



Attorney: Spy chief had 'forgotten' about NSA program when he misled Congress



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By Julian Hattem - 05/08/15 05:30 PM EDT

Director of National Intelligence Jim Clapper wasn't lying when he wrongly told Congress in 2013 that the government does not "wittingly" collect information about millions of Americans, according to his top lawyer.

He just forgot.

"This was not an untruth or a falsehood. This was just a mistake on his part," Robert Litt, the general counsel for the Office of the Director of National Intelligence, said during a panel discussion hosted by the Advisory Committee on Transparency on Friday.

"We all make mistakes."

The comments add to the **years of criticism** that Clapper has received for his testimony in the 2013 Senate Intelligence Committee hearing.

In the public session, longtime surveillance critic Sen. Ron Wyden (D-Ore.) had asked Clapper whether or not the NSA collected "any type of data at all on millions of Americans."

"No sir," Clapper responded. "There are cases where they could inadvertently perhaps collect, but not wittingly."

Just a few months later, however, leaks from Edward Snowden proved Clapper wrong. As documents released by Snowden made clear, the NSA collects records about millions of Americans' phone calls under a program the government has said is authorized by Section 215 of the Patriot Act.

After the fact, Clapper has said that his statement was the "least untruthful" possible answer, given the secrecy of the program at the time.

Still, critics such as Sen. Rand Paul (R-Ky.) have **called for Clapper to resign** over the flap, which they say amounts to perjury.

Litt on Friday said that Clapper merely did not have a chance to prepare an answer for Wyden and forgot about the phone records program when asked about it on the spot.

"We were notified the day before that Sen. Wyden was going to ask this question and the director of national intelligence did not get a chance to review it," Litt said.

"He was hit unaware by the question," Litt added. "After this hearing I went to him and I said, 'Gee, you were wrong on this.' And it was perfectly clear that he had absolutely forgotten the existence of the 215 program."

Instead, Litt said, Clapper had been thinking about separate programs authorized under Section 702 of the Foreign Intelligence Surveillance Act, which the NSA has used to collect massive amounts of foreigners' Internet data. The law explicitly prohibits the government from gathering the same kind of data about Americans, unless it is "incidental."

"If you read his answer it is perfectly clear that he was thinking about the 702 program," Litt said. "When he is talking about not wittingly collecting, he is talking about incidental collection."

Litt, he said, also erred after the hearing by not sending a letter to the panel to correct the mistake.

"I wish we'd done that at the time," he said on Friday.

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