Is that --

13   BY MR. ABDO:

14   Q   My original question was whether

15   packets that are traversing different paths to

16   their common destination are traversing different

17   circuits. And I believe, please correct me if I'm

18   wrong, you said, generally, yes.

19   MR. PATTON: That's a misstatement of

20   her prior testimony.

21   BY MR. ABDO:

22   Q   Could you please tell us what your

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 1    answer is to that original question?

 2              MR. PATTON:  Do you want the question

 3    to be read back?

 4              MR. ABDO:  No.  I mean, let's move on.

 5              Would you mind, Ms. Jaques, marking

 6    this as Exhibit 43?

 7              (Deposition Exhibit 43 was

 8               marked for identification.)

 9              BY MR. ABDO:

10        Q    So you have in front of you what's

11    been marked as Exhibit 43.

12              Do you recognize that document?

13        A    Absolutely.

14        Q    And what is Exhibit 43?

15        A    Privacy and Civil Liberties Oversight

16    Board, Report on the Surveillance Program Operated

17    Pursuant to Section 702 of the Foreign

18    Intelligence Surveillance Act, July 2nd, 2014.

19        Q    What was the NSA's relationship to the

20    drafting or review of the report marked

21    Exhibit 43?

22              MR. PATTON:  Objection as vague, and
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1   objection to the extent it may call for

2   deliberative process privilege that might be

3   invoked by the PCLOB that we don't represent. So

4   maybe if you could ask a more narrow question, we

5   can avoid most of the deliberative process.

6   She can speak in general terms on

7   that, that would be good, in answer to your

8   question, but I don't want to too broadly object

9   on deliberative process grounds to protect PCLOB's

10   privilege.

11   BY MR. ABDO:

12   Q   Let me ask a different related

13   question. Was the NSA involved in the drafting of

14   Exhibit 43?

15   MR. PATTON: Objection, vague.

16   THE WITNESS: NSA provided expert

17   testimony to the Board as is described on page 4

18   of the report. We provided documentation, we

19   provided presentations, and we answered questions

20   throughout their process.

21   We then for the fact section

22   reviewed -- we reviewed the document for factual

1   accuracy, as well as we reviewed the entire

2   document for classification to ensure there was no

3   classified material in it.

4   BY MR. ABDO:

5   Q   So I believe that you said that the

6   NSA provided testimony, documentation, and

7   presentations to the members of the PCLOB in

8   drafting Exhibit 43, right?

9   A   That is correct.

10   Q   Do you know how many sessions the NSA

11   provided testimony about the subject matter of the

12   report that's marked Exhibit 43?

13   A   It was a handful. I don't remember

14   the exact number, but certainly they came to NSA,

15   and we went to the PCLOB a number of times, both

16   ways. We had conference calls, and we had email

17   exchanges.

18   Q   And did that testimony involve both

19   classified and unclassified information?

20   A   Yes, it did.

21   Q   Is the same true of the documentation

22   that the NSA provided to the PCLOB?

1   A   Yes, it was both classified and

2   unclassified.

3   Q   And is that also true of the

4   presentations provided?

5   A   Yes, all was classified and

6   unclassified.

7   Q   And you say that the NSA reviewed the

8   factual section of the report marked Exhibit 43

9   for accuracy; is that correct?

10   A   That is correct.

11   Q   When you say "fact section," what

12   specific pages are you referring to, or page range

13   are you referring to?

14   A   Page 16 to 79. In essence, Part 3,

15   Description and History.

16   Q   Did the NSA review any other portion

17   of the report marked Exhibit 43 for factual

18   accuracy?

19   MR. PATTON: Objection to the form,

20   vague as to time.

21   THE WITNESS: NSA otherwise did a

22   classification review of the document.

 1   To the extent these documents have the

 2   opinions of the various board members, NSA was not

 3   reviewing that information beyond ensuring there

 4   was no classified material in it.

 5   BY MR. ABDO:

 6   Q   If the NSA, during its classification

 7   review of the portions of the report, other than

 8   Part 3, noticed a factual inaccuracy, would the

 9   NSA have notified the PCLOB of that inaccuracy?

10   A   NSA conducted a classification review

11   of the document. As part of that classification

12   review, to the extent that something would be

13   described in some of the other pieces of the

14   document that was not not, we would notify them as

15   part of that, as is noted again on page 4.

16   Q   Let me just make sure I understand.

17   A   Yeah.

18   Q   The NSA reviewed Part 3 of the report

19   marked Exhibit 43 for accuracy, right?

20   A   That is correct.

21   Q   It reviewed the entire document for

22   classification, right?

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 1   A   Correct.

 2   Q   And if in the process of reviewing the

 3   entire document for classification it noticed an

 4   inaccuracy outside the portion that it reviewed

 5   solely for accuracy -- sorry, outside the portion

 6   that it reviewed when it was conducting its review

 7   for accuracy, your testimony is that the NSA would

 8   have notified the PCLOB of that inaccuracy?

 9   A   Correct.

10   Q   Was the NSA's review for accuracy of

11   the factual section of the report thorough?

12   MR. PATTON: Objection, vague.

13   THE WITNESS: Yes.

14   BY MR. ABDO:

15   Q   The NSA would have reviewed every

16   sentence?

17   A   Absolutely.

18   Q   And what would the NSA have done if it

19   noticed an inaccuracy in any portion of the

20   report?

21   MR. PATTON: Objection, vague.

22   THE WITNESS: NSA would provide a

 1   response explaining either why it was inaccurate

 2   or why the information in the classification

 3   review was classified, and there was -- as is

 4   important to remember in the Upstream, large

 5   portions of that program remain classified, and so

 6   necessarily with this report, with this NSA Civil

 7   Liberties and Privacy Office Report, the

 8   information is incomplete.

 9   And so a lot of the conversation was a

10   mixture of how do you provide an accurate

11   representation of how Upstream works while keeping

12   the sources and methods classified? And so a lot

13   of the conversation, particularly around the

14   accuracy and the classification, were tied

15   together because of those reasons.

16   And so this gives, as does our report,

17   and continues to, a broad accurate description of

18   the outline of how the program runs, but does not

19   get into some of the much more specific aspects to

20   it.

21   BY MR. ABDO:

22   Q   In the course of the review for

1   accuracy of the report, did the NSA notice

2   inaccuracies and make recommendations to the PCLOB

3   about how to fix those inaccuracies in what's now

4   marked Exhibit 43?

5   A   Yes.

6   Q   Are you aware -- sorry, strike that.

7   Did the PCLOB generally accept those

8   recommendations?

9   MR. PATTON: Just a second.

10   (Counsel conferring.)

11   MR. PATTON: Could you read the

12   question back?

13   (The reporter read back the question.)

14   MR. PATTON: Just object to beyond the

15   scope of the 30(b)(6).

16   And if the answer to that question is

17   yes or no, you can answer. If the answer to that

18   question is going to be a narrative description of

19   what the PCLOB did or did not accept, then we're

20   concerned that we might be in the deliberative

21   process.

22   MR. ABDO: I just want to state for

1   the record, Rodney, you don't represent the PCLOB,

2   correct?

3   MR. PATTON: I do not, but I am with

4   the Department of Justice, and we do represent the

5   United States, so here we would be preserving

6   their ability to later assert that privilege if

7   need be. I certainly am not in a capacity to

8   waive it on their behalf.

9   MR. ABDO: I'm just not sure you're in

10   a position to assert it though. I'm not sure

11   we're asking for anything that's going to reveal

12   the deliberations anyway, but I note that we

13   object to your quasi-invocation of the PCLOB's

14   deliberative process.

15   MR. PATTON: I can rephrase it as a

16   preservation of their right to assert the

17   deliberative process privilege, since they are not

18   here to invoke that themselves.

19   MR. GILLIGAN: I would add that our

20   function as Department of Justice attorneys is to

21   represent the interests of the United States in

22   this proceeding, and PCLOB is an independent

 1   establishment of the United States government, but

 2   I understand your objection.

 3   MR. ABDO: Sure, but you also know

 4   that we had -- you know, Topic 6 very clearly

 5   included this report as a subject of this

 6   deposition.

 7   MR. PATTON: I doubt, again, that you

 8   will be delving into the details of that. There's

 9   an awful lot --

10   MR. GILLIGAN: The facts, not

11   recommendations.

12   MR. PATTON: There's an awful lot of

13   questions that the witness is perfectly capable of

14   answering, so I don't think we're going to be in

15   any --

16   BY MR. ABDO:

17   Q   Ms. Richards, can you answer the

18   question?

19   A   Yes, I'll answer the question.

20   What I would do is point you to,

21   again, page 4 that specifically says that they

22   considered the Intelligence Community's comments

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1   regarding the operation of the program to ensure

2   accuracy. None of the changes resulting from that

3   process affected the Board's substantive analysis

4   and recommendations.

5   So I would point you to that to avoid

6   this whole conversation about what is or isn't

7   sort of privileged between it to say that they

8   accepted our changes, they didn't change

9   substantively what they were doing. We went

10   through a back-and-forth to ensure that everybody

11   understood how the program worked, what was

12   classified.

13   In some instances, they asked for

14   information to be declassified in order to make

15   the record full, and that didn't change. So we

16   went through that process.

17   Q   Let me ask my question again because I

18   don't think that answered it.

19   A   Sure, okay.

20   Q   If the NSA identified an inaccuracy in

21   the report marked as Exhibit 43 to the PCLOB,

22   would the PCLOB generally fix that factual

 1   inaccuracy, generally have fixed it?

 2   MR. PATTON: Object to the form,

 3   vague.

 4   THE WITNESS: Yes. The PCLOB was not

 5   interested in having an inaccurate description of

 6   how Section 702 -- it was not within -- they

 7   didn't want to have that, and so they worked

 8   closely with us to ensure that they -- I don't

 9   know if "closely" is the right word, but they

10   worked with us extensively in order to ensure that

11   they had an accurate representation that could be

12   made unclassified, which was -- up until -- there

13   had -- the record had been not as extensive.

14   BY MR. ABDO:

15   Q   Okay. Are you aware of any

16   inaccuracies, factual inaccuracies, in the report

17   marked as Exhibit 43?

18   MR. PATTON: Object to form, vague.

19   THE WITNESS: If there's particular

20   sentences you would like me to look at or there's

21   particular questions that you have, I'd be happy

22   to look at those and walk through.

 1   As a general matter, the information

 2   in here is accurate as a description, but

 3   necessarily, as I mentioned before, not a full

 4   description of the program because many of those

 5   facts still remain unclassified. But if there's

 6   particular sentences that you would like to point

 7   me to, I'm happy to review.

 8   I would also note that, as of 2017,

 9   NSA changed one of the ways it was doing its

10   collection, so it was no longer getting "abouts"

11   collection. And so to the extent the material in

12   here accurately reflects what was happening in

13   2014, the general matter, there may be, you know,

14   slight, slight differences, but this is true.

15   That information has changed, so we

16   are no longer doing a collection that gets the,

17   quote, "abouts" collection in upstream. So to the

18   extent that that's no longer accurate, that would

19   be the case.

20   BY MR. ABDO:

21   Q   But at least as the NSA was conducting

22   upstream surveillance as of July 2nd, 2014, which

1   is the date of that report, you're not aware of

2   inaccuracies in the report?

3   A   Again, I would ask --

4   MR. PATTON: Sorry, just object to

5   asked and answered. Go ahead, you can answer.

6   THE WITNESS: Again, if there are

7   specific sentences you would like me to go to that

8   you think maybe are not accurate, I'm happy to

9   talk about those particular sentences. It's a

10   191-page document.

11   As a general matter, NSA considers

12   this to be an accurate outline of the unclassified

13   portions of Upstream. There may be particular

14   sentences as they describe them, but the facts we

15   believe to be accurate.

16   BY MR. ABDO:

17   Q   Okay. I want to turn your attention

18   to page 36 of the report marked Exhibit 43. Could

19   you please read the first sentence of the very

20   last paragraph that starts on that page? It

21   begins "once tasked." Again, that's at the bottom

22   of page 36 of Exhibit 43, and that sentence ends

1   on the next page, 37.

2   A   Okay, yes.

3   Q   Is that sentence factually accurate?

4   MR. PATTON: Object to the form,

5   vague.

6   BY MR. ABDO:

7   Q   As of the time -- let me start over.

8   Is the sentence that I just asked you

9   to read at the bottom of page 36, carrying over

10   onto page 37 of Exhibit 43, an accurate

11   description of how upstream surveillance operated

12   as of July 2nd, 2014?

13   A   Well, what I would do is I would point

14   you, rather than to the sentence that's on page 36

15   of the PCLOB report, and instead suggest that the

16   RFA, Request for Admission, on page 9, in response

17   to RFA for No. 8, that describes how this is --

18   how the government describes it.

19   The other place I would suggest, which

20   is the government's description, is also in the

21   NSA Civil Liberties and Privacy Office Report at

22   page 5.

 1   Those are both more accurate

 2   descriptions of how we would talk about Upstream.

 3   The description on page 36 is necessarily vague.

 4   Q   What's inaccurate about the sentence

 5   at the bottom of page 36, carrying over onto

 6   page 37, in Exhibit 43?

 7   MR. PATTON: Objection,

 8   mischaracterizes prior testimony. And just a

 9   second, there might be a classified response.

10   We will need to find out what her

11   answer is going to be on this to determine whether

12   the answer is partially classified, fully

13   classified, or wholly unclassified. At this

14   point, I don't know what her answer is going to

15   be.

16   MS. HANLEY COOK: Why don't we take a

17   five-minute break.

18   MR. ABDO: Go off the record, Dawn,

19   please.

20   (Off the record at 11:30 a.m.)

21   (Resume at 11:56 a.m.)

22   MR. ABDO: Ms. Jaques, do you mind

 1   reading back the last question before we broke?

 2   (The reporter read back the question.)

 3   MR. PATTON: Objection to the extent

 4   it misstates prior testimony, and objection to the

 5   extent that the answer calls for classified

 6   information and information subject to the

 7   statutory privileges.

 8   You can answer to the extent your

 9   answer is unclassified.

10   THE WITNESS: Okay. So this sentence,

11   as I mentioned about the entire document and the

12   sort of public description of Upstream, is

13   necessarily incomplete because of the

14   classification of information.

15   This sentence is accurate as of 2014,

16   but I would point you to the description that's

17   provided in the RFA, Request for Admission No. 8,

18   in the response. That provides an accurate

19   description of how upstream Internet collection

20   works today, with, again, the understanding that

21   it's necessarily incomplete.

22   To provide you a description of what

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1   is different between those two and why necessarily

2   gets into the classified realm, and so I can't go

3   any further into that.

4   BY MR. ABDO:

5   Q   Let me just make sure I understand.

6   A   Yep.

7   Q   Is it true that the sentence we've

8   been focusing on, the carryover sentence between

9   pages 36 and 37 of Exhibit 43, is accurate as of

10   2014?

11   MR. PATTON: Objection,

12   mischaracterizes prior testimony.

13   THE WITNESS: It is accurate, but

14   incomplete, and that's a very important fact.

15   BY MR. ABDO:

16   Q   And the reasons why it is incomplete

17   you are saying are classified; is that correct?

18   A   That is correct.

19   Q   Is it incomplete because it omits

20   additional information about the operation of

21   upstream surveillance that is classified?

22   MR. PATTON: Let me just check to find

 1   out whether the answer is yes or no.

 2   (Counsel conferring.)

 3   THE WITNESS: Ask your question one

 4   more -- can you repeat the question for me?

 5   BY MR. ABDO:

 6   Q   I can ask it again.

 7   Is the sentence that carries over

 8   between pages 36 and 37 of Exhibit 43 incomplete,

 9   which is the word you used --

10   A   Correct.

11   Q   -- because it omits information about

12   the operation of upstream surveillance that is

13   classified?

14   MR. PATTON: Just a second.

15   You can answer yes or no.

16   THE WITNESS: Okay, yes.

17   BY MR. ABDO:

18   Q   Is it incomplete for any other reason

19   other than that it omits additional information

20   that is classified about the operation of upstream

21   surveillance?

22   MR. PATTON: Object to form, but you

 1   can answer.

 2   THE WITNESS: It is incomplete because

 3   it omits classified information.

 4   I'm not sure I understood your second

 5   question, what you were trying to -- what my

 6   other -- what other options you're providing for.

 7   BY MR. ABDO:

 8   Q   A statement could be incomplete for a

 9   number of reasons. It could be incomplete because

10   it omits relevant information, it could be

11   incomplete because it includes information that is

12   inaccurate or misleading, and I'm trying to

13   understand why the NSA believes this sentence is

14   incomplete?

15   A   It's incomplete because it omits the

16   classified information.

17   Q   And for no other reason?

18   A   Not that I can think of. I'm pausing

19   because I can't -- I guess maybe you can be more

20   specific, but I guess you said I could have added

21   more information in -- they could have added more

22   information into it and that's what makes it

 1   incomplete? I'm not sure I understand. I guess I

 2   don't understand beyond omitting.

 3   I'm willing say to say it's incomplete

 4   because it's omitting information. I'm not sure I

 5   understand the remainder of what you're trying to

 6   get at, so maybe you can rephrase it.

 7   Q   Let me ask it another way.

 8   Is any of the information included in

 9   this sentence -- again, the sentence carrying over

10   from pages 36 to 37 of Exhibit 43 -- inaccurate?

11   MR. PATTON: Objection, vague as to

12   time.

13   MR. ABDO: As to the operation of

14   upstream surveillance in 2014.

15   THE WITNESS: As I've said, it's

16   incomplete.

17   BY MR. ABDO:

18   Q   I'm asking if it's inaccurate.

19   A   No. I've stated it's accurate. It's

20   just incomplete.

21   Q   Is it inaccurate as to the operation

22   of upstream surveillance today?

 1   MR. PATTON: Objection, calls for

 2   information that is classified and subject to the

 3   state secrets privilege, the other statutory

 4   privileges. I instruct the witness not to answer

 5   the question.

 6   BY MR. ABDO:

 7   Q   Are you going to follow your lawyer's

 8   instruction not to answer?

 9   A   I'm going to follow my lawyer's

10   direction not to answer.

11   Q   Do you know the answer to the question

12   that I asked? In other words, if you were to

13   answer, could you?

14   A   It would be classified, so I can't

15   answer it because it's classified.

16   Q   But do you know the information that

17   you would provide in response but for --

18   A   The classification?

19   Q   Yes.

20   A   Yes.

21   Q   Is there anything you can say in

22   response to the question without revealing

 1   information you've been instructed not to provide?

 2   A   I would point you to the answer to the

 3   response that's on page 9 of the RFA, which

 4   accurately, to the extent possible given the

 5   classified nature, describes the current way

 6   Upstream works. And so I would -- that's how I

 7   would answer.

 8   Q   But specifically with respect to this

 9   sentence, is there anything you can say in

10   response to my question, which was is the sentence

11   accurate as to the operation of upstream

12   surveillance today?

13   Is there anything you can say, aside

14   from pointing me to other testimony or other

15   information, that would not require you to

16   disclose classified information?

17   A   No.

18   Q   Can you describe -- well, let me ask

19   you this. Do you agree with your lawyer's

20   instruction that answering the question would harm

21   national security?

22   MR. PATTON: I'm going to object to

1   the form of the question as it seeks a legal

2   conclusion, and as my colleagues just pointed out,

3   beyond the scope of 30(b)(6).

4   MR. ABDO: You should take a look at

5   guideline 7 of Appendix A of the local rules,

6   which clearly contemplates counsel asking for the

7   basis of assertions of privilege.

8   So my question is --

9   MR. PATTON: Same objection. That

10   calls for a legal conclusion.

11   BY MR. ABDO:

12   Q   Do you believe that answering the

13   question would result in harm to national

14   security?

15   A   Yes.

16   Q   Can you describe that harm?

17   MR. PATTON: No. I'm going to object

18   to that question, as it would call for classified

19   information and information subject to the

20   statutory privileges, and I'll instruct her not to

21   answer the question.

22

 1   BY MR. ABDO:

 2   Q   Do you agree that describing the harm

 3 would itself result in harm to national security?

 4   A   Yes.

 5   Q   Have you discussed the invocation of

 6 the state secrets privilege with respect to this

 7 question with Admiral Michael Rogers?

 8   MR. PATTON: With respect to this

 9 particular question?

10   MR. ABDO: Yes.

11   THE WITNESS: The question being --

12 I'm sorry, so just explain to me. The question is

13 whether describing the difference between the

14 sentence on page 36 and the interrogatory -- or

15 the Request for Admission on page 9, whether

16 describing what is different between those two

17 would be a national security harm with him

18 specifically?

19   BY MR. ABDO:

20   Q   No. The original question was whether

21 the carryover sentence from page 36 to 37 of

22 Exhibit 43 is accurate with respect to upstream

1   surveillance as it is conducted today.

2   Have you discussed with Admiral Rogers

3   whether answering a question seeking that

4   information requires invocation of the state

5   secrets privilege?

6   MR. PATTON: You can answer the

7   question.

8   THE WITNESS: No, I have not.

9   BY MR. ABDO:

10   Q   Have you more generally discussed the

11   invocation of the state secrets privilege in this

12   deposition with Admiral Rogers?

13   A   I spoke to him extensively prior to

14   the issuance of both the NSA Civil Liberties and

15   Privacy Office Report, as well as the PCLOB

16   Report, for him to understand what information was

17   going to be in that.

18   So whether for today's testimony -- I

19   did not go back to him and ask him specifically

20   about any of this information, as that had largely

21   been covered when we were issuing those reports

22   back in 2014.

1   Q   Okay. Is there anything else you can

2   tell us about this assertion of the state secrets

3   privilege?

4   MR. PATTON: Objection, vague.

5   THE WITNESS: I don't know what you're

6   asking me.

7   BY MR. ABDO:

8   Q   Is there anything that you can say

9   that would be unclassified about the nature of the

10   state secrets privilege invocation, or the reason

11   for it, or the harm that would come about by

12   answering the question?

13   A   No, other than to say that this is

14   sources and methods. You're getting into sources

15   and methods, which is what we have -- we protect

16   extensively.

17   Q   Okay. As of 2014, did the NSA conduct

18   upstream surveillance on at least one Internet

19   backbone circuit?

20   MR. PATTON: Object to the question to

21   the extent it calls for a classified answer,

22   subject to the state secrets privilege, prior

 1   statutory privileges.

 2   You can answer the question to the

 3   extent not classified.

 4   THE WITNESS: The question is at least

 5   one?

 6   BY MR. ABDO:

 7   Q   Internet backbone circuit.

 8   A   One Internet backbone circuit.

 9   MR. PATTON: This is probably another

10   one of those questions where a yes-or-no answer

11   would be unclassified, but --

12   MR. ABDO: That's what I'm looking

13   for, a yes or no.

14   MR. PATTON: Any narrative answer we

15   would have to break for.

16   THE WITNESS: At least one Internet --

17   BY MR. ABDO:

18   Q   Let me restate the question.

19   A   Okay.

20   Q   As of 2014, did the NSA conduct

21   upstream surveillance on at least one Internet

22   backbone circuit? Yes or no.

 1   MR. PATTON: Same classified

 2 objections to the extent that the question seeks

 3 classified information. To the extent it's yes or

 4 no, you can answer the question.

 5   THE WITNESS: Yes.

 6   BY MR. ABDO:

 7   Q   As of 2014, did the NSA conduct

 8 upstream surveillance on more than one Internet

 9 backbone circuit?

10   MR. PATTON: Object to that question

11 to the extent it calls for classified information

12 protected by the state secrets privilege,

13 statutory privilege.

14   Instruct the witness not to answer the

15 question.

16   THE WITNESS: I will follow my

17 lawyer's direction.

18   BY MR. ABDO:

19   Q   Your view is that stating a yes in

20 response to that question or a no in response to

21 that question would disclose state secrets?

22   MR. PATTON: Same objection, same

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 1   instruction.

 2   THE WITNESS: Still following my

 3   lawyer's description -- direction.

 4   BY MR. ABDO:

 5   Q   Is --

 6   MR. GILLIGAN: Excuse me, Counsel,

 7   just one moment.

 8   MR. ABDO: Yeah, sorry.

 9   (Counsel conferring.)

10   BY MR. ABDO:

11   Q   Is your view that the sentence we've

12   been discussing between pages 36 and 37 of

13   Exhibit 43 discloses any classified facts or facts

14   protected by the statutory authorities your

15   counsel has cited?

16   A   The sentence is unclassified.

17   Q   Is that true notwithstanding the fact

18   that the sentence states that upstream

19   surveillance involves the acquisition of

20   communications transiting through circuits --

21   that's a quote -- on the Internet backbone?

22   MR. PATTON: Object to the form of the

 1   question, vague as to time.

 2   MR. ABDO: As of 2014.

 3   MR. PATTON: Same objections, vague as

 4   to time.

 5   THE WITNESS: My answer remains the

 6   same.

 7   BY MR. ABDO:

 8   Q   What's your answer?

 9   A   That the fact that the word "circuits"

10   is plural does not change any of my previous

11   answers.

12   Q   You don't view that as inconsistent

13   with the assertion of the state secrets privilege

14   in response to my question of whether, as of 2014,

15   upstream surveillance involved more than one

16   Internet backbone circuit?

17   MR. PATTON: Objection, asked and

18   answered, argumentative. Go ahead.

19   THE WITNESS: I don't see that as

20   inconsistent.

21   BY MR. ABDO:

22   Q   Why not?

 1   MR. PATTON: Same objections.

 2   THE WITNESS: As we've stated, we've

 3   stated that we were on at least one, and the fact

 4   that there's a plural there isn't dispositive one

 5   way or the other.

 6   BY MR. ABDO:

 7   Q   As of 2014, were multiple electronic

 8   communication service providers compelled to

 9   assist the NSA in the operation of upstream

10   surveillance?

11   MR. PATTON: Objection, calls for

12   classified information, sources and methods,

13   operational details, and subject to state secrets

14   and statutory privileges.

15   I instruct the witness not to answer

16   the question.

17   THE WITNESS: I will follow my

18   lawyer's --

19   BY MR. ABDO:

20   Q   Can you please turn to page 12 of

21   what's marked Exhibit 43 and read, if you would,

22   what is marked as Recommendation 6, which is the

1   final paragraph of page 12.

2   MR. PATTON: Read it to herself or out

3   loud?

4   MR. ABDO: To yourself, yeah.

5   THE WITNESS: Yes.

6   BY MR. ABDO:

7   Q   Do you understand -- well, strike

8   that.

9   Is it true that in the operation of

10   upstream surveillance in 2014, there were -- and

11   I'm quoting from this recommendation -- affected

12   telecommunication service providers?

13   MR. PADGETT: Could you read back the

14   question?

15   (The reporter read back the question.)

16   MR. PATTON: I'm going to object to

17   vagueness in terms of time, and object to the

18   question to the extent it calls for classified

19   information, sources and methods information

20   protected by the statutory privileges.

21   The witness can answer the question to

22   the extent unclassified.

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1   BY MR. ABDO:

2   Q   Let me specify with respect to time

3   that I'm talking about July 2nd, 2014, the date of

4   this report.

5   MR. PATTON: Same objections.

6   THE WITNESS: I'd like to go in the

7   SCIF before I answer this question.

8   MR. PATTON: Okay.

9   MR. ABDO: Take a break.

10   (Off the record at 12:16 p.m.)

