

ROBERT LITT AND MIKE ROGERS KNOW CONGRESS HASN'T RATIFIED THE PHONE DRAGNET

WaPo has a biting profile of Robert Litt, ODNI's General Counsel who made one more failed attempt to rationalize James Clapper's lies to Congress last week.

One of the most newsworthy bits is that WaPo published the name of Alfreda Frances Bikowsky, the analyst who got Khaled el-Masri kidnapped and tortured by mistake, for the first time.

A far more subtle but equally important detail comes in its description of why House Intelligence Chair Mike Rogers banned Litt from appearing before the Committee last summer.

Some lawmakers have found Litt's manner off-putting at best. Rogers, the chairman of the House Intelligence Committee, made clear to the DNI's office last summer that Litt was no longer welcome before his panel.

"The committee has not found Bob to be the most effective witness to explain complex legal and policy issues," said a U.S. government official familiar with the falling-out. Rogers was also bothered that Litt faulted the committee for not doing more to share information about the surveillance programs with other members, unaware that doing so would have violated committee rules. [my emphasis]

For what it's worth, I suspect Rogers is not worried as much about Litt's honesty (Rogers hasn't objected to James Clapper or Keith

Alexander's lies, for example, and has himself been a key participant in sustaining them), but rather, for his usual candor and abrasiveness, which the article also shows inspiring members of Congress to want to repeal the dragnet. Litt couches his answers in legalese, but unlike most IC witnesses, you can often parse it to discern where the outlines of truth are.

But I am acutely interested that Litt blames Rogers for not "doing more to share information about the surveillance programs with other members."

That refers, of course, to Rogers' failure to make the Administration's notice on the phone dragnet available to members in 2011, before the PATRIOT Reauthorization. As a result of that, 65 Congressmen voted to reauthorize the PATRIOT Act without full notice (perhaps any formal notice) of the phone dragnet – a sufficiently large block to make the difference in the vote. In spite of that fact, the Administration and even FISA Judges have repeatedly pointed to Congress' reauthorization of the phone dragnet to explain why it's legal even though it so obviously exceeds the intent of the Section 215 as passed.

Apparently Litt blames Rogers for that. And doing so got him banished from the Committee.

Frankly, Litt is right in this dispute. Rogers' excuse that committee rules prevented him from sharing the letter the Administration stated they wanted to be shared with the rest of Congress rings hollow, given that just one year earlier, Silvestre Reyes did make the previous letter available. If committee rules prevent such a thing, they are Rogers' committee rules, and they were fairly new at the time.

(Ironically, by imposing those rules, Rogers prevented members of his own party, elected with strong Tea Party backing, from learning about intelligence programs, though he may have just imposed the rules to increase the value of his own special access.)

So it is Rogers' fault the Administration should

not be able to claim Congress ratified the FISA Court's expansive understanding of Section 215.

And Rogers and Litt's spat about it make it clear they both know the significance of it: claims of legislative ratification fail because Congress did not, in fact, know what they were voting on, at least in 2011.

Unsurprisingly, that has not prevented the Administration from making that claim. Litt himself made a variety of it before PCLOB in November, months after he had this fight with Rogers.

[NSA General Counsel Raj] DE: So in other words, and some of this is obviously known to you all but just to make sure members of the public are aware, not only was this program approved by the Foreign Intelligence Surveillance Court every 90 days, it was twice, the particular provision was twice re-authorized by Congress with full information from the Executive Branch about the use of the provision.

[snip]

MR. LITT: I just want to add one very brief comment to Raj's in terms of the extent to which Congress was kept informed. By statute we're required to provide copies of significant opinion and decisions of the FISC to the Intelligence and Judiciary Committees of both Houses of Congress and they got the materials relating to this program, as we were required to by law.

Now, Litt's interjection here is particularly interesting. He doesn't correct De. He shifts the claim somewhat, to rely on Judiciary and Intelligence Committee notice. But even there, his claim fails, given that the Administration did not provide all relevant opinions to those Committees until after the first dragnet reauthorization in 2010. Litt probably thinks

that's okay because he didn't qualify when Congress got the materials.

But it's still a blatant lie, according to the public record.

More significantly, the Administration repeated that lie to both the FISC and, more significantly still, the 3 Article III Judges presiding over challenges to the dragnet generally.

The Administration keeps running around, telling everyone who is obligated to listen that Congress has ratified their expansive interpretation of the phone dragnet. It's not true. And the fact that Litt and Rogers fought – way back in the summer – over who is responsible makes it clear they know it's not true.

But they still keep saying it.