



## Did Another Intelligence Director Lie to Wyden About Surveillance?

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Privacy advocates and journalists want to know what Sen. Ron Wyden is up to -- and whether the Oregon Democrat elicited another lie about surveillance from a director of national intelligence during Wednesday's Senate intelligence committee hearing.

Wyden asked one of the final questions at the hearing that dealt with the investigation into Russia's role in the 2016 election and with Section 702 of the Foreign Intelligence Surveillance Act, which expires later this year if Congress does not act.

Wyden, a forceful privacy advocate, asked Director of National Intelligence Dan Coats, with whom he had sparred earlier, a simple standalone question: "Can the government use FISA Act Section 702 to collect communications it knows are entirely domestic?"

Coats replied: "Not to my knowledge. It would be against the law."

Surveillance policy experts immediately recalled the 2013 hearing where James Clapper, Coats' predecessor, lied to Wyden by saying "no sir" and "not wittingly" in response to a question about mass surveillance. Clapper apologized months later after whistleblower Edward Snowden's disclosures.

"Wyden knows something that we don't know and he was trying to get Coats on the record about whatever this thing is," says Liza Goitein, a privacy expert at New York University's Brennan Center for Justice.

"I strongly suspect he is getting at something here and that the reason he is not spelling it out is because it relates to something classified about which he has knowledge but the public does not," she says.

"He certainly looked worried when Wyden was done," Goitein says about Coats.

"Wyden has a method and we've seen the method before and I am personally glad he's on the case, even though I don't know yet what that case is."

The opinion that Wyden was asking about something beyond the "incidental" collection of American records under Section 702 programs is widespread.

"This feels like Wyden is up to something, like the famous Clapper question in 2013," tweeted New York Times reporter [Charlie Savage](#), who routinely breaks major news about U.S. intelligence agencies.

"Coats looked concerned after Wyden said 'Thank you, no further questions,'" Reuters reporter Dustin Volz [wrote](#).

"It was certainly odd," says Julian Sanchez, a senior fellow at the Cato Institute.

"Wyden, of course, understands full well that the statute prohibits the collection of communications 'known at the time of acquisition' to be wholly domestic, which makes the question a bit unusual, especially given that he didn't subsequently follow it up," Sanchez says in an email.

*Watch the exchange:*

"It would have made sense if he'd then gone on to discuss, for example, the recent difficulties concerning 'about' collection under the upstream component of 702, and the related problem of domestic messages being collected as consequence of pulling in so-called 'Multiple Communication Transactions' (where multiple messages—some international, some wholly domestic—are bundled together in the same communications session). 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."

Trouble sorting domestic from international communications has been publicly noted, including in a [2014 report](#) from the Privacy and Civil Liberties Oversight Board, a now-dormant government entity.

"It is perhaps worth emphasizing that what Wyden asked was slightly different from what the statute strictly prohibits," Sanchez says. "The law says their targeting procedures must [be] 'reasonably designed' to prevent the 'intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.' Between 'intentional' and 'known at the time of acquisition' there's a bit of wiggle room there for cases where there's a fairly wide collection aperture, and they're perhaps not doing all they might to 'know' a communication is entirely domestic before they acquire it."

Journalist Marcy Wheeler notes in a [blog post](#) that an April order from the Foreign Intelligence Surveillance Court touched on wholly domestic MCT 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 writes.

Wyden spokesman Keith Chu says "I can't comment further" on Wyden's motivation or whether there is some classified impetus.

Coats spokesman Timothy Barrett defended the accuracy of the answer, 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.' [Coats] interpreted Senator Wyden's question to ask about this provision and answered accordingly." Barrett says the statement does not change Coats' answer.

Authorities say Section 702 is an important legal authority that allows for surveillance programs targeting foreigners located overseas who are suspected terrorists or agents of foreign powers. The communications are taken from the internet backbone through Upstream collection or directly from tech companies.

Collection of internet records overseas is separately governed by Executive Order 12333, which privacy advocates say allows for massive collection on Americans without court or congressional oversight.

Coats told Wyden earlier in the Wednesday hearing that the government would be unable to tally the number of Americans whose records are incidentally collected under Section 702.

During the hearing, witnesses including National Security Agency Director Mike Rogers, FBI acting director Andrew McCabe and Deputy Attorney General Rod Rosenstein urged renewal of Section 702.

The Trump administration would like the surveillance authority to be made permanent as it currently exists. Privacy advocates want to make changes including a warrant requirement before authorities perform "backdoor" searches for American records in repositories of intercepted communications.

Witnesses at the hearing said if communications from Americans taken under Section 702 show evidence of a crime, they are turned over to the Justice Department or FBI for investigation.