11   (Resume at 12:19 p.m.)

12   MR. PATTON: Same objections.

13   THE WITNESS: So as I said earlier,

14   providing any information as to the number of

15   telecommunication service provider beyond one is

16   classified. Because this is temporally at one

17   point, we can neither confirm nor deny that

18   information, whether it was more than one. To the

19   extent there was more than -- to the extent there

20   is a program, there must be one.

21   BY MR. ABDO:

22   Q   Can you tell us whether there have

1   been more than one provider involved, even if not

2   more than one at the same time?

3   MR. PATTON: Objection, calls for

4   classified information pursuant to the state

5   secrets privilege. Instruct the witness not to

6   answer, and to the statutory privileges.

7   THE WITNESS: I will follow my

8   lawyer's direction.

9   MR. ABDO: Rodney, are you okay

10 shortening that objection to something?

11   MR. PATTON: I'm trying.

12   MR. ABDO: Okay.

13   Ms. Jaques, do you mind marking this

14 as Exhibit 44?

15   (Deposition Exhibit 44 was

16   marked for identification.)

17   BY MR. ABDO:

18   Q   Ms. Richards, you have in front of you

19 what's been marked as Exhibit 44. Do you

20 recognize that document?

21   A   Yes, I do.

22   Q   Did you draft this document?

1   A   I did.

2   Q   What is the document?

3   A   The document is the NSA Director of

4   Civil Liberties and Privacy Office Report, NSA's

5   Implementation of Foreign Intelligence

6   Surveillance Act, Section 702, dated April 16th,

7   2014. It's exactly four years old.

8   Q   Did the NSA review this document for

9   accuracy and classification?

10   A   Did the NSA?

11   Q   Yes.

12   A   Yes, it did.

13   Q   Was that review thorough?

14   A   Yes, it was.

15   MR. PATTON: Objection, vague.

16   THE WITNESS: Sorry, too fast.

17   BY MR. ABDO:

18   Q   What was the purpose of issuing this

19   report?

20   A   The purpose of issuing the report was

21   to put on the public record a description from

22   NSA's perspective of what the privacy protections

1   were in place as it relates to Section 702.

2   Q   Was it important to the NSA in issuing

3   Exhibit 44 that the report be accurate?

4   A   Absolutely.

5   Q   And why is that?

6   A   Because this was submitted to the

7   Privacy and Civil Liberties Oversight Board as

8   part of their request for comment as part of their

9   report on Section 702, and we wanted to put on the

10   record an unclassified description that NSA stood

11   behind as to how the program worked.

12   Q   And was it also important that the

13   report, to the extent publicly disclosed, not

14   reveal classified information?

15   A   Yes.

16   Q   Could you turn to page 5 of the

17   report, again what's marked as Exhibit 44? I want

18   to direct your attention to the first sentence of

19   the last paragraph of the page, which starts, "In

20   the second."

21   A   Mm-hmm.

22   Q   Could you read that sentence to

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 1   yourself, please, and let me know when you're

 2   done.

 3   A   (Witness reviewing document.)   Okay.

 4   Q   Is this sentence referring to upstream

 5   surveillance as it operated as of April 16, 2014?

 6   A   Yes, it is.

 7   Q   Does this sentence confirm that

 8   service providers, plural, are compelled to assist

 9   the NSA in the lawful interception of electronic

10   communications to, from, or about task selectors

11   as of April 16th, 2014?

12   MR. PATTON: Just a moment.

13   (Counsel conferring.)

14   MR. PADGETT: Can you read back the

15   question?

16   (The reporter read back the question.)

17   BY MR. ABDO:

18   Q   Let me ask it differently.

19   Is this sentence accurate as of

20   April 16, 2014?

21   A   To the extent, as with the PCLOB

22   report, it's necessarily incomplete.   It is

1   accurate to the outline of how the program works.

2   Q   When you say it's incomplete, is it

3   incomplete because it omits classified information

4   about the operation of upstream surveillance as of

5   April 16, 2014?

6   A   Yes.

7   Q   Is it incomplete for any other reason?

8   A   No.

9   Q   Do you understand this sentence to

10   confirm that service providers are compelled to

11   assist NSA in the lawful interception of

12   electronic communications to, from, or about task

13   selectors as of April 16th, 2014?

14   MR. PATTON: Just a moment.

15   (Counsel conferring.)

16   MR. PATTON: We need to take just, I

17   promise, a very short break to make sure the

18   answer is unclassified. Thanks.

19   (Off the record at 12:26 p.m.)

20   (Resume at 12:40 p.m.)

21   MR. ABDO: Do you mind reading back

22   the last question to us, Ms. Jaques?

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 1   (The reporter read back the question.)

 2   MR. PATTON: Objection, vague as to

 3   time, and objection to the extent it seeks

 4   classified and otherwise statutorily privileged

 5   information.

 6   You can answer to the extent it's

 7   unclassified.

 8   THE WITNESS: So this sentence --

 9   here's the thing. Would it have been clearer if

10   we had put parens between the S? Yes. But we're

11   not here -- we can't confirm or deny whether --

12   we've said that there was one service provider, at

13   least one service provider in Upstream. The fact

14   that this is plural does not -- is not an

15   indication that it was more than one at that point

16   in time or less than one at that point in time.

17   And so this is just -- it probably

18   would have been clearer if we had put the parens.

19   We didn't put the parens, so you've found the S's

20   in our report, but it's not meant to have provided

21   classified information, the fact that the numbers

22   are classified.

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 1                    BY MR. ABDO:

 2         Q    You understand that at the time that

 3   this report was issued -- and for the record,

 4   we're talking about Exhibit 44 -- there was a

 5   relatively small amount of unclassified

 6   information available from the government about

 7   the operation of upstream surveillance, right?

 8                    MR. PATTON:  Objection, vague.

 9                    THE WITNESS:  Yes, that's why I wrote

10   the report.

11                    BY MR. ABDO:

12         Q    And you understand that the public and

13   the PCLOB, which received this report, would

14   regard it as an authoritative source of public

15   information from the government about the

16   operation of upstream surveillance?

17                    MR. PATTON:  Objection, calls for

18   speculation about others and their thought

19   processes.

20                    THE WITNESS:  Yes.

21                    BY MR. ABDO:

22         Q    And that was precisely one of the
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 1   reasons that you drafted it and disclosed the

 2   report, right?

 3   A   Correct.

 4   MR. PATTON: Objection.

 5   BY MR. ABDO:

 6   Q   Were you careful throughout to ensure

 7   that the factual assertions in this report were

 8   accurate?

 9   MR. PATTON: Objection, vague.

10   THE WITNESS: Yes.

11   BY MR. ABDO:

12   Q   And was that in part at least so as

13   not to mislead the public or the PCLOB as to the

14   operation of upstream surveillance at the time the

15   report was issued?

16   A   Yes.

17   Q   Did you take great care throughout the

18   rest of the report in every word used to ensure

19   that what the words conveyed were accurate and

20   unclassified?

21   MR. PATTON: Objection, vague.

22   THE WITNESS: Yes.

 1   BY MR. ABDO:

 2   Q   Was this sentence reviewed with that

 3   same level of care?

 4   MR. PATTON: Objection, vague.

 5   THE WITNESS: Yes.

 6   BY MR. ABDO:

 7   Q   Are you aware of any factually

 8   incorrect statements in Exhibit 44 as to the

 9   operation of upstream surveillance at the time

10   that the report purports to describe the operation

11   of upstream surveillance?

12   MR. PATTON: Objection, ambiguous.

13   MR. ABDO: I'm sorry, I didn't hear.

14   MR. PATTON: Objection, ambiguous.

15   THE WITNESS: Again, to the extent

16   that the information in here is unclassified, and

17   therefore is necessarily incomplete, yes, this is

18   an accurate description.

19   This was also really one of the first

20   times that the NSA had written, so to the extent

21   we've gotten better at this as we've gone along,

22   the first time is always -- we were doing our

1   best.

2   BY MR. ABDO:

3   Q   Setting aside the question of

4   incomplete information, are you aware of any

5   factual inaccuracies in Exhibit 44 as to the

6   operation of upstream surveillance at the relevant

7   time periods described in the report?

8   MR. PATTON: Just a moment.

9   (Counsel conferring.)

10   MR. PATTON: Go ahead.

11   THE WITNESS: No, I'm not.

12   BY MR. ABDO:

13   Q   Also setting aside the question of

14   incompleteness, are you aware of any factual

15   inaccuracies in Exhibit 43, the report of the

16   PCLOB, as to the operation of upstream

17   surveillance for the periods of time described in

18   that report?

19   MR. PATTON: Objection, vague.

20   THE WITNESS: As I said earlier, and

21   as we just then described going through these

22   different sentences, the answer is I am not

 1   generally aware of any inaccuracies.

 2   To the extent you have a question

 3   about a particular sentence, I'm happy to, as we

 4   did on page 36, walk you through and understand

 5   whether there was classified information that

 6   makes that sentence more or less complete.

 7   BY MR. ABDO:

 8   Q   I appreciate that, and we may do that

 9   for a few more sentences, but my question is

10   whether, as you sit here today, you are aware of

11   any inaccuracies, factual inaccuracies, in

12   Exhibit 43 with regard to the operation of

13   upstream surveillance as the report describes?

14   MR. PATTON: Objection, asked and

15   answered.

16   THE WITNESS: My answer is still the

17   same. You know, the information in it is,

18   generally speaking, accurate.

19   If there's a particular sentence you

20   want to discuss -- it's necessarily incomplete,

21   and describing Upstream, which is classified, in

22   an unclassified sentence is difficult, as you're

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1   seeing with us having to walk back and forth and

2   make sure that we're hitting those lines so that

3   we are providing an accurate general description

4   of the program without going into the classified

5   sources and methods of the program.

6   So, you know, it still remains

7   accurate to the extent that it was true in 2014.

8   I'll just re-remind you that we are no longer do

9   the "abouts" collection as it was described

10   starting in 2017, and so that piece of this report

11   is not accurate.

12   BY MR. ABDO:

13   Q   The report doesn't purport to describe

14   surveillances operated years later, correct?

15   A   Correct. I'm just re-reminding that

16   to the extent that we've changed certain aspects

17   of the program, that's no longer accurate.

18   Q   Okay. I'm going to ask you similar

19   questions that I just asked you about Exhibit 44,

20   but about Exhibit 43.

21   Did the NSA, as it did with

22   Exhibit 44, also review each and every factual

 1   disclosure in Exhibit 43 to ensure that it was

 2   accurate?

 3   MR. PATTON: Object to the form,

 4   vague, asked and answered.

 5   THE WITNESS: To the extent that NSA

 6   scrubbed through the facts provided in the

 7   historical, as we mentioned, section from 16 to

 8   roughly 79, and also looked at from a

 9   classification purpose, yes.

10   We were, again, doing our best to try

11   and help provide an unclassified description of a

12   classified program, and so it was necessarily

13   incomplete.

14   BY MR. ABDO:

15   Q   And at the time that report was

16   issued, is it also fair to say that there was

17   relatively little public information from the

18   government describing the operation of upstream

19   surveillance?

20   MR. PATTON: Object to the form,

21   vague.

22   THE WITNESS: I'm pausing because I

1   don't exactly remember when a number of the

2   different FISC opinions were declassified. So I

3   believe that there were a number of -- they were

4   actually issued -- that they were declassified

5   prior to -- or they were reviewed and redacted.

6   So Judge Bates -- which are mentioned.

7   There are a number of reports that are footnoted

8   in here that are -- that were declassified. I

9   just -- some of the timing.

10   BY MR. ABDO:

11   Q   Is it fair to say that at the time

12   this report was issued, it was the most

13   comprehensive description from the government of

14   how upstream surveillance operated at the time the

15   report was issued?

16   MR. PATTON: Objection, vague.

17   THE WITNESS: Yes, to the extent,

18   though -- I would just offer that to the extent

19   that these are the words of an independent

20   executive agency with oversight over the

21   Intelligence Community as it relates to CT

22   functions, you know, these are their words.

 1   They're not NSA's words. They're not NSA

 2   submissions.

 3   And so sometimes they may describe

 4   things slightly differently than we may have

 5   chosen to do so, and so I would refer you back to

 6   the NSA or the government submissions on the

 7   descriptions of the programs.

 8   BY MR. ABDO:

 9   Q   Okay. Is it fair to describe the

10   report marked Exhibit 43 as an exhaustive

11   description of upstream surveillance as it

12   operated in 2014?

13   MR. PATTON: Objection, vague.

14   THE WITNESS: I suppose that's one.

15   I'm guessing that you have something over there

16   that -- are you referring to a specific document

17   where NSA may have said that?

18   BY MR. ABDO:

19   Q   Well, I'm asking you first whether

20   that's fair, setting aside what the NSA has

21   otherwise said?

22   A   Yes, I think it's fair.

 1   MR. PATTON: In unclassified terms.

 2   THE WITNESS: In unclassified terms.

 3   MR. PATTON: I guess that's probably

 4   what that's talking about, right?

 5   MR. ABDO: Yeah, no, I think -- let me

 6   ask the question clearly.

 7   Is the PCLOB's description of the

 8   operation of upstream surveillance exhaustive?

 9   MR. PATTON: Same objection.

10   THE WITNESS: So, again, I think what

11   I would say is I think that their study was

12   exhaustive. To the extent that there's classified

13   information, they had access to that information,

14   which makes the study probably exhaustive, but to

15   the extent that the report is necessarily

16   incomplete, it's as much information as possible

17   without going into the classified material.

18   BY MR. ABDO:

19   Q   Okay. I want to ask you a question

20   that I've tried different versions of, so forgive

21   the repetition. I'm asking it multiple ways

22   because I'm looking for what I think you ought to

 1   be able to provide, which is a clean yes or no.

 2   Setting aside the incompleteness of

 3   the report marked Exhibit 43, are you aware now of

 4   any factual inaccuracies in the report and its

 5   description of upstream surveillance as Upstream

 6   was conducted at the time the report was issued?

 7   MR. PATTON: Objection, asked and

 8   answered. Go ahead.

 9   THE WITNESS: I am not aware of any

10   inaccurate -- known inaccuracies in the document

11   as described other than the fact that there's

12   classified information that has been omitted.

13   BY MR. ABDO:

14   Q   What is the number, or approximate

15   number, of Internet backbone circuits on which

16   upstream surveillance is conducted --

17   MR. PATTON: Objection.

18   MR. ABDO: -- as of June 2015?

19   MR. PATTON: Objection, calls for

20   classified information, sources and methods,

21   operational details subject to state secrets and

22   the statutory privilege.

 1   Instruct the witness not to answer.

 2   THE WITNESS: I will follow my

 3   lawyer's direction.

 4   MR. ABDO: Rodney, I think it might be

 5   in our interest to come up with a shortened

 6   version of that, at least for the next few

 7   minutes.

 8   MR. PATTON: Yes, you have my word.

 9   BY MR. ABDO:

10   Q   What is the number, or approximate

11   number, of Internet backbone circuits on which

12   upstream surveillance is conducted today?

13   MR. PATTON: Same objection, same

14   instruction.

15   THE WITNESS: Still following those

16   directions.

17   BY MR. ABDO:

18   Q   Okay. What is the average bandwidth

19   of the Internet backbone circuits on which

20   upstream surveillance was conducted in June 2015?

21   MR. PATTON: Same objections, same

22   instruction.

 1   THE WITNESS: Following the

 2   instruction.

 3   BY MR. ABDO:

 4   Q   What is the average bandwidth of the

 5   Internet backbone circuits on which upstream

 6   surveillance is conducted today?

 7   MR. PATTON: Same objections, same

 8   instruction.

 9   THE WITNESS: Still following the

10   instructions.

11   BY MR. ABDO:

12   Q   What is the approximate combined

13   bandwidth of the Internet backbone circuits on

14   which upstream surveillance was conducted in June

15   of 2015?

16   MR. PATTON: Same objections, same

17   instruction.

18   THE WITNESS: Still following

19   instructions.

20   BY MR. ABDO:

21   Q   What is the approximate combined

22   bandwidth of the Internet backbone circuits on

 1   which upstream surveillance is conducted today?

 2   MR. PATTON: Same objections, same

 3   instruction.

 4   THE WITNESS: Following instruction.

 5   BY MR. ABDO:

 6   Q   What are the categories of circuits

 7   that were subject to upstream surveillance in

 8   June 2015?

 9   MR. PATTON: Same objection, same

10   instruction.

11   THE WITNESS: Following instruction.

12   BY MR. ABDO:

13   Q   What are the categories of circuits

14   that are subject to upstream surveillance today?

15   MR. PATTON: Same objections, same

16   instruction.

17   THE WITNESS: Following instruction.

18   BY MR. ABDO:

19   Q   Were any individual optical fibers on

20   the Internet backbone subjected to upstream

21   surveillance in June 2015 and/or any individual

22   optical fibers on the Internet backbone subjected

 1   to upstream surveillance today?

 2   MR. PATTON: Just a second.

 3   MR. PADGETT: Could you read back the

 4   question?

 5   MR. ABDO: Sure. Let me --

 6   MR. PATTON: I really am listening to

 7   your questions.

 8   BY MR. ABDO:

 9   Q   I appreciate that. In the interest of

10   speed, I was combining two, but let me be clear.

11   Are any individual optical fibers on

12   the Internet backbone subjected to upstream

13   surveillance today?

14   MR. PATTON: Same objection, same

15   instruction.

16   THE WITNESS: Following instruction.

17   BY MR. ABDO:

18   Q   Were any individual optical fibers on

19   the Internet backbone subjected to upstream

20   surveillance as of June 2015?

21   MR. PATTON: Same objection, same

22   instruction.

 1   THE WITNESS: Following instruction.

 2   BY MR. ABDO:

 3   Q   Are any subdivisions of optical fibers

 4   on the Internet backbone subjected to upstream

 5   surveillance today?

 6   MR. PATTON: Same objection, same

 7   instruction.

 8   THE WITNESS: Following instruction.

 9   BY MR. ABDO:

10   Q   Were any subdivisions of optical

11   fibers on the Internet backbone subjected to

12   upstream surveillance in June 2015?

13   MR. PATTON: Same objection, same

14   instruction.

15   THE WITNESS: Following instruction.

16   BY MR. ABDO:

17   Q   Are any wavelengths of light carried

18   on optical fibers on the Internet backbone

19   subjected to upstream surveillance today?

20   MR. PATTON: Same objection, same

21   instruction.

22   THE WITNESS: Following instruction.

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 1              BY MR. ABDO:

 2        Q    Were any wavelengths of light carried

 3   on optical fibers on the Internet backbone

 4   subjected to upstream surveillance in June 2015?

 5              MR. PATTON:  Same objection, same

 6   instruction.

 7              THE WITNESS:  Following instruction.

 8              BY MR. ABDO:

 9        Q    What is the smallest subdivision by

10   bandwidth of an optical fiber on the Internet

11   backbone that was subjected to upstream

12   surveillance in June 2015 and that is subjected to

13   upstream surveillance today?

14              MR. PATTON:  Objection, compound.

15   Objection, same as before, classified.

16              MR. ABDO:  We might go quicker if you

17   would withdraw the compound objection.

18              MR. GILLIGAN:  I like this pace,

19   actually.

20              BY MR. ABDO:

21        Q    Let me rephrase the question.

22              What is the smallest subdivision by
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1   bandwidth of an optical fiber on the Internet

2   backbone subjected to upstream surveillance today?

3   MR. PATTON: Same objection, same

4   instruction.

5   THE WITNESS: Following instruction.

6   BY MR. ABDO:

7   Q   What was the smallest subdivision by

8   bandwidth of an optical fiber on the Internet

9   backbone subjected to upstream surveillance in

10   June 2015?

11   MR. PATTON: Same instruction, same

12   instruction.

13   THE WITNESS: Following instruction.

14   BY MR. ABDO:

15   Q   What was the largest circuit by

16   bandwidth on the Internet backbone subjected to

17   upstream surveillance in June 2015?

18   MR. PATTON: Same objection, same

19   instruction.

20   THE WITNESS: Following instruction.

21   BY MR. ABDO:

22   Q   What is the largest circuit by

 1   bandwidth on the Internet backbone subjected to

 2   upstream surveillance today?

 3   MR. PATTON: Same objection, same

 4   instruction.

 5   THE WITNESS: Following instruction.

 6   BY MR. ABDO:

 7   Q   Is now a good time for you to break,

 8   Ms. Richards?

 9   A   Sure.

10   Q   Okay, why don't we take a lunch break

11   and go off the record, Dawn.

12   (Lunch break taken at 12:59 p.m.)

13   (Resume at 2:06 p.m.)

14   BY MR. ABDO:

15   Q   We're back from lunch.

16   Ms. Richards, what does the term

17   "Internet link" refer to?

18   MR. PATTON: Objection, vague.

19   THE WITNESS: Is there a specific

20   place where you want me to look for "Internet

21   link," or are you looking for the general

22   telecommunications definition?

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 1                BY MR. ABDO:

 2        Q    That's right, the general definition.

 3        A    So it's similar to a circuit, and

 4   there's no special NSA meaning.

 5        Q    So the NSA's understanding of that

 6   term is consistent with the general understanding

 7   of the term within the telecommunications

 8   industry?

 9        A    That is correct.

10        Q    Okay.  What does the term

11   "international Internet link" refer to?

12                MR. PATTON:  Objection, vague, calls

13   for expert opinion.

14                THE WITNESS:  I'm sorry,

15   international --

16                BY MR. ABDO:

17        Q    International Internet link.

18        A    Is there, again, something specific?

19   I'm not sure of it.

20        Q    The question is whether that term has

21   a meaning to the NSA.

