

# Clapper v. Amnesty International USA: Allowing the FISA Amendments Act of 2008 to Turn "Incidentally" into "Certainly"

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## Note

### ***CLAPPER* v. *AMNESTY INTERNATIONAL USA*: ALLOWING THE FISA AMENDMENTS ACT OF 2008 TO TURN “INCIDENTALLY” INTO “CERTAINLY”**

LIZ CLARK RINEHART\*

In February 2013, the Supreme Court of the United States decided *Clapper v. Amnesty International USA*,<sup>1</sup> which considered whether United States persons<sup>2</sup> who frequently interacted with foreign nationals living abroad had standing to challenge the constitutionality of 50 U.S.C. Section 1881a, a controversial part of the Foreign Intelligence Surveillance Act (“FISA”).<sup>3</sup> Added through Section 702 of the FISA Amendments Act of 2008, Section 1881a expanded the scope of FISA surveillance the Foreign Intelligence Surveillance Court (“FISC”)<sup>4</sup> could authorize while simultaneously reducing judicial power to oversee and supervise the surveillance.<sup>5</sup> In *Amnesty International*, the plaintiffs claimed the government was highly likely to intercept their conversations using Section 1881a surveillance due to their numerous international contacts.<sup>6</sup> The Court

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\* J.D. Candidate, 2015, University of Maryland Francis King Carey School of Law. The author thanks Professor Renée Hutchins for her invaluable guidance, Professor Marc DeSimone for his thoughtful comments, and Professors David Gray, Michael Greenberger, Frank Pasquale, Kami Simmons, and Gordon Young for their insightful conversations and suggestions throughout the writing process. The author also thanks her editors, particularly Kari D’Ottavio and Lisa Piccinini. Finally, the author thanks her husband, Richard Rinehart, their two daughters, Harper and Maya, and her extended family, whose patience and support made this Note possible.

1. 133 S. Ct. 1138 (2013).

2. A “United States person,” as used in Title 50 of the *United States Code*, is “a citizen of the United States, an alien lawfully admitted for permanent residence . . . , an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States.” 50 U.S.C. § 1801 (i) (2006). This Note will use “person” and “persons” accordingly.

3. *Amnesty Int’l*, 133 S. Ct. at 1142.

4. The Chief Justice of the Supreme Court chooses eleven federal judges to sit on the FISC and rule on FISA applications. 50 U.S.C. § 1803(a)(1) (2006).

5. *See infra* Part I.

6. *Amnesty Int’l*, 133 S. Ct. at 1142–43. Like the Court and the parties, this Note will refer to Section 1881a, rather than Section 702, though many commentators refer to the law in question as Section 702. *See, e.g.*, Orin Kerr, *The Overcollection Problem Identified in the 2011 FISC Opinion*, VOLOKH CONSPIRACY (Aug. 22, 2013, 1:52 AM), <http://www.volokh.com/2013/08/22/the-overcollection-problem-identified-in-the-2011-fisc->

held that the plaintiffs lacked standing, however, because they could not show the government had intercepted their conversations or that government interception was “certainly impending.”<sup>7</sup> Because the plaintiffs could not show a certainly impending injury through government interception, the Court also denied standing based on the costs the plaintiffs incurred to prevent the interception of their communications.<sup>8</sup>

One of the first reasons the Court cited for denying standing was that the plaintiffs, as U.S. persons, could not be targeted for surveillance under the challenged statute.<sup>9</sup> According to the Court, to preserve the chain of causation linking the injury to the statute, the plaintiffs needed to prove specific third-party actions were certain to occur; namely, that the government would seek a surveillance order targeting their contacts, the FISC would approve the order, and the government would successfully implement the order.<sup>10</sup> This analysis created an unnecessarily high standard. Congress contemplated individuals like the plaintiffs as being potentially affected by the statute because Section 1881a surveillance could incidentally intercept their conversations with targeted individuals.<sup>11</sup> The Court, therefore, should have avoided the third-party causation analysis and instead examined whether the plaintiffs, having been incidentally intercepted rather than targeted, were asserting a cognizable legal right.<sup>12</sup>

