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## Clapper v. Amnesty International USA: Balancing National Security and Individuals' Privacy

Kristen Choi

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# ***Clapper v. Amnesty International USA: Balancing National Security and Individuals' Privacy***

**By Kristen Choi\***

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## I. INTRODUCTION

How secure are Americans' electronic communications? The government has the ability to "watch and listen to telephone, e-mail, or Internet communication in almost any circumstance, and it can power through massive amounts of electronic data in search of relevant information almost instantaneously" with the development in technology.<sup>1</sup> The government has been encroaching on Americans' electronic communications in the name of national security since the 1930s.<sup>2</sup> Presidents have claimed that they have inherent power to authorize warrantless electronic surveillance because they have a duty to protect the United States against foreign countries.<sup>3</sup> National security is important, but so is the individual's privacy.<sup>4</sup> Presidents have used surveillance to protect the nation<sup>5</sup>; however, the use of electronic surveillance was not limited to protecting the nation.<sup>6</sup> Eventually, Congress had to step in to put an end to abusive use of electronic surveillance. The Foreign Intelligence Surveillance Act of 1978 (FISA or the Act) provided a statutory procedure for the government to conduct electronic

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\* Kristen Choi is a third-year student at Pepperdine University School of Law. She would like to thank the Lord for his guidance. She would also like to thank her family for their endless love, support, and encouragement to pursue her dream. And lastly, she would like to thank her best friend, James Lee, for always loving her and supporting her through hard times.

<sup>1</sup> William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209, 1216 (2007).

<sup>2</sup> Richard Henry Seamon & William Dylan Gardner, *The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 HARV. J.L. & PUB. POL'Y 319, 330 (2005).

<sup>3</sup> *Id.*

<sup>4</sup> "The Constitution envisions the protection of individuals from both foreign threats and government intrusion and the foreign intelligence purpose requirement epitomizes this conflict." David Hardin, *The Fuss Over Two Small Words: The Unconstitutionality of The USA Patriot Act Amendments To FISA Under The Fourth Amendment*, 71 GEO. WASH. L. REV. 291, 344 (2003).

<sup>5</sup> John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 588 (2007). "President Franklin Roosevelt authorized the FBI to intercept any communications . . . of persons 'suspected of subversive activities against the [g]overnment . . .'" *Id.*

<sup>6</sup> See *infra* Part II for discussion of how Presidents in the past have abused the surveillance.

surveillance, limiting warrantless electronic surveillance.<sup>7</sup> Since the passage of FISA in 1978, Congress has passed several statutes amending FISA.<sup>8</sup> In 2008, Congress passed yet another amendment to FISA, which permits the Attorney General and the Director of National Intelligence to acquire foreign intelligence information for up to one year, by jointly authorizing the surveillance of individuals who are reasonably believed to be located outside the United States.<sup>9</sup> Many scholars have debated over the constitutionality of changes to FISA, and whether these changes are strengthening or weakening the government's ability to conduct electronic surveillance.<sup>10</sup> Other scholars have also challenged the constitutionality of changes to FISA. In *Clapper v. Amnesty International USA*, a group of attorneys and human rights, labor, legal, and media organizations (collectively Respondents) challenged the constitutionality of the FISA Amendments Act.<sup>11</sup> In a 5–4 decision, the Supreme Court of the United States ruled that Respondents—whose work requires them to frequently engage in international communications with persons not in the United States—lacked standing to challenge the amendment to FISA.<sup>12</sup>

In Part II, this note will examine FISA and the amendments to the Act in detail, the need for changes to the Act, and briefly provide an overview of the Fourth Amendment issue.<sup>13</sup> Part III will include details of *Clapper*, including Respondents' claim and why they

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<sup>7</sup> Stephanie Cooper Blum, *What Really is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform*, 18 B.U. PUB. INT. L.J. 269, 275 (2009).

<sup>8</sup> See *id.* at 280 (The U.S.A. Patriot Act amended several provisions of FISA.); Robert N. Davis, *Striking the Balance: National Security vs. Civil Liberties*, 29 BROOK. J. INT'L L. 175, 204 (2003) (The 1994 Amendments to FISA added procedures for physical searches.); Brenton Hund, *Disappearing Safeguards: FISA Nonresident Alien "Loophole" is Unconstitutional*, 15 CARDOZO J. INT'L & COMP. L. 169, 200–02 (2007) (The "Lone Wolf" Amendment expanded the definition of agent of a foreign power, and the USA Patriot Improvement and Reauthorization Act of 2005 extended the duration of surveillance.).

<sup>9</sup> 50 U.S.C. § 1881a(a) (2012).

<sup>10</sup> See *infra* Part II for the discussion of different scholars' thoughts on FISA changes.

<sup>11</sup> *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1142 (2013).

<sup>12</sup> *Id.* at 1155.

<sup>13</sup> See *infra* Part II.

believed that they had standing.<sup>14</sup> Part IV will examine lower court decisions, specifically focusing on Article III standing.<sup>15</sup> Part V will examine how the U.S. Supreme Court came to its decision that Respondents did not satisfy the imminent injury element and thus did not have standing.<sup>16</sup> This part will also examine Justice Breyer's dissent, how he criticizes the Court's analysis of imminent injury, and why he believes Respondents' injury is not too speculative.<sup>17</sup> Part VI will analyze the impact of the ruling in *Clapper*.<sup>18</sup> Who has standing to bring a claim against FISA? Is the ruling of the Court strengthening FISA? This part will discuss opinions of scholars on whether the amendments to FISA are obliterating its original purpose to stop the government from abusing electronic surveillance in the name of national security.<sup>19</sup> Part VI will also discuss the impact of these changes to the Act on the balance between national security and individuals' privacy.<sup>20</sup> Part VII concludes that the purpose of FISA (keeping the balance between national security and individuals' privacy) has been frustrated by numerous amendments to FISA, especially within the past decade.<sup>21</sup>

## II. HISTORICAL BACKGROUND

In 1978, Congress passed FISA as a response to the Court's decision in *United States v. United States District Court*, commonly called *Keith*.<sup>22</sup> In *Keith*, the United States charged three defendants

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<sup>14</sup> See *infra* Part III.

<sup>15</sup> See *infra* Part IV.

<sup>16</sup> See *infra* Part V.A.

<sup>17</sup> See *infra* Part V.B.

<sup>18</sup> See *infra* Part VI.

<sup>19</sup> See *infra* Part VI.

<sup>20</sup> See *infra* Part VI.

<sup>21</sup> See *infra* Part VII.

<sup>22</sup> *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 299 (1972). "The title 'Keith' is taken from the name of then-United States District Court Judge Damon Keith." Tracey Maclin, *The Bush Administration's Terrorist Surveillance Program and the Fourth Amendment's Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. DAVIS L. REV 1259, 1263 n.9 (2008). Judge Keith disagreed with the Government's claim that the President has the inherent authority to authorize warrantless wiretaps for national security purposes and ordered the Government to disclose electronic surveillance directed at the

with conspiracy to destroy government property.<sup>23</sup> During pretrial proceedings, the defendants filed a motion to compel the United States to disclose electronic surveillance information.<sup>24</sup> In response to the motion, the Government filed an affidavit by the Attorney General.<sup>25</sup> The affidavit stated, “[T]he Attorney General approved the wiretaps ‘to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government.’”<sup>26</sup> The Government argued that even though the surveillance was conducted without prior judicial approval, it was still lawful because it was a “reasonable exercise of the President’s power . . . to protect the national security.”<sup>27</sup> The District Court for the Eastern District of Michigan disagreed with the Government and held that the surveillance violated the Fourth Amendment.<sup>28</sup> In deciding that the surveillance was unlawful, the Supreme Court of the United States emphasized that the issue in *Keith* was “only the domestic aspects of

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defendants. *Id.* (reviewing *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971)). “The government then filed a writ of mandamus in the Court of Appeals for the Sixth Circuit to compel Judge Keith to vacate his order . . .” *Id.*

<sup>23</sup> *Keith*, 407 U.S. at 299.

<sup>24</sup> *Id.* at 299–300.

<sup>25</sup> *Id.* at 300.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 301 (The President’s power was exercised through the Attorney General.). Title III of the Omnibus Crime Control and Safe Streets Act of 1968 created two exceptions to the juridical approval: as to foreign threats, “[n]othing contained in this chapter . . . shall limit the constitutional power of the President [1] to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a *foreign power*, [2] to obtain *foreign intelligence information* deemed essential to the security of the United States, or [3] to protect national security information against *foreign intelligence activities*” and as to domestic threats, “[n]or shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States [4] against the overthrow of the Government by force or other unlawful means, or [5] against any other clear and present danger to the structure or existence of the Government.” Seamon & Gardner, *supra* note 2, at 330–31.

<sup>28</sup> *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971), *aff’d, rev’d sub nom. United States v. U.S. Dist. Ct. for E.D. of Mich.*, 444 F.2d 651 (6th Cir. 1971), *cert. granted*, 403 U.S. 297 (1972).

national security” and not “activities of foreign powers or their agents.”<sup>29</sup>

Because the ruling in *Keith* only applied to domestic national security, the President still had power to authorize electronic surveillance against foreign powers to protect the nation.<sup>30</sup> Congress perceived that the surveillance power was being abused and needed to be controlled.<sup>31</sup> After the ruling in *Keith*, Congress passed FISA to address abusive uses of electronic surveillance.<sup>32</sup> A committee established by Congress to investigate abusive use of electronic surveillance discovered that “at least since the administration of Franklin Roosevelt in 1940,” many presidents authorized electronic surveillance “for national security purposes” without judicial approval.<sup>33</sup> The committee reported the following numbers:

- Nearly a quarter of a million first class letters were opened and photographed in the United States by the CIA between 1953–1973, producing a CIA computerized index of nearly one and one-half million names.
- At least 130,000 first class letters were opened and photographed by the FBI between 1940–1966 in eight U.S. cities.
- Some 300,000 individuals were indexed in a CIA computer system and separate files were created on approximately 7,200 Americans and over 100 domestic groups during the course of CIA’s Operation CHAOS (1967–1973).
- Millions of private telegrams sent from, to, or through the United States were obtained by the National Security Agency from 1947 to 1975

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<sup>29</sup> *Keith*, 407 U.S. at 321–24; see also Seamon & Gardner, *supra* note 2, at 330–32.