22                MR. PATTON:  Just a second.
```

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 1   I'm just going to object to the extent

 2   that any response might call for a classified

 3   answer, subject to state secrets, statutory

 4   privileges.

 5   If the witness has an unclassified

 6   answer, she can provide it.

 7   THE WITNESS: I'm just going to take a

 8   minute to make sure I --

 9   (Witness reviewing document.)

10   So just for clarification, you're

11   looking for the definition of "international

12   Internet link" --

13   BY MR. ABDO:

14   Q   That's right.

15   A   -- as was originally described in

16   Judge Bates' order?

17   Q   I'm asking for your understanding of

18   it, not for Judge Bates' understanding.

19   A   Okay, I just want to make sure.

20   So I'll say there's no special NSA

21   meaning.

22   Q   What is the meaning of it though, even

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 1   if there's not a special NSA one?

 2   MR. PATTON: Objection to the extent

 3   it calls for expert opinion, and to the extent it

 4   may call for classified information and statutory

 5   privileges.

 6   The witness can answer if the answer

 7   is unclassified.

 8   Are you concerned that there's --

 9   THE WITNESS: I'm concerned whether

10   I'm going into classified. I'm just trying

11   to under- -- I'm clicking through my head as to

12   what's classified and what's not classified, so

13   I'm sorry I'm taking a little bit more, and so

14   maybe --

15   MR. PATTON: Do you need to talk about

16   that?

17   THE WITNESS: Maybe we should just

18   take a quick minute, go off the record.

19   MR. ABDO: Okay.

20   (Off the record at 2:11 p.m.)

21   (Resume at 2:28 p.m.)

22   MR. ABDO: Ms. Jaques, do you mind

 1   re-reading the last question asked?

 2   (The reporter read back the question.)

 3   MR. PATTON: Object to the question to

 4   the extent it calls for expert testimony.

 5   THE WITNESS: I'm going to clarify my

 6   answer, which is the logical definition of an

 7   international Internet link would be an Internet

 8   link between two countries, but it's not I think a

 9   well -- it's not a telecommunications -- unlike

10   some of the other descriptions that we provided in

11   terms of "circuit" or "cable" or "Internet

12   backbone," this is not a commonly understood

13   telecommunications word -- or set of three words,

14   I guess.

15   BY MR. ABDO:

16   Q   Okay. But your understanding of it is

17   a link between two countries essentially?

18   MR. PATTON: Same objection.

19   THE WITNESS: Yes, in the broad

20   context of those three words, not in the context

21   of anything specific.

22

 1   BY MR. ABDO:

 2   Q   Okay. I want to go back for a moment

 3   to Internet link -- not international Internet

 4   link, just Internet link.

 5   You said, I believe, and please

 6   correct me if I'm wrong, that it is similar to a

 7   circuit. Is that correct? Am I characterizing

 8   your previous testimony accurately?

 9   MR. PATTON: Object to the extent it

10   calls for expert opinion.

11   THE WITNESS: Yes.

12   BY MR. ABDO:

13   Q   When you say "similar" -- or when you

14   said "similar," did you mean analogous to, or did

15   you mean identical to? I'm trying to understand,

16   if there are differences between an Internet link

17   and a circuit, what you believe those differences

18   to be.

19   MR. PATTON: Same objection.

20   THE WITNESS: I don't see them -- I

21   see them as being analogous. So sometimes you use

22   "circuit," sometimes you use "link." I don't see

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1   them as having any real difference between them.

2   BY MR. ABDO:

3   Q   Okay. Would "interchangeable" be a

4   better word than "analogous" then?

5   A   Yeah.

6   MR. ABDO: Ms. Jaques, would you mind

7   marking this Exhibit 45?

8   (Deposition Exhibit 45 was

9   marked for identification.)

10   BY MR. ABDO:

11   Q   Ms. Richards, you have in front of you

12   what's been marked as Exhibit 45.

13   Do you recognize that document?

14   A   I do.

15   Q   What is it? I should say, sorry, it's

16   marked Exhibit 45, and it is Bates numbered

17   NSA-WIKI 149 to NSA-WIKI 229. Wiki is spelled

18   W-I-K-I. What is this document, Ms. Richards?

19   A   This is the Judge Bates' Memorandum

20   Opinion from October 3rd, 2011.

21   Q   Could you turn to page 45, or

22   NSA-WIKI 193 of Exhibit 45, and read the sentence

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1   that begins, "Indeed, the government readily

2   concedes." It is about halfway down the page.

3   A   Got it.

4   Q   "Indeed, the government readily

5   concedes that NSA will acquire a wholly domestic

6   'about' communication if the transaction

7   containing the communication is routed through an

8   international Internet link being monitored by NSA

9   or is routed through a foreign server."

10   Is that sentence true?

11   Let me rephrase that. Was that

12   sentence true at the time Judge Bates issued this

13   opinion?

14   MR. PATTON: Just a moment.

15   You can answer.

16   THE WITNESS: Okay. Yes, that

17   sentence is accurate.

18   BY MR. ABDO:

19   Q   What do you understand the Foreign

20   Intelligence Surveillance Court to mean in its use

21   of the term "international Internet link" in that

22   sentence?

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 1                    MR. PATTON:  Objection, the question

 2  calls for classified information, information

 3  subject to the state secrets and the statutory

 4  privileges previously mentioned.

 5                    I instruct the witness not to answer

 6  the question.

 7                    BY MR. ABDO:

 8          Q    Do you --

 9          A    Hold on.

10                    MR. PATTON:  Do you have an

11  unclassified response?

12                    THE WITNESS:  I have an unclassified

13  response, at least in part.

14                    MR. PATTON:  So long as you're

15  comfortable and it's unclassified.

16                    THE WITNESS:  NSA -- so unlike the

17  other words that you had me go through in terms of

18  definitions that were telecom provider -- you

19  know, sort of generally what a teleco expert would

20  be, NSA has an understanding of this term that is

21  specific to how Judge Bates described it, but it's

22  classified to provide any further information.
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 1   BY MR. ABDO:

 2   Q   I understand. Is the NSA's

 3 understanding of the term different from the

 4 general meaning of the term you described in

 5 response to an earlier question as a link between

 6 two countries?

 7   MR. PATTON: Objection, calls for

 8 information subject to the statutory privilege,

 9 and instruct the witness not to answer the

10 question.

11   THE WITNESS: I will follow

12 instructions.

13   BY MR. ABDO:

14   Q   Is it your understanding that in using

15 the term "international Internet link," the

16 Foreign Intelligence Surveillance Court meant an

17 Internet link that terminates in a foreign

18 country?

19   MR. PATTON: Same objection, same

20 instruction.

21   THE WITNESS: Following instruction.

22

 1   BY MR. ABDO:

 2   Q   Is it your understanding that an

 3   international Internet link is an Internet

 4   backbone circuit with one end in the United States

 5   and the other end in a foreign country?

 6   MR. PATTON: Same objection, same

 7   instruction.

 8   THE WITNESS: Following instruction.

 9   BY MR. ABDO:

10   Q   Is there anything you can tell us

11   unclassified about the nature of the harm that

12   would arise were you to provide an answer to the

13   question of what the term "international Internet

14   link" means as used by the Foreign Intelligence

15   Surveillance Court in Exhibit 45?

16   MR. PATTON: Object to the question.

17   The witness is not an official classification

18   authority, nor is she the Director of the NSA or

19   the Director of National Intelligence, who would

20   invoke and assert the state secrets privilege to

21   that.

22   You can answer the question to the

 1   extent it's unclassified.

 2   THE WITNESS: Sources and methods.

 3   BY MR. ABDO:

 4   Q   Do you believe that disclosing the

 5   NSA's understanding of that term would harm

 6   national security?

 7   MR. PATTON: Same objection, same

 8   instruction.

 9   THE WITNESS: Which was to not answer,

10   or to answer to the extent --

11   MR. PATTON: To answer to the extent

12   that you're able. You're not a classification

13   authority, you're not asserting the state secrets.

14   THE WITNESS: So the question is

15   whether I believe it would harm national security?

16   BY MR. ABDO:

17   Q   Yes.

18   A   Yes.

19   Q   Do you believe it would substantially

20   harm national security?

21   MR. PATTON: Same objection, same

22   instruction.

 1   THE WITNESS: Yes.

 2   BY MR. ABDO:

 3   Q   Are you familiar with the process

 4   through which the government seeks approval from

 5   the Foreign Intelligence Surveillance Court to

 6   conduct upstream surveillance?

 7   MR. PATTON: Object to the form of

 8   that question as vague, and objection, beyond the

 9   scope of 30(b)(6).

10   THE WITNESS: Yes.

11   BY MR. ABDO:

12   Q   Does the NSA provide information to

13   the Foreign Intelligence Surveillance Court about

14   the operation of upstream surveillance in support

15   of the government's applications to that court to

16   conduct upstream surveillance?

17   MR. PATTON: Same objections.

18   THE WITNESS: Yes.

19   BY MR. ABDO:

20   Q   Is the information that the NSA

21   provides in support of the government's

22   applications to the Foreign Intelligence

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1   Surveillance Court supposed to be accurate?

2   MR. PATTON: Objection. Same

3   objections.

4   THE WITNESS: Yes.

5   BY MR. ABDO:

6   Q   Is that information, in fact,

7   accurate?

8   MR. PATTON: Objection, calls for

9   speculation.

10   THE WITNESS: To the extent the

11   government's job is to provide the Court with as

12   accurate as information as possible at the time,

13   that is what the NSA does.

14   BY MR. ABDO:

15   Q   Does the NSA verify, under penalty of

16   perjury, that its submissions to the Foreign

17   Intelligence Surveillance Court are true and

18   correct?

19   MR. PATTON: Same objections.

20   THE WITNESS: Yes.

21   BY MR. ABDO:

22   Q   Does the NSA review the Department of

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 1   Justice's submissions to the Foreign Intelligence

 2   Surveillance Court seeking authority to conduct

 3   upstream surveillance?

 4   MR. PATTON: Same objections.

 5   THE WITNESS: Yes.

 6   BY MR. ABDO:

 7   Q   Does it review the technical

 8   explanations of the way that upstream surveillance

 9   operates and drafts of those submissions before

10   they are filed with the Foreign Intelligence

11   Surveillance Court?

12   MR. PATTON: Same objections.

13   MR. PADGETT: Excuse me, could you

14   read back the question?

15   (The reporter read back the record.)

16   THE WITNESS: Okay, yes.

17   BY MR. ABDO:

18   Q   If there are mistakes in the drafts of

19   the Department of Justice's submissions to the

20   Foreign Intelligence Surveillance Court, would the

21   NSA identify those mistakes to the Department of

22   Justice?

1   MR. PATTON: Objection, vague.

2   THE WITNESS: Yes.

3   BY MR. ABDO:

4   Q   Would it identify any inaccuracies in

5   the explanations of the technical operation or

6   implementation of upstream surveillance to the

7   Department of Justice?

8   A   Yes.

9   MR. PATTON: Objection, vague and

10 ambiguous, and also beyond the scope of 30(b)(6).

11   THE WITNESS: Yes.

12   BY MR. ABDO:

13   Q   To your knowledge, does the Foreign

14 Intelligence Surveillance Court acquire

15 information about the operation of upstream

16 surveillance from anyone aside from

17 representatives of the NSA or the Department of

18 Justice?

19   MR. PATTON: Objection, calls for

20 speculation. Objection, beyond the scope of

21 30(b)(6).

22   THE WITNESS: What time frame would

 1   you be asking about? Just in general? Over a

 2   specific time frame?

 3   BY MR. ABDO:

 4   Q   Why don't we -- if you can answer in

 5   general, please do. If you can't, let me know.

 6   MR. PATTON: Are you asking --

 7   I'm sorry, does this include just Upstream?

 8   MR. ABDO: Just Upstream.

 9   MR. PATTON: Same objections.

10   THE WITNESS: To the extent that the

11   new law that was passed, and actually some

12   previous ones over the last couple years, allow

13   for an Amicus, there's certainly that opportunity

14   for the Court to include that type of additional

15   expert outside advice. Similarly -- yeah.

16   BY MR. ABDO:

17   Q   The new law you're referring to is the

18   USA Freedom Act?

19   A   Yes. I'm sorry, yes, USA Freedom Act,

20   and then the --

21   Q   The reauthorization --

22   A   -- reauthorization for 702 also has

1   the Amicus portion of it.

2   Q   Is there anyone else, to your

3   knowledge, from whom the Foreign Intelligence

4   Surveillance Court might acquire information about

5   the operation of upstream surveillance?

6   MR. PATTON: Same. Hold on.

7   (Counsel conferring.)

8   MR. PATTON: So same objections as

9   before. There are, as you know, some ex parte

10   communications, and while I'm a Department of

11   Justice Civil Division attorney, I'm not a

12   Department of Justice national Security Division

13   attorney, and so there may be other things that

14   the witness is not aware of.

15   Again, I'd objected before to the fact

16   that the it was beyond the scope of 30(b)(6), so

17   she may not be aware of certain other things that

18   may go on that I'm not aware of as well. I don't

19   want the record to be unclear. That's potentially

20   beyond her personal knowledge.

21   MR. ABDO: Understood. To the extent

22   you know the answer --

 1   THE WITNESS: So his answer was

 2 exactly what I was about to say before we --

 3 before my lawyer said that, which is fantastic, so

 4 I've given you the information I know.

 5   I don't work for the FISC, I don't do

 6 anything before the FISC, so what the FISC -- what

 7 else the FISC has at their disposal is up to the

 8 FISC.

 9   BY MR. ABDO:

10   Q   Do you know whether the NSA reviews or

11 participates in any review of opinions of the

12 Foreign Intelligence Surveillance Court concerning

13 upstream surveillance before those opinions are

14 signed or issued?

15   MR. PATTON: Just a moment.

16   (Counsel conferring.)

17   MR. PATTON: Would you just read that

18 back? I think it's fine, but I just want to be

19 double sure.

20   (The reporter read back the question.)

21   MR. PATTON: Object as beyond the

22 scope of 30(b)(6), but if you have personal

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 1   knowledge, you can give it.

 2   THE WITNESS: To the best of my

 3   knowledge, no.

 4   BY MR. ABDO:

 5   Q   If the NSA identifies an inaccuracy in

 6   an opinion of the Foreign Intelligence

 7   Surveillance Court concerning upstream

 8   surveillance after that opinion is issued, would

 9   the NSA notify the Foreign Intelligence

10   Surveillance Court of that inaccuracy?

11   MR. PATTON: Objection. Same as

12   before, beyond the scope of 30(b)(6).

13   You can answer if you know.

14   THE WITNESS: I think that's when you

15   would go to the FISC Review Board. You would do

16   an appeal.

17   BY MR. ABDO:

18   Q   What if it were not a judgment that

19   the Department of Justice or the NSA disagreed

20   with, but a factual misstatement in the opinion

21   that would not give rise to or necessitate an

22   appeal?

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 1                 MR. PATTON:  Same objection.

 2                 THE WITNESS:  It would be fact

 3   specific.  I can't speak to one way or another.

 4                 BY MR. ABDO:

 5        Q    Okay.  Do you imagine that it would be

 6   good practice for the NSA to correct factual

 7   misstatements in the Foreign Intelligence

 8   Surveillance Court's opinions if and when they

 9   identify them?

10                 MR. PATTON:  Objection, calls for a

11   legal conclusion, opinion, speculation, and beyond

12   the scope of 30(b)(6).

13                 THE WITNESS:  Again, I think it would

14   have to be very fact specific -- you know, the

15   sort of situation and fact specific would have to

16   decide what to do next, but, I mean, it's an

17   Article III judge signing something.  We're not

18   really one part of the government saying something

19   to the other part of the government.  You may want

20   to be thoughtful about how to do that.

21                 BY MR. ABDO:

22        Q    Understood.  Are there any
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1   inaccuracies that you're aware of relating to the

2   operation of upstream surveillance in Exhibit 45,

3   October 3rd, 2011, Foreign Intelligence

4   Surveillance Court opinion?

5   MR. PATTON: Objection, vague as to

6   time, and object to the extent it calls for

7   classified information or statutory privileges

8   information.

9   The witness can answer to the extent

10   unclassified.

11   THE WITNESS: So you're asking if

12   there's any information as of October 3rd, 2011,

13   that we believe would have been inaccurate in

14   Judge Bates' Memorandum and Opinion?

15   BY MR. ABDO:

16   Q   Yes.

17   A   To the extent that there are certain

18   opinions that the judge makes as it relates to

19   different aspects of this, those are the opinions

20   of the Court and not necessarily those of NSA.

21   To the extent that there are facts in

22   here, I believe we stand behind those facts, as

1   they're based off of the submission from June 1st

2   that the government made in the subsequent

3   submissions.

4   Q   Okay. Did the NSA conduct a

5   declassification review of Exhibit 45?

6   A   Yes.

7   Q   I assume that was a thorough review?

8   A   Yes.

9   Q   And anything that would disclose

10   classified information, the NSA would identify as

11   classified to the FISC so as not to release it to

12   the public?

13   MR. PATTON: Just a second.

14   (Counsel conferring.)

15   MR. PATTON: I'm sorry, could you read

16   that question back?

17   BY MR. ABDO:

18   Q   Let me rephrase it. That's all right.

19   Did the NSA -- sorry.

20   If the NSA identified classified

21   information -- let me -- sorry, let me start over.

22   Who actually disclosed Exhibit 45 to

1   the public?

2   MR. PATTON: Objection, vague.

3   THE WITNESS: It's a FISC document, so

4   while the government has -- while the Executive

5   Branch reviews it for classification, I believe

6   the FISC issues it, although I know that the

7   documents actually sit on ODNI's website.

8   BY MR. ABDO:

9   Q   Are the redactions in this opinion in

10   Exhibit 45 the government's redactions or the

11   FISC's redactions?

12   A   So the process is with all these

13   documents that the government -- the Executive

14   Branch will review them for classification and

15   suggest redactions, and then the FISC has the

16   opportunity to say no, I think these should be put

17   out, and there was a conversation. But as a

18   general matter, I guess they're really the FISC's

19   document.

20   Q   Do you know whether there's any

21   dispute between the NSA or the Department of

22   Justice with the FISC relating to the

 1   classifications in Exhibit 45?

 2   MR. PATTON: Just a second.

 3   (Counsel conferring.)

 4   MR. PATTON: My colleague was just

 5   getting warm. You can keep answering the

 6   question.

 7   THE WITNESS: Okay.

 8   MR. PATTON: I think there's some

 9   confusion back and forth as to this particular

10   document, when it was declassified, and then the

11   standard way that it's now under USA Freedom Act

12   taken care of.

13   But this was, as you know,

14   declassified prior to USA Freedom Act, and so I

15   want to make sure the witness's answers are both

16   accurate and reflective of what occurred.

17   BY MR. ABDO:

18   Q   Right. I'm asking specifically about

19   this opinion, Exhibit 45.

20   A   And to which I don't know. I was not

21   working at NSA. This I believe was declassified

22   in 2013, and I was not working at NSA at that

1   point, so I don't have any specific knowledge on

2   that fact.

3   Q   Is there somebody at NSA who would

4   know the answer to that question?

5   A   I imagine the answer is that there

6   wasn't any disagreement, that this is the document

7   that went out.

8   Q   Just to confirm though, you say you

9   imagine that. Is that a guess, or is that --

10   A   No, that's a statement. I mean, this

11   is the document that went out. If there were any

12   disagreements, those were resolved.

13   Q   Okay.

14   A   There's no further information that

15   can be provided as to what those would be or not

16   be.

17   Q   Okay. Would the NSA treat statements

18   in a FISC opinion as classifiable if they revealed

19   information that the government considered

20   classified?

21   MR. PATTON: Objection to the

22   question. It calls for the expertise of an

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 1   original classification authority, and it's beyond

 2   the scope of 30(b)(6). You can answer.

 3   THE WITNESS: I'm not sure I

 4   understand your question, so ...

 5   BY MR. ABDO:

 6   Q   Let me ask it a slightly different

 7   way.

 8   Would the NSA treat a statement in a

 9   FISC opinion as classifiable if it revealed

10   information the government considered classified

11   even if the FISC were not quoting a statement made

12   by an Executive Branch agent?

13   MR. PATTON: Objection.

14   BY MR. ABDO:

15   Q   In other words, if the FISC were to

16   make a factual statement using its own words about

17   the operation of upstream surveillance, and the

18   NSA believed that statement revealed classified

19   information, would the NSA consider that statement

20   to be classifiable?

21   MR. PATTON: Same objections.

22   THE WITNESS: Yes.

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 1              BY MR. ABDO:

 2         Q    Okay.  Does the NSA conduct upstream

 3    surveillance on one or more international Internet

 4    links?  I'm looking for a yes or no, not a

 5    specific number.

 6              (Counsel conferring.)

 7              MR. PADGETT:  Could you read it back?

 8              (The reporter read back the question.)

 9              MR. PATTON:  I misheard, so object to

10    that as seeking classified information, subject to

11    state secrets and statutory privileges.

12              Instruct the witness not to answer the

13    question.

14              THE WITNESS:  I'll follow the --

15              BY MR. ABDO:

16         Q    Did the NSA conduct upstream

17    surveillance on one or more international Internet

18    links in 2015?

19              MR. PATTON:  Same objection, same

20    instruction.

21              THE WITNESS:  Will follow instruction.

22
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 1   BY MR. ABDO:

 2   Q   Does the NSA conduct upstream

 3   surveillance today on more than one international

 4   Internet links?

 5   MR. PATTON: Same objection, same

 6   instruction.

 7   THE WITNESS: Will follow the

 8   instruction.

 9   BY MR. ABDO:

10   Q   Did the NSA conduct upstream

11   surveillance on more than one international

12   Internet links in June of 2015?

13   MR. PATTON: Same objection, same

14   instruction.

15   THE WITNESS: Follow the instruction.

16   BY MR. ABDO:

17   Q   What is the number or approximate

18   number of international Internet links on which

19   the NSA conducted upstream surveillance in June of

20   2015?

21   MR. PATTON: Same objection, same

22   instruction.

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 1                    THE WITNESS:  Will follow the

 2   direction.

 3                    BY MR. ABDO:

 4        Q    What is the approximate number of

 5   international Internet links on which the NSA

 6   today conducts upstream surveillance?

 7                    MR. PATTON:  Same objection, same

 8   instruction.

 9                    THE WITNESS:  Will follow instruction.

10                    BY MR. ABDO:

11        Q    Okay.  Is upstream surveillance

12   conducted on any international submarine cables?

13                    MR. PATTON:  Same objection, same

14   instruction.

15                    THE WITNESS:  Will follow

16   instructions.

17                    BY MR. ABDO:

18        Q    Was upstream surveillance conducted on

19   any international submarine cables in June of

20   2015?

21                    MR. PATTON:  Same objection, same

22   instruction.
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 1   THE WITNESS: Will follow instruction.

 2   BY MR. ABDO:

 3   Q   What is the number or approximate

 4   number of cables on which the NSA conducted

 5   upstream surveillance in June 2015?

 6   MR. PATTON: Same objection, same

 7   instruction.

 8   THE WITNESS: Will follow instruction.

 9   BY MR. ABDO:

10   Q   What is the number or approximate

11   number of cables on which the NSA today conducts

12   upstream surveillance?

13   MR. PATTON: Same objection, same

14   instruction.

15   THE WITNESS: Will follow instruction.

16   BY MR. ABDO:

17   Q   Okay. In the context of upstream

18   surveillance, can you tell me what an

19   international chokepoint is?

20   MR. PATTON: Just a second.

21   Will you just read it back, please?

22   (The reporter read back the question.)

 1   MR. PATTON: Same objection, same

 2   instruction.

 3   THE WITNESS: Will follow the

 4   instruction.

 5   BY MR. ABDO:

 6   Q   Is upstream surveillance today

 7   conducted at one or more international

 8   chokepoints?

 9   MR. PATTON: Same objection, same

10   instruction.

11   THE WITNESS: Will follow instruction.

12   BY MR. ABDO:

13   Q   Was upstream surveillance in June 2015

14   conducted at one or more international

15   chokepoints?

16   MR. PATTON: Same objection, same

17   instruction.

18   THE WITNESS: Will follow the

19   instruction.

20   BY MR. ABDO:

21   Q   What number, approximate number, of

22   international chokepoints was upstream

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1   surveillance conducted on in June 2015?

2   MR. PATTON: Same objection, same

3   instruction.

4   THE WITNESS: Will follow instruction.

5   BY MR. ABDO:

6   Q   What number, approximate number, of

7   international chokepoints is upstream surveillance

8   conducted on today?

9   MR. PATTON: Same objection, same

10   instruction.

11   THE WITNESS: Will follow instruction.

12   BY MR. ABDO:

13   Q   I want to go back to page 45 very

14   briefly of Exhibit 45, the sentence we were

15   talking about before, the one that begins,

16   "Indeed, the government readily concedes."

17   A   Yes, okay.

18   Q   Is there a term -- well, let me

19   scratch that for a moment.

20   A moment ago I asked you whether the

21   government conducts upstream surveillance on one

22   or more international Internet links in 2015, then

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 1    I asked about today.

 2                    Is there a way I could phrase that

 3    question that would allow you to respond with an

 4    unclassified response more fully than you've

 5    responded so far?

 6                    MR. PATTON:  For any given time

 7    period?

 8                    MR. ABDO:  For June 2015 to today, and

 9    in 2011, at the time of -- let me try rephrasing

10    one thing.

11                    As of October 3rd, 2011, did the NSA

12    conduct upstream surveillance on one or more

13    international Internet links?

14                    MR. PATTON:  Same objection, same

15    instruction.

16                    BY MR. ABDO:

17        Q    Is there a way that I could rephrase

18    that question to use a term other than

19    "international Internet link" that would allow you

20    to provide an unclassified response?

21                    (Counsel conferring.)

22                    MR. PATTON:  We don't think she can.
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1   This is Rodney Patton, counsel for government.

2   We don't think she can answer that as

3   to specific time periods for anything related to

4   international Internet link. There may be a more

5   general statement that she can make, but I feel

6   like she's probably already provided that to you.

7   MR. ABDO: Okay.

8   MR. PATTON: Perhaps if we could go

9   out and check, we might be able to come up with --

10   MR. ABDO: Maybe at the next break.

11   You can add this to --

12   MR. PATTON: That's fine.

13   BY MR. ABDO:

14   Q   So back to page 45 very briefly of

15   Exhibit 45. Do you understand the sentence we've

16   been discussing, the one that begins, "Indeed, the

17   government readily concedes," to confirm that, as

18   of October 3rd, 2011, that the government in fact

19   conducted upstream surveillance at at least one

20   international Internet link?

21   MR. PATTON: Objection,

22   mischaracterizes the language of page 45 of

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 1   Exhibit 45.

 2   BY MR. ABDO:

 3   Q   You can answer.

 4   A   Do you want me to answer?

 5   MR. PATTON: Not as it's phrased, no,

 6   she can not answer that question. It would call

 7   for a classified answer.

 8   MR. ABDO: I'm sorry, I didn't hear

 9   that. So you're instructing the witness not to

10   answer?

11   THE WITNESS: Yeah, that's classified.

12   BY MR. ABDO:

13   Q   Okay. Do you understand the sentence

14   to confirm that if a transaction -- that as of

15   October 3rd, 2011, the NSA would in fact acquire a

16   wholly domestic -- sorry, would in fact acquire a

17   wholly domestic "about" communication if the

18   transaction containing the communication were

19   routed through an international Internet link

20   being monitored by the NSA?

21   MR. PATTON: Objection as not exactly

22   what the language of the sentence said. Let me

1   see if she can answer that question.

2   To avoid us having to go out to the

3   SCIF and come back again, she can answer whether

4   or not the statement in this, as exactly written,

5   is correct as of October 3rd, 2011, in a yes-or-no

6   answer. I believe she's already answered that,

7   but --

8   MR. ABDO: I think you did already

9   answer that this sentence, as written, is true as

10   of October 3rd, 2011.

11   MR. PATTON: That she can answer.

12   MR. ABDO: Okay.

13   THE WITNESS: Do you want me to say it

14   again?

15   BY MR. ABDO:

16   Q   Sure.

17   A   Yes, that sentence is accurate as of

18   October 3rd, 2011.

19   Q   Okay. Let me go back to Exhibit 42.

20   A   Which one is 42?

21   Q   The NSA's Responses and Objections to

22   Plaintiffs' First Set of Interrogatories.

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 1                    I direct your attention to page 7 to

 2      8.

 3            A     7 to 8, oh, yes.

 4            Q     The paragraph that carries over

 5      between the two, which is labeled "RESPONSE."

 6                  Would you mind just reading that to

 7      yourself?

 8                  MR. ABDO:  Why don't we take a break

 9      right now.  Can we go off the record for a minute?

10                  (A break was taken at 3:06 p.m.)

11                  (Resume at 3:15 p.m.)

12                  BY MR. ABDO:

13            Q     Ms. Richards, have you had a chance to

14      look at page 6 of Exhibit -- sorry, page 7 to 8 of

15      the carryover paragraph on pages 7 to 8 of

16      Exhibit 42, the NSA's response to Interrogatory

17      No. 3?

18            A     Yes.

19            Q     Is there anything beyond that response

20      in Exhibit 42 that isn't classified that you could

21      provide us about the NSA's understanding of the

22      term "filtering mechanism," both in June 2015 and
```

1   today?

2   A   Those are pretty good definitions

3   you've got right there. I don't have anything

4   else to add.

5   Q   Does that mean that there isn't

6   anything unclassified that you could add to those

7   definitions?

8   A   There's nothing unclassified I can add

9   to those descriptions.

10   Q   Okay. With respect to upstream

11   surveillance as it operated in 2015, did the term

12   "filtering mechanism" include the use of, quote,

13   an Internet protocol filter to ensure that the

14   person from whom the NSA seeks to obtain foreign

15   intelligence information is located overseas?

16   A   In 2015, filtering mechanism would

17   have -- one of the examples that was used --

18   I'm sorry.

19   An example of a filtering mechanism

20   was an IP address -- sorry. (Reviewing document.)

21   Okay, let me revise -- I'm sorry, let

22   me just revise my answer.

 1   Q   Sure.

 2   A   So I would actually add from the Civil

 3   Liberties and Privacy Office Report, which is

 4   Exhibit 44, on page 5, where we give an example

 5   that, in certain circumstances, NSA's procedures

 6   require that it employ an Internet protocol filter

 7   to ensure that the target is located overseas.

 8   Q   Does that mean the answer to my

 9   question is yes, that the filter you just

10   described is part of the filtering mechanism

11   described in the NSA's response to Interrogatory

12   No. 3?

13   A   Yes, and so I was correcting the fact

14   that when I said that was everything you could say

15   in an unclassified.

16   What I'm saying is I'm correcting the

17   record to say I could have additionally added the

18   fact that that would include the IP -- that could

19   include -- could include --

20   Q   Could include, understood.

21   A   -- as an example of what the filtering

22   mechanisms are, so ...

 1   Q   In June of 2015, did the term

 2   "filtering mechanism" include the use of an

 3   Internet protocol filter? I'm trying to

 4   understand "did" versus "could" include.

 5   MR. PATTON: Just a second.

 6   (Counsel conferring.)

 7   MR. PATTON: Object to form, vague.

 8   You can answer.

 9   THE WITNESS: Okay. To the extent

10   that the information is classified -- to the

11   extent that how this exactly works is classified,

12   I use the term "could" as one of the examples of

13   what a filtering mechanism is.

14   I can neither confirm nor deny exactly

15   what was happening in 2015 as it relates to the

16   specificity of the filtering mechanism. I can

17   just tell you that it could include that as an

18   example.

19   BY MR. ABDO:

20   Q   Can you confirm whether it did include

21   an Internet protocol filter as of the date of

22   Exhibit 44, April 16th, 2014?

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 1   A   As is specifically stated on page 5,

 2   it's a "could." It's not a "did."

 3   Q   Just for the record, could you tell us

 4   where you're reading from on page 5?

 5   A   Sure. It's the very last sentence on

 6   page 5 of Exhibit 44 that begins with "for

 7   example."

 8   Q   "In certain circumstances, NSA's

 9   procedures require that it employ an Internet

10   protocol filter to ensure that the target is

11   located overseas."

12   So in certain circumstances, they're

13   required to.

14   A   Mm-hmm.

15   Q   Can you tell us what those certain

16   circumstances would be in unclassified terms?

17   MR. PATTON: No, she can't. Object to

18   the question to the extent it calls for classified

19   information --

20   THE WITNESS: The information -- oh.

21   MR. PATTON: -- subject to the state

22   secrets and statutory privileges, and instruct the

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 1   witness not to answer.

 2   THE WITNESS: I'll follow.

 3   BY MR. ABDO:

 4   Q   With respect to upstream surveillance

 5   as it operated in 2015, did the term "filtering

 6   mechanism" include, quote, the use of a screening

 7   device in the upstream Internet collection process

 8   to acquire only Internet transactions containing

 9   at least one task selector?

10   A   It appears you're reading from

11   something. Could you just refer me to where those

12   words exactly are to make sure I have the full

13   context?