Traditionally, non-targeted individuals could not assert Fourth Amendment challenges<sup>13</sup> to surveillance that incidentally intercepted their communications.<sup>14</sup> While the incidental interception exception is grounded in years of precedent, the Court should have reassessed whether the exception is appropriate given the high risk of substantial government intrusion Section 1881a surveillance poses.<sup>15</sup> As written and as applied, Section 1881a permits a level of government intrusion distinguishable from the level of intrusion in cases supporting the incidental interception

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opinion/ (“The FISC’s newly-declassified 2011 Opinion on the NSA’s implementation of Section 702 surveillance is both dense and fascinating.”).

7. *Amnesty Int’l*, 133 S. Ct. at 1143.

8. *Id.*

9. *Id.* at 1148.

10. *Id.* at 1148–50.

11. *See infra* Part IV.B.

12. *See infra* Part IV.C.

13. Although the plaintiffs in *Amnesty International* asserted several claims, *Amnesty Int’l*, 133 S. Ct. at 1146, this Note will focus solely on their Fourth Amendment claim, which is the most plausible challenge to broad-scope surveillance. *See* David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 67 (2013) (describing the Fourth Amendment implications of new surveillance technologies).

14. *See infra* Part II.B.2.

15. *See infra* Part IV.C.2.

exception.<sup>16</sup> By ignoring the incidental interception question, the Court's decision in *Amnesty International* created an exceptional standing condition for broad-scope surveillance, not because future plaintiffs will fail to show they have been intercepted, but because the interception of a non-targeted individual may not be an injury to a cognizable right.<sup>17</sup> Even if the Court had upheld the incidental interception exception and refused to grant standing to the plaintiffs, a clear decision interpreting how new forms of surveillance do or do not affect the exception would have given much needed guidance to lower courts.<sup>18</sup> It would also have signaled to Congress whether more statutory protections are needed.<sup>19</sup> The current scope of the possible surveillance, however, strongly supports narrowing the exception to prevent the creation of another class of people who can expect less Fourth Amendment protection than others.<sup>20</sup> In avoiding this issue, the Court in *Amnesty International* missed a crucial opportunity.<sup>21</sup>

## I. THE CASE

On July 10, 2008, President George W. Bush signed the FISA Amendments Act of 2008.<sup>22</sup> The new Section 702, codified as 50 U.S.C. Section 1881a (Supp. 2012), changed the procedures the federal government must follow when it conducts surveillance of “non-United States persons located outside the United States.”<sup>23</sup> For example, the government is no longer required to identify specific targets of surveillance, and the FISC can no longer require probable cause that the target is a foreign agent or that foreign agents are using the targeted facility.<sup>24</sup> Instead, the new orders under Section 1881a can be significantly broader and less particularized, potentially requiring that telecommunications providers deliver “[a]ll telephone and e-mail communications to and from countries of foreign policy interest—for example, Russia, Venezuela, or Israel—

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16. *See infra* Part IV.C.2.

17. *See infra* Part IV.A. *But see* *Amnesty Int'l*, 133 S. Ct. at 1155 (Breyer, J., dissenting) (“No one here denies that the Government’s interception of a private telephone or e-mail conversation amounts to an injury . . .”).

18. *See infra* Part IV.C.2.

19. *See infra* Part IV.C.2.

20. *See infra* Part IV.C.2.

21. *See infra* Part IV.C.2.

22. *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633, 634, 637 (S.D.N.Y. 2009), *vacated and remanded sub nom.*, *Amnesty Int'l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1138 (2013). The case name changed when James R. Clapper, Jr. became the Director of National Intelligence. *See* FED. R. APP. P. 43 (c)(2) (automatic substitution of government officials).

23. *Amnesty Int'l*, 638 F.3d at 124.