<sup>30</sup> Blum, *supra* note 7, at 274.

<sup>31</sup> *Id.* at 287.

<sup>32</sup> *Id.* at 275; Seamon & Gardner, *supra* note 2, at 334–37.

<sup>33</sup> For a more detailed list of the committee’s report, see Blum, *supra* note 7, at 275; see also Banks, *supra* note 1, at 1226–27.

under a secret arrangement with three United States telegraph companies.

- An estimated 100,000 Americans were the subjects of United States Army intelligence files created between the mid-[1960s] and 1971.
- Intelligence files on more than 11,000 individuals and groups were created by the Internal Revenue Services between 1969 and 1973 and tax investigations were started on the basis of political rather than tax criteria.
- At least 26,000 individuals were at one point catalogued on an FBI list of persons to be rounded up in the event of a “national emergency.”<sup>34</sup>

Electronic surveillance was also used for political purposes. Presidents Johnson and Nixon used electronic surveillance for political purposes, such as eavesdropping on United States citizens who opposed Vietnam War protesters.<sup>35</sup> In the 1970s, President Nixon refused to disclose tape recordings of his political opponents for national security purposes.<sup>36</sup> In light of these activities, Congress believed it was necessary to set boundaries on presidential discretion by passing FISA.

#### A. FISA

In 1978, Congress passed FISA, which allowed for electronic surveillance of foreign powers or an agent of a foreign power—as specially defined in section 1801 of the FISA.<sup>37</sup> According to FISA, a foreign power is:

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<sup>34</sup> Senate Select Comm. To Study Governmental Operations, Intelligence Activities and the Rights of Americans, S. REP. No. 94-755, at 6–7 (1976), reviewed by Banks, *supra* note 1, at 1226–27.

<sup>35</sup> Blum, *supra* note 7, at 275; Nicholas J. Whilt, *The Foreign Intelligence Surveillance Act: Protecting the Civil Liberties that Make Defense of Our Nation Worthwhile*, 35 SW. U. L. REV. 361, 385 (2006).

<sup>36</sup> Banks, *supra* note 1, at 1225.

<sup>37</sup> Allan N. Kornblum & Lubomyr M. Jachnycky, *America’s Secret Court: Listening in on Espionage and Terrorism*, 24 JUDGES’ J. 15, 15 (1985).

- (1) a foreign government or any component thereof, whether or not recognized by the United States;
- (2) a faction of a foreign nation or nations, not substantially composed of United States persons;
- (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;
- (4) a group engaged in international terrorism or activities in preparation therefor;
- (5) a foreign-based political organization, not substantially composed of United States persons;
- (6) an entity that is directed and controlled by a foreign government or governments; or
- (7) an entity not substantially composed of United States persons that is engaged in the international proliferation of weapons of mass destruction.<sup>38</sup>

An agent of a foreign power means any person other than a United States person who:

- (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section;
- (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities;
- (C) engages in international terrorism or activities in preparation therefore;

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<sup>38</sup> 50 U.S.C. § 1801(a)(1)–(7) (2012).

(D) engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor; or

(E) engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor for or on behalf of a foreign power<sup>39</sup>

FISA also defined electronic surveillance to include using an electronic, mechanical, or other surveillance device to acquire any wire or radio communication.<sup>40</sup> FISA established two courts to

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<sup>39</sup> 50 U.S.C. § 1801(b)(1)(A)–(E) (2012).

<sup>40</sup> *Amnesty Int’l USA v. McConnell*, 646 F. Supp. 2d 633, 643 (S.D. N.Y. 2009), *vacated, rev’d sub nom. Amnesty Int’l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011), *cert. granted*, 133 S. Ct. 1138 (2013).

FISA defined electronic surveillance to include: (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes; (2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of Title 18; (3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or (4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

*Id.* at 122 n.2.

govern applications for orders authorizing electronic surveillance: the Foreign Intelligence Surveillance Court (FISA Court) and the Court of Review (FISA Review Court).<sup>41</sup> The FISA Court consisted of seven district court judges appointed by the Chief Justice of the United States Supreme Court, and the FISA Review Court consisted of three district court or appellate court judges appointed by the Chief Justice.<sup>42</sup> The FISA Court has jurisdiction to review applications for authorizing electronic surveillance, and the FISA Review Court has jurisdiction to review applications that have been denied by the FISA Court.<sup>43</sup> A federal officer submits a written application to the FISA Court, which includes identity, if known, or a description of the specific target, a statement justifying his belief that “the target of the electronic surveillance is a foreign power or an agent of a foreign power,” and a description of the facilities at which the electronic surveillance is directed, among other things.<sup>44</sup> Because the FISA Court proceedings are held privately, it is difficult to assess the effectiveness of the court.<sup>45</sup>

#### B. USA PATRIOT Act

In 2001, roughly five weeks after the September 11th attacks, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), which amended several provisions of FISA.<sup>46</sup> The USA PATRIOT Act increased the number of hours the government can conduct emergency warrantless surveillance from twenty-four hours to seventy-two hours, expanded the number of FISA Court judges from seven to eleven, “expanded the availability of physical searches, pen registers, and trap and trace

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<sup>41</sup> Davis, *supra* note 8, at 192; Kornblum & Jachnycky, *supra* note 37, at 16.

<sup>42</sup> Davis, *supra* note 8, at 192.

<sup>43</sup> *Id.*

<sup>44</sup> 50 U.S.C § 1804(a)(3)(A) (2012).

<sup>45</sup> Nola K. Breglio, *Leaving FISA Behind: The Need to Return to Warrantless Foreign Intelligence Surveillance*, 113 YALE L.J. 179, 188 (2003). FISA Court itself is also very secretive. *Id.* at 190. FISA Court is not listed in *The United States Government Manual* or in *The United States Court Directory*, and the location of the court was initially kept secret. *Id.*

<sup>46</sup> Hund, *supra* note 8, at 191.

devices, . . . allowed roving wiretaps[, and] . . . extended the time periods for the surveillance from 90 days to 120 days.”<sup>47</sup> But most importantly, the USA PATRIOT Act lowered the legal standard for a FISA warrant from a “primary purpose” to a “significant purpose.”<sup>48</sup> To obtain a warrant for surveillance, the government has to assert that the purpose of the surveillance is to obtain foreign intelligence information, which, over time, has been interpreted as the “primary purpose.”<sup>49</sup> The primary purpose test is very important because it distinguishes between “the purpose of gathering foreign intelligence and the purpose of gathering evidence for a prosecution.”<sup>50</sup> Information obtained under FISA may be used as evidence in criminal prosecutions as long as the primary purpose of surveillance under FISA was to gather foreign intelligence.<sup>51</sup> The test draws a line between foreign intelligence and criminal prosecution at the outset of surveillance.<sup>52</sup> The USA PATRIOT Act, however, lowered the standard to a “significant purpose.”<sup>53</sup> During the floor debate for the USA PATRIOT Act, Senator Dianne Feinstein stated that changing the requirement from “the [primary] purpose” to a

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<sup>47</sup> Blum, *supra* note 7, at 280.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* Before FISA was passed, some courts of appeals upheld warrantless electronic surveillances that were conducted “for the sole or primary purpose of obtaining foreign intelligence information.” Seamon & Gardner, *supra* note 2, at 359. *See, e.g.*, *United States v. Butenko*, 494 F.2d 593, 605 (3d Cir. 1974) (en banc) (holding that the warrantless wiretaps were constitutional because they were conducted solely for the purpose of gathering foreign intelligence information); *see also* *United States v. Brown*, 484 F.2d 418, 427 (5th Cir. 1972) (holding that the warrantless wiretaps were constitutional because they were conducted for the purpose of gathering foreign intelligence). *But see* *United States v. Truong*, 629 F.2d 908, 911 (4th Cir. 1980) (holding that warrantless electronic surveillances were unconstitutional to the extent the government switched the focus of investigation for criminal prosecution). After the passage of FISA, courts applied the primary purpose test to surveillance authorized under FISA. Seamon & Gardner, *supra* note 2, at 364. *See, e.g.*, *United States v. Megahey*, 553 F. Supp. 1180 (E.D.N.Y. 1982), *aff’d sub nom.* *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984) (upheld Defendant’s conviction because the government’s primary purpose for the surveillance was to obtain foreign intelligence).

<sup>50</sup> Seamon & Gardner, *supra* note 2, at 365.

<sup>51</sup> *Id.* at 366.

<sup>52</sup> *See id.* at 367.

<sup>53</sup> Blum, *supra* note 7, at 281.

“significant purpose” was to make it “easier to collect foreign intelligence information.”<sup>54</sup> Senator Feinstein explained:

[I]n today’s world things are not so simple. In many cases, surveillance will have two key goals—the gathering of foreign intelligence, and the gathering of evidence for a criminal prosecution. . . .

Rather than forcing law enforcement to decide which purpose is primary . . . this bill strikes a new balance. It will now require that a “significant” purpose of the investigation must be foreign intelligence gathering to proceed with surveillance under FISA.

The effect of this provision will be to make it easier for law enforcement to . . . [use FISA] . . . where the subject of the surveillance is both a potential source of valuable intelligence and the potential target of a criminal prosecution.<sup>55</sup>

The government’s electronic surveillance was conducted under FISA (as amended by the USA PATRIOT Act) until 2008,<sup>56</sup> with small changes.<sup>57</sup>

During the period between the USA PATRIOT Act and the 2008 Amendments to FISA, the Bush administration created the Terrorist Surveillance Program (TSP), which authorized the National Security Agency (NSA) “to engage in electronic surveillance, without prior judicial authorization, of communications between persons in other

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<sup>54</sup> Banks, *supra* note 1, at 1245.

