

JAMES CLAPPER CONFIRMS VADM MIKE ROGERS NEEDLESSLY OBFUSCATED IN CONFIRMATION HEARING

On Friday, James Clapper finally provided Ron Wyden an unclassified response to a question he posed on January 29, admitting that the NSA conducts back door searches. (via Charlie Savage)

As reflected in the August 2013 Semiannual Assessment of Compliance with Procedures and Guidelines Issued Pursuant to Section 702, which we declassified and released on August 21, 2013, there have been queries, using U.S. person identifiers, of communications lawfully acquired to obtain foreign intelligence by targeting non U.S. persons reasonably believed to be located outside the U.S. pursuant to Section 702 of FISA.

It has taken just 9 months for Clapper to admit that, contrary to months of denials, the NSA (and FBI, which he doesn't confirm but which the Report makes clear, as well as the CIA) can get the content of Americans' communications without a warrant. But Clapper's admission that this fact was declassified in August should disqualify Vice Admiral Mike Rogers from confirmation as CyberComm head (I believe he started serving as DIRNSA head, which doesn't require confirmation, yesterday). Because it means Rogers refused to answer a question the response to which was already declassified.

Udall: If I might, in looking ahead, I

want to turn to the 702 program and ask a policy question about the authorities under Section 702 that's written into the FISA Amendments Act. The Committee asked your understanding of the legal rationale for NASA [sic] to search through data acquired under Section 702 using US person identifiers without probable cause. You replied the NSA—the NSA's court approved procedures only permit searches of this lawfully acquired data using US person identifiers for valid foreign intelligence purposes and under the oversight of the Justice Department and the DNI. The statute's written to anticipate the incidental collection of Americans' communications in the course of collecting the communications of foreigners reasonably believed to be located overseas. But the focus of that collection is clearly intended to be foreigners' communications, not Americans. But declassified court documents show that in 2011 the NSA sought and obtained the authority to go through communications collected under Section 702 and conduct warrantless searches for the communications of specific Americans. Now, my question is simple. **Have any of those searches been conducted?** Rogers: I apologize Sir, **I'm not in a position to answer that as the nominee.** Udall: You—yes. Rogers: But if you would like me to come back to you in the future if confirmed to be able to specifically address that question I will be glad to do so, Sir. Udall: Let me follow up on that. You may recall that Director Clapper was asked this question in a hearing earlier this year and he didn't believe that an open forum was the appropriate setting in which to discuss these issues. The problem that I have, Senator Wyden's had, and others is that we've tried in various ways to get

an unclassified answer – simple answer, yes or no – to the question. We want to have an answer because it relates – the answer does – to Americans’ privacy. **Can you commit to answering the question before the Committee votes on your nomination?** Rogers: Sir, I believe that one of my challenges as the Director, if confirmed, is how do we engage the American people – and by extension their representatives – in a dialogue in which they have a level of comfort as to what we are doing and why. That is no insignificant challenge for those of us with an intelligence background, to be honest. But I believe that one of the takeaways from the situation over the last few months has been as an intelligence professional, as a senior intelligence leader, I have to be capable of communicating in a way that we are doing and why to the greatest extent possible. That perhaps the compromise is, **if it comes to the how we do things, and the specifics, those are perhaps best addressed in classified sessions**, but that one of my challenges is I have to be able to speak in broad terms in a way that most people can understand. And I look forward to that challenge. Udall: I’m going to continue asking that question and I look forward to working with you to rebuild the confidence. [my emphasis]

I assume that now that Clapper has given him the okay to discuss unclassified topics with Congress, Rogers will now provide a forthright answer, all the while claiming he was ignorant about the answer at the time (fine! then make me DIRNSA because I know more about it!). But Rogers’ response went far beyond such an answer. He refused – not just in the hearing but even after it – to commit to answering a question with a completely unclassified answer. And as I pointed out in this post, his written answers

were even more obfuscatory. I don't get a vote. But I think this should disqualify him as a nominee.

Update: Here's the exchange in Rogers' questions for the record on back door searches.

What is your understanding of the legal rationale for NSA to search through data acquired under section 702 using U.S. Persons identifiers without probable cause?

Information acquired by NSA under Section 702 of FI SA must be handled in strict accordance with minimization procedures adopted by the Attorney General and approved by the Foreign Intelligence Surveillance Court. As required by the statute and certifications approving Section 702 acquisitions, such activities must be limited to targeting non-U.S. persons reasonably believed to be located outside the United States . NSA's Court-approved procedures only permit searches of this lawfully acquired data using U.S. person identifiers for valid foreign intelligence purposes and under the oversight of the Department of Justice and Office of Director of National Intelligence.