24. *Id.* at 125–26.

including communications made to and from U.S. citizens and residents.”<sup>25</sup> Additionally, the FISA Amendments Act took the responsibility of monitoring compliance with statutory requirements away from the FISC and gave it to the U.S. Attorney General or the Director of National Intelligence.<sup>26</sup> As a result, the government can authorize broader surveillance on a larger scale, and with less judicial monitoring, than under the previous version of FISA.<sup>27</sup>

Amnesty International USA and other organizations filed suit in the United States District Court for the Southern District of New York on the day the FISA Amendments Act was signed into law.<sup>28</sup> They challenged the facial constitutionality of the Act, claiming their international communications with individuals residing outside of the United States were likely to be monitored, and they were forced “to take costly and burdensome measures to protect the confidentiality of those communications.”<sup>29</sup> Both parties filed for summary judgment, with the government arguing that Section 1881a was constitutional and that the plaintiffs lacked standing because they could not show they had actually been subject to surveillance under Section 1881a.<sup>30</sup> The plaintiffs responded that it was sufficiently likely that their communications would be intercepted under Section 1881a and that, alternatively, the measures they took to prevent the interception should be considered injury for standing purposes.<sup>31</sup> The district court found the plaintiffs did not have standing because neither their fear of surveillance nor the preventative measures they took to avoid surveillance met the traditionally requisite standard of “personal, particularized, concrete injury in fact.”<sup>32</sup>

On appeal, the United States Court of Appeals for the Second Circuit reversed and remanded back to the district court, finding both the plaintiffs’ reasonable fear of future surveillance and the costs of avoiding surveillance constituted sufficient injury in fact to support standing, when coupled with the “objectively reasonable likelihood” that the government would conduct

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25. *Id.* at 126 (quoting Brief for Plaintiff-Appellant at 11, *Amnesty International USA v. Blair*, 638 F.3d 118 (2d Cir. 2011) (No. 09-4112), 2009 WL 8185998, at \*11. The court noted that the government had challenged how the plaintiffs characterized the “scope” of the law but had been unable to specify why the plaintiffs’ description was inaccurate. *Id.* at 126 n.8.

26. *Id.* at 126.

27. *Id.*

28. *Id.* at 126–27; *Amnesty Int’l USA v. McConnell*, 646 F. Supp. 2d 633, 634 (S.D.N.Y. 2009).

29. *Amnesty Int’l*, 638 F.3d at 127.

30. *Id.*

31. *Id.*

32. *Amnesty Int’l*, 646 F. Supp. 2d at 643–44.

surveillance of the plaintiffs' communications.<sup>33</sup> After the Second Circuit denied rehearing *en banc*, the Supreme Court of the United States granted certiorari to consider whether the Second Circuit's "novel view of standing" based on reasonable likelihood of surveillance and reasonable fear of surveillance met the burden for constitutional standing.<sup>34</sup>

## II. LEGAL BACKGROUND

Two intersecting analyses determine whether an individual plaintiff has standing to challenge a program of government surveillance.<sup>35</sup> First, the plaintiff must show a sufficient, "legally protected interest"<sup>36</sup> in the outcome.<sup>37</sup> Second, the plaintiff must show the challenged law, and not the actions of independent third parties, caused the injury to the protected interest.<sup>38</sup> Plaintiffs typically challenge surveillance laws on numerous grounds,<sup>39</sup> but the core complaint is often that the government action infringes or will infringe upon the Fourth Amendment right to be free from unreasonable searches.<sup>40</sup> Because certain people, such as foreign nationals and individuals who are not the targets of the surveillance, are exempt from or receive lesser Fourth Amendment protection, they face even steeper hurdles in showing standing to assert facial challenges.<sup>41</sup>

### A. Article III of the U.S. Constitution Requires That Plaintiffs Have Standing to Bring a Suit in Federal Court

Article III of the U.S. Constitution permits federal courts to hear only "Cases" and "Controversies."<sup>42</sup> As the Supreme Court explained in *Lujan v. Defenders of Wildlife*,<sup>43</sup> "One of [the] landmarks, setting apart the 'Cases'

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33. *Amnesty Int'l*, 638 F.3d at 134, 138. After the Second Circuit remanded, the government filed a petition for rehearing *en banc* on May 12, 2011. Petition for rehearing *en banc*, *Amnesty Int'l v. Clapper*, 667 F.3d 163 (2d Cir. 2011) (No. 09-4112).

34. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013).

35. *See infra* Part II.A.

36. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

37. *Baker v. Carr*, 369 U.S. 186, 204, 208 (1962).

38. *Id.* at 208.

39. *See, e.g., Amnesty Int'l*, 133 S. Ct. at 1146 (noting that the plaintiffs sought a declaration that § 1881a violated the First and Fourth Amendment, as well as Article III of the Constitution and the principles underlying separation of powers); *ACLU v. NSA*, 493 F.3d 644, 649–50 (6th Cir. 2007) (explaining that the plaintiffs claimed an NSA surveillance program "violate[d] the First and Fourth Amendments, the Separation of Powers Doctrine, the Administrative Procedures Act . . . , Title III of the Omnibus Crime Control and Safe Streets Act . . . , and the Foreign Intelligence Surveillance Act").

40. *See infra* Part II.B.

41. *See infra* Part II.B.

42. U.S. CONST. art. III, § 2, cl. 1.

43. 504 U.S. 555 (1992).

and ‘Controversies’ that are of the justiciable sort referred to in Article III . . . is the doctrine of standing.”<sup>44</sup> For a plaintiff to have standing to bring suit in federal court, she must have “a personal stake in the outcome” of the case,<sup>45</sup> although organizations can represent the injuries of individual members.<sup>46</sup> Whether in the context of an individual or an organization, standing requires alleging “specific, concrete facts” demonstrating harm, which the court’s favorable decision would redress.<sup>47</sup> The harm must be “concrete and particularized” as well as “actual or imminent.”<sup>48</sup> Moreover, the line of causation between the challenged action and the harm cannot be too attenuated<sup>49</sup> or rely on the decision of independent parties not named in the suit.<sup>50</sup> Put simply, for a plaintiff to successfully bring a facial constitutional challenge to a law in federal court, the alleged injury must have either already happened or be very close to happening, and the injury must be “fairly . . . trace[able]” to the challenged law.<sup>51</sup>

*1. Plaintiffs Must Show Imminent or Actual, Individualized Harm That Is Traceable to the Contested Action*

Standing requires more than a general possibility that an individual’s rights will be violated if and when the government acts.<sup>52</sup> The Supreme Court in *O’Shea v. Littleton*<sup>53</sup> was unwilling to accept that the plaintiffs had alleged sufficient injury for standing simply by claiming that they represented people in the community who had been the victims of “selectively discriminatory enforcement and administration of criminal justice.”<sup>54</sup> According to the Court, the plaintiffs had failed to allege an

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44. *Id.* at 560.

45. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

46. *Id.* at 511.

47. *Id.* at 508.

48. *Lujan*, 504 U.S. at 560.

49. *See Whitmore v. Arkansas*, 495 U.S. 149, 158–60 (1990) (finding the prospect of habeas relief based on the possible reversal of an uncontested death sentence to be too attenuated to confer standing).

50. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976) (“[T]he ‘case or controversy’ limitation of Art. III . . . requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.”); *Warth v. Seldin*, 422 U.S. 490, 509 (1975) (refusing to find standing based on the possible injurious actions of local authorities who were not named in the suit).

51. *Lujan*, 504 U.S. at 560–61 (quoting *E. Ky. Welfare Rights*, 426 U.S. at 41) (internal quotation marks omitted).

52. *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) (“It is not enough that the conduct of which the plaintiff complains will injure *someone*. The complaining party must also show that he is within the class of persons who will be concretely affected.”).