<sup>55</sup> 147 CONG. REC. S10,990, S11,004 (2001) (statement of Sen. Feinstein), *quoted in* Banks, *supra* note 1, at 1245.

<sup>56</sup> Blum, *supra* note 7, at 283.

<sup>57</sup> Hund, *supra* note 8, at 200. In 2004, Congress passed the “Lone Wolf” Amendment, which expanded the definition of agent of a foreign power. *Id.* at 200. The Lone Wolf Amendment does not require the government to prove a connection with a foreign power when seeking surveillance authorization for nonresident aliens. *Id.* at n.176.

countries and persons inside the United States.”<sup>58</sup> The Bush administration directed the NSA to intercept electronic communications that started or ended in the United States<sup>59</sup> if the government had “a reasonable basis to believe [the communication] involve[d] al Qaeda or . . . its affiliates.”<sup>60</sup> Although the TSP was created shortly after the September 11th attacks, it was kept secret until the *New York Times* disclosed its existence in 2005.<sup>61</sup> Conducting wiretaps outside the United States does not require a warrant, but the Bush administration directed the NSA to intercept electronic communications that started and ended in the United States.<sup>62</sup> This required the NSA to obtain a FISA warrant, yet the TSP did not fall under the framework of FISA.<sup>63</sup> Some critics argued that the TSP violated the Fourth Amendment and FISA, while the Bush administration argued that the TSP was legal under Article II of the Constitution.<sup>64</sup> In 2007, however, “the government announced that President Bush would not reauthorize the TSP because the government had succeeded in obtaining an order under FISA

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<sup>58</sup> Michael Avery, *The Constitutionality of Warrantless Electronic Surveillance of Suspected Foreign Threats to the National Security of the United States*, 62 U. MIAMI L. REV. 541, 541 (2008).

<sup>59</sup> Blum, *supra* note 7, at 283.

<sup>60</sup> Avery, *supra* note 58, at 544–45.

NSA also targeted the communications of individuals it deemed suspicious on the basis of NSA’s belief that the targeted individuals had some unspecified “link” to al Qaeda or unspecified related terrorist organizations, that they belonged to an organization that the government considers to be “affiliated” with al Qaeda, that they had provided some unspecified support for al Qaeda, or that they “want to kill Americans.”

*Id.*

<sup>61</sup> Blum, *supra* note 7, at 284. The New York Times published an article in 2005 revealing TSP and what NSA was authorized to do under TSP. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, <http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all>.

<sup>62</sup> Blum, *supra* note 7, at 283.

<sup>63</sup> *Id.*

<sup>64</sup> Critics viewed FISA as “the exclusive statute monitoring foreign surveillance” and the Bush administration viewed the TSP as the President exercising his inherent authority as Commander in Chief. *Id.* at 284.

allowing similar surveillance to be conducted under the Act.”<sup>65</sup> In 2007, the FISA Court issued orders authorizing the government to conduct surveillance on international communications that start or end in the United States if there is “probable cause to believe that one participant to the communication was a member or agent of al Qaeda or an associated terrorist organization.”<sup>66</sup> These new orders subjected NSA’s current electronic surveillances to the FISA Court’s approval.<sup>67</sup> After the FISA Court narrowed its authorization, the President asked Congress to amend FISA in order to provide intelligence agencies “additional authority to meet the challenges of modern technology and international terrorism.”<sup>68</sup> Responding to the President’s request, Congress passed the Protect America Act in 2007.<sup>69</sup> Though it expired after six months, it set the stage for the FISA Amendments Act in 2008.<sup>70</sup> A few months after the Protect America Act expired, Congress passed the FISA Amendments Act.<sup>71</sup> Former Deputy Assistant Attorney General in the Office of Legal Counsel, John Yoo, argued that the probable cause element<sup>72</sup> of FISA causes several problems.<sup>73</sup> He explained the problem as follows: when an al Qaeda leader has a cell phone with a hundred numbers in its memory and ten of them are in the United States, the government would need to obtain a warrant to conduct surveillance.<sup>74</sup> However, Yoo argued that the users of those ten numbers would probably not fall under the category of agents of a foreign power under FISA because the FISA Court would “probably require” evidence identifying people who answered the phone, which the intelligence

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<sup>65</sup> Avery, *supra* note 58, at 582.

<sup>66</sup> Clapper v. Amnesty Int’l USA, 133 S. Ct. 1138, 1144 (2013).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* “FISA also must keep pace with the continuing explosion in communications technologies available both to law enforcement agencies and potential surveillance targets.” Yoo, *supra* note 5, at n.82.

<sup>69</sup> Owen Fiss, *Even in a Time of Terror*, 31 YALE L. & POL’Y REV. 1, 9 (2012).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> FISA requires the government to show that they have a probable cause to believe that someone is an agent of a foreign power when obtaining a warrant from FISA Court. 50 U.S.C. § 1805(a)(3) (2010).

<sup>73</sup> Yoo, *supra* note 5, at 575.

<sup>74</sup> *Id.* at 575–76.

agencies would not know immediately.<sup>75</sup> He further argued that in the case of e-mail addresses, it is even more difficult to establish probable cause because it is not immediately obvious who holds which email address.<sup>76</sup> However, despite Yoo's argument, the statistics showed that most of the applications seeking a surveillance warrant were granted.<sup>77</sup>

C. *FISA Amendments Act of 2008*

In 2008, Congress passed an amendment to FISA.<sup>78</sup> Under the FISA Amendments Act, "the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to [one] year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information."<sup>79</sup> There are several limitations when carrying out the surveillance authorized under the new amendment.<sup>80</sup> The government:

- (1) may not intentionally target any person known at the time of acquisition to be located in the United States;
- (2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States;
- (3) may not intentionally target a United States person reasonably believed to be located outside the United States;
- (4) may not intentionally acquire any communication as to which the sender and all intended recipients are

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See *infra* note 188 for the statistics of FISA Court granting surveillance warrants.

<sup>78</sup> 50 U.S.C. § 1881a (2012).

<sup>79</sup> 50 U.S.C. § 1881a(a) (2012).

<sup>80</sup> 50 U.S.C. § 1881a(b)(1)-(5) (2012).

known at the time of the acquisition to be located in the United States; and  
(5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.<sup>81</sup>

Unlike FISA, the FISA Amendments Act protects all Americans by adding section 1881a(b) limitations.<sup>82</sup> On the other hand, the new amendment changed a handful of provisions, loosening warrant procedures.<sup>83</sup> Under the FISA Amendments Act, the Attorney General does not need to identify the specific place at which the surveillance will be conducted.<sup>84</sup> The FISA Court no longer looks at individual surveillance applications, but instead looks to see if the government followed procedural requirements under FISA.<sup>85</sup> The FISA Amendments Act also increases the exigent circumstance exception to seven days.<sup>86</sup> As long as the government presents certification to the FISA Court within seven days, the government can begin surveillance under an exigent circumstance.<sup>87</sup> When there is no exigent circumstance, the Attorney General and the Director of National Intelligence must submit a certification to the FISA Court, and the court must review the certification, targeting procedures, and minimization procedures.<sup>88</sup> If the FISA Court finds that the

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<sup>81</sup> *Id.*

<sup>82</sup> Under FISA, there was no specific procedure for obtaining a warrant for conducting surveillance on Americans outside the United States. Jonathan D. Forgang, “*The Right of the People*”: *The FISA Amendments Act of 2008, and Foreign Intelligence Surveillance of Americans Overseas*, 78 *FORDHAM L. REV.* 217, 238 (2009).

<sup>83</sup> *Id.* at 238.

<sup>84</sup> 50 U.S.C. § 1881a(g)(4) (2012).

<sup>85</sup> 50 U.S.C. § 1881a(i)(2) (2012). Under FISA Amendments Act, the government does not need to disclose every targeted individual to the FISA Court. Fiss, *supra* note 69, at 18. This allows the FISA Court to issue “blanket” authorization, allowing the government to target a large group of people. *Id.*

<sup>86</sup> 50 U.S.C. § 1881a(g)(1)(B) (2012). Attorney General and the Director of National Intelligence determine that exigent circumstances exist when there is not enough time to obtain authorization. *See* 50 U.S.C. § 1881a(c)(2) (2012).

<sup>87</sup> *Id.*

<sup>88</sup> 50 U.S.C. § 1881a(i)(2) (2012).

government satisfied the statute, it will approve the procedures for conducting surveillance.<sup>89</sup>

### 1. Certification

The Attorney General and the Director of National Intelligence are required to provide a written certificate to the FISA Court.<sup>90</sup> A certification must attest that there are procedures to ensure that targeted persons are reasonably believed to be located outside the United States and to prevent the intentional acquisition of communications where participants are known to be located in the United States.<sup>91</sup> It must also attest that the minimization procedures meet the definition of minimization procedures under section 1801(h) or section 1821(4).<sup>92</sup> There is an exception to this rule. The FISA Amendments Act gives the Attorney General and the Director of National Intelligence seven days to submit a certification to the FISA Court if time did not permit them to submit a certification prior to implementing an authorization of surveillance.<sup>93</sup>

### 2. Targeting Procedures

The Attorney General and the Director of National Intelligence are required to adopt targeting procedures to ensure that targeted persons under the authorization are limited to “persons reasonably believed to be located outside the United States” and to prevent the intentional acquisition of any communications between people who were known to be located in the United States at the time of the acquisition.<sup>94</sup> The procedure must also prevent the government from intentionally targeting persons reasonably believed to be located outside the United States if the purpose of acquiring the

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<sup>89</sup> 50 U.S.C. § 1881a(i)(3) (2012).

<sup>90</sup> 50 U.S.C. § 1881a(g)(1)(A) (2012).

<sup>91</sup> 50 U.S.C. § 1881a(g)(2)(A)(i) (2012).

<sup>92</sup> 50 U.S.C. § 1881a(g)(2)(A)(ii) (2012).

