United States Senate
WASHINGTON, DC 20510

May 13, 2014

The Honorable Donald B. Verrilli, Jr.
Solicitor General
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Dear Solicitor General Verrilli:

We have received the Justice Department's reply to our letter regarding the U.S. Supreme Court case *Clapper v. Amnesty International USA (Clapper v. Amnesty)*. We appreciate your attention to this important matter. However, we disagree with the reply's characterization of certain key facts, and we remain concerned that inaccurate statements appear to have been made to the Supreme Court in regard to this case, and that some of these misleading statements have not been acknowledged or corrected. We write to lay out our concerns about these statements in more detail.

The Justice Department's reply acknowledges that the government's collection of communications under section 702 of the Foreign Intelligence Surveillance Act includes communications that are "about" targeted individuals, as well as to or from targeted individuals, and it also acknowledges that this formerly secret fact was not presented to the Supreme Court during the consideration of *Clapper v. Amnesty*. However, the reply also claims that the Justice Department "made no statements that could be reasonably understood as denying the existence of 'about' collection." We respectfully disagree with this statement.

In the Reply Brief submitted to the Supreme Court in October 2012, the Justice Department stated that in order to support their claim that their communications were likely to be collected, the *Amnesty* plaintiffs "must conjecture about a number of matters, including (1) the government's foreign-intelligence collection interests; (2) the government's targeting decisions and priorities and whether they would lead to a decision to target respondents' contacts..."[1] Furthermore, during oral arguments you stated:

> in addition to the speculation I just described, once you get through all that, you still have to speculate about whether the communication that – whether the persons with whom the Respondents are communicating are going to be targeted…[2]

These statements – if taken at face value – appear to foreclose the possibility of collection under section 702 intercepting any communications that are not to or from particular targets. In other words, the Justice Department indicated that communications that are

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[1] Reply Brief for Petitioner, *Clapper v. Amnesty International USA*, October 2012, p. 14. Emphasis added.
[2] Official transcript of oral arguments, *Clapper v. Amnesty International USA*, p. 11. Emphasis added. Retrieved from http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-1025.pdf.

merely "about" a target would not be collected. But recently declassified court opinions make it clear that legitimate communications about particular targets can also be intercepted under this authority. Since this fact was classified at the time, the plaintiffs did not raise it, but in our view this does not make these misleading statements acceptable.

The Justice Department's reply also states that the "about" collection "did not bear upon the legal issues in the case." But in fact these misleading statements about the limits of section 702 surveillance appear to have informed the Supreme Court's analysis. In writing for the majority, Justice Alito echoed your statements to the Court by stating that the "respondents' theory necessarily rests on their assertion that the Government will target *other individuals* – namely their foreign contacts."[3] This statement, like your statements, appears to foreclose the possibility of "about" collection.

We recognize that the inclusion of this misleading statement in the Court's analysis does not prove that the Court would have ruled differently if it had been given a fuller set of facts. Indeed, it is entirely possible that the Court would have ruled in exactly the same way. But while the Justice Department may claim that the *Amnesty* plaintiffs' arguments would have been "equally speculative" if they had referenced the "about" collection, that should be a determination for the courts, and not the Justice Department, to make.

As we have noted elsewhere, we are concerned that the executive branch's decade-long reliance on a secret body of surveillance law has given rise to a culture of misinformation, and led senior officials to repeatedly make misleading statements to the public, Congress and the courts about domestic surveillance. The way to end this culture of misinformation and restore the public trust is to acknowledge and correct inaccurate statements when they are made, and not seek to ignore or justify them. We will continue to engage with you and other executive branch officials to ensure that this takes place.

Sincerely,

Mark Udall

Ron Wyden

[3] *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), p. 12. Emphasis added.