53. 414 U.S. 488 (1974).

54. *Id.* at 491 (quoting the complaint).

immediate threat of injury.<sup>55</sup> The Court refused to assume that in the future the plaintiffs would commit illegal activities for which the government would choose to prosecute them, and thus subject them to the alleged discriminatory system.<sup>56</sup>

Similarly, when determining whether the threat of injury was sufficient for standing in *City of Los Angeles v. Lyons*,<sup>57</sup> the Court continued to assume that plaintiffs were generally law-abiding and that police followed proper procedure.<sup>58</sup> In *Lyons*, the Supreme Court considered whether an individual had standing to seek an injunction banning police officers' use of chokeholds.<sup>59</sup> Although the police had previously placed Lyons in a chokehold during a traffic stop, the Court determined there was no "real and immediate threat" that the police would put Lyons in a chokehold again, despite the allegation that Los Angeles police "routinely" placed individuals in chokeholds.<sup>60</sup> According to the Court, it was "untenable" to believe police placed everyone in chokeholds, and it was unlikely Lyons would have another similar interaction with the police, unless he broke the law.<sup>61</sup> As further evidence of the unlikelihood that Lyons would be choked again, the Court noted that after Lyons was placed in a chokehold, he had no more "unfortunate encounters" with the police before he filed his complaint.<sup>62</sup> Because he could not show the event in question was likely to repeat, Lyons did not meet the requirements for standing to seek injunctive relief in a federal court.<sup>63</sup>

As evidenced by the Court's refusal to relax standing requirements in response to the threat of dangerous police practices, the severity of the potential injury creates no exception to the requirement of individualized and particular harm. In *Whitmore v. Arkansas*,<sup>64</sup> for example, the Supreme Court considered whether a prisoner sentenced to death had standing to contest the death sentence of another convicted person.<sup>65</sup> The inmate seeking to show standing, Whitmore, argued that because the other inmate,

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55. *Id.* at 498.

56. *Id.*

57. 461 U.S. 95 (1983).

58. *Id.* at 105.

59. *Id.* at 97–98.

60. *Id.* at 105. At the time of the Court's decision, the Los Angeles police department had temporarily banned the use of the hold in question, but the Court concluded that because the ban was temporary, it did not make the case moot. *Id.* at 100–101.

61. *Id.* at 108.

62. *Id.* Five months passed between when Lyons was placed in the chokehold and when he filed the complaint. *Id.*

63. *Id.* at 113. The Court stressed that Lyons could still seek relief through damages and that state courts could grant broader standing than the federal courts. *Id.*

64. 495 U.S. 149 (1990).

65. *Id.* at 151.



Simmons, had not sought appellate review of his sentence, the “heinous”<sup>66</sup> nature of Simmons’s crimes would not be included in the Supreme Court of Arkansas’s comparison analysis of how the death penalty is applied in the state.<sup>67</sup> Whitmore argued that, although he had exhausted his appeals, he could still obtain federal habeas corpus relief, which would grant him a new trial.<sup>68</sup> If he was convicted and sentenced to death again, he would seek another appellate review of his sentence.<sup>69</sup> Because Whitmore’s crime was not as terrible as Simmons’s, Whitmore argued, the omission of Simmons’s crime from the database of death penalty crimes could “arbitrarily skew[]” the appellate court’s comparative analysis.<sup>70</sup>

The Court found Whitmore’s alleged injury based on several possible events “too speculative to invoke the jurisdiction of an Art. III court.”<sup>71</sup> In addition to questioning whether Whitmore would obtain habeas relief, the Court was unconvinced the Supreme Court of Arkansas might reverse Whitmore’s death sentence after Simmons’s crimes were added to the database.<sup>72</sup> The Court also refused to “create an exception to traditional standing doctrine for this case,” even though Whitmore argued that the death penalty presented special circumstances where society had an unusually high interest in promoting fair application of the law.<sup>73</sup> In flatly rejecting this proposal, the Court reminded Whitmore that Article III requirements are grounded in the Constitution and cannot be manipulated for the sake of “an appealing case.”<sup>74</sup>

Although the likelihood of injury cannot be overly speculative, as it was in *Whitmore*, standing does not require plaintiffs to wait for the injury to occur.<sup>75</sup> The Supreme Court has found standing based on the threat of

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66. *Id.* at 157. The other inmate, Ronald Gene Simmons, murdered fourteen members of his family and two other people, *id.* at 151, while Whitmore murdered a woman during a robbery. *Id.* at 157.

