WYDEN AND UDALL ACCUSE DOJ OF MISLEADING SCOTUS ABOUT UPSTREAM EVEN AS NSA MISLEADS NDCA ABOUT UPSTREAM

As Charlie Savage reported this morning, Senators Ron Wyden and Mark Udall continue their ceaseless efforts to get NSA and DOJ to tell the truth. They (along with Martin Heinrich) wrote a letter to DOJ in November complaining about representations made in the Amnesty v. Clapper case. DOJ responded. And now Wyden and Udall have just written another response.

In addition to complaining about the government's notice to defendants, Wyden and Udall claim DOJ improperly hid Section 702 upstream collection from SCOTUS by claiming the Amnesty plaintiffs could only be swept up in the dragnet if they communicated with a target.

> 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 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.
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> 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 by the Court by stating that the "respondents' theory necessarily rests on their assertion that the Government will target *other individuals* — namely their foreign contacts." This statement, like your statements, appears to foreclose the possibility of "about" collection.
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> [snip]
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> [W]hile 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.

After laying this out, they conclude by accusing the Executive of making "misleading statements to the public, Congress and the courts."

They don't name all the Courts, though.

They might want to start collecting a list of all the courts DOJ and NSA have lied to, though. Because even as the Senators and DOJ were having this squabble in DC, NSA was continuing to misinform courts on the other side of the country.

Consider how then Acting NSA Deputy Director Frances Fleisch described upstream collection — and the collection of entirely domestic communications that FISC deemed illegal — in a then-sealed declaration in the EFF Jewel case submitted 4 days before DOJ responded to the Senators.

> Once a target has been approved, the NSA uses two means to acquire the target's

> electronic communications. First, it acquires such communications directly from compelled U.S.-based providers. This has been publicly referred to as the NSA's PRISM collection. Second, in addition to collection directly from providers, the NSA collects electronic communications with the compelled assistance of electronic communications service providers as they transit Internet "backbone" facilities within the United States.
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> [snip]
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> In an opinion issued on October 3, 2001, the FISC found the NSA's proposed minimization procedures as applied to the NSA's upstream collection of Internet transactions containing multiple communications, or "MCTs," deficient. In response, the NSA modified its proposed procedures and the FISC subsequently determined that the NSA adequately remedied the deficiencies such that the procedures met the applicable statutory and constitutional requirements, and allowed the collection to continue.

That is, Fleisch doesn't even hint that the problem on which Bates ruled — the MCTs — consisted of entirely domestic communications unrelated to those mentioning the "about" selector. She doesn't even hint that in addition to those MCTs, upstream collection also includes over 4 times as many completely domestic communications — SCTs — as well. She doesn't reveal that John Bates threatened NSA with sanctions over distributing illegally collected domestic person content. And all of these issues are central to the Jewel complaint, which has always focused on telecoms collecting US person content at circuits. (I believe earlier declarations to NDCA were even more incomplete or downright dishonest on this issue, though will need to show that in a later post.)

In fact, EFF complained about this omission its response to the government's declarations, noting that upstream about collection is precisely what whistleblower Mark Klein revealed back in 2006.

> Public disclosures over the past six months, however, provide substantially more information about these collection practices than the government's passing references. In particular, the government has publicly released an opinion of the FISC confirming that "'upstream collection' refers to the acquisition of Internet communications as they transit the 'internal backbone' facilities" of telecommunications firms, such as AT&T. Mem. Op. at 26, Redacted, No. [Redacted] (FISC Sep. 25, 2012) (emphasis added) (Ex. 1).
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> [snip]
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> These descriptions of upstream Internet surveillance are functionally identical to the surveillance configuration described by the [Mark] Klein evidence: a system designed to acquire Internet communications as they flow between AT&T's Common Backbone Internet network to the networks of other providers.

The FISA Court ruled that NSA had been breaking the law and violating the Constitution for at least 3 years leading up to the 2011 decision. And neither DOJ nor NSA have bothered telling courts ruling on the legality of the program about that fact.

It's pretty impressive that the Executive can mislead courts about the same subject in so many places at once.

But I guess that's just the flip side of an omnipresent spying agency, that it can also serve as an omnipresent lying agency.