U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 24, 2013

The Honorable Mark Udall
United States Senate
Washington, DC 20510

Dear Senator Udall:

This is in response to your letter to the Solicitor General, dated November 20, 2013, concerning the Department of Justice's advocacy before the Supreme Court in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), about Section 702 of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1881a. We are providing an identical response to the other Senators who joined in your letter.

Your letter raises questions regarding the now-declassified "about" collections that have resulted in the acquisition of some wholly domestic communications as a result of Section 702 surveillance and whether the government's representations in *Clapper v. Amnesty International* were incomplete or misleading for failing to refer to such collections. The government acted appropriately by not addressing the "about" collections in *Clapper v. Amnesty International* because the existence of this type of collection was classified throughout the period during which the case was briefed, argued, and decided, and because those collections did not bear upon on the legal issues in the case. At all times, the Department and the Office of the Solicitor General have a duty of candor in our representations to the Supreme Court, and it is a duty we take extremely seriously. The Department and the Office of the Solicitor General also have a duty to respect the classified status of information, and that is also a duty we take extremely seriously. In litigation, we must take pains to avoid discussing matters that are unnecessary to the resolution of matters before the Court when those matters might disclose classified information or undermine national security, while ensuring that the Court has all of the information relevant to deciding the issues before it.

The Department's briefing and argument in *Clapper v. Amnesty International* fully respected both of these duties. The Department described the surveillance authorized by Section 702 (and the provision's targeting and minimization requirements) accurately, and we made no statements that could be reasonably understood as denying the existence of "about" collection. Moreover, the possibility of then-classified, incidental collection of domestic communications, while of undoubted importance and interest to the public, was not material to the legal issue before the Supreme Court. The question in the case was whether the plaintiffs had demonstrated that they would suffer "certainly impending" future injuries as a result of the surveillance Section

702 authorizes, and therefore had "standing" to challenge the law. Because none of the plaintiffs was a non-US Citizen located outside the United States, they were not persons who could be targeted for surveillance under Section 702 and could not establish standing on that basis.

Instead, they sought to establish the requisite "certainly impending" injury by claiming they communicated with persons outside the United States whom they believed the Government would likely target under Section 702. Responding to plaintiffs' claims, the Department argued, and the Supreme Court agreed, that the plaintiffs had no actual knowledge of the government's targeting practices and their assertions about who they believed would likely be targeted were too speculative to establish standing. It would have been equally speculative for the plaintiffs to assert that their communications with other non-targeted individuals were likely being acquired based on the possibility that those communications included an identifier (such as an email address) associated with persons they conjectured might be foreign targets of Section 702 surveillance. In both instances, the plaintiffs' lack of knowledge of those foreign targets meant that they could not establish standing. The government's briefs therefore properly did not comment on a then-classified program that was not material to why the plaintiffs' own assertions were insufficient to establish standing.

Separately, your letter also questions the Department's representations regarding notice of the use of Section 702 information in legal proceedings. The Department informed the Court that "[i]f the government intends to use or disclose any information obtained or derived from its acquisitions of a person's communications under [Section 702] in judicial or administrative proceedings against that person, it must provide advance notice of its intent to the tribunal and the person, whether or not the person was targeted for surveillance under [Section 702]." US Gov't Brief at 8. This is an accurate statement of the law, and it reflected the understanding that FISA imposes an obligation on the government to provide notice of its intent to use or disclose information that was derived from Section 702 surveillance as well as information that was obtained from Section 702 surveillance. Of course, the issue before the Court in *Clapper v. Amnesty International* did not involve the precise scope of the categories of cases in which information is properly considered to be "obtained or derived from" Section 702 surveillance.

Based on a recent review, the Department has determined that information obtained or derived from Title I FISA collection may, in particular cases, also be derived from prior Title VII FISA collection, such that notice concerning both Title I and Title VII should be given in appropriate cases with respect to the same information. Based on this determination, the government has provided notice concerning Section 702-derived information in two criminal cases. The defendants in those cases will thus have the opportunity to challenge the constitutionality of Section 702 and the lawfulness of the acquisitions. The Department will continue to comply with its legal obligations to notify aggrieved persons of the use of information obtained or derived from an acquisition under Section 702 in judicial or administrative proceedings against such person.

We hope that this information is helpful. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,

Peter J. Kadzik
Principal Deputy Assistant Attorney General