<sup>93</sup> 50 U.S.C. § 1881a(g)(1)(B) (2012). When FISA was first established, the government had twenty-four hours to obtain a warrant in cases of emergency surveillance. Pub.L. No. 95-511, § 105(e), 92 Stat. 1792 (1978). The USA PATRIOT Act increased this to seventy-two hours. Blum, *supra* note 7, at 280.

<sup>94</sup> 50 U.S.C. § 1881a(d) (2012).

communication is to target a particular, known person reasonably believed to be in the United States.<sup>95</sup>

### 3. *Minimization Procedures*

The Attorney General and the Director of National Intelligence are required to adopt minimization procedures as defined under sections 1801(h)(1) and 1821(4)(A) of FISA.<sup>96</sup> Minimization procedures are “specific procedures . . . that are reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information.”<sup>97</sup> The minimization procedures ensure that nonpublicly available information about any United States person that is not foreign intelligence information will not be disseminated without such person’s consent. However, when the information is evidence of a crime, the statute allows the government to retain and disseminate such information for law enforcement purposes.<sup>98</sup>

If the FISA Court finds that one of the three requirements failed to satisfy the statute, the court will order the government to correct any deficiencies within thirty days or not to implement the authorization submitted for approval.<sup>99</sup> The government has the option to appeal the FISA Court’s decision to the FISA Review Court.<sup>100</sup> If the government has already begun implementing the authorization before submitting a certification to the FISA Court, the government may continue acquiring surveillance while the case is pending for rehearing or until the FISA Review Court enters an order.<sup>101</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> 50 U.S.C. § 1881a(e)(1) (2012).

<sup>97</sup> 50 U.S.C. § 1801(h)(1) (2012); 50 U.S.C. § 1821(4)(A) (2012).

<sup>98</sup> 50 U.S.C. § 1821(4)(C) (2012).

<sup>99</sup> 50 U.S.C. § 1881a(i)(3)(B) (2012).

<sup>100</sup> 50 U.S.C. § 1881a(i)(4) (2012).

<sup>101</sup> *Id.*

*D. Fourth Amendment*

Respondents in *Clapper* argued that the FISA Amendments Act violates the Fourth Amendment because it “fails to protect the privacy interest of Americans in the content of their telephone calls and emails.”<sup>102</sup> The Fourth Amendment of the Constitution protects people from unreasonable searches and seizures.<sup>103</sup> When FISA was passed, however, Congress did not require the Fourth Amendment’s traditional probable cause standard.<sup>104</sup> The government could use information gathered under FISA in criminal investigations, as FISA “simply requires probable cause to believe that the target of the electronic surveillance is a foreign agent and the targeted facility is, or is about to be, used by a foreign agent.”<sup>105</sup> If the target is a United States person, the government needs to show that the target is “an employee or agent of a foreign power,” and if the foreign power is a terrorist group, “it can be fairly assumed that . . . the target is a terrorist and thus that the probable cause requirement has been satisfied.”<sup>106</sup> Taking it one step further, surveillance under FISA is allowed, “even if the foreign power is another nation . . . and there is thus no reason to suspect the target of criminal activity.”<sup>107</sup> To maintain the balance between national security and our Constitutional protection, FISA’s lowered probable cause standard only applied to surveillances where the purpose was to gather foreign intelligence.<sup>108</sup> Many scholars have criticized the change in wording from “primary purpose” to “significant purpose” for the probable cause standard<sup>109</sup> in the USA PATRIOT Act because they viewed this change to mean that United States citizens are more exposed to electronic

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<sup>102</sup> *Amnesty Int’l USA v. McConnell*, 646 F. Supp. 2d 633, 642 (S.D.N.Y. 2009), *vacated, rev’d sub nom. Amnesty Int’l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011), *cert. granted*, 133 S. Ct. 1138 (2013).

<sup>103</sup> U.S. CONST. amend. IV.

<sup>104</sup> Hardin, *supra* note 4, at 292.

<sup>105</sup> *Id.*

<sup>106</sup> Fiss, *supra* note 69, at 21.

<sup>107</sup> *Id.*

<sup>108</sup> Hardin, *supra* note 4, at 292.

<sup>109</sup> Blum, *supra* note 7, at 282.

surveillance of their international communications.<sup>110</sup> Law professor Stephen Schulhofer at New York University argued that this change exposed “U[nited] S[tates] citizens and foreign nationals . . . to ‘broad FISA surveillance’ when the government’s primary purpose is not to gather foreign intelligence but instead to gather evidence for use at a criminal trial.”<sup>111</sup> This change allowed the government to conduct electronic surveillance authorized under FISA for the purposes of finding evidence in criminal prosecutions.<sup>112</sup> Against these critics, the FISA Review Court upheld the change in *In re Sealed Case*, arguing that the government’s primary purpose is to stop terrorism, and that criminal prosecutions are often “interrelated with other techniques used to frustrate a foreign power’s efforts.”<sup>113</sup> The FISA Review Court further argued that “unless the government’s ‘sole objective’ was to obtain evidence of a past crime, a FISA warrant should be granted.”<sup>114</sup> In its discussion of the Fourth Amendment, the FISA Review Court distinguished the criminal prosecution from foreign intelligence as applied to ordinary crimes, thereby holding that the USA PATRIOT Act is constitutional.<sup>115</sup> Hardin criticized this holding because he believed the FISA Review Court failed to consider the constitutionality of the USA PATRIOT Act in relation to ordinary crimes.<sup>116</sup> Instead, Hardin opined that by broadening “the applicability of FISA to ordinary crimes inextricably intertwined with foreign intelligence activity,” the USA PATRIOT Act went beyond what the Fourth Amendment allows.<sup>117</sup>

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<sup>110</sup> Banks, *supra* note 1, at 1213. See Part II.B for the discussion regarding how the court interpreted “purpose” as “primary purpose.”

<sup>111</sup> STEPHEN J. SCHULHOFER, *THE ENEMY WITHIN INTELLIGENCE GATHERING, LAW ENFORCEMENT AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11* 44 (Century Foundation Press, 2002), *construed in* Blum, *supra* note 7, at 281–82.

<sup>112</sup> Banks, *supra* note 1, at 1213.

<sup>113</sup> *In re Sealed Case*, 310 F.3d 717, 743 (FISA Ct. Rev. 2002).

<sup>114</sup> Blum, *supra* note 7, at 282.

<sup>115</sup> *In re Sealed Case*, 310 F.3d 717, 743 (FISA Ct. Rev. 2002), *construed in* Hardin, *supra* note 4, at 333.

<sup>116</sup> *Id.* Hardin foresaw a situation in which “authorities conducting a FISA surveillance . . . conceivably put greater emphasis on collecting evidence regarding a murder investigation in which the counterintelligence information is insignificant.” *Id.* at 333–34.

<sup>117</sup> *Id.* at 345.

The FISA Amendments Act made an effort to ensure that the Fourth Amendment would be protected. Section 1881a(b)(5) states that an authorized acquisition of foreign intelligence information “shall be conducted in a manner consistent with the [F]ourth [A]mendment to the Constitution of the United States.”<sup>118</sup> However, “it is unclear what this additional requirement will add” to conducting electronic surveillance overseas,<sup>119</sup> because if the target is a foreigner not in the United States, the government does not have to prove that the target is associated with a foreign power; the government need only prove that the target is a foreigner abroad.<sup>120</sup> Also, the FISA Amendments Act kept the “significant purpose” standard from the USA PATRIOT Act.<sup>121</sup>

Once the FISA Amendments Act was passed, Respondents filed suit against the government seeking a declaration that the Act is unconstitutional and an injunction against surveillance authorized under the Act.<sup>122</sup>

### III. FACTS OF *CLAPPER V. AMNESTY INTERNATIONAL USA*

Respondents were attorneys, human rights, labor, legal, and media organizations “whose work require[d] them to engage in sensitive and sometimes privileged telephone and e-mail communications” with persons not in the United States.<sup>123</sup> Many of

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<sup>118</sup> 50 U.S.C § 1881a(b)(5) (2012).

<sup>119</sup> Blum, *supra* note 7, at 298.

<sup>120</sup> Fiss, *supra* note 69, at 21.

<sup>121</sup> 50 U.S.C. § 1881a(g)(2)(A)(v) (2012).

<sup>122</sup> *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2012).

<sup>123</sup> Brief for Plaintiffs-Appellants at 14, *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2012) (No. 11-1025).

Some [respondents] communicate by telephone and email with people located in geographic areas that are a special focus of the U.S. government’s counterterrorism or diplomatic efforts . . . some [respondents] communicate with attorneys or co-counsel overseas . . . some [respondents] communicate . . . with the family members of individuals who have been detained by the U.S. military or CIA . . . some [respondents] communicate . . . with political dissidents and human rights activists abroad . . . [and] some [respondents] communicate by telephone and email with foreign journalists, researchers, and other experts overseas.

these people were located in areas that were a special focus of the U.S. government.<sup>124</sup> Sylvia Royce and Scott McKay were attorneys whose clients were accused terrorists and Guantanamo Bay detainees.<sup>125</sup> They regularly communicated with their clients and their clients' families, who were abroad.<sup>126</sup> Because their clients were alleged to have been involved in terrorism, the nature of the conversations often related to terrorism, national defense, or foreign affairs.<sup>127</sup> Joanne Mariner was a human rights researcher who tracked down people the CIA rendered to other countries.<sup>128</sup> The nature of her job required her to frequently communicate with detainees, political activists, journalists, and fixers from all over the world; the CIA stamped many of these people as being involved in terrorist organizations.<sup>129</sup> When Congress passed the FISA Amendments Act, Respondents brought an action seeking a declaration that the new amendment was unconstitutional and an injunction seeking to enjoin any foreign intelligence surveillance from being conducted under the amendment.<sup>130</sup> Respondents alleged that the new amendment compromised their ability to engage in confidential communications via telephone and e-mail due to who the Respondents communicated with.<sup>131</sup> The United States government was likely to target some of the people Respondents communicated with because they were people the United States government believed were associated with terrorist organizations and are located in areas that were a "special focus" of the United States government.<sup>132</sup> Respondents also alleged that they were compelled "to take costly and burdensome measures to protect the privacy of their communications."<sup>133</sup> Respondents had to assume that the

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Brief for Respondents at 16–17, *Clapper*, 133 S. Ct. 1138 (No. 11–1025).