14   Q   Sure. The last portion of my question

15   was a direct quote from the NSA's response to

16   Interrogatory No. 5 in Exhibit 42 on page 10, the

17   text marked "RESPONSE."

18   A   Okay. And so could you read your

19   question once more?

20   Q   With respect to upstream surveillance

21   as it operated in 2015, did the term "filtering

22   mechanism" include, quote, the use of a screening

1   device in the upstream Internet collection process

2   to acquire only Internet transactions containing

3   at least one task selector?

4   A   So I would look at Interrogatory 4. I

5   understand you pointed me to the response to

6   Interrogatory 5, but the process is we filter for

7   wholly domestic communications, and then we do the

8   scanning to ensure that we're only -- we're doing

9   a scan using a screening device designed to

10   identify for acquisition Internet transactions.

11   And in 2015, it would have been to,

12   from, or about persons targeted; today, it's to or

13   from persons targeted, in parens, with our

14   targeting procedures.

15   Q   Okay. What I'm trying to understand

16   is whether the use of a screening device is part

17   of the filtering mechanism process described in

18   NSA's response to Interrogatory 3?

19   MR. PATTON: Objection, calls for

20   information that's classified, subject to state

21   secrets and statutory privileges.

22   Instruct the witness not to answer.

1   THE WITNESS: Follow instruction.

2   BY MR. ABDO:

3   Q   Would you be able to answer the

4 question if I asked whether the use of a screening

5 device could be part of the filtering mechanism

6 described in the NSA's response to Interrogatory 3

7 on pages 7 to 8 of Exhibit 42?

8   MR. PATTON: Just a second.

9   Can you read back that question?

10   BY MR. ABDO:

11   Q   Let me state it more clearly because

12 that's a bit fragmentary.

13   With respect to upstream surveillance

14 as it operated in 2015, could the term "filtering

15 mechanism" include, quote, the use of a screening

16 device in the upstream Internet collection process

17 to acquire only Internet transactions containing

18 at least one task selector?

19   MR. PADGETT: I'm sorry, I need to

20 hear that one more time.

21   (The reporter read back the question.)

22   MR. PADGETT: I guess I would ask,

1   before we instruct the witness whether they can

2   answer or not, are you referring to filtering

3   mechanism as used in the document that's referred

4   to by Interrogatory No. 3?

5   MR. ABDO: Yes.

6   MR. PADGETT: So can we see?

7   MR. ABDO: It's one of your briefs

8   from the Fourth Circuit.

9   MR. PATTON: Let's go off the record.

10   (Off the record at 3:26 p.m.)

11   (Resume at 3:38 p.m.)

12   (The reporter read back the question.)

13   MR. PATTON: Objection, vague.

14   You can answer.

15   THE WITNESS: Okay. So I think the

16   best description for how the process works in the

17   unclassified realm is going to be on page 37 of

18   the PCLOB Report, which is Exhibit 43.

19   To the extent that the -- so where it

20   says -- the sentence starting, "The provider is

21   compelled to assist the government in acquiring

22   communications across these circuits, to identify

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1   and acquire Internet transactions associated with

2   the Section 702 task selectors on the Internet

3   backbone. Internet transactions are first

4   filtered to eliminate potential domestic

5   transactions, and then are screened to capture

6   only transactions containing a task selector."

7   Now, my understanding is that there's

8   this other brief that comes up with a new term

9   called "filtering mechanisms"; that's not meant to

10   be something special or otherwise different from

11   the process that was described in PCLOB.

12   To the extent that you have specifics

13   about the how and the when and the what, that

14   would be classified, but those were not designed

15   to be somehow describing something different.

16   BY MR. ABDO:

17   Q   Okay. And for the record, you're

18   reading from the top of page 37 of Exhibit 43,

19   correct?

20   A   That is correct.

21   Q   The sentence beginning, "To identify

22   and acquire"?

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 1   A   That is correct.

 2   Q   So would the use of an IP filter fall

 3   within the description of that sentence in which

 4   it says, "Internet transactions are first filtered

 5   to eliminate potential domestic transactions"? Is

 6   that where an IP filter could be used?

 7   A   Yes, that is an example of where -- an

 8   IP filter is an example of something that could be

 9   used to do that filter.

10   Q   Okay. And is the use of a screening

11   device described in the NSA's response to

12   Interrogatory 5 in Exhibit 42, is that use of a

13   screening device what could be used to accomplish

14   what is described in the second portion of the

15   sentence that you were reading from page 37 of

16   Exhibit 43, that second part saying, quote, then

17   our screened capture only transactions containing

18   a task selector?

19   A   Yes.

20   Q   Okay. And with respect to upstream

21   surveillance as it operated in 2015, what else

22   could the term -- sorry, what else -- what other

1   processes could be used to accomplish either the

2   filtering or the screening described in the

3   sentence you were reading from page 37 of

4   Exhibit 43?

5   MR. PATTON: Objection, calls for

6   classified information, information subject to the

7   statutory privileges.

8   Instruct the witness not to answer.

9   THE WITNESS: I will follow the

10   instructions.

11   BY MR. ABDO:

12   Q   Okay. Are all transactions that were

13   subject to upstream surveillance in June 2015

14   subjected to Internet protocol filtering --

15   MR. PATTON: Objection.

16   BY MR. ABDO:

17   Q   Sorry, let me just finish the question

18   real quick.

19   -- to eliminate potential domestic

20   transactions from upstream surveillance?

21   MR. PATTON: Objection, calls for

22   classified information, information subject to the

 1   statutory privileges.

 2   Instruction not to answer the

 3   question.

 4   THE WITNESS: I will follow the

 5   instructions.

 6   BY MR. ABDO:

 7   Q   Can you please describe all the ways

 8   in which the NSA could determine in 2015 or could

 9   determine today whether a transaction is wholly

10   domestic in order to filter it out from upstream

11   surveillance?

12   MR. PATTON: Just a moment.

13   (Counsel conferring.)

14   MR. PATTON: Could you break that down

15   into 2015 to 2017 to make it clear?

16   BY MR. ABDO:

17   Q   Could you please describe all the ways

18   in which the NSA could determine in 2015, as part

19   of upstream surveillance, whether a transaction is

20   wholly domestic so as to filter it out?

21   MR. PATTON: Objection, calls for

22   classified information in order to respond fully

 1   to that question.

 2   There may be an unclassified response

 3   to that question, but without knowing what the

 4   witness's answer would be, I'm not comfortable

 5   just turning that over to her, but I believe there

 6   is an unclassified response, but it's also one

 7   that she has given you already.

 8   BY MR. ABDO:

 9   Q   Okay. If there's nothing more that

10   you could say that's unclassified, let me know

11   that you'll follow your counsel's instruction not

12   to provide any further information.

13   A   There's no additional information that

14   can be provided. What you see here is as much

15   unclassified information as available.

16   Q   And by "here," you're referring to

17   Exhibit 43, page 37?

18   A   Page 37, or the interrogatories.

19   Q   The responses we've been discussing?

20   A   The responses, yeah. There's no

21   additional information to be provided.

22   Q   Okay. What does it mean to say, as

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1   the NSA's response to Interrogatory 3 does, that

2   wholly domestic Internet transactions are, quote,

3   eliminated? And that's in Exhibit 42, I think at

4   page 7 to 8.

5   MR. PATTON: Object to the extent it

6   calls for classified information and information

7   protected by the statutory privileges.

8   There is an unclassified answer that

9   the witness can give.

10   THE WITNESS: So you're asking what

11   does it mean to eliminate?

12   BY MR. ABDO:

13   Q   Yes.

14   A   So I think if you look at the

15   response, it's important to understand that it

16   starts with -- the sentence is that the devices

17   utilized in the upstream Internet collection

18   process that were designed to eliminate wholly

19   domestic transactions.

20   So they were -- it's important to

21   recognize it was designed, not that it was

22   actually done.

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 1          Q     Understood.  So let me then be clear.

 2                What does it mean to say -- what were

 3     they designed to do in eliminating wholly

 4     domestic --

 5          A     So that they wouldn't --

 6          Q     -- transactions?

 7                MR. PATTON:  Same objection, same

 8     instruction.

 9                THE WITNESS:  They're designed so that

10     they don't make it through to being ingested by

11     NSA's -- into NSA's repository.  That's what it

12     means to be designed to eliminate.

13                BY MR. ABDO:

14          Q     And the repository is what holds

15     communications that contain a selector and are not

16     wholly domestic as of June 2015?

17                MR. PATTON:  Object to the extent it

18     calls for classified information and statutory

19     privileges.  You can answer to the extent

20     unclassified.

21                THE WITNESS:  So --

22
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 1              BY MR. ABDO:

 2       Q    I'm just trying to understand.

 3              When you say "ingested," you're

 4  referring to the databases or the places in which

 5  the NSA stores communications that are ultimately

 6  authorized by Section 702 to collect?

 7       A    Yes, yes.  It's when NSA collects it.

 8              MR. PATTON:  Same objections.

 9              THE WITNESS:  Yes.  NSA collects,

10  acquires, ingests.  It's the point at which NSA

11  now has it.

12              BY MR. ABDO:

13       Q    Understood.  Can an e-mail address be

14  a selector under upstream surveillance?

15       A    Yes.

16       Q    Can a phone number be a selector under

17  upstream surveillance?

18       A    Yes.

19       Q    Can an Internet protocol address be a

20  selector under upstream surveillance?

