

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

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TCP: Supreme Court's Decision in Clapper Creates Catch-22

WASHINGTON, D.C. -- Virginia Sloan, president of The Constitution Project, offered the following comment in reaction to today's 5-to-4 decision by the U.S. Supreme Court in *Clapper v. Amnesty International USA* (Case No 11-1025) that the groups and individuals could not proceed with their lawsuit challenging a federal law that authorizes intercepting electronic communications involving Americans and contacts abroad:

"We are disappointed by the Supreme Court's decision today that no court can hear the challenge to the constitutionality of the FISA Amendments Act, because the plaintiffs cannot prove that their conversations with foreign contacts are likely to be monitored through the surveillance authorized under this law. The Court's decision creates a true Catch-22. The Court said the groups suing the government couldn't prove imminent harm, and yet neither the Congress nor the president will direct the government to disclose the opinions of the secret Foreign Intelligence Surveillance Court. This means the public does not even know the rules that apply in authorizing such secret surveillance, making it nearly impossible to identify individuals actually subject to this monitoring. Americans cannot guard their constitutionally-protected rights if even the legal rules and standards under which our government operates are kept secret."

TCP's Liberty and Security Committee explained in its [Report on the FISA Amendments Act of 2008](#) that the law authorizing the surveillance program lacks adequate privacy safeguards to avoid intrusions on Fourth Amendment rights. The Committee also urged that the opinions of the Foreign Intelligence Surveillance Court be released.

In its [ruling](#), the Court determined that the plaintiffs -- which included international organizations, attorneys and journalists -- lacked jurisdiction or "standing" to proceed because they did not have sufficient proof that their communications had been, or were likely to be, intercepted. As a result, the justices did not address the underlying, larger issue of the constitutionality of the federal government's electronic monitoring of targeted foreigners when one party to the conversation is protected under the Fourth Amendment. Today's decision makes such a review by the courts much less likely.

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[About The Constitution Project](#)

Created out of the belief that we must cast aside the labels that divide us in order to keep our democracy strong, The Constitution Project (TCP) brings together policy experts and legal practitioners from across the political spectrum to foster consensus-based solutions to the most difficult constitutional challenges of our

time. TCP seeks to reform the nation's broken criminal justice system and to strengthen the rule of law through scholarship, advocacy, policy reform and public education initiatives. Established in 1997, TCP is based in Washington, D.C.



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