<sup>124</sup> Brief for the Plaintiffs-Appellants, *supra* note 123, at 14.

<sup>125</sup> Brief for Respondents, *supra* note 123, at 16.

<sup>126</sup> *Id.* at 15–16.

<sup>127</sup> Brief for Comm. on Civil Rights of the Ass'n of the Bar of N.Y.C. at 3, *Clapper*, 133 S. Ct. 1138 (No. 11-1025).

<sup>128</sup> *Clapper*, 133 S. Ct. at 1158.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1138.

<sup>131</sup> *Id.*

<sup>132</sup> Brief for the Plaintiffs-Appellants, *supra* note 123, at 15–17.

<sup>133</sup> *Id.* at 17, 19.

government may monitor every international communication; therefore, Respondents had to either forego the communication or travel abroad to have an in-person conversation.<sup>134</sup>

#### IV. PROCEDURAL HISTORY

To establish Article III standing, Plaintiffs had to show: (1) they suffered an actual and imminent injury that was concrete and particularized, (2) there was a causal connection between the injury and the Defendant's actions, and (3) it was likely that a favorable decision in the case would redress the injury.<sup>135</sup>

##### A. *United States District Court for the Southern District of New York*

The District Court for the Southern District of New York held that Plaintiffs lacked standing to bring a pre-enforcement challenge against the FISA Amendments Act. Plaintiffs argued that they only needed to demonstrate “an actual and well-founded fear that the law [would] be enforced against” them to satisfy the actual and imminent injury requirement because they were bringing a pre-enforcement challenge to a statute on First Amendment grounds.<sup>136</sup> The District Court responded that “[t]he plaintiffs [could] only demonstrate an abstract fear that their communications [would] be monitored.”<sup>137</sup> The District Court stated that the FISA Amendments Act does not authorize the automatic surveillance of persons such as Plaintiffs; it requires the government to seek authorization from the FISA Court. The District Court referred to *United Presbyterian Church in the United States of America v. Reagan* and stated that the courts have rejected standing based on a fear of surveillance, similar to the fear of surveillance in this case.<sup>138</sup> The District Court concluded that the

<sup>134</sup> Brief for Respondents, *supra* note 123, at 20.

<sup>135</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>136</sup> *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633, 644 (S.D.N.Y. 2009), *vacated, rev'd sub nom. Amnesty Int'l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011), *cert. granted*, 133 S. Ct. 1138 (2013).

<sup>137</sup> *Id.* at 645.

<sup>138</sup> *Id.* Plaintiffs in *United Presbyterian Church in the United States of America v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984), challenged the

link between Plaintiffs' fear of injury and the FISA Amendments Act was attenuated because the statute created a judicial body (FISA Court) to review each application for surveillance in order to ensure that it complied with the Fourth Amendment.<sup>139</sup>

The District Court also rejected Plaintiffs' second argument—that Plaintiffs had to take costly and burdensome measures to ensure confidential communication with people outside of the United States.<sup>140</sup> The District Court held that this argument could not be linked to the FISA Amendments Act because that action resulted from their fear of surveillance.<sup>141</sup> Plaintiffs' incurred costs could not be the basis for standing because they were not independent of their first actual and imminent injury argument.<sup>142</sup>

*B. United States Court of Appeals for the Second Circuit*

The Second Circuit vacated the District Court's decision and held that the Plaintiffs had standing.<sup>143</sup> The Second Circuit interpreted the elements of standing differently than the District Court.<sup>144</sup> As to the actual and imminent injury element, the Second Circuit reasoned that “[w]hen a plaintiff asserts a present injury based on conduct taken in anticipation of future government action, [the court] evaluate[s] the likelihood that the future action will in fact come to pass.”<sup>145</sup> As to the traceability element, the Second Circuit considered whether the Plaintiffs' present injury “resulted from some irrational or otherwise clearly unreasonable fear of future government action that is unlikely

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constitutionality of Executive Order No. 12333, which allows intelligence agencies to apply to the Attorney General for approval to collect, retain, or disseminate intelligence information. The court in this case held that the plaintiffs lacked standing because they failed to show that “any specific action is threatened or even contemplated against them.” *Id.* at 1380.

<sup>139</sup> *McConnell*, 646 F. Supp. 2d at 646.

<sup>140</sup> *Id.* at 653.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 658.

<sup>143</sup> *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 122 (2d Cir. 2011), *cert. granted*, 133 S. Ct. 1138 (2013).

<sup>144</sup> *Id.* at 131–132.

<sup>145</sup> *Id.* at 135 (emphasis omitted).

to take place.”<sup>146</sup> The Second Circuit agreed with Plaintiffs that the government was likely to conduct surveillance on Plaintiffs’ communications in the future because Plaintiffs engaged in communications with individuals likely to be targeted by the government.<sup>147</sup> The Second Circuit further held that fears of future surveillance were fairly traceable to the FISA Amendments Act because “they [we]re based on a reasonable interpretation of the challenged statute and a realistic understanding of the world.”<sup>148</sup> Unlike the District Court, the Second Circuit concluded that the FISA Court by itself did not preclude standing because virtually every application submitted to the FISA Court was approved.<sup>149</sup> The Second Circuit held that Plaintiffs had standing because their fears of electronic surveillance and actions they took to avoid possible surveillance constituted actual and imminent injuries traceable to the FISA Amendments Act.<sup>150</sup>

#### V. ANALYSIS OF OPINION

In a 5–4 decision, the Supreme Court held that Respondents did not have standing under Article III of the Constitution because they did not suffer any injury.<sup>151</sup> The Court also held that the “costly and burdensome measures” Respondents had to take to protect their communications did not satisfy the injury requirement for standing.<sup>152</sup> The minority disagreed and concluded that at least some of the respondents had standing because there was a high probability that the government—at some time in the future—would monitor at least some of Respondents’ communications.<sup>153</sup>

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 138. These are people ‘the U.S. government believes or believed to be associated with terrorist organizations,’ ‘political and human rights activists who oppose governments that are supported economically or militarily by the U.S. government,’ and ‘people located in geographic areas that are a special focus of the U.S. government’s counterterrorism or diplomatic efforts.’” *Id.* at 138–139.

<sup>148</sup> *Id.* at 139.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 140.

<sup>151</sup> *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1155 (2013).

<sup>152</sup> *Id.* at 1143.

<sup>153</sup> *Id.* at 1155 (Breyer, J., dissenting).

A. *Justice Alito's Majority Opinion*

Justice Alito delivered the opinion of the Court in which Chief Justice Roberts, Justice Scalia, Justice Kennedy, and Justice Thomas joined.<sup>154</sup> Justice Alito began his discussion by briefly explaining section 1881a and Respondents' complaint, and stating the issue of this case—Article III standing.<sup>155</sup> The Court held that Respondents lacked Article III standing because their “theory of *future* injury [was] too speculative” to satisfy the requirement that injury must be “certainly impending,” and even if they satisfied the “certainly impending” requirement, “they still would not be able to establish that . . . injury [was] fairly traceable to [section] 1881a.”<sup>156</sup> The Court pointed out that Congress enacted FISA against the Court's decision in *United States v. United States District Court for Eastern District of Michigan*.<sup>157</sup> However, with the major changes, the FISA Amendments Act “established a new and independent source of intelligence collection authority, beyond that granted in traditional FISA.”<sup>158</sup> The government seeking surveillance authorization is no longer required to (1) show probable cause that their target is a “foreign power or agent of a foreign power,” or (2) “specify the nature and location of each of the particular facilities or places” at which the surveillance will occur.<sup>159</sup>

Justice Alito noted that Respondents asserted two theories of Article III standing, which he rejected later in the opinion.<sup>160</sup> Respondents claimed that “there [was] an objectively reasonable likelihood that their communications [would] be acquired under [the FISA Amendments Act] at some point in the future, thus causing them injury,” and that the risk of surveillance was “so substantial that

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 1142 (majority opinion).

<sup>156</sup> *Id.* at 1143.

<sup>157</sup> *Id.* See *United States v. U.S. Dist. Ct. for E.D. of Mich.*, S. Div. 92 S. Ct. 2125 (1972). This case “implicitly suggested that a special framework for foreign intelligence surveillance might be constitutionally permissible.” *Clapper*, 133 S. Ct. at 1143.

<sup>158</sup> *Clapper*, 133 S. Ct. at 1144.

<sup>159</sup> *Id.* See *supra* Part II.C for FISA Amendments Act in detail.

<sup>160</sup> *Clapper*, 133 S. Ct. at 1146. See *supra* Part III.A–B for Justice Alito's discussion regarding why Respondents' two theories of Article III standing fail.

they [had] been forced to take costly and burdensome measures” to protect their international communications, thus causing present injury traceable to the FISA Amendments Act.<sup>161</sup>

Starting with a brief history of Article III standing, Justice Alito began to lay out standards to meet Article III requirements.<sup>162</sup> The issue in *Clapper* was whether Respondents satisfied the injury-in-fact element, and Justice Alito stated that threatened injury must have been *certainly* impending to satisfy the injury-in-fact element.<sup>163</sup> The Court held that Respondents’ injury-in-fact argument failed because they relied on “a highly attenuated chain of possibilities,” which did not satisfy the certainly impending requirement.<sup>164</sup> Justice Alito further noted that even if Respondents satisfied the injury-in-fact requirement, their argument failed to show that their injury could be fairly traceable to the FISA Amendments Act.<sup>165</sup> Then Justice Alito provided reasons why Respondents’ speculative chain of possibilities failed to show that “injury based on potential future surveillance [was] certainly impending or [was] fairly traceable to [the FISA Amendments Act].”<sup>166</sup> First, Justice Alito argued that Respondents *assumed* that the government *may* target their international communication without providing any factual evidence that their communications would be targeted.<sup>167</sup> Second, even if Respondents could show that the government would imminently target their international communications, they could not satisfy the fairly traceable requirement because there were ways the government could conduct the surveillance other than under the FISA Amendments

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<sup>161</sup> *Clapper*, 133 S. Ct. at 1146.