21              MR. PATTON:  Objection, calls for

22  classified information and privileged information
```

 1   pursuant to the statutes aforementioned, and

 2   instruct the witness not to answer the question.

 3   THE WITNESS: I will follow the

 4   instructions.

 5   BY MR. ABDO:

 6   Q   Can a URL, or uniform resource

 7   locator, be a selector under upstream

 8   surveillance?

 9   MR. PATTON: Same objection, same

10   instruction.

11   THE WITNESS: Will follow the

12   instruction.

13   MR. PATTON: Just a moment.

14   MR. PADGETT: Let's go off the record

15   to discuss.

16   (Off the record at 3:49 p.m.)

17   (Resume at 3:53 p.m.)

18   BY MR. ABDO:

19   Q   We're back from break, and the

20   question was can a URL be a selector under

21   upstream surveillance?

22   MR. PATTON: Objection, calls for

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 1   classified information and information protected

 2   by the statutory privileges.

 3                 Instruct the witness not to answer.

 4                 THE WITNESS:  I will not answer.

 5                 BY MR. ABDO:

 6        Q    Could a URL be a selector under

 7   upstream surveillance as of June 2015?

 8                 MR. PATTON:  Same objection, same

 9   instruction.

10                 THE WITNESS:  Will follow the

11   instruction.

12                 BY MR. ABDO:

13        Q    Are the selectors used for upstream

14   surveillance the same as those used for PRISM

15   surveillance as of June 2015?

16                 MR. PATTON:  Same objection, same

17   instruction.

18                 THE WITNESS:  Wait, I'm sorry.  Can

19   you ask the question again?

20                 BY MR. ABDO:

21        Q    Sure.  I'll modify it slightly to make

22   it grammatically correct.
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 1   Were the selectors used for upstream

 2   surveillance the same as those used for PRISM

 3   surveillance in June 2015?

 4   MR. PATTON: Same objection, same

 5   instructions.

 6   THE WITNESS: Can you just --

 7   MR. ABDO: Ms. Jaques, would you mind

 8   marking this as Exhibit -- you're still looking at

 9   something for this question?

10   THE WITNESS: Yes, I am.

11   The only thing I would state which is

12   definitely not classified is on page 6 of the

13   Civil Liberties and Privacy Office Report,

14   Exhibit 44. At the very top of page 6 it says,

15   "The process for approving the selectors for

16   tasking is the same for both PRISM and upstream

17   collection."

18   I realize that's not exactly the

19   question you were asking, but I just wanted to

20   make sure you had that piece of information.

21   BY MR. ABDO:

22   Q   Thank you. Ms. Jaques, would you mind

1   marking this 46? And it's the entire folder.

2   (Deposition Exhibit 46 was

3   marked for identification.)

4   BY MR. ABDO:

5   Q   Ms. Richards --

6   A   Oh, this is fabulous, okay.

7   Q   You have in front of you what's marked

8   as Exhibit 46. Do you recognize that document?

9   A   I do.

10   Q   And what is that document?

11   A   This is the Privacy and Civil

12   Liberties Oversight Board Public Hearing Regarding

13   the Surveillance Program Operated Pursuant to

14   Section 702 of the Foreign Intelligence

15   Surveillance Act, March 19, 2014.

16   Q   Did employees of the NSA testify at

17   that hearing?

18   A   Yes.

19   Q   And they were testifying in their

20   official capacity as NSA employees?

21   A   Yes.

22   Q   Could you turn to page 57 of the

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 1   transcript? Do you see at lines 17 to 20 there's

 2   a statement that's labeled as coming from Mr. De,

 3   spelled D-E?

 4   Do you understand that to be -- who do

 5   you understand that to be?

 6   A   I'm sorry, we're at line?

 7   Q   Lines 17 to 20 of page 57.

 8   A   17 to 20, okay.

 9   Q   Of Exhibit 46.

10   A   Mr. De. Oh, let me just --

11   Q   Before getting to the substance of

12   that sentence, which we'll give you a chance to

13   read in a second, do you know who this Mr. De is

14   who is being referred to?

15   A   Yes. He was the general counsel at

16   the time of NSA.

17   Q   And for the record, his full name is

18   Rajesh De?

19   A   Yes.

20   Q   Could you now read those two lines --

21   those four lines, 17 to 20 on page 57, to

22   yourself?

 1   A   (Witness reviewing document.) Okay.

 2   Q   What do you understand Mr. De to have

 3   been communicating in this first sentence? And

 4   the first sentence was, quote, "And it's the same

 5   selectors that are used for the PRISM program that

 6   are also used for upstream collection."

 7   MR. PATTON: Objection to form, vague.

 8   MR. ABDO: You can answer.

 9   THE WITNESS: I think similar to what

10   I just read to you, the words on the face of it

11   seem accurate.

12   I'm not sure what you're trying to ask

13   me. Maybe you can help clarify.

14   BY MR. ABDO:

15   Q   What I'm trying to understand is

16   whether the selectors that are used for PRISM are

17   also used for Upstream collection, and that seems

18   to be on the face of the statement what Mr. De

19   said at the hearing transcribed in Exhibit 46, but

20   I understood you to refuse to answer the question

21   of whether the selectors that are used for the

22   PRISM program are also used for Upstream

1   collection, so I'm trying to understand what the

2   difference is between my question and this

3   statement.

4   A   I think I need to go -- sorry.

5   MR. PADGETT: Can I ask a clarifying

6   question? Because it might involve an

7   instruction.

8   MR. PATTON: Right. There's also a

9   difference of what we're talking about here, so I

10   don't know whether the witness is aware of that,

11   the differences.

12   MR. ABDO: Are you saying you need to

13   talk in the SCIF?

14   MR. PATTON: I don't know that we need

15   time to talk in the SCIF, but the objection was to

16   something A, and this is meaning something B, if

17   you know what I mean, and therefore I want to get

18   you that answer because I think that answer is

19   unclassified.

20   MR. ABDO: Is there an answer that the

21   witness --

22   MR. PATTON: Because I can understand

1   why you're having this question, but I'm trying to

2   figure out the best way to get you that

3   unclassified answer.

4   BY MR. ABDO:

5   Q   Ms. Richards, do you understand the

6   distinction your counsel is drawing between this

7   statement by Mr. De at the hearing transcribed in

8   Exhibit 46 and the question that I asked a few

9   moments ago about whether selectors used for

10   Upstream are the same as those used for PRISM

11   surveillance?

12   If you know the answer to my question,

13   could you please answer it?

14   A   So let me see if I can restate the two

15   different questions, and maybe I need to have you

16   read back to me what you asked before and we

17   objected to on classified, which is this statement

18   states, "it's the same selectors that are used for

19   the PRISM program that are also used for upstream

20   collection."

21   A few minutes ago, you had asked

22   whether this was true, and I declined to comment

 1   for classified purposes.

 2   Q   Right.

 3   A   That's the --

 4   Q   Well, let me phrase it this way.

 5   Is the statement that Mr. De made at

 6   this hearing in March of 2014 true, or was it true

 7   at that time that, quote, it's the same selectors

 8   that are used for the PRISM program that are also

 9   used for upstream collection?

10   A   I would like to confer in the SCIF

11   before I give you the answer to both of those

12   questions.

13   MR. PATTON: I just want to seek

14   clarification for the record.

15   Are you concerned that there's a

16   privilege issue, a classification issue? Is that

17   your concern?

18   THE WITNESS: Yes.

19   MR. PATTON: Okay.

20   THE WITNESS: Not with this sentence.

21   MR. PATTON: Not with the sentence,

22   but whether or not you can answer --

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1   THE WITNESS: With the other question

2 that was asked.

3   BY MR. ABDO:

4   Q   I see. If I were to rephrase my

5 previous question to be were the selectors used

6 for PRISM surveillance in June 2015 the same as

7 those used for Upstream surveillance?

8   MR. PATTON: I have to object to the

9 question as to its vagueness. There is an

10 unclassified answer and there's a classified

11 answer, and --

12   THE WITNESS: And I'm tripping over

13 which one, so I just need to go --

14   MR. PATTON: -- and I want to get you

15 the unclassified answer.

16   MR. ABDO: Okay. Can we take a break

17 and go off the record while you guys confer in the

18 SCIF?

19   (Off the record at 4:03 p.m.)

20   (Resume at 4:13 p.m.)

21   BY MR. ABDO:

22   Q   We're back on the record.

 1   The question we left with,

 2   Ms. Richards, was what Mr. De meant in the hearing

 3   in March 2014, transcribed in Exhibit 46, when he

 4   said, "And it's the same selectors that are used

 5   for the PRISM program that are also used for

 6   upstream collection."

 7   MR. PATTON: Objection to the extent

 8   it calls for classified information and

 9   information protected by the statutory privileges.

10   You can answer to the extent

11   unclassified.

12   THE WITNESS: Okay. So in looking at

13   page 57, it's important to roll back to roughly

14   around page 55 and understand what they were

15   talking about at this point. And, specifically, I

16   would bring you to -- okay, I'm sorry, go back to

17   54. Where did the language just go? Okay,

18   I'm sorry, page 56.

19   So Mr. Wiegmann says, "About that

20   selector, correct."

21   And then Mr. De says, "It is always

22   focused on that account, so I think the key is,

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1   the misperception that some may have that 'about'

2   collection is somehow about a key word or about

3   the person that may be behind that account.

4   "But all collections under

5   Section 702, whether it's upstream abouts, which

6   is a subset of upstream, or PRISM is all based on

7   the selectors at issue."

8   Then we have Ms. Brand says, "Just to

9   follow-up on that because that's a good line of

10 inquiry, just to make sure that everyone

11 understands. So you're saying that if someone is

12 emailing about Rachel Brand or about explosives

13 that would not be a permissible about query under

14 your explanation?"

15   And Mr. De goes on, and what he's

16 explaining then, when we get down to lines 17 to

17 20, is the type of selectors is the context for

18 this exchange back and forth, which is then

19 how this is -- in talking about the types of

20 selectors, as opposed to "bomb" or "explosive" or

21 a name, he's explaining that these are the same

22 types of selectors.

 1   That is what's the unclassified fact,

 2   and then it's furthered by the sentence I

 3   mentioned in the Civil Liberties and Privacy

 4   Office Report, as opposed to your question you

 5   asked earlier where we said that's classified.

 6   BY MR. ABDO:

 7   Q   I think I understand.

 8   A   Okay.

 9   Q   Moving on a bit.

10   As of 2015, did the procedures

11   approved by the FISC for upstream surveillance

12   permit the NSA to collect an international HTTP

13   transmission of a website if the text of that

14   website contained a selector?

15   MR. PATTON: Objection, calls for

16   classified information and information subject to

17   the statutory privileges.

18   Instruct not to answer the question.

19   THE WITNESS: I will follow the

20   instruction.

21   BY MR. ABDO:

22   Q   Okay. Sorry, just one second.

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 1   (Deposition Exhibit 47 was

 2   marked for identification.)

 3   BY MR. ABDO:

 4   Q   Ms. Richards, you have in front of you

 5   what's been marked as Exhibit 47.

 6   Do you recognize this document?

 7   A   Yes.

 8   Q   What is it?

 9   A   This is the government's response to

10   the Court's briefing order of May 9th, 2011.

11   Q   With the Court being the Foreign

12   Intelligence Surveillance Court?

13   A   Yes.

14   Q   Do you know which agency of government

15   authored this document?

16   A   It's submitted by the National --

17   MR. PATTON: Objection to form, vague.

18   THE WITNESS: -- National Security

19   Division of the Department of Justice, and

20   verified by National Security Agency.

21   BY MR. ABDO:

22   Q   Okay. When you say "verified," you

 1   mean verified as to the accuracy of the statements

 2   within it?

 3   A   Yes, to the best of the knowledge of

 4   the individual doing it.

 5   Q   Would you mind turning to page 30 of

 6   Exhibit 47? And I should have mentioned at the

 7   outset, Exhibit 47 is Bates stamped

 8   NSA-WIKI 237 -- sorry, I may not have the full

 9   version in mine. Sorry, NSA-WIKI 234 to 277.

10   Okay, if you turn to page 30, which is

11   marked NSA-WIKI 266, toward the bottom there's a

12   sentence that begins "this figure," and I'll read

13   it. "This figure was then compared to the total

14   take of Section 702 upstream collection of web

15   activity for the month."

16   Do you know the context in which this

17   sentence was written in unclassified terms?

18   A   Can you clarify your question? I'm

19   not sure I know what you're asking.

20   Q   Was the context of this sentence an

21   effort to respond to the FISC's inquiry of the NSA

22   about the volume of certain forms of the NSA's

1   upstream collection?

2   A   Can you repeat?

3   Q   I'll repeat that.

4   Does this sentence come in a paragraph

5   responding to the FISC's inquiry of the NSA about

6   the volume of certain forms of the NSA's upstream

7   collection activity?

8   A   Yes.

9   Q   And was this sentence explaining how

10   the Department of Justice and the NSA arrived at

11   certain figures it was relaying to the FISC in

12   responding to the question?

13   A   Yes.

14   Q   What does "web activity" mean in the

15   context of Internet communications?

16   MR. PATTON: Object to the form of the

17   question to the extent it calls for a classified

18   answer or an answer that would be subject to the

19   statutory privileges.

20   The witness can answer if there's an

21   unclassified answer.

22   THE WITNESS: I'm going to read this

 1   answer over once more before I give you --

 2   BY MR. ABDO:

 3   Q   Please. Maybe I can rephrase the

 4   question for you.

 5   A   Sure.

 6   Q   Do you understand "web activity" to

 7   refer to activity of the World Wide Web -- or

 8   activity on the World Wide Web?

 9   MR. PATTON: Just a second.

10   (Counsel conferring.)

11   MR. PATTON: I'm just going to object

12   to the vagueness.

13   THE WITNESS: I would refer that to

14   meaning as a way of generally talking about the

15   collection of discrete Internet communications.

16   BY MR. ABDO:

17   Q   Would you understand it to refer to

18   collection -- let me ask this.

19   Would Internet web browsing constitute

20   web activity?

21   MR. PATTON: Objection, calls for

22   classified information to the extent that it's

1   being asked in the context of upstream collection

2   in this particular document, and subject to that

3   objection and to the statutory privileges that

4   would protect that.

5   I instruct the witness not to answer

6   the question.

7   THE WITNESS: I will follow the

8   instruction.

9   BY MR. ABDO:

10   Q   Do you understand the meaning of the

11   term "web activity" generally, not with regard to

12   this document?

13   A   Yes.

14   MR. PATTON: Object. Object that it's

15   beyond the scope of the 30(b)(6), but the witness

16   can answer.

17   BY MR. ABDO:

18   Q   What does it mean generally beyond --

19   you know, outside of the context of this document,

20   Exhibit 47?

21   MR. PATTON: Same objection.

22   THE WITNESS: You say activity on the

1   Internet?

2   BY MR. ABDO:

3   Q   Any activity on the Internet. You

4   don't understand "web activity" to be distinct

5   from "Internet activity"?

6   MR. PATTON: Same objection.

7   THE WITNESS: I think it's a vague

8   enough term it could be meant any number of

9   different things.

10   BY MR. ABDO:

11   Q   You don't understand it to mean

12   specifically the protocol referred to as the World

13   Wide Web, which encompasses HTTP and HTTPS

14   communications? That's not how you understand an

15   Internet professional would understand that term?

16   MR. PATTON: Same objection, adding

17   objection that it calls for expert opinion, and

18   also object that it's asked and answered.

19   THE WITNESS: I don't think there's a

20   set definition for "web activity." I think it

21   could mean Internet activity, it could mean World

22   Wide Web activity. It could mean any of those

 1   different -- those particular different ones.

 2   I think you have to look at the

 3   context for the sentence, and then make a decision

 4   accordingly.

 5   BY MR. ABDO:

 6   Q   Do you have any reason to believe that

 7   this sentence was inaccurate, "this sentence"

 8   again in Exhibit 47 beginning, "This figure was

 9   then compared"?

10   A   No.

11   Q   Does it disclose classified

12   information?

13   MR. PATTON: As redacted?

14   MR. ABDO: As it appears in

15   Exhibit 47.

16   THE WITNESS: I don't think so.

17   BY MR. ABDO:

18   Q   To your knowledge, is the term

19   "web activity" ever otherwise used by the NSA in

20   publicly disclosed documents interchangeably with

21   "Internet activity" at large?

22   MR. PATTON: Object to the form,

 1   vague.

 2   THE WITNESS: I don't know that I've

 3   seen "web activity" used in other documents that

 4   are unclassified -- that have been declassified.

 5   To the extent you're going to show me one next --

 6   BY MR. ABDO:

 7   Q   I don't have one. I'm asking.

 8   A   So if this is the only instance of

 9   this and you're -- you know, I don't have -- I

10   haven't seen it in any of the other documents I've

11   read in the last few weeks, or since we've been

12   prepping for this, so --

13   Q   I'm not trying to play a game of

14   gotcha. I'm asking because your answer suggested

15   that you believe "web activity" to be essentially

16   used interchangeably with the very generic term

17   "Internet traffic" or "Internet communications,"

18   and I would assume, if that were the case, then

19   the NSA would in fact use that term

20   interchangeably, but I don't believe that to be

21   the case. I'm asking why that is.

22   MR. PATTON: Object to the extent it

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1   mischaracterizes prior testimony.

2   THE WITNESS: I don't have any

3   specific further information that would help

4   elucidate this conversation.

5   Anything further I might say would go

6   into a classified discussion, and so I can't give

7   you any further explanation as to the use of the

8   word "web" there.

9   BY MR. ABDO:

10   Q   Under upstream surveillance, as

11   conducted in June 2015, was the NSA permitted to

12   collect the communications of a foreign target

13   with a website in the United States?

14   MR. PATTON: Just a second.

15   (Counsel conferring.)

16   MR. PATTON: Object to the form, vague

17   and ambiguous, and also object that it could call

18   for classified information and information

19   protected by the statutory privileges.

20   Depending on what the question means,

21   there might be an unclassified answer.

22

 1   BY MR. ABDO:

 2   Q   Do you have an unclassified answer,

 3   Ms. Richards?

 4   MR. PATTON: And if she does, I'd like

 5   to hear it before she gives it to make sure that

 6   it is unclassified.

 7   BY MR. ABDO:

 8   Q   Let me give you another question to

 9   consider.

10   A   I was just going to say, do you have a

11   whole bunch of them, and then we can go and confer

12   on what those might be?

13   Q   I have one other.

14   A   Okay, but could you repeat that one

15   again?

16   Q   Let me repeat that one, and I'll tell

17   you the other one.

18   A   Yeah.

19   Q   The first one is, under upstream

20   surveillance as approved as of June 2015, was the

21   NSA permitted to collect the communications of a

22   foreign target -- that is, somebody who is a

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 1    foreign target of upstream surveillance -- abroad

 2    with a website in the United States?

 3               Do you understand my question?

 4         A    I do understand.

 5               I don't think there's an unclassified

 6    answer, but to the extent --

 7         Q    Okay.  The second question that I hope

 8    you'll consider in the SCIF, under upstream

 9    surveillance as it was implemented in June 2015,

10    was the NSA permitted to collect the transactions

11    or communications of a non-targeted foreigner

12    abroad with a website in the United States if the

13    website contained a selector tasked for

14    collection?

15         A    A non-targeted foreigner abroad on a

16    U.S. --

17         Q    With a website in the United States.

18         A    With a website in U.S.

19         Q    If the website contained a selector

20    task for collection.  You're generally --

21               MR. GILLIGAN:  I'm baffled by the

22    question.
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1   MR. ABDO: A non-foreign target -- I'm

2   sorry, a non-targeted foreigner abroad

3   communicating with a website in the United States,

4   and the website contains a selector.

5   MR. GILLIGAN: You mean communicating

6   with a website?

7   MR. ABDO: Yeah. They visit the

8   website, for example. They're communicating with

9   a website.

10   MR. GILLIGAN: Yeah, that's what was

11   baffling, what you meant by "with."

12   MR. ABDO: Communications to and from.

13   THE WITNESS: So the selector is

14   looking at the website?

15   BY MR. ABDO:

16   Q   Suppose a non-targeted foreigner

17   abroad is viewing a website, and the website is

18   stored on a web server in the United States, and

19   it contains a task selector --

20   A   The website?

21   Q   The website. And that task selector

22   is being communicated back to this non-targeted

1   foreigner abroad, and it passes through something

2   being monitored by the NSA in upstream

3   surveillance, did the NSA have the authority in

4   2015 to collect that communication?

5   MS. HANLEY COOK: Should we go off the

6   record now?

7   MR. ABDO: Okay, thanks.

8   MR. PATTON: Thank you.

9   (Off the record at 4:30 p.m.)

10   (Resume at 4:46 p.m.)

11   MR. PATTON: The witness has reviewed

12   in the interim the applicable targeting

13   procedures, the declassified public version of

14   those, and is prepared to make a statement on that

15   particular point, but we don't believe that

16   anything beyond what she's going to say can be

17   said on the public record.

18   So to the extent not covered by what

19   she's about to say, we object to the questions to

20   the extent they call for a classified response

21   subject to state secrets and subject to the

22   statutory privileges.

 1   THE WITNESS: The examples you

 2   provided are classified. How the targeting might

 3   or might not occur is all classified on page 5.

 4   It's all black, so we can't go any further into

 5   that information.

 6   If you would like to -- I'm sorry.

 7   I'm looking at Exhibit A, the procedures used by

 8   the National Security Agency for targeting

 9   non-United States persons reasonably believed to

10   be located outside the United States to acquire

11   foreign intelligence information pursuant to

12   Section 702 of the Foreign Intelligence

13   Surveillance Act of 1978 as amended. These are

14   dated June 2014.

15   BY MR. ABDO:

16   Q   What page were you looking at of

17   those?

18   A   5.

19   Q   If I understand, page 5 relates to the

20   NSA's method for assessing whether there would be

21   a foreign intelligence purpose for collecting

22   certain Internet communications, right?

 1   A   Yes.

 2   Q   My question didn't deal with whether

 3   the NSA in fact had reason to or would want to

 4   collect Internet communications.

 5   My question was, did the NSA, in June

 6   of 2015, have the authority to collect the

 7   communications of a foreign target abroad with a

 8   website in the United States?

 9   MR. PATTON: The answer to that

10   question is classified and subject to statutory

11   privileges.

12   Instruct the witness not to answer the

13   question.

14   THE WITNESS: I'll follow the

15   instructions.

16   BY MR. ABDO:

17   Q   And under upstream surveillance as

18   conducted in 2015, did the NSA have the authority

19   to collect the transactions of a foreigner abroad

20   with a website in the United States if the website

21   contained a selector task for collection?

22   MR. PATTON: Same objection, same

 1   instruction.

 2   THE WITNESS: I'll follow the

 3   instruction.

 4   BY MR. ABDO:

 5   Q   Are you aware that the Office of

 6   Director of National Intelligence has acknowledged

 7   that there was a time when overcollection of

 8   webmail in-boxes had contributed to the -- had

 9   occurred under upstream collection?

10   MR. PATTON: Just a second.

11   (Counsel conferring.)

12   THE WITNESS: Can you point to the

13   document or provide whatever that is?

14   BY MR. ABDO:

15   Q   I'm asking whether you're aware that

16   that's the case.

17   A   I would want to see where exactly ODNI

18   had said that information to make sure that I

19   wasn't somehow going into some sort of classified

20   discussion.

21   Without the context of what you're

22   saying, as we've seen a few times, sometimes the

1   information on its face looks like it says one

2   thing, as we just went through with Raj De's back

3   and forth. So without seeing the context of

4   whatever that is, I don't know how to answer.

5   Q   Let me ask a different question then.

6   Do you know the answer to the question

7   I asked? Well, let me ask that. Do you know the

8   answer to the question I asked?

9   MR. PATTON: Objection, vague as to

10   which question.

11   MR. ABDO: The question being whether

12   you're aware that the Office of Director of

13   National Intelligence has acknowledged that one of

14   the overcollection problems that the NSA had with

15   upstream surveillance involved the collection of

16   webmail in-boxes? Do you know the answer to that

17   question?

18   THE WITNESS: Again, without

19   confirming or denying, I need to see the document

20   you're referring to to better understand. I'm

21   just concerned I'm in classified territory.

22

 1   BY MR. ABDO:

 2   Q   I'm not asking you for an answer to

 3   that question. I'm asking whether you know the

 4   answer to that question first.

 5   A   I'm sorry, I don't know how to answer

 6   what you're saying.

 7   MR. GILLIGAN: It's circular. The

 8   question is whether she knows, so I don't know

 9   whether she knows the answer to that question is

10   the same question.

11   MR. ABDO: If forced to answer that

12   question, do you know whether you would say yes or

13   no? I'm not asking you to say yes or no, I'm

14   asking whether you know which one you would say if

15   you were forced to answer the question?

16   THE WITNESS: And so I'm sorry, I

17   don't know what document you're referring to. I

18   assume you're referring to some document somewhere

19   that ODNI published, and if I could see that so

20   that I could look at it, I would be able to tell

21   you whether I know the answer or not.

22   But in the abstract question of, "Do

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1   you know this?," I can't answer one way or the

2   other. So without sort of having some basis in

3   what we're looking at, I'm having a hard time

4   answering.

5   BY MR. ABDO:

6   Q   Okay. Was the collection of webmail

7   in-boxes in fact one of the overcollection

8   problems the NSA had with upstream surveillance

9   specifically with regard to multi-communications

10   transactions?

11   MR. PATTON: Just a moment.

12   (Counsel conferring.)

13   MR. PATTON: I just want to state for

14   the record that neither the witness nor I are

15   trying to be difficult here. We are concerned

16   about providing responses to information that we

17   haven't seen, and so I don't want to instruct the

18   witness not to answer the question if there's a

19   public document out there.

20   I think it would be better if you show

21   it to her. It will either refresh her

22   recollection and she'll be able to explain whether

1   she's seen it before or anything like that, but at

2   this point, she's not wanting to answer the

3   question, and I'm concerned that the answer may be

4   classified.

5   MR. ABDO: Are you able to determine

6   whether the answer is classified without knowing

7   whether there's a physical document in the world

8   that contains the information? Is that the

9   definition of "classified"?

10   MR. PATTON: No, it really gets to, at

11   this particular point, we don't know what it is

12   that you're referring to, and it may be an

13   unclassified document that the Director of

14   National Intelligence has said X, Y or Z. If

15   that's it, it provides the context and some form

16   of comfort for the witness, who is being asked to

17   determine what's on one side of the classified

18   line and what's not on the other.

19   She signed a Non-Disclosure Agreement

20   and is -- I mean, her responses to you so far have

21   tried to give you as much unclassified information

22   as possible. She's evidently concerned that if

1   she provides a response to this outside of any

2   context that she might be violating that NDA.

3   BY MR. ABDO:

4   Q   Are you aware that the Office of

5   Director of National Intelligence, on August 21st

6   of 2013, held a conference call with reporters in

7   which the Office of Director of National

8   Intelligence described the overcollection of

9   webmail in-boxes as an example of the

10   overcollection problem the NSA experienced under

11   upstream surveillance with regard to

12   multi-communication transactions?

13   MR. PATTON: Again, that may have

14   occurred on August 21st, 2013. It may be a

15   document that is a newspaper article that may or

16   may not be accurately depicting what ODNI said at

17   that time. And so our concern again, in the

18   abstract, is whether or not the information you're

19   providing is both accurate and unclassified.

20   MR. ABDO: Okay. So can I confirm, at

21   least for the time being, are you instructing the

22   witness not to answer the question?

 1   MR. PATTON: At the moment, I don't

 2   think the witness is in a position to answer the

 3   question. Factually, I don't know what it is that

 4   you're referring to. And given the amount of

 5   information that has been provided through

 6   unofficial sources, our concern, and my duty here,

 7   and the witness's duty, is to protect classified

 8   information, and we want to provide as much

 9   unclassified information as we can --

10   MR. ABDO: I understand. I'm just

11   asking a simple question, Rodney. Are you

12   instructing the witness not to answer?

13   MR. GILLIGAN: Tell you what, if we

14   step outside, I might be able to suggest a way

15   around this.

16   MR. ABDO: Can we go off the record?

17   (Off the record at 4:57 p.m.)

18   (Resume 5:04 p.m.)

19   THE WITNESS: Is there an outstanding

20   question? Where are we?

21   BY MR. ABDO:

22   Q   There was. Let me start with the

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1   question outstanding, which was are you aware that

2   the Office of Director of National Intelligence

3   has acknowledged that the NSA has collected

4   webmail in-boxes under upstream surveillance?

5   MR. PATTON: Object to the form as

6   beyond the scope of the 30(b)(6) notice, and the

7   witness can answer in her personal capacity.

8   THE WITNESS: I'm not aware.

9   BY MR. ABDO:

10   Q   Has the NSA collected webmail in-boxes

11   as part of upstream surveillance?

12   MR. PATTON: Object to the question,

13   calls for classified information and information

14   protected by the statutory privileges, and

15   instruct the witness not to answer the question.

16   THE WITNESS: I will follow the

17   instructions.

18   BY MR. ABDO:

19   Q   Okay. Are you familiar with the fact

20   that the contents of Internet communications are

21   transported in what is known as the application

22   layer of Internet packets?

1   MR. PATTON: Object to the question to

2   the extent it calls for classified -- I'm sorry,

3   I'm so used to that -- to the extent it calls for

4   expert opinion, and that it's beyond the scope of

5   30(b)(6).

6   THE WITNESS: Yes.

7   BY MR. ABDO:

8   Q   Okay. Are you aware of the fact that

9   the contents of an email communication are

10   transported within the application layer of

11   Internet packets?

12   MR. PATTON: Same objections.

13   THE WITNESS: Yes.

14   Isn't that what you just asked me?

15   BY MR. ABDO:

16   Q   The first question was with respect to

17   Internet communications generally, and the second

18   question was with respect to email communications

19   specifically.

20   A   Okay.

21   Q   Is your answer to both yes?

22   A   Yes. It sounded like the same one,

1   and I worried I was missing something.

2   Q   And are you aware of the fact that the

3   contents of a website are transported within the

4   application layer of Internet packets?

5   MR. PATTON: Same objections.

6   THE WITNESS: Yes.

7   BY MR. ABDO:

8   Q   Are the filtering or screening

9   processes that you've described with respect to

10   upstream collection as it operates -- or

11   excuse me, upstream surveillance as it operated in

12   June 2015 -- forms of deep packet inspection?

13   MR. PATTON: Objection.

14   (Counsel conferring.)

15   MR. PATTON: I'm sorry, could you read

16   that back?

17   BY MR. ABDO:

18   Q   Sure. Are the filtering or screening

19   processes that you've described under upstream

20   surveillance as conducted in June 2015 forms of

21   deep packet inspection?

22   MR. PADGETT: I'm sorry, one key thing

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1   I didn't get. Could you read that back?

2   (The reporter read back the question.)

3   MR. PATTON: Object to the question

4   because it calls for classified information and

5   information protected by the statutory privileges.

6   Instruct the witness not to answer.

7   THE WITNESS: I will follow the

8   instructions.

9   BY MR. ABDO:

10   Q   Are you familiar with the term "deep

11   packet inspection"?

12   MR. PATTON: Object to that question,

13   beyond the scope of 30(b)(6), and it calls for an

14   expert opinion.

15   THE WITNESS: In the general sense of

16   the word, as in not specific to anything in

17   particular, but known as the outside world?

18   BY MR. ABDO:

19   Q   Not specific to upstream surveillance,

20   but --

21   A   Yes.

22   Q   You are familiar with it?

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 1   A   Yes.

 2   Q   What does it mean?

 3   MR. PATTON: Same objections.

 4   THE WITNESS: It's the concept of --

 5   I'm sorry, I'm --

 6   BY MR. ABDO:

 7   Q   Is it the process of examining or

 8   analyzing the application layer of packets

 9   traversing the network?

10   MR. PATTON: Same objections.

11   THE WITNESS: Yeah, I'm -- yes. Yes,

12   that's a fine description.

13   BY MR. ABDO:

14   Q   Tell me again your position at the

15   Department of Homeland Security.

16   A   I was the Senior Director for Privacy

17   Compliance in the Privacy Office.

18   Q   And you participated in the drafting

19   of Privacy Impact Assessments?

20   A   I did.

21   Q   Were you involved in the Privacy

22   Impact Assessments conducted for the Einstein 2 or

 1   Einstein 3 programs?

 2   A   Yes, which is why I changed the answer

 3   when you asked about the four types of sort of --

 4   Q   Ah, got it.

 5   A   When I rechanged it, I realized that

 6   would probably constitute what you were

 7   considering to be surveillance.

 8   Q   Network surveillance?

 9   A   Network surveillance.

10   Q   Did Einstein 2 involve deep packet

11   inspection?

12   A   I honestly don't remember.

13   MR. PATTON: Just object to that

14   question as beyond the scope of 30(b)(6). I'm not

15   sure whether the answer is unclassified or not

16   since I have not consulted with the Department of

17   Homeland Security, but if the witness knows of an

18   unclassified answer, the witness can give an

19   unclassified answer.

20   BY MR. ABDO:

21   Q   Sorry, please go ahead.

22   A   I apologize, but I don't remember what

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1   is classified or unclassified about the Einstein 2

2   PIA, so unless you have a copy of what was

3   published, I can't speak to the specifics of what

4   was in it.

5   Q   Okay. Are you familiar with

6   Einstein 3? Generally, not anything specific, but

7   are you aware of the Department of Homeland

8   Security's intrusion detection and intrusion

9   prevention program known as Einstein 3

10   Accelerated?

11   MR. PATTON: Objection to beyond the

12   scope of 30(b)(6), potentially classified. I'll

13   have to rely on the witness, who may be more

14   familiar with the DHS program certainly than me.

15   If there's a unclassified answer, you can give it

16   in your personal capacity.

17   MR. ABDO: Surely the existence of

18   this program is unclassified, but --

19   MR. PATTON: I'm not willing to take

20   the risk.

21   BY MR. ABDO:

22   Q   Did you work on the Privacy Impact

 1   Assessment for Einstein 3?

 2   MR. PATTON: Same set of objections.

 3   THE WITNESS: Generally speaking, yes,

 4   because every PIA that was approved by the

 5   Department of Homeland Security at that point was

 6   reviewed by me.

 7   BY MR. ABDO:

 8   Q   Okay. Are you aware that Einstein 3

 9   was part of the comprehensive cybersecurity

10   initiative announced by the Obama administration?

11   A   Yes.

12   MR. PATTON: Same objections.

13   THE WITNESS: Oh, sorry.

14   BY MR. ABDO:

15   Q   And are you aware that, in announcing

16   that, the administration also made clear that

17   Einstein 3 was implemented with the technological

18   support of the NSA?

19   MR. PATTON: Same objections.

20   THE WITNESS: Do you have a document

21   that provides that information?

22   MR. ABDO: Sure.

 1   (Deposition Exhibit 48 was

 2   marked for identification.)

 3   BY MR. ABDO:

 4   Q   You have what's been marked as

 5   Exhibit 48 in front of you, Ms. Richards.

 6   Do you recognize this document?

 7   MR. PATTON: Object to this document

 8   as beyond the scope of 30(b)(6), but the witness

 9   can answer this and any other series of questions

10   you have that have unclassified answers and are

11   within her personal knowledge.

12   THE WITNESS: Yes, I've seen this

13   document before. It's been quite some time.

14   BY MR. ABDO:

15   Q   Can you tell us what it is?

16   A   It's the Comprehensive National

17   Cybersecurity Initiative.

18   There it is. Look at that.

19   Q   Would you turn to page 3 of it, about

20   halfway down, two-thirds of the way down, the

21   sentence beginning, "DHS is currently conducting

22   a[n] exercise" -- I think they meant an

 1   exercise -- "to pilot the EINSTEIN 3 capabilities

 2   described in this initiative based on technology

 3   developed by NSA to solidify processes for

 4   managing and protecting information gleaned from

 5   observed cyber intrusions."

 6   A   Yes.

 7   Q   So is it true that the Einstein 3

 8   program was piloted based on technology developed

 9   by the NSA?

10   MR. PATTON: Just a moment.

11   (Counsel conferring.)

12   THE WITNESS: Do you have the date of

13   this document?

14   BY MR. ABDO:

15   Q   I believe it's 2010, but I don't know

16   off the top of my head.

17   A   Could I see your Einstein 3 PIA?

18   Q   We've got another copy of it. Can we

19   mark this too, Dawn?

20   (Deposition Exhibit 49 was

21   marked for identification.)

22

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 1            BY MR. ABDO:

 2       Q    So just for the record, you're now

 3  looking at what's been marked as Exhibit 49.

 4            Do you recognize that?

 5       A    Yes.

 6       Q    What is that document?

 7       A    The Privacy Impact Assessment for the

 8  National Protection and Programs Directorate,

 9  Department of Homeland Security, Einstein 3

10  Accelerated (E3A), dated April 19th, 2013.

11       Q    Okay.  And for the record, you

12  participated in the drafting of that assessment?

13       A    I reviewed it.

14       Q    Okay.  If you're not quickly familiar

15  with the answer to a question, that's fine, we can

16  move on.  I was just asking whether the

17  Comprehensive National Cybersecurity Initiative --

18       A    So my answer to you --

19            MR. PATTON:  Just a second.

20            THE WITNESS:  I'm sorry.

21            MR. PATTON:  Just preserving my

22  objection that both Exhibit 48 and Exhibit 49,
```

1   that series of questions are outside the scope of

2   30(b)(6), and the witness is answering in her

3   personal capacity.

4   THE WITNESS: To the extent that the

5   CNCI information is from 2010, stating something

6   specific about NSA-developed technology, and not

7   having reviewed this in almost five years, I would

8   have to look at those and really understand

9   whether what was described in 2010 actually got

10   implemented in 2013.

11   MR. ABDO: Understood. Okay.

12   MR. GILLIGAN: Sorry, is that 49

13   there?

14   MR. ABDO: 49, yeah.

15   THE WITNESS: I can read it if you

16   would like me to, but --

17   BY MR. ABDO:

18   Q   No, that's okay.

19   Is it correct that in upstream

20   collection that NSA obtains what it calls

21   transactions?

22   A   Internet transactions.

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```
1           Q    Internet transactions.  Sorry, yes,

2    internet transactions.

3           A    Yes.

4           Q    Do the Internet packets that

5    constitute a single Internet transaction have a

6    common destination?

7                MR. PATTON:  Objection.  Just a

8    second.

9                (Counsel conferring.)

10               MR. PATTON:  We're just trying to see

11   if there's an unclassified response to that.

12               THE WITNESS:  Uh-uh.

13               MR. PATTON:  Objection, calls for a

14   classified response and information subject to the

15   statutory privileges.

16               Instruct the witness not to answer.

17               THE WITNESS:  Instructions will be

18   followed.

