

# JAMES CLAPPER THROWS A CONCENTRATED NUGGET OF ORWELLIAN TURD- SPLAT

Hooboy.

I was going to leave the whole CNET thing well enough alone after Jerry Nadler issued a statement retracting his sort-of suggestion that the NSA could wiretap Americans without a warrant (more on that below).

But I can't remember seeing a more concentrated piece of Orwellian turd-splat than this statement addressing the issue from James Clapper.

The statement that a single analyst can eavesdrop on domestic communications without proper legal authorization is incorrect and was not briefed to Congress. Members have been briefed on the implementation of Section 702, that it targets foreigners located overseas for a valid foreign intelligence purpose, and that it cannot be used to target Americans anywhere in the world.

The claim that NSA doesn't wittingly "collect" data on millions of Americans was just an opening act for James Clapper, it seems. I know it won't work this way for those who trust this program, but Clapper's statement should raise more questions whether the thrust of what Nadler said, rather than four words taken out of context, are in fact true.

Let's take this slowly.

I've put my transcription of the exchange between Jerry Nadler and Robert Mueller below for your reference. But one thing to keep in

mind as you read Clapper's turd-splat is that Nadler first described "getting the contents of the [American] phone" identified using the metadata database and, in repeating the question he had earlier asked a briefer who actually knows about how these programs are used, "getting specific information from that telephone." It is true that in response to Mueller, he spoke of "listening to the phone," the four words taken out of context, and his walk-back describes "listening to the content." But the range of Nadler's language suggests the distinct possibility the briefer discussed a different kind of collection, and Nadler never once explicitly described setting a dedicated wiretap on the phone of an American identified from conversations with suspected terrorists (which is what CNET blew it up as).

With that in mind, I offer you turd-splat:

The statement that a single analyst can eavesdrop on domestic communications without proper legal authorization and was not briefed to Congress.

Clapper has set up a straw man that differs in at least three key ways from what Nadler asked about. First, he is addressing only **eavesdropping**, monitoring a phone in real time going forward, not accessing historic collections (though one thing these two programs in conjunction do is collapse historic and ongoing communications). I'm especially amused by this move, because it replicates a mistake that many have made when discussing these programs (especially the metadata one) as wiretapping. Clapper is only addressing the most inflammatory language Nadler used, not the language he used first and last in this exchange.

Then Clapper introduces the idea of **domestic communications**. This has no source in Nadler's comment whatsoever, at least so long as you believe the only way NSA uses the metadata

database is to see which Americans are talking to suspected foreign terrorist phone numbers. Given the government's improbable claim they're only making 300 queries a year, we may well be talking about domestic communications, but that's not what Nadler addressed, which was about the American participant in a call with a suspected foreign terrorist phone number.

Nadler asked about an analyst deciding, on the basis of metadata analysis, that a US phone number looks suspicious, to "get the content" from that number. He implies that he has been told an analyst has that authority. Clapper addresses only whether an analyst **without proper legal authorization** can get US person content. That is, in response to Nadler's question whether an analyst does have the legal authority to get content based on suspicion, Clapper says an analyst can't get content without the proper legal authority. Nadler's entire (implied) question was whether an analyst would have the legal authority to do so. Clapper doesn't answer it.

So in other words, Clapper alters Nadler's comment in three fundamental ways, changing its entire meaning, and then asserts Clapper's now only tangentially related distortion of Nadler's comment **was not briefed to Congress**.

No. Of course not. And Nadler hadn't said it was, either.

And then Clapper describes what (he claims) members were briefed. Splat!

Members have been briefed on the implementation of Section 702, that it targets foreigners located overseas for a valid foreign intelligence purpose, and that it cannot be used to target Americans anywhere in the world.

Whoa! Do you see what Clapper did there? Nadler asked a question about how an analyst would move from metadata analysis – the Section 215 program – and then use it to access content, via

whatever means. Nadler mentioned Section 215 specifically. Yet Clapper claims this is all about **the implementation of Section 702**. (Note, I find this interesting in part because Mueller suggests Nadler might be talking about another program entirely, which remains a possibility.)

I have pointed out on several times how desperate the Administration is to have you believe that Section 215 metadata collection and Section 702 content collection are unrelated, even if surrogates can't keep them straight themselves. Clapper's ploy is more of the same.

As is his emphasis that Section 702 **targets foreigners** located overseas **for a valid foreign intelligence purpose**. Now, just to make clear, the government has always held that any collection of information on what foreigners are doing is a valid foreign intelligence purpose. While Clapper doesn't engage in suggesting this as directly as he and others have in past weeks, for Section 702 there is clearly no limitation of this authority to terrorism or counterintelligence or proliferation or hacking (the Administration and surrogates have suggested there **is** a terrorism limit for the Section 215 dragnet, but if there is, it comes from court-ordered minimization, not the law). But the real cherry here is the word "target," which has become almost as stripped of common meaning as "collect" in this context.

In the 702 context, "target" refers to the node of communication at which collection is focused, not to all communications associated with that collection. So a directive to Verizon might ask for all communications that the original suspected terrorist phone number engages in (including its surfing and texting and pictures and email). But at a minimum that would include everyone the suspected terrorist communicates via his Verizon service, and there's very good reason to believe it includes at least one and probably more degrees of separation out, if Verizon has it.

So when Clapper says 702 cannot be used to

target Americans anywhere in the world, he means Americans cannot be the communication node on which collection is focused unless you have a FISA warrant (which is the practice Marc Ambinder, who is far more impressed with Clapper's turd-splat than I am, addresses in this piece).

But what has never been answered – except perhaps in an off-hand comment in a debate defeating language that would actually prevent what everyone says is already prevented – is whether the government can, um, “collect” the content of Americans who communicate with those who are, um, “targeted.”

I'm not saying I have the answer to that question – though it is a concern that has been raised for years by the very same people who have been vindicated in their warnings about Section 215. But let's be very clear what Clapper did here. He completely redefined Nadler's comment, then divorced that redefined comment from the context of Section 215, and then threw the Orwellian term “target” at it to make it go away.

He could have denied Nadler's more general assertions. That, he did not do.

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Nadler: Secondly, under Section 215, if you've gotten information from metadata, and you as a result of that think that gee, this phone number, 873-whatever, looks suspicious and we ought to get the contents of the phone, do you need a new specific warrant?

Mueller: You need at least a new National Security Letter. All you have is a telephone number. You do not have subscriber information, so you need subscriber information you would have to get probably a National Security Letter to get that subscriber information. And then if you wanted to do more—

Nadler: If you wanted to listen to the phone?

Mueller: You'd have to get a particularized order from the FISA Court directed at that particular phone at that particular individual.

Nadler: Now, is the answer you just gave me classified?

Mueller: Is what?

Nadler: Is the answer you just gave me classified in any way?

Mueller: I don't think so.

Nadler: OK. Then I can say the following. We heard precisely the opposite at the briefing the other day. We heard precisely that you could get specific information from that telephone simply based on an analyst deciding that, and you didn't need a new warrant. In other words, that what you just said is incorrect.

Mueller: I'm sure that it's the same—an answer to the same question. I'm sorry, I didn't mean to interrupt.

Nadler: Well, I asked the question both times and I think it's the same question.

Here's what Nadler said to walk this back (which I suspect overstates what is the case):

I am pleased that the administration has reiterated that, as I have always believed, the NSA cannot listen to the content of Americans' phone calls without a specific warrant.