<sup>162</sup> *Id.* at 1146–47.

<sup>163</sup> *Id.* at 1147.

<sup>164</sup> *Id.* at 1147–48. *See also* *Summers v. Earth Island Inst.*, 555 U.S. 488, 500–01 (2009) (rejecting a standing theory premised on a speculative chain of possibilities).

<sup>165</sup> *Clapper*, 133 S. Ct. at 1147–52; *see also* *Am. Civ. Liberties Union v. Nat’l. Sec. Agency*, 493 F.3d 644, 673–74 (6th Cir. 2007) (holding that plaintiffs lacked standing to bring claim against the NSA’s use of warrantless wiretaps).

<sup>166</sup> *Clapper*, 133 S. Ct. at 1150.

<sup>167</sup> *Id.* at 1149 (majority opinion). *But see id.* at 1157–60 (Breyer, J. dissenting) (arguing that the injury-in-fact is not speculative).

Act.<sup>168</sup> Third, even if the government had sought the FISA Court's authorization, Respondents could only speculate as to whether the FISA Court would authorize the surveillance.<sup>169</sup> Fourth, even if the government had obtained the FISA Court's approval, it was unclear whether the government would successfully acquire the communications of Respondents' foreign contacts.<sup>170</sup> And lastly, even if the government had conducted surveillance of Respondents' foreign contacts, Respondents could only speculate as to whether their own communications would be acquired.<sup>171</sup>

Respondents also argued that they were suffering ongoing injuries because they were taking "costly and burdensome measures to protect the confidentiality of their communications" from the government.<sup>172</sup> Noting the Second Circuit's holding that Respondents' ongoing injuries were fairly traceable to the FISA Amendments Act, the Court held that the Second Circuit analyzed the issue "under a relaxed reasonableness standard . . . improperly allow[ing] [R]espondents to establish standing."<sup>173</sup> Justice Alito argued that Respondents could not establish standing "merely by inflicting harm on themselves based on their fears of hypothetical future harm that [was] not certainly impending."<sup>174</sup> He feared that accepting fears of hypothetical further harm as satisfying the injury requirement would lower the standard for Article III standing.<sup>175</sup> Further supporting his argument that Respondents were inflicting harm on their own, Justice Alito pointed out that the ongoing injuries Respondents claimed to have suffered could not be fairly traceable to

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<sup>168</sup> *Id.* at 1149 (majority opinion). See *infra* note 188 for FISA Court's approval of authorization. Justice Alito states that the Court is "reluctant to endorse standing theories that require guesswork as to how independent decision-makers will exercise their judgment," but looking at the statistics, the majority of the applications filed with the FISA Court has been approved. *Clapper*, 133 S. Ct. at 1150.

<sup>169</sup> *Id.* at 1149–50.

<sup>170</sup> *Id.* at 1150.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 1151.

<sup>173</sup> *Id.* The Second Circuit held that Respondents suffered present injuries in fact stemming from a reasonable fear of future harmful government conduct. *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 138 (2d Cir. 2011).

<sup>174</sup> *Clapper*, 133 S. Ct. at 1151.

<sup>175</sup> *Id.*

the FISA Amendments Act because Respondents had engaged in similar measures to protect their communications even before the Act was enacted.<sup>176</sup> Referring to the Court's decision in *Laird v. Tatum*,<sup>177</sup> the Court held that fear of surveillance and costs they incurred to avoid such surveillance could not establish standing.<sup>178</sup>

Then Justice Alito reasoned that Respondents incorrectly compared the injuries they incurred to the injuries incurred by plaintiffs in previous cases where this Court upheld standing.<sup>179</sup> In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, the Court held that Friends of the Earth and Citizens Local Environmental Action Network (FOE) had standing because Laidlaw Environmental Services' disposal of mercury into the waterway "directly affected [members of FOE's] recreational, aesthetic, and economic interests."<sup>180</sup> Justice Alito distinguished this from Respondents' case by pointing out that the unlawful discharges of mercury were ongoing, whereas in Respondents' case, electronic

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<sup>176</sup> *Id.* at 1152.

<sup>177</sup> 408 U.S. 1 (1972).

<sup>178</sup> *Clapper*, 133 S. Ct. at 1152.

<sup>179</sup> *Id.* at 1153. See *Friends of the Earth, Inc. v. Laidlaw Envntl. Servs., Inc.*, 528 U.S. 167, 184 (2000) (holding that the plaintiffs had standing because "a company's continuous and pervasive illegal discharges of pollutants into a river" causing nearby residents to "curtail their recreational use of that waterway and . . . subject[ing] them to other economic and aesthetic harm[]" were "concededly ongoing"); *Meese v. Keene*, 481 U.S. 465, 475 (1987) (holding that the plaintiff had standing because he demonstrated that he "could not exhibit the films without incurring a risk of injury to his reputation and of an impairment of his political career."); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156 (2010) (holding that conventional alfalfa farmers had standing because genetically engineered alfalfa seed fields were being planted within the bees' pollination range).

<sup>180</sup> 528 U.S. at 169. Friends of the Earth and Citizens Local Environmental Action Network (FOE) filed suit against Laidlaw Environmental Services (Laidlaw) alleging noncompliance with the National Pollutant Discharge Elimination System (NPDES) permit, seeking declaratory and injunctive relief, and an award of civil penalties. *Id.* at 173–74. NPDES permitted Laidlaw to discharge treated water but limited discharging pollutant; however, Laidlaw exceeded the limit on multiple occasions by discharging mercury into the waterway. *Id.* at 176. Laidlaw argued that FOE lacked standing because FOE failed to show that any of their members faced the threat of any injury from Laidlaw's activities. *Id.* at 177.

surveillance of Respondents' communication could be done through ways other than utilizing the FISA Amendments Act.<sup>181</sup>

In *Meese v. Keene*, the Court held that Keene had standing because his personal, political, and professional reputation would suffer, and his ability to obtain re-election would be impaired if he were to exhibit the films marked as "political propaganda."<sup>182</sup> *Meese* was distinguished from Respondents' case because in *Meese*, the films were already labeled as "political propaganda" and the labeling was regulated by the statute in question, whereas in Respondents' case, it was mere speculation as to whether the government would subject Respondents' communications to electronic surveillance using the FISA Amendments Act.<sup>183</sup> In *Monsanto Co v. Geertson Seed Farms*, the Court held that the farmers did have standing to seek injunctive relief because if Roundup Ready Alfalfa were deregulated, farmers' organic and conventional alfalfa crops would be infected with the engineered gene.<sup>184</sup> Justice Alito distinguished this case from Respondents' case because the farmers presented concrete evidence of fear that the genetically engineered alfalfa seeds were being planted in all the major alfalfa seed production areas well within the bees' pollination range.<sup>185</sup> With these three cases, Justice Alito seemed to emphasize that Respondents failed to provide sufficient evidence to trace their alleged injury to the FISA Amendments Act.

Respondents alternatively argued that the government's surveillance activities were insulated from judicial review.<sup>186</sup> The Court disagreed with this argument.<sup>187</sup> The Court held that the FISA Amendments Act is not insulated from judicial review because the

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<sup>181</sup> *Clapper*, 133 S. Ct. at 1141.

<sup>182</sup> 481 U.S. at 467. A member of the California State Senate brought suit to enjoin the use of term "political propaganda" to certain Canadian Films, as required by Foreign Agents Registration Act of 1938. *Id.* at 473.

<sup>183</sup> *Id.*

<sup>184</sup> *Monsanto*, 130 S. Ct. at 2752. Farmers of conventional alfalfa challenged the decision of the Animal and Plant Health Inspection Service (APHIS) to deregulate a variety of genetically engineered alfalfa developed under license from Monsanto Company. *Id.*

<sup>185</sup> *Clapper*, 133 S. Ct. at 1154–55.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

FISA Court “evaluates the [g]overnment’s certifications, targeting procedures, and minimization procedures.”<sup>188</sup>

In the majority’s opinion, Respondents did not provide any concrete evidence to support their fear of future government surveillance, but mere speculation of possible government actions.<sup>189</sup>

### B. Justice Breyer’s Dissent

Justice Breyer wrote the dissenting opinion in which Justice Ginsburg, Justice Sotomayor, and Justice Kagan joined. Justice Breyer disagreed with the Court that the injury was too speculative.<sup>190</sup> Justice Breyer listed three important ways the FISA Amendments Act changed FISA.<sup>191</sup> With these changes, the government could obtain the FISA Court’s approval to conduct electronic surveillance on “communications between places within the United States and targets in foreign territories” by using “general targeting and privacy-intrusion minimization procedures,” as long as a significant purpose of the surveillance was to obtain foreign intelligence information.<sup>192</sup> Combined with the kinds of communications Respondents engaged in, Justice Breyer argued that Respondents’ future harm was not speculative.<sup>193</sup> He was convinced

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<sup>188</sup> *Id.* at 1154. *But cf.* Nicholas J. Whilt, *The Foreign Intelligence Surveillance Act: Protecting the Civil Liberties that Make Defense of Our Nation Worthwhile*, 35 SW. U. L. REV. 361, n.4 (2006). Also, in FISA’s annual report to Congress in 2012, it indicates that 1,789 applications were filed requesting an authority to conduct electronic surveillance, and the FISA Court did not deny any of the 1,789 applications. FISA’S 2012 ANNUAL REPORT TO CONGRESS, <https://www.fas.org/irp/agency/doj/fisa/2012rept.pdf> (last visited Oct. 10, 2014).

<sup>189</sup> *Clapper*, 133 S. Ct. at 1154.

<sup>190</sup> *Id.* at 1155 (Breyer, J., dissenting).