19               BY MR. ABDO:

20          Q    Okay.  Do the Internet packets that

21   constitute a single Internet transaction have a

22   common source?
```

 1   MR. PATTON: Same objection, same

 2   instruction.

 3   THE WITNESS: Will follow the

 4   instructions.

 5   BY MR. ABDO:

 6   Q   Are you familiar with the term "flow"

 7   or "network flow" as used in the context of

 8   Internet communications?

 9   MR. PATTON: Objection, it's beyond

10   the scope of 30(b)(6), and it's calling for an

11   expert opinion.

12   THE WITNESS: I am, but don't make me

13   define them.

14   BY MR. ABDO:

15   Q   Is an Internet transaction, as

16   understood by the NSA, the same as a flow or

17   network flow as used in the context of Internet

18   communications?

19   MR. PATTON: Just a moment. I don't

20   think she can answer that.

21   THE WITNESS: Uh-uh, no. No, I can't

22   answer that.

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 1   (Counsel conferring.)

 2   MR. PATTON: Same objection, same

 3   instruction.

 4   THE WITNESS: And will follow the

 5   instruction.

 6   BY MR. ABDO:

 7   Q   And the reason you can't answer is

 8   because it would disclose classified information?

 9   A   No.

10   Q   Not because you're not familiar with

11   the definition of "flow"?

12   A   No, not because -- no, that is

13   correct. I know what flow is, I just don't --

14   that's classified.

15   Q   Okay. Is the definition of "flow"

16   classified?

17   MR. PATTON: Objection, beyond the

18   scope.

19   BY MR. ABDO:

20   Q   In general as that term is commonly

21   used in the network communications industry?

22   MR. PATTON: Objection, it's beyond

1   the scope, and calling for telecommunications

2   expert opinion.

3   THE WITNESS: As you've just

4   described, it's the general meaning. There's no

5   specific definition. Internet transaction is an

6   NSA definition. It's not a commonly understood

7   telecommunications one.

8   So it, like -- there was one another

9   we had earlier today. So there's sort of

10   different groups of NSA-specific versus the

11   outside world would know what they are. "Internet

12   transaction" is one of those.

13   BY MR. ABDO:

14   Q   What about network flow, flow or

15   network flow?

16   A   Those would be the normal everyday use

17   of the words.

18   Q   In other words, the NSA doesn't have a

19   special definition of that term?

20   A   Correct.

21   Q   Okay. Can we take a five-minute

22   break?

  1   MR. PATTON: Sure.

  2   (A break was taken at 5:21 p.m.)

  3   (Resume at 5:35 p.m.)

  4   EXAMINATION BY COUNSEL FOR

  5   WIKIMEDIA FOUNDATION AND THE ACLU

  6   BY MR. TOOMEY:

  7   Q   Ms. Richards, so I'm going to be

  8 asking some --

  9   MR. ABDO: Why don't you introduce

 10 yourself.

 11   BY MR. TOOMEY:

 12   Q   I'm Patrick Toomey. I'm counsel for

 13 Wikimedia Foundation from the American Civil

 14 Liberties Union.

 15   So carrying on, in the course of

 16 upstream surveillance, does the NSA review the

 17 contents of communications as they are in transit

 18 on the Internet backbone?

 19   MR. PATTON: Objection, calls for

 20 information that's classified, subject to state

 21 secrets, and the other statutory privileges.

 22   Instruct the witness not to answer.

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 1   THE WITNESS: I will follow the

 2   instructions.

 3   BY MR. TOOMEY:

 4   Q   Let's focus on the period of June 2015

 5   for the questions that follow.

 6   In the course of upstream surveillance

 7   in June 2015, did the NSA review the contents of

 8   communications as they were in transit on the

 9   Internet backbone?

10   MR. PATTON: Same objections, same

11   instructions.

12   THE WITNESS: Will follow the -- oh.

13   MR. PATTON: There are unclassified

14   facts that could come out with different

15   questions, but for that particular phrasing,

16   instruct her not to answer.

17   THE WITNESS: Will follow the

18   instructions.

19   BY MR. TOOMEY:

20   Q   In the course of upstream surveillance

21   in June 2015, did the NSA scan the contents of

22   communications as they were in transit on the

 1   Internet backbone?

 2   MR. PATTON: Let me just confer,

 3   because there's a specific phrase that you're

 4   using that I think is causing both NSA counsel and

 5   I as a basis to object on classified information.

 6   So I don't want to appear we're overclassifying

 7   Einstein 3.

 8   MR. GILLIGAN: So we can go off the

 9   record.

10   MR. TOOMEY: Let's go off the record

11   for a minute.

12   (Off the record at 5:37 p.m.)

13   (Resume at 6:23 p.m.)

14   MR. PATTON: Can remind us of where we

15   were?

16   MR. TOOMEY: Yes. We're going back on

17   the record, and, Ms. Jaques, if you could read

18   back the previous question, please.

19   (The reporter read back the question.)

20   MR. PATTON: Objection to the question

21   to the extent it calls for classified information

22   and information protected by the statutory

 1   privileges. The witness can answer the question

 2   to the extent unclassified.

 3   THE WITNESS: So I think what you're

 4   asking is sort of a two-part question, and so I

 5   wanted to unpack and provide the unclassified

 6   aspects of it, and then sort of acknowledge that

 7   we've got the classified.

 8   So as part of the upstream, we scan

 9   the content of the Internet transactions, and we

10   did that in 2015.

11   As to the question of basically the in

12   transit or the location, that piece is classified.

13   BY MR. TOOMEY:

14   Q   Thank you. In June of 2015, in the

15   course of upstream surveillance, did the NSA scan

16   the application layer data of communications that

17   transit the Internet backbone?

18   MR. PATTON: I'm just listening to

19   your question. There's a slight difference in

20   that that I just need to consult.

21   (Counsel conferring.)

22   MR. PADGETT: Could you read the

 1   question?

 2   (The reporter read back the question.)

 3   THE WITNESS: It's classified.

 4   MR. PATTON: There's something

 5   unclassified.

 6   MR. PADGETT: Can we just go off the

 7   record for a second?

 8   (Off the record at 6:26 p.m.)

 9   (Resume at 6:28 p.m.)

10   MR. PATTON: And there may be a lot of

11   these back and forth on this, so ...

12   THE WITNESS: Can you repeat the

13   question, please?

14   (The reporter read back the question.)

15   MR. PATTON: Objection to the extent

16   it calls for classified information or information

17   protected by the statutory privileges.

18   The witness can answer to the extent

19   unclassified about June 2015.

20   THE WITNESS: So to make sure I'm

21   accurately -- I want to make sure I'm

22   understanding the question and making the

1   distinction.

2   So what you're saying is what I just

3   said was part of upstream in 2015, we scanned the

4   content of Internet transactions.

5   Your next question is are we -- is NSA

6   scanning the application layer of the Internet --

7   of the Internet -- that doesn't make sense -- if

8   we're scanning the Internet -- I'm sorry, the

9   application layer?

10   BY MR. TOOMEY:

11   Q   Yes. The question is, in June 2015,

12   did the NSA scan the application layer data of

13   communications that transit the Internet backbone?

14   MR. PATTON: Same objection, same

15   instruction.

16   THE WITNESS: The answer is yes for

17   2015, that we scan certain application data of

18   communications that transit the Internet backbone.

19   BY MR. TOOMEY:

20   Q   When you say certain --

21   A   Mm-hmm, that's important.

22   Q   -- application layer data, what you

 1   mean by "certain"?

 2   MR. PATTON: Objection, misstates

 3   prior testimony. Same objections as before, same

 4   instruction.

 5   THE WITNESS: I can't go any further.

 6   It's classified.

 7   BY MR. TOOMEY:

 8   Q   In unclassified terms, in June 2015,

 9   how did the NSA determine whether an Internet

10   transaction contained a selector?

11   MR. PATTON: Object to the extent it

12   calls for -- the whole answer would be classified.

13   The witness can answer to the extent unclassified.

14   THE WITNESS: I just want to refer to

15   see if there's any additional information I can

16   provide to you beyond what we've already given to

17   you.

18   There's no additional information

19   beyond what was provided in the Interrogatories 3,

20   4 and 5, so there's no additional unclassified

21   information beyond the fact that that's conducted.

22

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 1                BY MR. TOOMEY:

 2          Q    Is there any classified information

 3   that would be responsive to that question?

 4          A    Yes.  This is necessarily incomplete

 5   because of the classified nature of the program.

 6          Q    And you're --

 7                MR. PATTON:  We're still talking about

 8   June 2015?

 9                MR. TOOMEY:  That's correct, yes.

10                THE WITNESS:  Still June 2015, yes.

11                BY MR. TOOMEY:

12          Q    And you're refusing to provide that

13   information on the basis of an instruction from

14   your lawyer?

15                MR. PATTON:  I haven't instructed her

16   on that, but her answer did indicate what was

17   unclassified, which was the interrogatory

18   responses to 3, 4 and 5, I believe she said, and I

19   believe she also said that anything else beyond

20   that was classified.

21                And there wasn't a pending question,

22   but to the extent that you asked her a question
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1   such as tell me what that classified information

2   is, I would instruct her not to answer.

3   BY MR. TOOMEY:

4   Q   Understood. Thank you.

5   Today does the NSA scan the

6   application layer data of communications that

7   transit the Internet backbone?

8   MR. PATTON: Objection, calls for

9   information that's classified, subject to the

10   statutory privileges before mentioned, and

11   instruct the witness not to answer.

12   THE WITNESS: I follow those

13   instructions.

14   BY MR. TOOMEY:

15   Q   In June of 2015, if a transaction was

16   scanned by the NSA in the course of upstream

17   surveillance, and the NSA determined that it did

18   not contain a selector, was the communication

19   eliminated?

20   MR. PATTON: Just a moment.

21   (Counsel conferring.)

22   MR. PADGETT: Can you read the

 1   question back?

 2   (The reporter read back the question.)

 3   MR. PATTON: Can we just go off the

 4   record for a second?

 5   MR. TOOMEY: Can we go off the record?

 6   (Off the record at 6:34 p.m.)

 7   (Resume at 6:37 p.m.)

 8   (The reporter read back the question.)

 9   MR. PATTON: Object to that question

10   to the extent it calls for classified information

11   or otherwise privileged information.

12   The witness can answer to the extent

13   unclassified.

14   THE WITNESS: So the process by which

15   Internet transaction is filtered, and then

16   scanned, if it doesn't have a test selector or

17   isn't about the target, then that means that

18   information will not be ingested into the NSA

19   repository.

20   BY MR. TOOMEY:

21   Q   And is that communication eliminated?

22   MR. PATTON: Objection. The question

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 1    calls for a classified answer, as well as an

 2    unclassified one, which the witness has already

 3    given.

 4                 The witness can answer again and

 5    provide the unclassified answer.

 6                 THE WITNESS:  I have nothing

 7    additional beyond.  If you'd like me to repeat

 8    what I said, I'd be happy to.

 9                 BY MR. TOOMEY:

10         Q    No need to repeat.

11                 And to the extent there is -- is there

12    classified information that you are not providing

13    in response?

14         A    Yes.

15         Q    Today, does the NSA seek to acquire

16    email communications to and from its targets using

17    upstream surveillance?

18                 MR. PATTON:  Object to the question.

19    It calls for classified information and

20    information protected by the statutory privileges.

21                 I instruct the witness not to answer.

22                 THE WITNESS:  I will follow
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1   instructions.

2   BY MR. TOOMEY:

3   Q   Could you please describe as fully as

4   possible how, in June 2015, the NSA determined

5   whether an Internet transaction contained a

6   selector?

7   MR. PATTON: Objection to the extent

8   it calls for classified information, or

9   information otherwise protected by the statutory

10   privileges.

11   The witness can answer if she can

12   regarding the unclassified response to that

13   question.

14   THE WITNESS: There's no additional

15   unclassified information beyond what I've already

16   said.

17   BY MR. TOOMEY:

18   Q   Thank you. Beyond what you've already

19   said or what appears in the NSA's discovery

20   responses, could you please describe as fully as

21   possible how the NSA today determines whether an

22   Internet transaction contains a selector?

 1   MR. PATTON: Objection. The question

 2   calls for classified information and information

 3   protected by the statutory privileges, and

 4   instruct the witness not to answer.

 5   THE WITNESS: I will --

 6   MR. ABDO: Rodney, can we just try to

 7   compress if it's the same objection? Thanks.

 8   MR. PATTON: If you ask the same --

 9   exactly those kind of questions, I will do my

10   best. Thank you.

11   THE WITNESS: I will follow the

12   instructions.

13   BY MR. TOOMEY:

14   Q   In the course of upstream surveillance

15   in June 2015, did the NSA scan communications in

16   bulk?

17   MR. PATTON: Objection, calls for

18   classified information. Just check and see if

19   there's a --

20   (Counsel conferring.)

21   MR. PATTON: Just a second. Can we go

22   off the record?

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1   (Off the record at 6:40 p.m.)

2   (Resume at 6:43 p.m.)

3   MR. TOOMEY: Can you please repeat the

4   question?

5   (The reporter read back the question.)

6   MR. PATTON: Objection. We'd need to

7   go into the SCIF to discuss whether or not there's

8   an unclassified response to this.

9   THE WITNESS: But before we do that,

10   can you give a definition of what you mean by

11   "bulk," scanning communications in bulk?

12   BY MR. TOOMEY:

13   Q   Does the NSA ever use the term "bulk"

14   in connection with surveillance activities?

15   A   Yes.

16   Q   And what do you understand the NSA to

17   mean by the term "bulk"?

18   A   To do collection without -- let's see,

19   the definition is in Presidential Policy Directive

20   No. 28, which I don't have with me, but it's

21   something roughly along the lines of collection

22   without discriminates.

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 1   Q   That document describes bulk

 2   collection to the best of your recollection?

 3   A   Yeah.

 4   Q   Yes?

 5   A   Or it has a general description of it,

 6   and then carries on to provide when NSA can

 7   conduct bulk -- for what purposes the information

 8   can be used.

 9   Q   And so my question here is about

10   whether in June 2015, in the course of upstream

11   surveillance, the NSA scanned communications in

12   bulk?

13   MR. PATTON: Go off the record.

14   (Off the record at 6:45 p.m.)

15   (Resume at 6:57 p.m.)

16   (The reporter read back the question.)

17   MR. PATTON: Objection to the extent

18   it calls for classified information and

19   information protected by the statutory privileges.

20   Instruct the witness to answer the

21   question to the extent able in unclassified terms.

22   THE WITNESS: So in terms of

 1   unclassified, the best information I can give to

 2   you is in the PCLOB report, which is Deposition

 3   Exhibit 43, page 103. The last line of the first

 4   paragraph that states the program does not operate

 5   by collecting communications in bulk.

 6   BY MR. TOOMEY:

 7   Q   Could you please answer my question

 8   about whether in June 2015 the NSA scanned

 9   communications in bulk?

10   MR. PATTON: Objection. The answer to

11   that question, to the extent not already provided

12   by the witness, is classified and subject to

13   statutory privileges.

14   Instruct the witness not to answer.

15   MR. GILLIGAN: And state secrets. Did

16   you say state secrets?

17   MR. PATTON: I said classified. I'm

18   trying to shorten it.

19   MR. GILLIGAN: Oh, okay. We're all

20   for that.

21   MR. PATTON: Also subject to the state

22   secrets privilege.

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 1   THE WITNESS: I will follow the

 2   instructions of my counsel.

 3   BY MR. TOOMEY:

 4   Q   In the context of upstream

 5   surveillance, is scanning a communication

 6   different from collecting a communication?

 7   A   Yes.

 8   Q   In the course of upstream surveillance

 9   today, does the NSA scan communications in bulk?

10   MR. PATTON: Objection. The question

11   calls for information that's classified, subject

12   to the state secrets, and to the statutory

13   privileges. Instruct the witness not to answer.

14   THE WITNESS: I will not answer.

15   BY MR. TOOMEY:

16   Q   In the course of upstream surveillance

17   today, does the NSA scan the metadata of

18   communications in bulk?

19   MR. PATTON: Same objections, same

20   instruction.

21   THE WITNESS: Will follow the

22   instruction.

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 1                BY MR. TOOMEY:

 2         Q    In the course of upstream surveillance

 3   in 2015, did the NSA copy communications in bulk?

 4                MR. PATTON:  Same objection, same

 5   instructions.

 6                THE WITNESS:  Follow instructions.

 7                BY MR. TOOMEY:

 8         Q    In the course of upstream surveillance

 9   today, does the NSA copy communications in bulk?

10                MR. PATTON:  Same objection, same

11   instruction.

12                THE WITNESS:  Follow the instructions.

13                BY MR. TOOMEY:

14         Q    In the course of upstream surveillance

15   in June of 2015, did the NSA deliberately attempt

16   to filter out any of Wikimedia's international

17   communications?

18                MR. PATTON:  Objection.  Same

19   objection, same instruction.

20                THE WITNESS:  Will follow the

21   instruction.

22
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 1   BY MR. TOOMEY:

 2   Q   In the course of upstream surveillance

 3   today, does the NSA deliberately attempt to filter

 4   out any of Wikimedia's international

 5   communications?

 6   MR. PATTON: Same instruction, same

 7   objections.

 8   THE WITNESS: Will follow instruction.

 9   BY MR. TOOMEY:

10   Q   In the course of upstream surveillance

11   in June of 2015, did the NSA deliberately attempt

12   to filter out all of Wikimedia's communications?

13   MR. PATTON: Same objection, same

14   instruction.

15   THE WITNESS: Will follow instruction.

16   BY MR. TOOMEY:

17   Q   In the course of upstream surveillance

18   today, does the NSA deliberately attempt to filter

19   out all Wikimedia communications?

20   MR. PATTON: Same objection, same

21   instruction.

22   THE WITNESS: Will follow

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 1   instructions.

 2   BY MR. TOOMEY:

 3   Q   Does the NSA contend as a factual

 4   matter in this case that it deliberately filters

 5   out all Wikimedia communications?

 6   MR. PATTON: Just a moment.

 7   (Counsel conferring.)

 8   MR. PATTON: Could you go off the

 9   record?

10   (Off the record at 7:01 p.m.)

11   (Resume at 7:08 p.m.)

12   MR. TOOMEY: Could you read back the

13   last question?

14   (The reporter read back the question.)

15   MR. PATTON: Object to the question as

16   beyond the scope of 30(b)(6), improper 30(b)(6)

17   question. The witness can answer in her personal

18   capacity.

19   THE WITNESS: In my personal capacity,

20   I have no idea, but to the extent that we do or do

21   not filter something out would be classified in

22   any event.

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 1                BY MR. TOOMEY:

 2        Q    Does anyone at the NSA know whether

 3   the NSA contends in this case, as a factual

 4   matter, that it deliberately filters out all

 5   Wikimedia communications?

 6                MR. PATTON:  Same objections, same

 7   instruction.

 8                THE WITNESS:  It's classified.  I

 9   mean --

10                MR. PATTON:  That's not the question

11   he's asking.

12                THE WITNESS:  That's not the question.

13                MR. PATTON:  That's not the question

14   he's asking.

15                THE WITNESS:  So same answer, which I

16   have no idea, and to the extent it is or isn't

17   would be classified.

18                BY MR. TOOMEY:

19        Q    To the extent it is or isn't what?

20        A    Filtering out Wikimedia, as you were

21   contending in your question.

22        Q    My question is whether the NSA
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 1   contends that it is filtering out Wikimedia's

 2   communications. Do you know the answer to that

 3   question?

 4   MR. PATTON: Objection. Same

 5   objections as before, and adding asked and

 6   answered.

 7   THE WITNESS: I have nothing else to

 8   say on the topic.

 9   MR. TOOMEY: Ms. Jaques, could you

10   mark as the next exhibit this document, please?

11   (Deposition Exhibit 50 was

12   marked for identification.)

13   BY MR. TOOMEY:

14   Q   So the court reporter has handed

15   Ms. Richards Exhibit 50, which is titled

16   Memorandum of Points and Authorities in Support of

17   Defendant's Motion to Compel Discovery. Sorry, we

18   don't have as many copies of this one, sorry.

19   Could you please tell me what this

20   document is?

21   MR. PATTON: Objection, lacks

22   foundation.

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 1   BY MR. TOOMEY:

 2   Q   You can answer.

 3   Have you seen this document before?

 4   A   I have not seen this document before.

 5   Q   Can you read the title of the

 6   document, please?

 7   A   Sure. Memorandum of Points and

 8   Authorities in Support of Defendant's Motion to

 9   Compel Discovery, dated March 26, 2018.

10   Q   Thank you. Could you please turn to

11   page 11 --

12   A   Sure.

13   Q   -- of Exhibit 50?

14   I'm going to read a sentence from the

15   document in the last paragraph toward the bottom

16   of the page.

17   "An entity seeking to conduct

18   surveillance on the Internet that lacks the

19   ability to decipher encrypted HTTPS communications

20   may well decide to program its surveillance

21   equipment to disregard such communications

22   altogether."

 1   Has the NSA programmed its

 2 surveillance equipment to disregard HTTPS

 3 communications altogether?

 4   MR. PATTON: Objection, the question

 5 calls for classified information protected by the

 6 state secrets privilege and information protected

 7 by the statutory privileges.

 8   Instruct the witness not to answer the

 9 question.

10   THE WITNESS: I'll follow the

11 instructions.

12   BY MR. TOOMEY:

13   Q   Can we now turn to page 12 of

14 Exhibit 50. I'm going to read a passage from the

15 first paragraph toward the top of the page.

16   "If the NSA lacked the ability to

17 decipher HTTPS communications," dot dot dot, "then

18 nothing --

19   MR. PATTON: It's an important dot dot

20 dot.

21   MR. TOOMEY: We'll get there. I'm

22 going to start again. I'm going to read the

 1   passage again.

 2   "If the NSA lacked the ability to

 3   decipher HTTPS communications ... then nothing in

 4   the 'technical rules of how the Internet

 5   works' ... would prevent the configuration of

 6   devices used in connection with Upstream

 7   surveillance to exclude HTTPS communications."

 8   Does the NSA have the ability to

 9   decipher HTTPS communications?

10   MR. PATTON: Objection, outside the

11   scope of 30(b)(6), and the question calls for

12   classified information protected by the state

13   secrets privilege, statutory privileges.

14   Instruct the witness not to answer.

15   THE WITNESS: I will follow the

16   instructions.

17   BY MR. TOOMEY:

18   Q   I'm going to read a passage now from

19   page 12 of Exhibit 50 in the second paragraph

20   toward the bottom of the page.

21   "If the NSA deemed communications to

22   and from Wikimedia's websites to be of low

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1   foreign-intelligence value, then nothing in the

2   technical rules of the Internet would prevent the

3   configuration of equipment used in connection with

4   Upstream surveillance to ignore all communications

5   having source or destination IP addresses

6   associated with Wikimedia."

7   THE NSA configured its

8   surveillance equipment to ignore all

9   communications having source or destination

10   IP addresses associated with Wikimedia?

11   MR. PATTON: Objection, beyond the

12   scope of 30(b)(6), and objection, it calls for

13   classified information, subject to state secrets,

14   statutory privileges.

15   Instruct the witness not to answer.

16   THE WITNESS: Will follow the

17   instructions.

18   BY MR. TOOMEY:

19   Q   Does the NSA deem communications to

20   and from Wikimedia's websites to be of low foreign

21   intelligence value?

22   MR. PATTON: Same objection, same

 1   instruction.

 2   THE WITNESS: Will follow instruction.

 3   BY MR. TOOMEY:

 4   Q   Would the NSA be permitted under

 5   upstream surveillance today to collect a targets

 6   communications with a U.S.-based website?

 7   A   How is this question different than

 8   the last one?

 9   MR. PATTON: I'm not sure it is.

10   THE WITNESS: Okay.

11   MR. PATTON: Can we go off the record?

12   (Off the record at 7:16 p.m.)

13   (Resume at 7:23 p.m.)

14   BY MR. TOOMEY:

15   Q   Back on the record.

16   Ms. Jaques, could you please read back

17   the prior question?

18   (The reporter read back the question.)

19   MR. PATTON: We object to that

20   question. It calls for a classified answer.

21   The witness has reviewed during the

22   break the currently applicable declassified and

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1   public targeting procedures, and there's no

2   unclassified answer we can give. So as a result,

3   we object to the question, it calls for classified

4   information, subject to the state secrets and

5   subject to the statutory privileges, and instruct

6   the witness not to answer.

7   THE WITNESS: I'll follow the

8   instructions.

9   BY MR. TOOMEY:

10   Q   Is it possible that a targets

11   communications with Wikimedia could contain

12   foreign intelligence information that would be of

13   interest to the NSA?

14   (Counsel conferring.)

15   MR. PATTON: You'll like this one.

16   Object as beyond the scope of 30(b)(6)

17   and speculative. The witness can answer in her

18   own capacity to the extent the answer is

19   unclassified.

20   THE WITNESS: It's speculative. I

21   can't speak to who would or wouldn't be, what

22   particular individual might be targeted. If an

 1   analyst decides a particular selector or person

 2   meets the targeting standards, then that would be

 3   appropriate.

 4   BY MR. TOOMEY:

 5   Q   Could the term "foreign intelligence

 6   information" encompass information that a person

 7   surveilled using upstream surveillance is reading

 8   on one of Wikimedia's websites?

 9   MR. PADGETT: Could I get that read

10   back?

11   (The reporter read back the question.)

12   MR. PADGETT: Do you want to talk

13   about it? Let's go off the record.

14   (Off the record at 7:26 p.m.)

15   (Resume at 7:28 p.m.)

16   MR. TOOMEY: Ms. Jaques, could you

17   please read back the last question?

18   (The reporter read back the question.)

19   MR. PATTON: Objection, beyond the

20   scope of 30(b)(6), speculative, and calls for

21   legal conclusion. The witness can answer in her

22   personal capacity.

 1   THE WITNESS: I'm sorry, can you read

 2   that question one more time?

 3   (The reporter read back the question.)

 4   MR. PATTON: Same objections.

 5   THE WITNESS: Can we go off the

 6   record? Sorry.

 7   (Off the record at 7:30 p.m.)

 8   (Resume at 7:32 p.m.)

 9   MR. PATTON: Same objections, same

10   instruction.

11   THE WITNESS: So you have a couple of

12   different things, which is why we kept having to

13   walk outside to unpack that, and so I want to

14   unpack what's classified and what's unclassified.

15   So the first part of your question

16   would be is there possibly foreign intelligence

17   information on the Wikimedia sites, to which the

18   answer, from my perspective, is there could be. I

19   don't actually know. I haven't trolled through

20   the Wikimedia websites, but it's possible.

21   The second part of that question had

22   to do with how it would function in the upstream

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 1   context, and that piece of it is what's

 2   classified.

 3   BY MR. TOOMEY:

 4   Q   Similar question, could the term

 5   "foreign intelligence information" encompass

 6   information that a person surveilled using

 7   upstream surveillance is contributing to one of

 8   Wikimedia's websites?

 9   MR. PATTON: Same objections, same

10   instruction.

11   THE WITNESS: I would give the same

12   answer, which is I would separate those two pieces

13   to say it's possible that somebody at one of your

14   contributors is creating foreign intelligence

15   information in a hypothetical. I don't actually

16   know.

17   To the extent it has anything to do

18   with upstream, any piece of that would be

19   classified.

20   BY MR. TOOMEY:

21   Q   And you're not answering that portion

22   to that aspect of the question based on your

1   lawyer's instruction?

2   A   Correct.

3   MR. PATTON: Not based on my

4   instruction. When we broke the last time, the

5   witness had a question as to what aspect of this

6   that she could talk about. She provided the

7   information that she could talk about and

8   indicated to you there's another classified

9   component, and the nature of that classified

10   information, and she declined to answer based on

11   that.

12   Had you asked her a follow-up question

13   as to the content of that classified information,

14   I would have instructed her not to answer.

15   BY MR. TOOMEY:

16   Q   Could you please provide any

17   classified information that you believe my

18   question calls for?

19   MR. PATTON: I respect that question.

20   It keeps our record clean.

21   Object to the question to the extent

22   it calls for classified information, information

 1   subject to the statutory privileges, and instruct

 2   the witness not to answer.

 3   THE WITNESS: I will follow those

 4   instructions.

 5   BY MR. TOOMEY:

 6   Q   Today, does the NSA intentionally

 7   attempt to filter out all HTTPS communications

 8   from upstream surveillance?

 9   MR. PATTON: Objection, the question

10   calls for classified information, subject to the

11   state secrets and to the statutory privileges.

12   Instruct not to answer.

13   THE WITNESS: Will follow the

14   instruction.

15   BY MR. TOOMEY:

16   Q   Same question, but for June 2015. Did

17   the NSA at that time intentionally attempt to

18   filter out all HTTPS communications from upstream

19   surveillance?

20   MR. PATTON: Same objections, same

21   instruction.

22   THE WITNESS: Will follow the

 1   instruction.

 2   BY MR. TOOMEY:

 3   Q   Today, does the NSA intentionally

 4   attempt to filter out all Internet communications

 5   that use TCP port 443?

 6   MR. PATTON: Same objections, same

 7   instruction.

 8   THE WITNESS: Follow the instruction.

 9   BY MR. TOOMEY:

10   Q   In June 2015, did the NSA

11   intentionally attempt to filter out all Internet

12   communications that used TCP port 443?

13   MR. PATTON: Same objections, same

14   instruction.

15   THE WITNESS: Follow the instruction.

16   BY MR. TOOMEY:

17   Q   Today, does the NSA intentionally

18   filter out all encrypted VPN communications?

19   MR. PATTON: Same objection, same

20   instruction.

21   THE WITNESS: Will follow the

22   instruction.

 1   BY MR. TOOMEY:

 2   Q   In June 2015, did the NSA

 3   intentionally filter out all encrypted VPN

 4   communications?

 5   MR. PATTON: Same objection, same

 6   instruction.

 7   THE WITNESS: Follow the instruction.

 8   BY MR. TOOMEY:

 9   Q   Today, does the NSA intentionally

10   filter out all open VPN communications?

11   MR. PATTON: Same objection, same

12   instruction.

13   THE WITNESS: Follow the instruction.

14   BY MR. TOOMEY:

15   Q   In June 2015, did the NSA

16   intentionally filter out all open VPN

17   communications?

18   MR. PATTON: Same objection, same

19   instruction.

20   THE WITNESS: Will follow the

21   instruction.

22

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 1   BY MR. TOOMEY:

 2   Q   Today does the NSA intentionally

 3   filter out Wikimedia's encrypted VPN

 4   communications?

 5   MR. PATTON: Same objection, same

 6   instruction.

 7   THE WITNESS: Will follow the

 8   instruction.

 9   BY MR. TOOMEY:

10   Q   In June 2015, did the NSA

11   intentionally filter out Wikimedia's

12   encrypted VPN communications?

13   MR. PATTON: Same objection, same

14   instruction.

15   THE WITNESS: Will follow the

16   instruction.

17   BY MR. TOOMEY:

18   Q   Can you please describe in as much

19   detail as necessary to provide a complete answer

20   how the NSA implemented any changes to "about"

21   collection during or after April 2017?

22   MR. PATTON: Just a moment.

 1   (Counsel conferring.)

 2   MR. PATTON: Object to the question to

 3   the extent it calls for classified information and

 4   information protected by the statutory privileges.

 5   If there is an unclassified response,

 6   the witness can provide it.

 7   MR. TOOMEY: Rodney, to be clear, just

 8   so we can try to consolidate things, are you also

 9   instructing the witness not to provide any

10   unclassified information?

11   MR. PATTON: No. I'm instructing --

12   MR. TOOMEY: Sorry, any classified

13   information, just so --

14   MR. PATTON: I would love her to

15   provide any unclassified information, but if

16   there's any classified information, I'm

17   instructing her not to answer.

18   There may be some unclassified

19   information that she can provide, and that's what

20   I'm authorizing her to do.

21   THE WITNESS: As of 2017, April 2017,

22   NSA changed the way it did its upstream collection

1   so that it no longer collected the "abouts"

2   collection.

3   There's not any additional information

4   beyond the information that was either in the 2017

5   opinion or our associated unclassified information

6   that NSA put out on its website.

7   MR. PATTON: That's the April 2017

8   FISC opinion?

9   THE WITNESS: Sorry, yes, the

10   April 2017 FISC opinion.

11   BY MR. TOOMEY:

12   Q   Besides the information you just

13   identified, is there any other unclassified

14   information that you could provide to this

15   question?

16   MR. PATTON: Same objection, same

17   instruction.

18   THE WITNESS: Not that I'm aware of.

19   BY MR. TOOMEY:

20   Q   Is there classified information that

21   would answer the question that you are not

22   providing at the instruction of your attorney?

1   MR. PATTON: Objection to the extent

2   it calls for classified information.

3   If the witness's answer is yes or no,

4   she can provide that information.

5   THE WITNESS: Yes.

6   BY MR. TOOMEY:

7   Q   Apart from the information you

8   identified in response to my last question, could

9   you please describe how the NSA attempts to avoid

10   collecting communications that are solely about a

11   selector?

12   MR. PATTON: Object to the form of the

13   question, vague as to time. Potentially

14   classified.

15   (Counsel conferring.)

16   MR. PATTON: Would you mind rephrasing

17   to specify the time period?

18   MR. TOOMEY: Sure, I'll rephrase.

19   MR. PATTON: Thanks.

20   BY MR. TOOMEY:

21   Q   Apart from the unclassified

22   information that you provided in response to my

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1   last question, could you please describe in as

2   much detail as necessary to provide a complete

3   answer how, after April 2017, the NSA attempts to

4   avoid collecting communications that are solely

5   about a selector?

6   (Counsel conferring.)

7   MR. PATTON: Can we go off the record?

8   (Off the record at 7:42 p.m.)

9   (Resume at 7:43 p.m.)

10   MR. PATTON: Would you mind reading

11   back the question, please?

12   (The reporter read back the question.)

13   MR. PATTON: Object to the question to

14   the extent it calls for classified information.

15   If the witness's answer is yes or no,

16   she can answer that.

17   THE WITNESS: There's no additional

18   information beyond what I've pointed to. I have

19   no additional --

20   BY MR. TOOMEY:

21   Q   There's no additional unclassified

22   information?

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1   A   No additional unclassified

2   information.

3   Q   And is there classified information

4   that you're not providing at the instruction of

5   your counsel?

6   A   Yes.

7   Q   Apart from the unclassified

8   information that you provided in response to my

9   question, my previous question, please describe in

10   as much detail as necessary to provide a complete

11   answer how the change in April 2017 affected the

12   filtering of communications subject to upstream

13   surveillance?

14   (Counsel conferring.)

15   MR. PATTON: Can we go off the record?

16   (Off the record at 7:45 p.m.)

17   (Resume at 7:59 p.m.)

18   MR. TOOMEY: Could you please read

19   back the last question?

20   (The reporter read back the question.)

21   MR. PATTON: Objection to the question

22   to the extent it calls for classified information

 1   and information subject to the statutory

 2   privileges.

 3   To the extent the witness is aware of

 4   an unclassified answer, she may provide a

 5   response.

 6   THE WITNESS: The only point I would

 7   provide to you on this, which is not necessarily

 8   anything new, but we still stand behind the

 9   information about how the filtering works in our

10   Civil Liberties and Privacy Office Report, and

11   that remains true today as it did in 2014, when we

12   wrote the report.

13   BY MR. TOOMEY:

14   Q   Is there classified information you're

15   not providing in response to my question at the

16   instruction of your lawyer?

17   A   Yes.

18   Q   Thank you. Similar question, apart

19   from the unclassified information that you've

20   already provided today, could you please describe

21   in as much detail as necessary to give a complete

22   answer how the change in April 2017 affected the

 1   scanning of communications subject to upstream

 2   surveillance?

 3   MR. PATTON: Object to the question,

 4   calls for classified information and information

 5   subject to statutory privileges, and instruct the

 6   witness not to answer the question.

 7   THE WITNESS: I will not answer.

 8   BY MR. TOOMEY:

 9   Q   Apart from the unclassified

10   information you've already provided today, please

11   describe in as much detail as necessary to give a

12   complete answer which portions of an Internet

13   transaction are scanned for selectors after

14   April 2017?

15   MR. PATTON: Same objection, same

16   instruction.

17   THE WITNESS: Will follow the

18   instruction.

19   BY MR. TOOMEY:

20   Q   Since April 2017, does the NSA first

21   scan the contents of communications for selectors,

22   and then discard those that are solely about a

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 1   selector?

 2   MR. PATTON: Just a moment.

 3   (Counsel conferring.)

 4   MR. PATTON: Same objection, same

 5   instruction.

 6   THE WITNESS: Will follow the

 7   instruction.

 8   BY MR. TOOMEY:

 9   Q   Since April 2017, does the NSA copy

10   the contents of communications prior to scanning

11   those communications?

12   MR. PATTON: Same objection, same

13   instruction.

14   THE WITNESS: Will follow the

15   instruction.

16   BY MR. TOOMEY:

17   Q   Since April 2017, does the NSA copy

18   the application layer data of packets prior to

19   scanning the communications to which they belong?

20   MR. PATTON: Same objection, same

21   instruction.

22   THE WITNESS: Will follow the

 1   instruction.

 2   BY MR. TOOMEY:

 3   Q   Since April 2017, does the NSA review

 4   any portion of the contents of communications for

 5   selectors?

 6   MR. PATTON: Object to the form, vague

 7   as to "review," and object to the question as

 8   seeking classified information, subject to the

 9   state secrets and statutory privileges, and

10   instruct the witness not to answer.

11   THE WITNESS: Will follow the

12   directions.

13   BY MR. TOOMEY:

14   Q   Would your answer have been the same

15   if I had said does the NSA scan any portion of the

16   contents of communications for selectors --

17   MR. PATTON: One moment.

18   MR. TOOMEY: -- since April 2017?

19   MR. PATTON: Just a moment.

20   (Counsel conferring.)

21   MR. PATTON: Could you rephrase the

22   question in terms of an Internet transaction?

 1   It's fine if you don't, but that might take care

 2   of something.

 3   MR. TOOMEY: Sure, let me rephrase.

 4   BY MR. TOOMEY:

 5   Q   Since April 2017, does the NSA scan

 6   any portion of the contents of Internet

 7   transactions for selectors?

 8   (Counsel conferring.)

 9   MR. PATTON: I think we need to go off

10   the record.

11   MR. TOOMEY: Let's go off the record.

12   (Off the record at 8:04 p.m.)

13   (Resume at 8:18 p.m.)

14   MR. TOOMEY: Could you please read

15   back the prior question?

16   (The reporter read back the question.)

17   MR. PATTON: Objection to the question

18   to the extent it seeks classified information and

19   information protected by the statutory privileges.

20   The witness can answer the question to

21   the extent that it's unclassified.

22   THE WITNESS: So NSA scans a portion

1   of the Internet transaction to identify the task

2   selector in order to acquire the Internet

3   transaction that is to or from the target.

4   To go any further in terms of whether

5   it's in the content or the metadata, or any of

6   those further things, is classified.

7   MR. PATTON: And I instruct her not to

8   answer beyond that unclassified answer.

9   BY MR. TOOMEY:

10   Q   And you're following your counsel's

11   instruction?

12   A   I am.

13   Q   So just to confirm, what portions of

14   the contents of Internet transactions are scanned

15   for selectors since April 2017?

16   MR. PATTON: I was waiting for you to

17   finish.

18   Objection to the extent that it

19   mischaracterizes the prior testimony. The witness

20   can answer the question to the extent it's

21   unclassified. Any classified answer, I instruct

22   her not to provide.

 1   THE WITNESS: You're asking me what

 2   portion of the Internet transaction we're

 3   scanning, just so I'm clarifying?

 4   BY MR. TOOMEY:

 5   Q   Correct, after April 2017.

 6   A   After April 2017?

 7   I am not able to answer that question.

 8   The answer to that question is classified.

 9   Q   Since April 2017, does the NSA review

10   the entire contents of communication of

11   Internet -- let me strike that. I'll restate the

12   question.

13   Since April 2017, does the NSA scan

14   the entire contents of Internet transactions for

15   selectors?

16   MR. PATTON: Objection, calls for

17   classified information, information protected by

18   the statutory privileges, and instruct the witness

19   not to answer.

20   THE WITNESS: I will follow the

21   instructions.

22

 1   BY MR. TOOMEY:

 2   Q   Since April 2017, does the NSA scan

 3   any portion of the application layer data of

 4   Internet transactions for selectors?

 5   MR. PATTON: Same objection, same

 6   instructions.

 7   THE WITNESS: Will follow the

 8   instruction.

 9   BY MR. TOOMEY:

10   Q   And if I were to ask what portions of

11   Internet transaction the NSA scans for selectors,

12   would your answer be the same?

13   MR. PATTON: Are we talking about post

14   April 2017?

15   MR. TOOMEY: Yes, post April 2017.

16   MR. PATTON: Same objection, same

17   instruction.

18   THE WITNESS: Yes, my answer would be

19   the same.

20   BY MR. TOOMEY:

21   Q   And since April 2017, does the NSA

22   scan the entire application layer of Internet

 1   transactions for selectors?

 2   MR. PATTON: Same objection, same

 3   instruction.

 4   THE WITNESS: Will follow the

 5   instructions.

 6   BY MR. TOOMEY:

 7   Q   Are there any barriers to the NSA

 8   restarting "about" collection today?

 9   MR. PATTON: Objection, beyond the

10   scope of 30(b)(6) notice, calls for a legal

11   conclusion.

12   THE WITNESS: NSA --

13   MR. PATTON: Just a second. There may

14   be an additional objection.

15   (Counsel conferring.)

16   MR. PATTON: I would just add that to

17   the extent that the question calls for a

18   classified answer, I object to that based on the

19   state secrets privilege and the statutory

20   privileges. If there's an unclassified answer,

21   the witness can provide.

22   And my colleague let's me know that

 1   there's also a vagueness objection.

 2   BY MR. TOOMEY:

 3   Q   You can answer to the extent --

 4   A   Sure. With the passage of the 702 FAA

 5   Reauthorization, there is a requirement for once

 6   the FISC has approved us going back to "abouts,"

 7   that we have to give a 30-day notice to Congress

 8   before we can move forward with any type of

 9   collection.

10   MR. PATTON: Any type of "abouts"

11   collection.

12   THE WITNESS: Any type of "abouts"

13   collection. Apologies for not being clear.

14   BY MR. TOOMEY:

15   Q   Do you consider that statutory

16   requirement a barrier to the NSA restarting

17   "about" collection?

18   MR. PATTON: Objection, beyond the

19   scope of 30(b)(6), vague as to what a barrier is,