67. *Id.* at 157.

68. *Id.* at 156.

69. *Id.*

70. *Id.* at 156–57.

71. *Id.* at 157.

72. *Id.* The Court pointed out that in the original consideration of Whitmore’s death sentence, the Arkansas court “simply noted that defendants in similar robbery-murder capital crimes had also been sentenced to death,” and there was no indication that the court would consider Simmons’s crimes in Whitmore’s sentencing because Simmons had committed multiple murders during a killing spree, rather than a single robbery-murder like Whitmore. *Id.*

73. *Id.* at 161.

74. *Id.* Justice Marshall, in his dissent, asserted that the Court was within its authority to consider the case if it could prevent the possibly unconstitutional execution of Simmons. *Id.* at 167, 177–78 (“The Court certainly has the authority to expand or contract a common-law doctrine where necessary to serve an important judicial or societal interest.”).

75. *See, e.g.,* *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967) (allowing pharmaceutical companies to challenge regulations on drug labels before the regulations were put into effect

enforcement of a law when it is apparent that the law is directed at the plaintiffs. For instance, in *Virginia v. American Booksellers Ass'n*,<sup>76</sup> the Court granted standing to booksellers seeking to challenge a law that prohibited the selling or displaying of adult materials to juveniles.<sup>77</sup> The Court determined the statute was “aimed directly at [the] plaintiffs, who, if their interpretation of the statute [was] correct, [would] have to take significant and costly compliance measures or risk criminal prosecution.”<sup>78</sup> That the state had not yet enforced the law or prosecuted any of the plaintiffs was not determinative, the Court reasoned, because “[t]he State ha[d] not suggested that the newly enacted law [would] not be enforced, and [the Court saw] no reason to assume otherwise.”<sup>79</sup> The Court also emphasized that the alleged harm was that of “self-censorship,” which “can be realized even without an actual prosecution.”<sup>80</sup>

The Court has found standing in other pre-enforcement cases involving laws that would clearly affect certain individuals, such as the Medicaid recipients challenging nursing home decisions in *Blum v. Yaretsky*.<sup>81</sup> The Court in *Blum* held that the nursing home residents had standing to challenge the procedural adequacy of facility-initiated transfers even though there was no indication the residents bringing suit would be transferred.<sup>82</sup> The Court recognized the regulations in question did not directly cause the alleged potential injury because the nursing home board made individual determinations.<sup>83</sup> The regulations, however, required that facilities create the board, and the board’s determination could result in a

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because “the regulation is directed at them in particular[,] it requires them to make significant changes in their everyday business practices[, and] if they fail to observe the Commissioner’s rule they are quite clearly exposed to the imposition of strong sanctions”), *abrogated on unrelated grounds by* *Califano v. Sanders*, 430 U.S. 99 (1977).

76. 484 U.S. 383 (1988).

77. *Id.* at 387–88.

78. *Id.* at 392.

79. *Id.* at 393.

80. *Id.*

81. 457 U.S. 991, 994–95, 1000 (1982).

82. *Id.* at 999–1000.