<sup>191</sup> *Id.* FISA Amendments Act: eliminated the requirement that the government describe to the [FISA Court] each specific target and identify each facility at which its surveillance would be directed, . . . [and] the requirement that a target [must] be a “foreign power or an agent of a foreign power,” [and it] diminished the [FISA Court’s] authority to insist upon, and eliminated its authority to supervise, instance-specific privacy-intrusion minimization procedures. *Id.* at 1156.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 1156–60. At the time this suit was filed, Scott McKay was a lawyer representing Al-Hussayen, who is facing several civil cases, as well as criminal charges after the September 11 attacks. *Id.* at 1156–57. He was also representing

by Respondents' contention that there was a "very high likelihood that Government, *acting under the authority of [the FISA Amendment Act]*, [would] intercept at least some of the communications" engaged in by Respondents.<sup>194</sup> First, he said that Respondents engaged in "electronic communications of a kind that the [FISA Amendments Act], but not the prior Act" would authorize.<sup>195</sup> Second, he said that Respondents had "a strong *motive* to engage in, and the [g]overnment [had] a strong *motive* to listen to, conversations of the kind described."<sup>196</sup> Third, he argued that the government's past behavior showed that it was likely to pursue surveillance of electronic communications to seek information about terrorists and detainees.<sup>197</sup> Lastly, he mentioned that the government had the *capacity* to conduct electronic surveillance because of the level of technology available to the government.<sup>198</sup> Also, he pointed out that

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Khalid Sheik Mohammed, a detainee before the military commissions at Guantanamo Bay. *Id.* at 1157. He communicated with these clients and other people located outside the United States via telephone and e-mail. *Id.* Sylvia Royce was an attorney representing Mohammedou Ould Salahi, a prisoner held at Guantanamo Bay. *Id.* She communicated with Ould Salahi's brother, who was living in Germany. *Id.* Joanne Mariner is a human rights researcher and her work requires her to communicate via e-mail with people whom the CIA has said are associated with terrorist organizations. *Id.*

<sup>194</sup> *Id.* Justice Breyer argues against Justice Alito's arguments that the injury alleged by Respondents' is speculative, concluding that it is not speculative. *Id.* at 1160.

<sup>195</sup> *Id.* at 1157–58. Compare with Justice Alito's majority opinion where he argues that the injury cannot be fairly traceable to § 1881a since Respondents have taken similar measures to avoid surveillance even before FISA Amendments Act was passed. *Id.* at 1152.

<sup>196</sup> *Id.* at 1158. Compare with Justice Alito's majority opinion where he argues that it is speculative whether the government would target communications to which Respondents are parties. *Id.* at 1149–50.

<sup>197</sup> *Id.* at 1158. Compare with Justice Alito's majority opinion where he argues that Respondents can only speculate as to whether their own communications with their foreign contacts would be incidentally acquired. *Id.* at 1150. Justice Breyer argues that the nature of Respondents' communication with their clients is likely to be targeted by the government. *Id.* at 1158.

<sup>198</sup> *Id.* at 1158–59. Compare with Justice Alito's majority opinion where he argues that Respondents' alleged future injury is speculative because it is unsure whether the government would succeed in obtaining information by conducting surveillance. *Id.* at 1150.

the FISA Court rarely denied authorization of such surveillance.<sup>199</sup> Justice Breyer concluded that Respondents' harm was not speculative.<sup>200</sup>

Next, Justice Breyer criticized the way courts have used the standard of certainty as inconsistent.<sup>201</sup> He reasoned that the certainty standard has never been the "touchstone of standing" because courts have granted injunctions and declaratory relief "aimed at preventing future activities that [were] reasonably likely or highly likely, but not absolutely certain, to take place."<sup>202</sup> Instead of the "certainly impending" standard for establishing standing in this case, he argued that the standard should be "reasonably likely or highly likely."<sup>203</sup> To support his argument that the Court was inconsistent with its use of the certainty standard, Justice Breyer considered previous cases in which the Court had used the certainly impending standard differently.<sup>204</sup> In *Pennsylvania v. West Virginia*, the Court used the certainly impending standard as a sufficient, rather than a necessary, condition;<sup>205</sup> in *Lujan v. Defenders of Wildlife*, the Court used the phrase, "as if it concerned *when*, not *whether*, an alleged injury would occur."<sup>206</sup> The Court in *Lujan* held that the Plaintiff did not satisfy imminent injury because "'soon' might mean nothing more than 'in this lifetime.'"<sup>207</sup> However, the Court has referred to "reasonable probability" in numerous cases suggesting that imminent is not absolute.<sup>208</sup>

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<sup>199</sup> *Id.* at 1159. Compare with Justice Alito's majority opinion where he argues that it is speculative as to whether the FISA Court would authorize surveillance. *Id.* at 1150.

<sup>200</sup> *Id.* at 1160.

<sup>201</sup> *Id.* at 1160–61.

<sup>202</sup> *Id.* at 1160.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 1160 (citing *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)).

<sup>206</sup> *Id.* at 1160 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. at 555, 564 n.2 (1992)).

<sup>207</sup> *Id.* at 1160 (quoting *Lujan*, 504 U.S. at 564–65 n.2).

<sup>208</sup> *Clapper*, 133 S. Ct. at 1160. See *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); see also *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979).

Justice Breyer also discussed five Supreme Court cases in which the Court found standing when the injury was less than certain.<sup>209</sup> In *Pennell v. San Jose*, a group of landlords sought a declaration that the new city ordinance—prohibiting landlords to raise the rent charge by more than eight percent—was unconstitutional.<sup>210</sup> The Court held that the landlords had standing because “the likelihood of enforcement of the [new ordinance] with the concomitant probability that a rent will be reduced . . . is a sufficient threat of actual injury to satisfy Art[icle] III’s requirement.”<sup>211</sup> Justice Breyer, however, pointed out that the facts in *Pennell* did not amount to absolute certainty because it was uncertain whether landlords would be subjected to rent control under the new ordinance.<sup>212</sup> In *Blum v. Yaretsky*, a group of nursing home residents challenged the regulation permitting their nursing home to transfer them to a less desirable home.<sup>213</sup> The Court found that they had standing even though “Medicaid-initiated transfer had been enjoined and the nursing home itself had not threatened to transfer” them because the injury was not imaginary or speculative, but “quite realistic.”<sup>214</sup> Justice Breyer was quick to note that the standard was “quite realistic,” far less than “certainly impending.”<sup>215</sup> In *Davis v. Federal Election Commission*, the Court held that Davis, a self-financed candidate for the United States House of Representatives, had standing even though his opponent did not take advantage of the increased contribution limit allowed by the challenged statute.<sup>216</sup> The Court reasoned that Davis’s injury was a “realistic and impending threat.”<sup>217</sup> In *MedImmune v. Genentech*, a patent licensee sought a declaratory judgment (while he was making payments to the patent holder) that the patent was invalid.<sup>218</sup> The Court held that the patent licensee had standing because the Court “assumed that if the [patent licensee]

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<sup>209</sup> *Clapper*, 133 S. Ct. at 1161–62.

<sup>210</sup> 485 U.S. 1, 4 (1988).

<sup>211</sup> *Id.* at 2.

<sup>212</sup> *Clapper*, 133 S. Ct. at 1161.

<sup>213</sup> 457 U.S. 991, 993 (1982).

<sup>214</sup> *Clapper*, 133 S. Ct. at 1161, (reviewing *Blum*, 457 U.S. 991).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 1161–62 (reviewing *Davis v. FEC*, 554 U.S. 724 (2008)).

<sup>217</sup> *Id.*

<sup>218</sup> 549 U.S. 118, 120–21 (2007).

stopped making royalty payments it would have standing.”<sup>219</sup> The Court applied the “genuine threat” of injury standard in *MedImmune* and Justice Breyer noted that the threat of injury in *MedImmune* was less certain than in that case.<sup>220</sup> Lastly, in *Duke Power Co. v. Carolina Environmental Study Group*, a group of residents near a proposed nuclear power plant challenged the Price-Anderson Act that limited the plant’s liability in case of an accident.<sup>221</sup> The Court held that the residents had standing because of their “exposure to radiation and the apprehension flowing from the *uncertainty* about the health and genetic consequences of even small emissions.”<sup>222</sup> The Court found standing based on “probabilistic injuries.”<sup>223</sup> Concluding that “certainly impending” means more of a “reasonable probability” or “high probability” rather than “absolute certainty,” Justice Breyer held that Respondents demonstrated sufficient future injury to meet the requirement.<sup>224</sup>

## VI. IMPACT

This section explores the impact of the heightened standard for the injury-in-fact requirement on past and future cases and on public opinion. The majority opinion’s “certainly impending” standard analysis raised concerns among environmentalists who deal with environmental issues that are probabilistic in nature and others who seek to challenge other statutes based on future harm.<sup>225</sup> The ruling in *Clapper* also brought mixed opinions about government power: those who believe that national security and civil liberties are still balanced and those who are concerned with a lack of judicial review.

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<sup>219</sup> *Clapper*, 133 S. Ct. at 1162 (reviewing *MedImmune*, 549 U.S. at 118).

<sup>220</sup> *Id.*

<sup>221</sup> 438 U.S. 59, 81 (1978).

<sup>222</sup> *Clapper*, 133 S. Ct. at 1162 (quoting *Duke Power Co.*, 438 U.S. at 74).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 1165.

<sup>225</sup> Patrick Gallagher, *Environmental Law, Clapper v. Amnesty International, USA and the Vagaries of Injury-in-fact: “Certainly Impending” Harm, “Reasonable Concern,” and “Geographic Nexus”*, 32 UCLA J. ENVTL. L. & POL’Y 1 (2014).

