

THE EASY SECTION 702 SURVEILLANCE NUMBER JAMES CLAPPER CAN SHARE

Last week, a bunch of House Judiciary Committee members set James Clapper a letter stating that before the Committee deals with Section 702 reauthorization next year, they'd like:

- The number of telephone communications in which one caller is located in the United States
- The number of Internet communications acquired through upstream collection that originate or terminate in the United States
- The number of communications of or concerning U.S. persons that the NSA positively identifies as such in the routine course of its work

They asked for those numbers by May 6.

In response, Clapper is humming and hawing about "several options" for disclosing how many Americans get spied on under Section 702.

Clapper said that "any methodology we come up with will not be completely satisfactory to all parties."

"If we could have made such an estimate and if such an estimate were easy to do – explainable without compromise – we would've done it a long time ago," he said.

We just learned there is, however, one number that should be easy-peasy to make public (and one I'm frankly alarmed the HJC members didn't mention, as they should have known about it for some time): the number of back door searches FBI conducts on Section 702 data for reasons other than national security.

As I noted the other day, in response to FISC amicus (and former Eric Holder counsel) Amy Jeffress' argument that FBI's back door searches of Section 702 are unconstitutional, Thomas Hogan required FBI "submit in writing a report concerning each instance ... in which FBI personnel receive and review Section 702-acquired information that the FBI identifies as concerning a United States person in response to a query that is not designed to find and extract foreign intelligence information." As I noted, that's an easily gamed number – I'm sure FBI treats a lot of criminal matters as national security ones, and FBI has the ability to see if there is 702 data without looking at it, permitting it to see if the same data is available under another authority.

Nevertheless, DOJ must have an exact number of reports they've submitted in response to this reporting requirement, which has been in place for over four months.

That's not to say HJC shouldn't insist on getting estimates for all the other numbers they're seeking. But they should also demand that this number – the number of times FBI is using a foreign intelligence exception for criminal prosecutions that should be subject to a probable cause standard – be made public.