

MORE EVIDENCE SECRET “TWEAKS” TO SECTION 702 COMING

Way at the end of yesterday’s Senate Intelligence Committee Global Threats hearing, Tom Cotton asked his second leading question permitting an intelligence agency head to ask for surveillance, this time asking Admiral Mike Rogers whether he still wanted Section 702 (the first invited Jim Comey to ask for access to Electronic Communications Transactions Records with National Security Letters, as Chuck Grassley had asked before; Comey was just as disingenuous in his response as the last time he asked).

Curiously, Cotton offered Rogers the opportunity to ask for Section 702 to be passed unchanged. Cotton noted that in 2012, James Clapper had asked for a straight reauthorization of Section 702.

Do you believe that Congress should pass a straight reauthorization of Section 702?

But Rogers (as he often does) didn’t answer that question. Instead, he simply asserted that he needed it.

I do believe we need to continue 702.

At this point, SSCI Chair Richard Burr piped up and noted the committee would soon start the preparation process for passing Section 702, “from the standpoint of the education that we need to do in educating and having Admiral Rogers bring us up to speed on the usefulness and any tweaks that may have to be made.”

This seems to parallel what happened in the House Judiciary Committee, where it is clear some discussion about the certification process occurred (see this post and this post).

Note this discussion comes in the wake of a description of some of the changes made in last year's certification in this year's PCL0B status report. That report notes that last year's certification process approved the following changes:

- NSA added a requirement to explain a foreign intelligence justification in targeting decisions, without fully implementing a recommendation to adopt criteria "for determining the expected foreign intelligence value of a particular target." NSA is also integrating reviewing written justifications in its auditing process.
- FBI minimization procedures were revised to reflect how often non-national security investigators could search 702-collected data, and added new limits on how 702 data could be used.
- NSA and CIA write justifications for conducting back door searches on US person data collected under Section 702, except for CIA's still largely oversight free searches on 702-collected metadata.
- NSA and CIA twice (in January and May) provided

FISC with a random sampling of its tasking and US person searches, which the court deemed satisfactory in its certification approval.

- The government submitted a “Summary of Notable Section 702 Requirements” covering the rules governing the program, though this summary was not comprehensive nor integrated into the FISC’s reauthorization.

As the status report implicitly notes, the government has released minimization procedures for all four agencies using Section 702 (in addition to NSA, CIA, and FBI, NCTC has minimization procedures), but it did so by releasing the now-outdated 2014 minimization procedures as the 2015 ones were being authorized. At some point, I expect we’ll see DEA minimization procedures, given that the shutdown of its own dragnet would lead it to rely more on NSA ones, but that’s just a wildarseguess.