



## Wyden Asks Spy Chief to Give Third Answer to Question About Domestic Surveillance

Steve Nelson

June 15, 2017

Is Sen. Ron Wyden trying to warn the public about an unknown government surveillance effort that affects domestic communications? The Oregon Democrat isn't saying, leaving experts guessing as he presses a cryptic inquiry.

On Thursday the privacy advocate's office circulated to reporters a letter Wyden sent to Director of National Intelligence Dan Coats, demanding that Coats offer a third answer to a question about government surveillance.

The question, first asked by Wyden at a June 7 hearing and restated Thursday, seems straightforward: "Can the government use FISA Act Section 702 to collect communications it knows are entirely domestic?"

At the hearing, Coats told Wyden: "Not to my knowledge. It would be against the law."

Section 702 of the Foreign Intelligence Surveillance Act expires later this year unless Congress votes to renew it. The Trump administration wants it made permanent, but privacy advocates want safeguards for U.S. records siphoned from the internet as part of programs aimed at foreign intelligence targets.

The peculiar question and Coats' response recalled Wyden's 2013 questioning of James Clapper, Coats' predecessor, who lied to Wyden by saying "no sir" and "not wittingly" in response to a question about mass surveillance. Clapper did not admit misleading lawmakers until after whistleblower Edward Snowden's leaks.

"Wyden has a method and we've seen the method before and I am personally glad he's on the case," Liza Goitein, a privacy expert at New York University's Brennan Center for Justice, told U.S. News after the hearing.

Later in the day on June 7, Coats' office clarified his answer to Wyden, saying in a statement: "Section 702(b)(4) plainly states we 'may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of acquisition to be located in

the United States.' The DNI interpreted Senator Wyden's question to ask about this provision and answered accordingly."

In his Thursday letter to Coats, Wyden writes: "That was not my question. Please provide a public response to my question, as asked at the June 7, 2017, hearing."

Whether Wyden's theatrics should be read as hinting at unknown surveillance is unclear. His spokesman Keith Chu says he cannot provide additional comment.

Michael Hayden, director of the National Security Agency from 1999-2005 and CIA director from 2006-2009, says one explanation for Wyden's inquiry could be that he's hinting at discontinued "about" collection under Section 702 that collected domestic internet communications when the body of a communication referred to a selector -- distinguished from collection aimed specifically at a sender or recipient. But the government voluntarily ended "about" collection earlier this year.

"[The] only other possibility might be inadvertent collection when the carrier bundles messages and grabbing a legitimately targeted one might drag in another," Hayden says.

That theory was offered by national security journalist Marcy Wheeler immediately after the hearing. Wheeler noted that an April order from the Foreign Intelligence Surveillance Court touched on wholly domestic chains of "Multiple Communication Transactions" chains, requiring they be "promptly destroyed" unless each communication receives a waiver. The order's passage referring to waivers cites an unreleased March memo.

"[I]f Dan Coats was being truthful in response to Wyden's question, then he, at the same time, admitted that he certified a program without even reading the accompanying memorandum, and certainly without understanding the privacy problems with the program as constituted," Wheeler wrote.

A spokesman for Coats did not immediately respond to a request for comment.

Goitein says she could imagine that Wyden is "trying to underscore that ending 'about' collection didn't solve the problem of sweeping in wholly domestic communications through MCTs."

But would a publicly known issue about MCTs under Section 702 warrant such secrecy and flair from Wyden? Perhaps it deals with treatment of stolen data, or some other lesser-known issue?

"That he didn't follow up publicly suggests he may have something else in mind, or at least be referring to an aspect of the MCT problem that hasn't been disclosed," said Julian Sanchez, a senior fellow at the Cato Institute, after the hearing.

"I'm assuming it's significant given he is emphasizing it so much by following up with an official letter, but I don't have a good guess as to what," says Trevor Timm, executive director of the Freedom of the Press Foundation.

"Unfortunately I do not know what he's hinting at, but Sen. Wyden has a long and credible history of using these types of questions to highlight troubling and potentially illegal surveillance practices that the government considers classified," Timm says.

Hayden says “at least I don't know it” if Wyden is hinting at something significant and not well known.