### A. *Legal Impact*

The decision in *Clapper* raised the standard for the “imminent injury” element. To establish future injury for the purposes of satisfying Article III standing, the claimant has to show that the injury is *certainly* impending.<sup>226</sup> Although the Court argued that the standard has always been “certainly impending” for future injury to constitute the injury-in-fact element,<sup>227</sup> as Justice Breyer pointed out, the Court used lower standards in previous cases.<sup>228</sup> Nonetheless, the Court in *Clapper* clearly stated that future injury has to be certainly impending.<sup>229</sup> That clear statement, however, raised concerns for environmental law.<sup>230</sup> Sierra Club’s Legal Director, Patrick Gallagher, in reviewing the *Clapper* decision, opined that *Clapper* “muddie[d] an already confusing body of law.”<sup>231</sup> First, he said the Court in *Clapper* “heightened . . . the level of proof required for standing,” and second, he said the Court “improperly merge[d] the doctrine of ‘certainly impending’ harm with the doctrine of ‘reasonable concern.’”<sup>232</sup> Gallagher was concerned the *Clapper* decision would create an additional barrier for environmentalists, so he set out to clarify *Clapper* as applied to environmental law.<sup>233</sup> Agreeing with Justice Breyer’s dissenting opinion in *Clapper*, Gallagher argued that “a ‘certainty’ test [—as used by Justice Alito in his majority opinion in *Clapper*—] makes little sense” when the harm is inherently probabilistic—such as an environmental issue.<sup>234</sup> Instead of taking quantitative measures of the risk of harm, courts should look to qualitative measures, such as Congress’s intent behind the statute in question and the seriousness of the harm.<sup>235</sup> Gallagher also distinguished “reasonable concern” from “certainly impending

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<sup>226</sup> *Clapper*, 133 S. Ct. at 1147.

<sup>227</sup> *Id.* Citing *Monsanto* and *Whitmore*, Justice Alito claimed that anticipated future injury must be certainly impending. *Id.*

<sup>228</sup> *Id.* at 1161.

<sup>229</sup> *Id.* 1147.

<sup>230</sup> Gallagher, *supra* note 225.

<sup>231</sup> *Id.* at 4.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 17.

<sup>235</sup> *Id.* at 17–20.

harm” by showing that in *Laidlaw*, the Court viewed the plaintiff’s reasonable concern for the defendant’s violations of law rather than imminence of actual harm to the plaintiffs.<sup>236</sup> Thus, Respondents in *Clapper* did not have standing, not because some harm was not certainly impending, but because they could not provide sufficient evidence to trace possible government surveillance to the FISA Amendments Act.<sup>237</sup>

The ruling in *Clapper* seems to strengthen FISA by creating a higher bar to challenging the Act. Because the whole procedure of obtaining authorization is so secretive, most people are not aware that their communication is under the government’s surveillance unless the information gathered by the government is used against them in a criminal proceeding.<sup>238</sup> If Respondents, who frequently engaged in international electronic communications with people who were likely targets under the FISA Amendments Act, could not meet the certainly impending standard, then who else can satisfy that standard? Unless the government actually conducted electronic surveillance under the FISA Amendments Act and the targeted person became aware of the surveillance (mostly likely in a criminal case if the government acknowledged their use of electronic surveillance under the FISA Amendments Act),<sup>239</sup> it seems unlikely that anyone would have standing to challenge the FISA Amendments Act. Citing *Clapper* as a precedent, the United States Court of Appeals for the Second Circuit ruled that the plaintiffs in *Hedges v. Obama* lacked standing.<sup>240</sup> A group of journalists and activists (Plaintiffs) challenged the constitutionality of the National Defense Authorization Act of 2012 (NDAA), which allowed “the President to detain anyone who was part of, or has substantially supported, al-

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<sup>236</sup> *Id.* at 24.

<sup>237</sup> *Id.* at 25.

<sup>238</sup> Banks, *supra* note 1, at 1231.

<sup>239</sup> Jamid Muhtorov, charged with giving material aid to the Islamic Jihad Union, became the first criminal defendant to be informed that the government would be using information obtained under the FISA Amendments Act since its passage in 2008. Andrea Peterson, *Warrantless Wiretapping has Managed to Duck Significant Judicial Review. Until Now.*, WASH. POST, (Jan. 30, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/01/30/warrantless-wiretapping-has-managed-to-duck-significant-judicial-review-until-now/>.

<sup>240</sup> *Hedges v. Obama*, 724 F.3d 170, 204–05 (2d Cir. 2013).

Qaeda, the Taliban, or associated forces” without trial.<sup>241</sup> Similar to Respondents in *Clapper*, Plaintiffs’ profession required them to communicate with persons who were likely to be categorized as hostile to the United States, and thus they feared they might be detained under the NDAA.<sup>242</sup> The Second Circuit held that Plaintiffs did not have standing due to failure to show “sufficient threat that the government w[ould] detain them” under the NDAA.<sup>243</sup>

### B. Social Impact

In his analysis of the *Clapper* decision, Rush Atkinson, an attorney at the U.S. Department of Justice, opined that *Clapper* “simply allows the government to continue foreign surveillance in the same fashion it has conducted such surveillance for over seventy years.”<sup>244</sup> The Court’s decision on the standing doctrine did not have any impact on the government’s power to conduct surveillance under the FISA Amendments Act.<sup>245</sup> He argued that, if anything, the *Clapper* decision “incentivizes the government to use warrantless surveillance sparingly . . . and encourages the use of intelligence warrants whenever possible.”<sup>246</sup> However, encouraging the government to obtain a warrant for surveillance does not necessarily mean it is keeping a proper balance between Americans’ civil liberty and national security. This is because under the FISA Amendments Act, the government could probably easily obtain warrants for surveillances that are highly likely to target Americans. There are provisions under the FISA Amendments Act that are designed to prohibit the government from violating Americans’ civil liberties.<sup>247</sup> But it also has provisions that offset those safeguards.<sup>248</sup> Referring to the time before FISA was enacted, Yoo argued that if Presidents were

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<sup>241</sup> *Id.* at 173.

<sup>242</sup> *Hedges v. Obama*, 890 F.Supp.2d 424, 433 (2012).

<sup>243</sup> *Hedges v. Obama*, 724 F.3d at 174.

<sup>244</sup> Rush Atkinson, *The Fourth Amendment’s National Security Exception: Its History and Limits*, 66 VAND. L. REV. 1343, 1403 (2013).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 1404.

<sup>247</sup> 50 U.S.C. §§ 1881a(b), 1881a(g), 1881a(i) (2012).

<sup>248</sup> *See supra* Part II.C for discussion regarding how the FISA Amendments Act offsets additional protections added.

able to monitor communications concerning national security threats without a warrant “in peacetime,” then the executive authority has all the more reason to do the same when the nation is at war with terrorists.<sup>249</sup> Yet, the very reason the nation needed FISA in the first place was to set a boundary for Presidents’ discretion and to balance Americans’ civil liberties with national security. The FISA Amendments Act seems to have taken a step further away from this balance.

Some viewed the *Clapper* ruling as a “‘get out of jail free’ card for national security statutes that are written . . . with an eye toward secrecy” and are concerned that the ruling will not only affect people’s ability to “challenge the constitutionality” of the FISA Amendments Act, but also other secret government programs.<sup>250</sup> Adam Liptak, a Supreme Court correspondent for the *New York Times*, also opined that the *Clapper* ruling “illustrated how hard it is to mount court challenges to a wide array of antiterrorism measures . . . in light of the combination of government secrecy and judicial doctrines limiting access to the court.”<sup>251</sup> The FISA Amendments Act was a four-year statute, scheduled to expire in 2012, but it was extended until 2017.<sup>252</sup>

## VII. CONCLUSION

As Neil Richards<sup>253</sup> pointed out in his article, “The Dangers of Surveillance,” people like the benefits of surveillance, yet are fearful of its costs.<sup>254</sup> Most people would probably agree that the government should have the power to conduct surveillance in order

<sup>249</sup> Yoo, *supra* note 5, at 588.

<sup>250</sup> Matt Sledge, *Supreme Court’s Clapper v. Amnesty International Decision Could Affect Indefinite Detention Lawsuit*, HUFFINGTON POST (Feb. 27, 2013, 8:41 AM), [http://www.huffingtonpost.com/2013/02/27/clapper-v-amnesty-international\\_n\\_2769294.html](http://www.huffingtonpost.com/2013/02/27/clapper-v-amnesty-international_n_2769294.html).

<sup>251</sup> Adam Liptak, *Justices Turn Back Challenge to Broader U.S. Eavesdropping*, N.Y. TIMES (Feb. 26, 2013), <http://www.nytimes.com/2013/02/27/us/politics/supreme-court-rejects-challenge-to-fisa-surveillance-law.html?ref=foreignintelligencesurveillanceactfisa>.

<sup>252</sup> Fiss, *supra* note 69, at 10.

<sup>253</sup> Neil Richards is a law professor at Washington University School of Law.

<sup>254</sup> Neil Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1945 (2013).

to protect the nation. How much power the government should have is the question. FISA was originally passed to keep a balance between “protecting civil liberties and . . . national security.”<sup>255</sup> However, Congress has amended FISA numerous times within the past two decades, arguably tipping the balance in favor of national security. With all the changes the FISA Amendments Act brought, one could argue that Congress tried to keep that balance. Surveillance under the FISA Amendments Act is subject to (1) statutory conditions,<sup>256</sup> (2) judicial authorization,<sup>257</sup> (3) congressional supervision,<sup>258</sup> and (4) compliance with the Fourth Amendment.<sup>259</sup> But how effective is this safeguard in protecting Americans' privacy? When compared with FISA of 1978, the FISA Amendments Act is more lenient with the government, possibly subjecting Americans to surveillance. Some argue that changes to FISA were necessary to equip the government in the war on terror, while others argue that the changes are unconstitutional. Regardless, Congress has modified FISA, giving more power to the government. On top of the government-favored changes to the Act, the decision in *Clapper* tips the scale even more towards the government by requiring *certainly impending* injury to challenge the FISA Amendments Act.

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<sup>255</sup> Avery, *supra* note 58, at 549.

<sup>256</sup> 50 U.S.C. § 1881a (2012).

<sup>257</sup> 50 U.S.C. §§ 1881a(a), 1881a(c)(1), 1881a(i)(2), 1881a(i)(3) (2012).

<sup>258</sup> 50 U.S.C. § 1881a(f)(2) (2012).

<sup>259</sup> 50 U.S.C. § 1881a(b)(5) (2012).