20   calls for a legal conclusion.

21   The witness can answer in her own

22   capacity.

1   THE WITNESS: Can you explain what you

2   mean by barrier? I mean, to the extent -- yeah.

3   BY MR. TOOMEY:

4   Q   I mean by barrier any obstacle,

5   impediment to restarting "about" collection.

6   MR. PATTON: Same set of objections,

7   and add in the one that to the extent there's any

8   classified response to that, the witness should

9   not answer as to classified information. You can

10   otherwise provide an unclassified answer in your

11   personal capacity.

12   THE WITNESS: Certainly getting FISC

13   approval and notifying Congress are additional

14   barriers beyond just being able to turn it on

15   tomorrow.

16   BY MR. TOOMEY:

17   Q   And could you please state whether

18   there is any -- first of all, are there any other

19   barriers besides the two that you just described?

20   MR. PATTON: Just a moment.

21   (Counsel conferring.)

22   MR. PATTON: Go off the record.

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1   (Off the record at 8:25 p.m.)

2   (Resume at 8:36 p.m.)

3   MR. TOOMEY: All right, let's go back

4   on the record.

5   THE WITNESS: Can you read it back?

6   (The reporter read back the question.)

7   THE WITNESS: Are you answering first

8   or am I?

9   MR. PATTON: Sorry, putting this away.

10   Object to the question to the extent

11   it calls for classified information and

12   information protected by the statutory privileges.

13   The witness can answer the question to

14   the extent unclassified.

15   THE WITNESS: So as noted, the FISC

16   would have to approve us going back to doing

17   "abouts," so we would have to address any of the

18   underlying issues as it relates to getting the

19   FISC approval, as were described in the 2017

20   Memorandum Opinion.

21   BY MR. TOOMEY:

22   Q   What are those underlying issues?

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 1   MR. PATTON: Object to the question to

 2   the extent it calls for classified information and

 3   information protected by the statutory privileges.

 4   The witness can answer the question to

 5   the extent unclassified.

 6   THE WITNESS: So the two unclassified

 7   descriptions that were provided in the 2017

 8   Memorandum Opinion indicated there were both

 9   technological issues, as well as human error

10   issues.

11   BY MR. TOOMEY:

12   Q   And what were those issues?

13   MR. PATTON: Objection to the extent

14   it calls for classified information and

15   information protected by the statutory privileges.

16   The witness can answer to the extent

17   unclassified.

18   THE WITNESS: Could I have the 2017 so

19   I can point you to those sections? Do you want to

20   introduce that in? Is that what's coming next?

21   MR. TOOMEY: Could you please mark

22   that?

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 1                  (Deposition Exhibit 51 was

 2                   marked for identification.)

 3                  BY MR. TOOMEY:

 4          Q    Please take a look at Exhibit 51 which

 5     the court reporter has just handed you.

 6                  Could you tell me, are you familiar

 7     with this document and what it is?

 8          A    Yes.  This is the Memorandum Opinion

 9     and Order of the Foreign Intelligence Surveillance

10     Court dated April 26, 2017.

11                  So I will start with page 14 to 15 --

12                  MR. GILLIGAN:  Sorry, did we mark

13     this?

14                  THE WITNESS:  Yes, it's 51.

15                  So the first indication of this

16     discussion is starting at the bottom of page 14.

17     The sentence begins, "The October 26, 2016 Notice

18     disclosed that an NSA Inspector General review and

19     report and NSA Office of Compliance for Operation

20     verification activities indicated that, with

21     greater frequency than previously disclosed to the

22     Court, NSA analysts had used U.S.-person
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 1   identifiers to query the results of Internet

 2   'upstream' collection, even though NSA's

 3   Section 702 minimization procedures prohibited

 4   such queries."

 5   BY MR. TOOMEY:

 6   Q   So if I could stop you there.

 7   A   Sure.

 8   Q   Is it accurate to say that the

 9   technical and human error issues that the FISC

10   identified related to queries of the results of

11   Internet upstream collection?

12   (Counsel conferring.)

13   MR. PATTON: If the answer is yes or

14   no, the witness can answer the question.

15   THE WITNESS: Yes.

16   BY MR. TOOMEY:

17   Q   Besides the barriers you already

18   identified and what's described in Exhibit 51, are

19   there any other barriers to the NSA restarting

20   "about" collection?

21   MR. PATTON: Objection to the extent

22   that it calls for classified information and

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1   information protected by the statutory privileges.

2   If there's an unclassified answer the

3   witness can provide, she can provide it.

4   THE WITNESS: I'm sorry, can we go off

5   the record?

6   (Off the record at 8:42 p.m.)

7   (Resume at 8:43 p.m.)

8   THE WITNESS: To the extent that NSA

9   considers budget, time, intelligence needs, risk

10   to the agency, privacy and civil liberties impact,

11   all of those will also be considered as NSA

12   decides whether or not to spend its next

13   intelligence needs to go into "abouts."

14   Whether that's a particular barrier or

15   not, those are all considerations that NSA will

16   take into consideration as it thinks about whether

17   or not it should go forward with "abouts."

18   BY MR. TOOMEY:

19   Q   Okay. Is there any other barrier you

20   haven't already described?

21   A   No.

22   Q   Has the NSA disavowed any intention of

 1   resuming "about" collection in the future?

 2   MR. PATTON: Just a second.

 3   (Counsel conferring.)

 4   MR. PATTON: Just object to beyond the

 5   scope of 30(b)(6). The witness can answer if she

 6   knows.

 7   THE WITNESS: No.

 8   BY MR. TOOMEY:

 9   Q   Has the NSA indicated to any member of

10   Congress any interest in resuming "about"

11   collection in the future?

12   MR. PATTON: Just a second.

13   (Counsel conferring.)

14   MR. PATTON: Same objection as beyond

15   the scope of 30(b)(6). The witness can answer if

16   she's aware.

17   THE WITNESS: Admiral Rogers testified

18   that he would consider going back up on "abouts"

19   collection if he could make it through all the --

20   you know, if it met the needs -- met intelligence

21   needs, and they were in a position to meet all the

22   needs of the FISC and notification to Congress.

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 1              BY MR. TOOMEY:

 2         Q    Do you know when Admiral Rogers

 3    provided that testimony?

 4         A    I want to say roughly October time

 5    frame 2018 -- I'm sorry, sorry 2017 -- in the

 6    future.  Somewhere in the September/October 2017.

 7    It might have been part of one of the threat

 8    briefings.

 9         Q    Do you know to whom he provided that

10    testimony?  Which congressional committee or --

11         A    I believe it was SSCI, Senate Select

12    Committee on Intelligence.  I'm pretty certain

13    that's who it was.

14         Q    Thank you.

15         A    It could have been part of an

16    appropriations hearing, but ...

17         Q    And was that testimony public

18    testimony?

19         A    Yes, it was.

20         Q    Has the NSA indicated to the FISC any

21    interest in resuming "about" collection in the

22    future?
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 1   MR. PATTON: Objection.

 2   (Counsel conferring.)

 3   MR. PATTON: The objection is twofold.

 4 One, beyond the scope of 30(b)(6) and, two, object

 5 to the extent it calls for a classified answer,

 6 and also one subject to statutory privileges. But

 7 if the witness is personally aware of that fact

 8 and it's unclassified, she can answer.

 9   THE WITNESS: The answer is

10 classified, and I'm following the instructions of

11 my lawyer.

12   BY MR. TOOMEY:

13   Q   Has the NSA indicated to the FISC that

14 it intends to resume "about" collection in the

15 future?

16   MR. PATTON: Same objection, same

17 instruction.

18   THE WITNESS: Same answer.

19   MR. TOOMEY: Can we mark as the next

20 exhibit, please, this document?

21   (Deposition Exhibit 52 was

22   marked for identification.)

 1   BY MR. TOOMEY:

 2   Q   Could you please take a look at

 3   Exhibit 52 and tell me if you recognize this

 4   document and what it is?

 5   A   I recognize this document. It is the

 6   NSA press release dated April 28, 2017, stating,

 7   "NSA Stops Certain Foreign Intelligence Collection

 8   Activities Under Section 702."

 9   Q   Thank you. Let me move to a

10   different -- can we please mark this document as

11   Exhibit 53?

12   (Deposition Exhibit 53 was

13   marked for identification.)

14   BY MR. TOOMEY:

15   Q   Could you please take a look at this

16   document, state whether you're familiar with it,

17   and describe it.

18   A   Yes, I am familiar with it. It is the

19   statement from April 28th, 2017, stating, "NSA

20   Stops Certain Section 702 'Upstream' Activities."

21   Q   And I'm going to read a short passage

22   from the first paragraph at the end, which says,

1   "After a comprehensive review of mission needs,

2   current technological constraints, United States

3   person privacy interests, and certain difficulties

4   in implementation, NSA has decided to stop some of

5   its activities conducted under Section 702."

6   Is that sentence accurate?

7   A   Yes.

8   Q   Did any court order the NSA to stop

9   "about" collection?

10   MR. PATTON: One second.

11   (Counsel conferring.)

12   MR. PATTON: My only objection is to

13   vagueness as to the term "stop" in the context of

14   a court order.

15   MR. GILLIGAN: Beyond the scope.

16   MR. PATTON: It's also beyond the

17   scope then.

18   MR. TOOMEY: You can answer.

19   THE WITNESS: Actually, I would just

20   like more specificity. What are you -- I'm not

21   sure I entirely understand.

22   If you read -- maybe I'll give a

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1   little bit more answer. If you read on the second

2   page of Exhibit 53, it states, "After considerable

3   evaluation of the program and available

4   technology, NSA has decided that its Section 702

5   foreign intelligence surveillance activities will

6   no longer include any upstream internet

7   communications that are solely 'about' a foreign

8   intelligence target."

9   So could you be clearer of the

10   particular court?

11   BY MR. TOOMEY:

12   Q   Could you read me the title of

13   Exhibit 53?

14   A   Sure. NSA statement, "NSA Stops

15   Certain Section 702 'Upstream' Activities,"

16   dated April 28th, 2017.

17   Q   And my question is did any court order

18   the NSA to stop "about" collection?

19   MR. PATTON: Same objections.

20   THE WITNESS: Can you describe what

21   court you're talking about?

22

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 1   BY MR. TOOMEY:

 2   Q   I'm asking about any court.

 3   A   Any court?

 4   Q   But any court would include the FISC.

 5   MR. PATTON: Same objections. Also,

 6   this particular one calls for a legal conclusion

 7   too. You can answer.

 8   THE WITNESS: Okay.

 9   So the Attorney General and the DNI

10   put forward a set of targeting procedures to the

11   FISC, and the FISC agreed with those procedures.

12   There was no FISC ordering us to stop.

13   BY MR. TOOMEY:

14   Q   Did Congress prohibit the NSA from

15   conducting "about" collection in April of 2017?

16   MR. PATTON: Objection, vague as to

17   April 2017. Same set of objections as before,

18   beyond the scope of 30(b)(6), calls for a legal

19   conclusion, vague.

20   THE WITNESS: No.

21   BY MR. TOOMEY:

22   Q   Congress hasn't since prohibited the

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 1   NSA from restarting "about" collection, correct?

 2   MR. PATTON: Objection, beyond the

 3   scope, calls for a legal conclusion.

 4   THE WITNESS: With the passage of the

 5   702 FAA Reauthorization, it puts in place a

 6   requirement for notification 30 days between when

 7   the FISC approves it and when we could start,

 8   unless there's extenuating circumstances.

 9   BY MR. TOOMEY:

10   Q   So that statute doesn't contain a

11   prohibition on restarting "about" collection?

12   A   Correct.

13   MR. PATTON: Same set of objections.

14   THE WITNESS: Correct.

15   BY MR. TOOMEY:

16   Q   Today, does upstream surveillance

17   involve the scanning of all international

18   text-based communications on individual circuit or

19   circuits the NSA is monitoring?

20   MR. PATTON: Objection, calls for

21   classified information and information protected

22   by the statutory privileges.

 1   Instruct the witness not to answer.

 2   THE WITNESS: I will follow

 3   instructions.

 4   MR. GILLIGAN: Could I hear the

 5   question again, please?

 6   (The reporter read back the question.)

 7   MR. GILLIGAN: Can we go talk, please?

 8   Off the record.

 9   (Off the record at 8:57 p.m.)

10   (Resume at 9:22 p.m.)

11   BY MR. TOOMEY:

12   Q   Let's go back on the record.

13   Ms. Jaques, could you please read back

14   the last question?

15   (The reporter read back the question.)

16   MR. PATTON: Objection to the

17   question, that calls for a classified answer, and

18   also an answer that seeks information protected by

19   the statutory provisions.

20   Instruct the witness not to answer.

21   THE WITNESS: I will follow the

22   instructions.

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 1                    MR. TOOMEY:  So going forward, can we

 2   shorten that to assert state secrets and statutory

 3   privileges?

 4                    MR. PATTON:  I will shorten it as fast

 5   as I can.

 6                    BY MR. TOOMEY:

 7        Q    In June 2015, did upstream

 8   surveillance involve the scanning of all

 9   international text-based communications on the

10   individual circuit or circuits the NSA was

11   monitoring?

12                    MR. PATTON:  Same objection, same

13   instruction.

14                    THE WITNESS:  Will follow the

15   instructions.

16                    BY MR. TOOMEY:

17        Q    Today, if some international

18   text-based communications on a given circuit are

19   not scanned, please explain in as much detail as

20   necessary to completely answer why those

21   communications are not scanned.

22                    MR. PATTON:  Please repeat the
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 1   question.

 2   (The reporter read back the question.)

 3   MR. PATTON: Object to the question to

 4   the extent it calls for classified information and

 5   information protected by the statutory privileges.

 6   The witness can answer the question to

 7   the extent that she is aware of an unclassified

 8   answer to that question.

 9   THE WITNESS: Can you read the

10   question one more time to make sure I have it

11   entirely accurate?

12   (The reporter read back the question.)

13   THE WITNESS: As we were discussing in

14   the existing Civil Liberties and Privacy Report,

15   the process is that there's filtering, and then

16   there's scanning. So to the extent that we have

17   filtered wholly domestic communications out as

18   part of that, those would not be scanned.

19   BY MR. TOOMEY:

20   Q   Beyond that response and beyond the

21   unclassified information you've already provided

22   today, can you please fully explain in as much

1   detail as necessary why some communications are

2   not scanned?

3   MR. PATTON: Object to the question,

4   calls for classified information, information

5   protected by the statutory privileges.

6   Instruct not to answer.

7   THE WITNESS: Will follow the

8   instructions.

9   BY MR. TOOMEY:

10   Q   Same question as of June 2015. If you

11   need me to restate the question, I can.

12   A   Can you restate the question?

13   Q   Apart from the unclassified

14   information you've already provided today, as of

15   June 2015, if some international text-based

16   communications on a given circuit were not

17   scanned, please explain in as much detail as

18   necessary to fully answer why those communications

19   are not scanned.

20   MR. PATTON: Just a moment.

21   (Counsel conferring.)

22   MR. PATTON: Object to the question,

1   calls for classified information and information

2   protected by the statutory privileges.

3   If there's any information that the

4   witness is aware of that has not already been

5   provided either in the interrogatory responses or

6   in the prior testimony that would answer that

7   question, she can go ahead and give it.

8   If not, I would instruct her not to

9   answer the question based on those privileges.

10   THE WITNESS: There's no additional

11   information, so I'll follow counsel's directions.

12   BY MR. TOOMEY:

13   Q   There's no additional unclassified

14   information?

15   A   There's no additional unclassified

16   information that I can provide you beyond what

17   we've already provided you.

18   Q   And there is classified information

19   which you're not providing based on your counsel's

20   instruction?

21   MR. PATTON: To the extent that the

22   answer to that question is yes or no, you can

 1   answer the question.

 2   THE WITNESS: Yes, that's correct.

 3   MR. TOOMEY: Thank you. Let's go off

 4   record.

 5   (Off the record at 9:29 p.m.)

 6   (Resume at 9:39 p.m.)

 7   EXAMINATION BY COUNSEL FOR PLAINTIFFS

 8   BY MS. HANLEY COOK:

 9   Q   Hi, I'm Devon Hanley Cook. We spent

10   the day together, but nice to meet you. I want to

11   thank you for your patience and for putting up

12   with all our questions and going so late today. I

13   also want to thank you, Dawn. I know it's been a

14   really long day for everybody.

15   Does NSA now scan Wikimedia's

16   communications in the course of upstream

17   surveillance?

18   MR. PATTON: Objection, calls for

19   classified information, subject to state secrets

20   privilege and to statutory privileges.

21   Instruct the witness not to answer.

22   THE WITNESS: I will follow the

 1   instructions.

 2   BY MS. HANLEY COOK:

 3   Q   In 2015, did NSA scan Wikimedia

 4   communications in the course of upstream

 5   surveillance?

 6   MR. PATTON: Same objection, same

 7   instruction.

 8   THE WITNESS: Will follow the

 9   instruction.

10   BY MS. HANLEY COOK:

11   Q   Does NSA now copy Wikimedia

12   communications in the course of upstream

13   surveillance?

14   MR. PATTON: Same objection, same

15   instruction.

16   THE WITNESS: Will follow the

17   instruction.

18   BY MS. HANLEY COOK:

19   Q   In June 2015, did NSA copy Wikimedia

20   communications in the course of upstream

21   surveillance?

22   MR. PATTON: Same objection, same

 1   instruction.

 2   THE WITNESS: Will follow the

 3   instruction.

 4   BY MS. HANLEY COOK:

 5   Q   Has NSA acquired Wikimedia

 6   communications as a result of upstream

 7   surveillance now?

 8   MR. PATTON: Same objection, same

 9   instruction.

10   THE WITNESS: Will follow the

11   instruction.

12   BY MS. HANLEY COOK:

13   Q   As of June 2015, had NSA acquired

14   Wikimedia communications as a result of upstream

15   surveillance?

16   MR. PATTON: Same objection, same

17   instruction.

18   THE WITNESS: Will follow the

19   instructions.

20   BY MS. HANLEY COOK:

21   Q   Can I have Tab X, please? Let's save

22   time, let's do X and Y, please.

 1   MR. GILLIGAN: 54 and 55 then?

 2   THE REPORTER: Yes, 54 and 55.

 3   (Deposition Exhibits 54 and 55

 4   were marked for identification.)

 5   BY MS. HANLEY COOK:

 6   Q   Let's start with Exhibit 54.

 7   Have you seen Exhibit 54 before?

 8   MR. PATTON: Just a second.

 9   (Counsel conferring.)

10   MR. PATTON: Object to the question as

11   beyond 30(b)(6). The witness can answer yes or no

12   if she has personally seen this Exhibit 54 before.

13   THE WITNESS: No.

14   BY MS. HANLEY COOK:

15   Q   If you assumed that Exhibit 54 related

16   to upstream surveillance, it would indicate,

17   wouldn't it, that the NSA had an intelligence

18   interest in Wikimedia's communications, wouldn't

19   it?

20   MR. PATTON: Object to the question,

21   calls for a classified answer, subject to the

22   state secrets privilege and to the statutory

 1   privileges.

 2   Instruct the witness not to answer the

 3   question.

 4   THE WITNESS: Will follow those

 5   instructions.

 6   BY MS. HANLEY COOK:

 7   Q   Turning to Exhibit 55, have you seen

 8   this document before? Actually, let me --

 9   Exhibit 54. Recognizing that you have not seen

10   the document before, what do you think it is?

11   MR. PATTON: Objection. Same

12   objection as before, same instruction.

13   THE WITNESS: Which instruction was

14   that? Classified?

15   MR. PATTON: Classified, subject to

16   the state secrets privilege and to statutory

17   privileges.

18   The witness is instructed not to

19   answer the question.

20   THE WITNESS: I will follow those

21   instructions. I just had to make sure I knew what

22   the instructions were.

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 1   BY MS. HANLEY COOK:

 2   Q   Makes sense.

 3   Exhibit 55, have you seen this

 4   document before?

 5   MR. PATTON: Object to the question to

 6   the extent it's beyond 30(b)(6). The witness can

 7   answer yes or no if she has seen this document in

 8   her personal capacity.

 9   THE WITNESS: Yes.

10   BY MS. HANLEY COOK:

11   Q   What is it?

12   MR. PATTON: Object to the question,

13   calls for a classified answer, subject to the

14   state secrets and to statutory privileges.

15   Instruct the witness not to answer.

16   THE WITNESS: I will follow those

17   instructions.

18   BY MS. HANLEY COOK:

19   Q   If you assumed that Exhibit 55 related

20   to upstream surveillance, it would indicate,

21   wouldn't it, particularly on the second page in

22   the first bullet point, that the NSA has an

 1   intelligence interest in Wikimedia's HTTP

 2   communications, wouldn't it?

 3   MR. PATTON: Same objection, same

 4   instruction.

 5   THE WITNESS: Will follow those

 6   instructions.

 7   BY MS. HANLEY COOK:

 8   Q   Do Exhibits 54 or 55 relate to

 9   upstream surveillance?

10   MR. PATTON: Same objection, same

11   instruction.

12   THE WITNESS: Will follow those

13   instructions.

14   BY MS. HANLEY COOK:

15   Q   At this time, HTTP communications are

16   scanned for selectors in the course of upstream

17   surveillance, aren't they?

18   MR. PATTON: Just a second.

19   (Counsel conferring.)

20   MR. PATTON: Same objection, same

21   instructions. Do you need a reminder on the --

22   THE WITNESS: I just need to remind

 1   what --

 2   MR. PATTON: Do you need the question

 3   read back?

 4   THE WITNESS: Could you read the

 5   question again?

 6   (The reporter read back the question.)

 7   MR. PATTON: Object to the question,

 8   calls for classified information, information

 9   protected by the statutory privileges, and

10   instruct the witness not to answer.

11   THE WITNESS: I will follow those

12   instructions.

13   BY MS. HANLEY COOK:

14   Q   As of June 2015, HTTP communications

15   were scanned for selectors in the course of

16   upstream surveillance, right?

17   MR. PATTON: Same objection, same

18   instruction.

19   THE WITNESS: Will follow the

20   instructions.

21   BY MS. HANLEY COOK:

22   Q   At this time, HTTPS communications are

 1   scanned for selectors in the course of upstream

 2   surveillance, aren't they?

 3   MR. PATTON: Same objection, same

 4   instruction.

 5   THE WITNESS: Will follow the

 6   instruction.

 7   BY MS. HANLEY COOK:

 8   Q   Same question as to the June 2015 time

 9   frame.

10   MR. PATTON: Same objection, same

11   instruction.

12   THE WITNESS: Will follow the

13   instruction.

14   BY MS. HANLEY COOK:

15   Q   Are Apache Kafka communications

16   scanned for selectors in the course of upstream

17   surveillance?

18   MR. PATTON: Same objection, same

19   instruction.

20   THE WITNESS: Will follow the

21   instruction.

22

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 1                BY MS. HANLEY COOK:

 2        Q    Do you know what Apache Kafka

 3   communications are?

 4                MR. PATTON:  Object to the question,

 5   beyond the scope, calls for expert testimony.

 6                The witness can answer in her personal

 7   capacity.

 8                THE WITNESS:  Not well enough to

 9   describe to you.

10                BY MS. HANLEY COOK:

11        Q    Open VPN communications are scanned

12   for selectors in the course of upstream

13   surveillance, aren't they?

14                MR. PATTON:  Objection, vague as to

15   time period, calls for classified information and

16   information protected by the statutory privileges.

17                Instruct the witness not to answer.

18                THE WITNESS:  Will follow the

19   instruction.

20                BY MS. HANLEY COOK:

21        Q    As of June 2015, were open VPN

22   communications scanned for selectors in the course
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 1   of upstream surveillance?

 2   MR. PATTON: Same objection without

 3   the vague as to time.

 4   Same instruction not to answer.

 5   THE WITNESS: Will follow the

 6   instruction.

 7   BY MS. HANLEY COOK:

 8   Q   Other than public documents, public

 9   documents at large, hearing testimony that is

10   transcribed, public documents you reviewed,

11   documents that have been filed or served in this

12   case, or your testimony today, what can you tell

13   me about the volume of communications subject to

14   upstream surveillance at this time using any unit

15   of measurement you want to discuss volume of

16   communications?

17   MR. PATTON: Just one moment.

18   Can we go off the record?

19   (Off the record at the 9:49 p.m.)

20   (Resume at 9:49 p.m.)

21   MR. PATTON: Could you read back the

22   question, please?

 1   (The reporter read back the question.)

 2   MR. PATTON: Other than the officially

 3   disclosed government statements, whether they be

 4   publicly by ODNI or by NSA or filed in this

 5   particular case or filed in the FISC and

 6   declassified, any other information that the

 7   witness would have would be classified, and so I

 8   would instruct her not to answer the question

 9   based on the state secrets privilege and statutory

10   privileges.

11   THE WITNESS: I'll follow the

12   instructions.

13   BY MS. HANLEY COOK:

14   Q   Okay. How many communications -- and

15   you can use any unit of measurement you want --

16   did NSA retain as a result of upstream

17   surveillance in each of the last three years?

18   MR. PATTON: Objection, vague as to

19   the term "communication," and classified, subject

20   to the state secrets privilege and statutory

21   privileges, and instruct not to answer.

22   THE WITNESS: Will follow the

 1   instruction.

 2   BY MS. HANLEY COOK:

 3   Q   Same question as to transactions.

 4   MR. PATTON: Same objections except

 5   for vagueness, same instruction.

 6   THE WITNESS: I will follow the

 7   instructions.

 8   BY MS. HANLEY COOK:

 9   Q   What is the volume of communications

10   copied in the course of upstream surveillance in

11   each of the last three years?

12   MR. PATTON: Objection, vague.

13   Objection, seeks classified information protected

14   by the state secrets privilege, statutory

15   privileges, instruct not to answer.

16   THE WITNESS: I will follow the

17   instructions.

18   BY MS. HANLEY COOK:

19   Q   Same question as to transactions.

20   MR. PATTON: Same objections with

21   exception of vagueness, same instruction.

22   THE WITNESS: Following the

 1   instructions.

 2   BY MS. HANLEY COOK:

 3   Q   What is the volume of communications

 4   or transactions that are subject to filtering in

 5   the course of upstream surveillance in the last

 6   three years?

 7   MR. PATTON: I'm sorry, did you use

 8   the term "Internet transactions"?

 9   MS. HANLEY COOK: No.

10   MR. PATTON: I'm sorry, could you read

11   the question back?

12   (The reporter read back the question.)

13   MR. PATTON: Objection, vague as to

14   communications, and objection to the rest for the

15   same reasons set forth before, instruct not to

16   answer.

17   THE WITNESS: Will follow the

18   instructions.

19   BY MS. HANLEY COOK:

20   Q   Would the answer be the same if I used

21   the term "Internet transactions"?

22   MR. PATTON: The instruction not to

1   answer would be the same, but there would be no

2   vagueness objection, if that helps, or deemed

3   compound since it was previous communications or

4   transactions, but the instruction not to answer

5   would remain the same, yes.

6   (Deposition Exhibit 56 was

7   marked for identification.)

8   BY MS. HANLEY COOK:

9   Q   Please take a look at Exhibit 56.

10   Have you seen this document before?

11   MR. PATTON: We need to go off the

12   record.

13   MS. HANLEY COOK: Okay.

14   (Off the record at 9:53 p.m.)

15   (Resume at 9:59 p.m.)

16   BY MS. HANLEY COOK:

17   Q   The question was have you seen this

18   document before?

19   MR. PATTON: Objection as beyond the

20   scope of 30(b)(6). The witness can answer in her

21   personal capacity if she's seen the document

22   before.

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 1   THE WITNESS: I've certainly seen

 2   portions of it. I'm not sure I saw it in its

 3   entirety when I was working at DHS. I don't know

 4   that I saw it all in its entirety.

 5   BY MS. HANLEY COOK:

 6   Q   What is it?

 7   MR. PATTON: Same objection.

 8   THE WITNESS: Memorandum Opinion for

 9   the Counsel to the President on legal issues

10   relating to the testing, use, and deployment of an

11   intrusion detection system (Einstein 2.0) to

12   protect unclassified computer networks in the

13   Executive Branch, dated January 9, 2009.

14   BY MS. HANLEY COOK:

15   Q   Thank you. Please turn to page 4 of

16   Exhibit 56, the second paragraph that begins

17   "EINSTEIN 2.0."

18   A   Mm-hmm.

19   Q   I'd like you to read the first two

20   sentences to yourself, and tell me when you're

21   done.

22   A   (Witness reviewing document.) Yeah.

 1   Q   Exhibit 56 says that Einstein 2.0

 2   sensors will scan a temporary copy of traffic,

 3   right?

 4   MR. PATTON: Same objections.

 5   THE WITNESS: That's what the sentence

 6   says, yes.

 7   BY MS. HANLEY COOK:

 8   Q   Is that sentence containing "temporary

 9   copy" accurate to the best of your knowledge?

10   MR. PATTON: Same objection, lack of

11   foundation as well.

12   THE WITNESS: To the extent that I at

13   some point reviewed a Privacy Impact Assessment

14   associated with Einstein 1 or Einstein 2, it was

15   many years ago, so I can't speak to whether the

16   specificity -- I didn't review this document in

17   advance of any of this conversation, so I would

18   want to go back and look at all those materials

19   before I gave you an answer one way or the other.

20   I have no reason to say it's not, but

21   I have no reason to know whether that was exactly

22   how it was implemented, or whether it remains true

 1   today.

 2   BY MS. HANLEY COOK:

 3   Q   But this document at least says that

 4   it will create a temporary copy, right?

 5   MR. PATTON: Objection, the document

 6   speaks for itself.

 7   THE WITNESS: Yes, that's what the

 8   sentence says.

 9   BY MS. HANLEY COOK:

10   Q   The next sentence that I had you read

11   says that, "Einstein 2.0 operations will not

12   disrupt the normal operations of federal systems."

13   Did I read that right?

14   A   Yes, you did.

15   Q   Do you know why Einstein 2 involves

16   the creation of a temporary copy of the traffic

17   being scanned?

18   MR. PATTON: Objection, beyond the

19   scope of 30(b)(6), calls for -- it also -- it also

20   indicates I'm getting tired -- beyond the scope

21   and lacks foundation.

22   THE WITNESS: Well, you can read the

1   words that are on the page.

2   BY MS. HANLEY COOK:

3   Q   Do the words on this page indicate to

4   you why Einstein 2 involves the creation of a

5   temporary copy of the traffic being scanned?

6   MR. PATTON: Same objections.

7   THE WITNESS: Well, it says it's for

8   the purpose of scanning by the sensors. I guess

9   that's not the why.

10   BY MS. HANLEY COOK:

11   Q   Doesn't Einstein 2 create a temporary

12   copy of the traffic being scanned so that it will

13   not disrupt the normal operations of federal

14   systems?

15   MR. PATTON: Same objections,

16   including lack of foundation.

17   THE WITNESS: I'm not -- again, in my

18   personal capacity, having done work on this in

19   previous positions, without having reviewed all

20   those documents, I'm not willing to expound one

21   way or the other on the particular information

22   provided here beyond what you see on the piece of

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1   paper.

2   BY MS. HANLEY COOK:

3   Q   In June 2015, did upstream

4   surveillance involve the scanning of a temporary

5   copy of the transactions scanned?

6   MR. PATTON: Objection, calls for

7   classified information, information subject to the

8   statutory privileges, and instruct the witness not

9   to answer.

10   THE WITNESS: I will follow the

11   instructions.

12   BY MS. HANLEY COOK:

13   Q   Going back several hours now --

14   A   Awesome.

15   Q   -- you testified I think, but correct

16   me if I'm wrong, that as of June 2015, the NSA

17   scanned at least some portions of the application

18   layer of Internet transactions as part of upstream

19   collection, right?

20   MR. PATTON: Just a second.

21   (Counsel conferring.)

22   MR. PADGETT: Can you read the

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 1   question?

 2   (The reporter read back the question.)

 3   THE WITNESS: Can we go off the

 4   record?

 5   MS. HANLEY COOK: Yeah, thank you.

 6   (Off the record at 10:06 p.m.)

 7   (Resume at 10:11 p.m.)

 8   THE WITNESS: Can you repeat your

 9   sentence one more time to make sure I was

10   accurately -- or can you repeat what you --

11   MS. HANLEY COOK: Dawn, do you mind

12   reading it? Thanks.

13   (The reporter read back the question.)

14   THE WITNESS: Yes, that's correct.

15   BY MS. HANLEY COOK:

16   Q   You also testified that deep packet

17   inspection refers to the scanning of the

18   application layer of Internet packets, right?

19   A   In the general -- oh.

20   MR. PATTON: Object to the extent it

21   may mischaracterize the testimony, and beyond the

22   scope, but the witness can answer.

 1   THE WITNESS: In the general sense, as

 2   is traditionally understood for what deep packet

 3   inspection means, not specific to upstream.

 4   BY MS. HANLEY COOK:

 5   Q   But it's accurate then to say that

 6   upstream surveillance, as of June 2015, involved

 7   deep packet inspection, right?

 8   MR. PATTON: Just a moment.

 9   (Counsel conferring.)

10   MR. PATTON: Objection as to vague,

11   beyond the scope of 30(b)(6), and to the extent

12   there's any classified information, instruct the

13   witness not to answer.

14   If there's an unclassified answer that

15   she can provide, she can provide that now.

16   THE WITNESS: I have no further

17   information. I will take the instructions and not

18   provide classified information.

19   BY MS. HANLEY COOK:

20   Q   Today, how many targets does NSA have

21   for upstream surveillance?

22   MR. PATTON: Objection, calls for

 1   classified information, and information protected

 2   by the statutory privileges, instruct not to

 3   answer.

 4   THE WITNESS: Could you ask the

 5   question again, please?

 6   BY MS. HANLEY COOK:

 7   Q   Sure. Today how many targets does NSA

 8   have for upstream surveillance?

 9   MR. PATTON: Same objection. If the

10   witness is aware of any unclassified answer, we

11   should probably talk about that.

12   THE WITNESS: Okay, why don't we go

13   talk about that.

14   MR. PATTON: Off the record.

15   (Off the record at 10:14 p.m.)

16   (Resume at 10:14 p.m.)

17   MR. PATTON: Read the question back,

18   please.

19   (The reporter read back the question.)

20   MR. PATTON: Same objections, same

21   instructions.

22   THE WITNESS: I will follow the

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 1   instructions.

 2   BY MS. HANLEY COOK:

 3   Q   In June 2015, how many targets did NSA

 4   have for upstream surveillance?

 5   MR. PATTON: Same objection, same

 6   instruction.

 7   THE WITNESS: I'll follow the

 8   instructions.

 9   BY MS. HANLEY COOK:

10   Q   Without revealing the -- you good?

11   MR. PATTON: Yeah.

12   BY MS. HANLEY COOK:

13   Q   Without revealing the contents of any

14   conversations that you had with your attorneys

15   outside this room today, and with the exception of

16   conversations related to determining whether

17   classified information was responsive to a

18   question, where the line was properly drawn on

19   classified information, state secret

20   classifications, during breaks in the deposition

21   today, did you discuss with anyone the substance

22   of your testimony during the deposition?

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 1                    MR. PATTON:  Subject to those caveats

 2   you said, plus the statutory privileges, the

 3   witness can answer.

 4                    THE WITNESS:  No.

 5                    MS. HANLEY COOK:  I have no further

 6   questions.

 7                    MR. TOOMEY:  Can we take a break?

 8                    MS. HANLEY COOK:  Strike that I said

 9   that.  Take a break for five minutes to be sure,

10   just go back through the outline.

11                    (Off the record at 10:16 p.m.)

12                    (Resume at 10:26 p.m.)

13                       FURTHER EXAMINATION

14                    BY MR. TOOMEY:

15        Q    When a communication is encrypted

16   using HTTPS, does some of the communication's

17   metadata remain unencrypted?

18                    MR. PATTON:  One second.

19                    (Counsel conferring.)

20                    MR. PATTON:  Object to the question as

21   beyond the scope of 30(b)(6), calling for an

22   expert opinion.  The witness can answer in her
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 1   personal capacity to the extent that she is aware

 2   of the answer.

 3   THE WITNESS: In the general sense, it

 4   will depend on the type of encryption that's being

 5   used, and it will depend on the nature of how it's

 6   being transmitted, so there's not one answer that

 7   fits all.

 8   BY MR. TOOMEY:

 9   Q   So when a communication is encrypted

10   using HTTPS, does some of the communication's

11   metadata remain unencrypted?

12   MR. PATTON: Object to the term

13   "communication" as vague, and same prior

14   objections and instruction to the witness.

15   THE WITNESS: To the extent that the

16   question is somewhat vague, I'll say generally

17   speaking, yes, but I think there are different

18   ways you could do things that might change that

19   answer.

20   BY MR. TOOMEY:

21   Q   When a communication is encrypted

22   using HTTPS, are the senders and recipients'

Page 354

 1   IP addresses unencrypted?

 2   MR. PATTON: Same objection, same

 3   instruction.

 4   THE WITNESS: Generally speaking, they

 5   will -- I'm sorry, say the question one more time.

 6   (The reporter read back the question.)

 7   MR. PATTON: Same objection, same

 8   instruction.

 9   THE WITNESS: Again, the question is

10   somewhat vague, and so I would answer generally

11   that is true, but there are undoubtedly a number

12   of exceptions that also could make that untrue.

13   MR. TOOMEY: Could you please mark

14   this document as 57.

15   (Deposition Exhibit 57 was

16   marked for identification.)

17   BY MR. TOOMEY:

18   Q   Could you please take a look at the

19   document, describe what it is, and tell me if

20   you're familiar with it.

21   A   This is the Notice of Filing of

22   Government's Responses to FISC Questions Regarding

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 1   the Amended 2011 Section 702 Certifications, dated

 2   November 15th, 2011.

 3   Q   Thank you.

 4   A   Yes, I am familiar with these

 5   documents.

 6   Q   Could you please turn to page 9?

 7   A   Sure.

 8   Q   I'm going to read from about the third

 9   paragraph down in the middle of the personal

10   knowledge, which says, "Metadata that has been

11   extracted from Internet transactions consistent

12   with Section 3(b)(5)(b)(4) is subject to the

13   two-year retention limit set forth in Section 3(c)

14   of the amended NSA minimization procedures."

15   Was that statement accurate at the

16   time this document was filed with the FISC on

17   November 15th, 2011?

18   A   Yes.

19   Q   So the NSA extracts metadata from

20   communications collected in the course of upstream

21   surveillance, correct?

22   MR. PATTON: Just a moment.

 1   (Counsel conferring.)

 2   MR. PATTON: Objection, vague as to

 3   time period, but the witness can answer.

 4   THE WITNESS: Could you ask the

 5   question again?

 6   (The reporter read back the question.)

 7   MR. PATTON: Objection, vague as to

 8   time.

 9   THE WITNESS: So I would just offer

10   that the answer to your question is metadata has

11   been extracted from the Internet transactions. I

12   believe that the question said communications, in

13   which case that would be consistent with the

14   information that was provided here.

15   BY MR. TOOMEY:

16   Q   So I'll rephrase.

17   The NSA extracts metadata from

18   Internet transactions collected in the course of

19   upstream surveillance, correct?

20   MR. PATTON: Objection, vague as to

21   time.

22   THE WITNESS: Consistent with 2011,

 1   what's written here at 2011, yes, that is true.

 2   BY MR. TOOMEY:

 3   Q   Today, the NSA retains metadata

 4   associated with its targets' communications in the

 5   course of upstream surveillance, correct?

 6   MR. PATTON: Hold on.

 7   (Counsel conferring.)

 8   MR. PATTON: Sorry, could you read the

 9   question back, please?

10   (The reporter read back the question.)

11   MR. PATTON: Object to the question to

12   the extent it calls for classified information or

13   otherwise privileged pursuant to the

14   aforementioned statutes.

15   If there is an unclassified answer,

16   the witness can provide it.

17   THE WITNESS: Could you read the

18   question one more time?

19   (The reporter read back the question.)

20   MR. PATTON: Same objection, same

21   instruction.

22   THE WITNESS: NSA retains -- I would

 1   again go back to, instead of saying

 2   "communications," I would say "Internet

 3   transaction." I would say generally, yes, this is

 4   true.

 5   BY MR. TOOMEY:

 6   Q   Sorry, I didn't hear you. Could you

 7   say that again?

 8   A   Sure. NSA retains metadata -- may

 9   retain metadata associated with Internet

10   transactions in the course of upstream.

11   Q   The NSA has an interest in the

12   metadata of its targets' communications or

13   Internet transactions, correct?

14   MR. PATTON: Objection as vague,

15   beyond the scope of 30(b)(6).

16   The witness can answer.

17   THE WITNESS: NSA is interested in the

18   metadata associated with the Internet transactions

19   of a targeted selector -- to or from a targeted

20   selector.

21   BY MR. TOOMEY:

22   Q   So just to be clear, just to make sure

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1   I understood your answer, the NSA has an interest

2   in the metadata of communications to and from a

3   targeted selector?

4   MR. PATTON: Objection, beyond the

5   scope. The witness can answer.

6   THE WITNESS: Could you repeat the

7   question?

8   (The reporter read back the question.)

9   THE WITNESS: I would not use the word

10   "communications." I would use the word "Internet

11   transactions."

12   BY MR. TOOMEY:

13   Q   So just to be clear, the NSA has an

14   interest in the metadata of Internet transactions

15   to and from a targeted selector?

16   MR. PATTON: Objection, beyond the

17   scope, asked and answered.

18   THE WITNESS: Yes.

19   MR. TOOMEY: Thank you. All right, we

20   do not have any further questions right now.

21   MR. PATTON: Before we get off the

22   record, the government is going to invoke Federal

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1   Rule of Civil Procedure 30(e) to reserve the right

2   to review and signature of the witness.

3   (Whereupon, at 10:36 p.m., the taking

4   of the deposition was concluded.

5   Reading and signature were reserved.)

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 1              IN THE UNITED STATES DISTRICT COURT
                 FOR THE DISTRICT OF MARYLAND
 2

     ------------------------------x
 3   WIKIMEDIA FOUNDATION,           :
                                     :
 4              Plaintiff,           :        Case No.
         vs.                         :
 5                                   :     1:15-cv-00662-TSE
     NATIONAL SECURITY AGENCY,       :
 6   et al.,                         :
                                     :
 7              Defendants.          :
     ------------------------------x
 8

 9            ACKNOWLEDGMENT OF DEPONENT

10      I, REBECCA J. RICHARDS, do hereby acknowledge
                                        9            359
11   that I have read and examined pages 11 through 239

12   of the transcript of my deposition taken on Monday,

13   April 16, 2018, and that:

14

15   (Check appropriate box):

16   (  ) the same is a true, correct and complete
          transcription of the answers given by me to the
17        questions therein recorded.

18   (X) except for the changes noted in the attached
          errata sheet, the same is a true, correct and
19        complete transcription of the answers given by
          me to the questions therein recorded.
20

21       5/15/18                    _____
22        DATE                          SIGNATURE
```