83. *Id.*; *see also id.* at 1003 (“[R]espondents are not challenging particular state regulations or procedures, and their arguments concede that the decision to discharge or transfer a patient originates not with state officials, but with nursing homes that are privately owned and operated. Their lawsuit, therefore, seeks to hold state officials liable for the actions of private parties, and the injunctive relief they have obtained requires the State to adopt regulations that will prohibit the private conduct of which they complain.”).

transfer.<sup>84</sup> Thus, a law is not required to directly target an individual with a specific injury for it to pose sufficient potential harm to confer standing.<sup>85</sup>

2. *The Supreme Court Has Been Unwilling to Make Exceptions to the Standing Doctrine for Suits Alleging Violations of Constitutional Rights Through Surveillance*

Unlike standing cases related to overt government action, programs of broad government surveillance pose a different problem for plaintiffs seeking to show standing because so much about the programs is unknown and speculative.<sup>86</sup> In *Laird v. Tatum*,<sup>87</sup> a group of civilians brought a suit contesting an Army program that involved collecting information from public news sources, open meetings, and local law enforcement.<sup>88</sup> Because the government was collecting and compiling public information, the plaintiffs could not allege that the government had violated their rights by observing private affairs.<sup>89</sup> In holding that there was no standing, the Court emphasized that in order to support standing based on an alleged “chilling” of the exercise of First Amendment rights, plaintiffs must show more than “knowledge” of a government program or “fear that . . . the agency might in the future take some *other* . . . action detrimental to that individual.”<sup>90</sup> The Court also was troubled by the possible scope of judicial power over the executive branch that would result from granting the plaintiffs standing, explaining that Congress is the proper “continuing monitor[.]” of “Executive action.”<sup>91</sup>

At least two federal appellate courts have interpreted *Laird* to hold that the potential “chilling effect” of surveillance was insufficient to confer Article III standing.<sup>92</sup> In *United Presbyterian Church v. Reagan*,<sup>93</sup> the

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84. *Id.* at 994–95.

85. *See id.* at 1000–01 (explaining that the threatened injury was that the nursing home administrators would decide to move the patients). The Court ultimately held the facilities were not state actors and their procedures could not violate Fourteenth Amendment rights. *Id.* at 1012.

86. *See, e.g.,* *ACLU v. NSA*, 493 F.3d 644, 653 (6th Cir. 2007) (declining to find standing because, among other weaknesses, “the plaintiffs do not—and because of the State Secrets Doctrine cannot—produce any evidence that any of their own communications have ever been intercepted by [the federal government’s surveillance program] or without warrants”).

87. 408 U.S. 1 (1972).

88. *Id.* at 6.

89. *Id.* at 9.

90. *Id.* at 11.

91. *Id.* at 15. Justice Douglas, writing for the dissent, called the program of military surveillance “a gross repudiation of our traditions,” *id.* at 23, citing a history of “civilian supremacy and subordination of military power.” *Id.* at 19. Justice Douglas found the majority’s conclusion that respondents lacked standing “too transparent for serious argument.” *Id.* at 24.

92. *See, e.g.,* *ACLU v. NSA*, 493 F.3d 644, 661 (6th Cir. 2007) (reviewing *Laird* and concluding that a “chilling” effect is not sufficient injury regardless of the type of speech the

United States Court of Appeals for the District of Columbia Circuit refused to find standing to challenge a surveillance program, even though the plaintiffs alleged they had been targets of surveillance in the past and that they were likely targets of surveillance in the future.<sup>94</sup> Because the plaintiffs had not alleged that their surveillance was a direct result of the challenged law, the court found that the plaintiffs appeared to be challenging the entirety of the executive branch's intelligence-gathering program, which was too much of a "generalized grievance" to meet the injury requirement.<sup>95</sup>

Not all courts have chosen to apply *Laird* to modern surveillance cases. The United States Court of Appeals for the Ninth Circuit recently held in *Jewel v. NSA*<sup>96</sup> that plaintiffs, who were telephone customers, had standing to challenge the government's application of several surveillance statutes.<sup>97</sup> The court found no issue with the plaintiffs' allegations of particularized injury because at least one plaintiff had alleged she had been a target of the broad, dragnet surveillance program and described the program in great detail.<sup>98</sup> The court distinguished the case from other surveillance cases because the present case was at the "initial pleading stage" rather than the summary judgment stage, during which the court expects to review a full record.<sup>99</sup> At this stage in the proceedings, the court concluded, the plaintiffs had alleged sufficient injury for standing.<sup>100</sup>

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government action affects); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (finding that *Laird* requires a direct harm to plaintiffs).

