

# OBVIOUSLY BOGUS CLAPPER EXONERATION ATTEMPT 4.0

[youtube]QwiUVUJmGjs[/youtube]

Wyden: Does the NSA collect any type of data, at all, on millions, or hundreds of millions of Americans?

Clapper: No sir.

Wyden: It does not?

Clapper: There are cases where they could inadvertently, perhaps, uh, collect, but not wittingly. [After 6:38]

Almost immediately after the first Edward Snowden leaks proved James Clapper lied when he told Ron Wyden the NSA doesn't collect data of any kind on millions of Americans, Clapper explained that he meant the NSA didn't vicariously pore through Americans' emails.

"What I said was, the NSA does not voyeuristically pore through U.S. citizens' e-mails. I stand by that," Clapper told National Journal in a telephone interview.

That is, his first response was about reading emails in a certain smarmy fashion; he did not apparently deny collecting them.

Then, with a bit more time to think up an excuse, he admitted to Andrea Mitchell that he had been "too cute by half" but didn't really explain what semantic excuse he had invented for himself.

First— as I said, I have great respect for Senator Wyden. I thought, though in retrospect, I was asked— "When are you going to start— stop beating your wife" kind of question, which is meaning not—

answerable necessarily by a simple yes or no. So **I responded in what I thought was the most truthful, or least untruthful manner** by saying no.

[snip]

And this has to do with of course somewhat of a semantic, perhaps some would say too— **too cute by half**. But it is— there are honest differences on the semantics of what— when someone says “collection” to me, that has a specific meaning, which may have a different meaning to him. [my emphasis]

Nevertheless, the implication, less than a week after Snowden’s first revelations, was that collecting Americans’ metadata doesn’t count until you access it, which seems to address the phone dragnet data (though would apply to incidentally collected US person data as well).

Perhaps because his Mitchell answer only increased the mockery, Clapper thought up a new answer, one he sent Senate Intelligence Committee Chair Dianne Feinstein 3 months after he lied to her committee.

**I have thought long and hard to re-create what went through my mind at the time.** In light of Senator Wyden’s reference to “dossiers” and faced with the challenge of trying to give an unclassified answer about our intelligence collection activities, many of which are classified, **I simply didn’t think of Section 215 of the Patriot Act.** Instead, my answer addressed collection of the content of communications. I focused in particular on Section 702 of FISA, because we had just been through a year-long campaign to seek reauthorization of this provision and had had many classified discussions about it, including with Senator Wyden. That is why I added a comment about

“inadvertent” collection of U.S. person information, because that is what happens under Section 702 even though it is targeted at foreigners.

That said, **I realized later** that Senator Wyden was asking about Section 215 metadata collection, rather than content collection. Thus, my response was clearly erroneous—for which I apologize. While **my staff acknowledged the error to Senator Wyden’s staff soon after the hearing**, I can now openly correct it because the existence of the metadata collection program has been declassified. [my emphasis]

Note Clapper himself admits he spent time (and he suggests, though it’s not entirely clear, that it continued up to June) trying to think through what he had said. He also didn’t acknowledge that Wyden’s office had to call him on his lie. Which of course means he doesn’t say specifically what Wyden’s office said after he lied blatantly.

Clapper’s changing answers have only fed the impression (supported by many other Clapper comments) that he’s a liar. Which is probably why the NYT called him one in its call for amnesty for Edward Snowden.

Clapper’s office, however, has not given up hope of convincing us he’s not a liar. Today, ODNI General Counsel Robert Litt tried to refute the NYT’s claim he’s a liar.

“Edward Snowden, Whistle-Blower” (editorial, Jan. 2) repeats the allegation that James R. Clapper Jr., the director of national intelligence, “lied” to Congress about the collection of bulk telephony metadata. **As a witness to the relevant events and a participant in them, I know that allegation is not true.**

Senator Ron Wyden asked about collection

of information on Americans during a lengthy and wide-ranging hearing on an entirely different subject. **While his staff provided the question the day before, Mr. Clapper had not seen it.** As a result, **as Mr. Clapper has explained, he was surprised by the question and focused his mind on the collection of the content of Americans' communications.** In that context, his answer was and is accurate.

When we pointed out Mr. Clapper's mistake to him, he was surprised and distressed. I spoke with a staffer for Senator Wyden several days later and told him that although Mr. Clapper recognized that his testimony was inaccurate, it could not be corrected publicly because the program involved was classified.

This incident shows the difficulty of discussing classified information in an unclassified setting and **the danger of inferring a person's state of mind from extemporaneous answers given under pressure.** Indeed, it would have been irrational for Mr. Clapper to lie at this hearing, since every member of the committee was already aware of the program. [my emphasis]

As a threshold matter, when a crafty lawyer like Litt says his principal did not "see" the question, it says nothing about whether or not Clapper "knew" about the question. Usually, senior officials get briefed on such things, they don't read them. Though they presumably are more likely to read letters from members of Congress, and Clapper had received and not fully responded to several related letters from Wyden already by that point, including some invoking Keith Alexander's earlier lies about collection on US persons.

Which is one reason I'm intrigued that Litt

seems to have added the claim that Clapper was “surprised” to the public record – I’m not aware of Clapper ever expressing such a thing. If he were surprised, it’d be especially problematic given his involvement in correspondence going back months.

But that “surprised” (apparent) invention allows Litt to claim that Clapper didn’t know what he was answering when he almost certainly did, given that he had been avoiding answering that question in unclassified form for months.

More interesting still is Litt’s warning about inferring a person’s state of mind. Clapper himself said he thought long and hard, three months after his lies, to recreate what he was thinking at the time. So how can Litt claim to know that Clapper didn’t lie, based on an assertion about what he was thinking (unless he told him what he was thinking, which I guess crafty lawyers do sometimes)?

Here’s the other thing. Perhaps Wyden was thinking only of one (the secret phone dragnet collecting data on hundreds of millions of Americans) or the other (the mostly unacknowledged backdoor searches on content collected “incidentally” on millions of Americans) NSA collection of any kind of data on millions of Americans. But his conversations have often linked the two (perhaps because the Intelligence Community uses metadata in part to decide which Americans’ content to go read without RAS?). And he might well be including the **intentional** collection of US person data via upstream collection (though there’s no reason to believe that includes millions of Americans).

But even if he was asking about incidentally collected (and then back door searched) US person data, Clapper’s first instinct was a flat “no.” It wasn’t until Wyden challenged him with the mock surprise he has had so much practice at affecting, “it does not?,” that Clapper retreated to his “wittingly” lie. And “wittingly” – even “inadvertently” – are different words than “incidentally.” One point

of this Section 702 is to collect the contacts of suspected terrorists, including the Americans. That's the intent; there's nothing inadvertent about it (as people like Sheldon Whitehouse have made clear).

Moreover, Clapper's first response – that they don't voyeuristically read the emails they collect – assumes they do collect them. His first response assumes they intentionally collect content, but don't necessarily access them all.

The NSA collects the content of millions of Americans "incidentally" (using their official euphemism), but there's nothing unintentional or inadvertent or unwitting about that collection.

Even this fall-back lie is demonstrably a lie.

So nice of Robert Litt to confirm the NYT's impressions on their Letters-to-the-Editors page.

Update: You've got a "pal" in principal error corrected per BS.