Wikimedia Foundation v. NSA, et al., 15-cv-00662-TSE (D. Md.)

ERRATA SHEET of REBECCA J. RICHARDS

Page	Line	To	From	Justification
9	8	Kathleen	Cathleen	Spelling Error
45	4	Michael S. Rogers	Michael F. Rogers	Spelling Error
161	19	telecom	teleco	Spelling Error
169	19	USA FREEDOM Act	USA Freedom Act	Capitalization
192	6	Protocol	protocol	Capitalization
196	13	(with our targeting procedures)	in parens	Transcription Error
263	17	scanned	scan	Clarification

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1   CERTIFICATE OF NOTARY PUBLIC

2   I, DAWN A. JAQUES, a Notary Public in and for

3   the District of Columbia, before whom the foregoing

4   deposition was taken, do hereby certify that witness

5   whose testimony appears in the foregoing pages was

6   duly sworn by me; that the testimony of said witness

7   was taken by me in shorthand at the time and place

8   mentioned in the caption hereof and thereafter

9   reduced to typewriting under my supervision; that

10   said deposition is a true record of the testimony

11   given by said witness; that I am neither counsel

12   for, related to, nor employed by any of the parties

13   to the action in which this deposition is taken;

14   and, further, that I am not a relative or employee

15   of any attorney or counsel employed by the parties

16   thereto, nor financially or otherwise interested in

17   the outcome of the actions.

18

19   _____
       Dawn A. Jaques, CSR, CLR
20   Notary Public in and for
       District of Columbia

21

       My commission expires:
22   January 14, 2020

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 1                      *** ERRATA SHEET ***
                   TRANSPERFECT DEPOSITION SERVICES
 2                    216 E. 45th Street, Suite #903
                        NEW YORK, NEW YORK 10017
 3                          (212) 400-8845

 4     CASE: WIKIMEDIA FOUNDATION v. NATIONAL SECURITY AGENCY, et al.
       DATE: APRIL 16, 2018
 5     WITNESS: REBECCA J. RICHARDS      REF: 21368

 6      PAGE  LINE  FROM                    TO

 7      ____|_____|_____|_____

 8      ____|_____|_____|_____

 9      ____|_____|_____|_____

10      ____|_____|_____|_____

11      ____|_____|_____|_____

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14      ____|_____|_____|_____

15      ____|_____|_____|_____

16

17                     _____
                         REBECCA J. RICHARDS
18
       Subscribed and sworn to before me
19
       this ____ day of _____, 20__.
20
       _____
21      Notary Public

22
```

A

Abdo 3:3 5:4 8:2,3
8:19 9:11 11:22
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