

# JAMES CLAPPER VERSUS DOJ (AND NSA) ON UPSTREAM COLLECTION TRANSPARENCY

<sup>3</sup> The term "upstream collection" refers to NSA's interception of Internet communications as they transit [REDACTED], rather than to acquisitions directly from Internet service providers such as [REDACTED].

Last week, David Ignatius wrote a column declaring the Director of National Intelligence position under James Clapper "Mission Accomplished!" It's mostly a beat sweetener, but I'm intrigued by his claim that James Clapper forced the NSA to declassify more of the 2011 John Bates decision than they wanted to.

But there are welcome signs that this jury-rigged structure may finally be starting to work as the DNI responds to budget pressures and the scandals surrounding National Security Agency's surveillance programs. Clapper has recently taken steps that forced the National Security Agency (NSA) to accept greater transparency and stopped the military agencies from wasteful spending on duplicative satellite imagery.

[snip]

One example is Clapper's pressure on the NSA to disclose more about its surveillance programs. The NSA initially wanted to "redact" (a fancy word for censor) far more of a 2011 ruling by the Foreign Intelligence Surveillance Court that the agency had engaged in illegally broad surveillance. Clapper thought NSA lawyers were suppressing too much, so he instructed his general counsel, Robert Litt, to go back through the document and make public more information.

Clapper ignored NSA and Justice Department protests, including to the White House, and backed Litt's less-redacted version.

That 2011 opinion is one of the most important disclosures so far (and the more I think about it the more I'm convinced it was a dangerous rubber stamp). So I'm grateful as much of it was released as it was.

But I'm intrigued by what this account says of upstream collection (and the searching on US person data collected under FISA Amendments Act) generally.

As the screen cap above shows, even while the opinion made it clear what "upstream" collection is (and other documents released, Dianne Feinstein's public comments, and the footnote below have made it clear the telecoms conduct the collection), it kept the actual language describing the process redacted.

<sup>24</sup> In addition to its upstream collection, NSA acquires discrete Internet communications from Internet service providers such as [REDACTED] [REDACTED] Aug. 16 Submission at 2; Aug. 30 Submission at 11; see also Sept. 7, 2011 Hearing Tr. at 75-77. NSA refers to this non-upstream collection as its "PRISM collection." Aug. 30 Submission at 11. The Court understands that NSA does not acquire "Internet transactions" through its PRISM collection. See Aug. 16 Submission at 1.

Assuming Ignatius description that Clapper pushed for this level of disclosure is correct, consider Clapper's gimmicky efforts to deny or refuse to discuss other upstream collection under E.O. 12333. That would say Clapper pushed to make more of this FAA upstream collection public, but has gone to some effort to deny the other direct collection under E.O. 12333.

Meanwhile, remember the way David Kris' paper, which was reviewed by DOJ, managed to raise Internet metadata and E.O. 12333, but largely indirectly.

They're awfully squirrely about the upstream collection, perhaps because they are increasingly targeting US persons using E.O.

12333. But it's worth following.