93. 738 F.2d 1375 (D.C. Cir. 1984).

94. *Id.* at 1380.

95. *Id.* at 1381 (internal quotation marks omitted); *see also ACLU*, 493 F.3d at 648 (holding that the plaintiffs lacked standing to challenge the NSA's warrantless wiretapping program). In *ACLU*, the Sixth Circuit rejected the plaintiffs' theory that they sustained injury by installing protective measures to prevent interception because the plaintiffs could not produce any evidence that they had been subjected to the surveillance or that they would be subjected to the surveillance. *Id.* at 648, 673–75.

96. 673 F.3d 902 (9th Cir. 2011).

97. *Id.* at 906. Jewel alleged constitutional violations as well as violations of "the Foreign Intelligence Surveillance Act ("FISA"), the Electronic Communications Privacy Act ("ECPA"), the Stored Communications Act ("SCA"), and the Administrative Procedure Act ("APA')." *Id.* (citations omitted).

98. *Id.* at 910.

99. *Id.* at 911.

100. *Id.* The court acknowledged that the plaintiffs in this case may eventually "face similar procedural, evidentiary and substantive barriers as the plaintiffs in *ACLU*." *Id.*

*B. The Standing Requirements to Bring Fourth Amendment Challenges to Government Surveillance Programs Require a Consideration of the Merits of the Case, but Are Also Subject to Individual Exceptions*

The issue of standing in Fourth Amendment cases is “subsumed” by the Fourth Amendment analysis.<sup>101</sup> Standing to challenge surveillance based on the Fourth Amendment therefore requires that surveillance affect a right protected by the Fourth Amendment. Since *Berger v. New York*,<sup>102</sup> the Supreme Court has recognized the potential of wiretapping laws to violate the Fourth Amendment, regardless of whether the government physically trespasses on an individual’s property, if the laws are broad enough to authorize “general warrant[s].”<sup>103</sup> Absent special circumstances, a warrant may still be required to avoid Fourth Amendment violations even if the method of surveillance is narrowed. For example, the Court in *Katz v. United States*<sup>104</sup> refused to create an exception that would allow law enforcement to wiretap public pay phones absent a warrant, reasoning that surveillance did not fall within the exceptions for search incident to arrest, “hot pursuit,” or suspect consent.<sup>105</sup> Since *Katz* and *Berger*, however, Congress has passed legislation designed to conform to Fourth Amendment jurisprudence while still allowing law enforcement to use wiretapping to investigate crimes.<sup>106</sup> Concurrently, courts have crafted exceptions to Fourth Amendment protection that expand the government’s ability to conduct surveillance, notably the lack of Fourth Amendment protection for foreign individuals living abroad<sup>107</sup> and for U.S. persons who are not the targets of the surveillance.<sup>108</sup>

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101. *Rakas v. Illinois*, 439 U.S. 128, 139 (1978) (“[W]e think the better analysis forthrightly focuses on the extent of a particular defendant’s rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.”). The Court further explained, however, that “nothing we say here casts the least doubt on . . . [the] general proposition [that] the issue of standing involves two inquiries: first, whether the proponent of a particular legal right has alleged ‘injury in fact,’ and, second, whether the proponent is asserting his own legal rights and interests.” *Id.*

102. 388 U.S. 41 (1967).

103. *Id.* at 64; *see also Katz v. United States*, 389 U.S. 347, 353 (1967) (“The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”).

104. 389 U.S. 347 (1967).

105. *Id.* at 357–58 nn.20–22 (citing *Agnello v. United States*, 269 U.S. 20, 30 (1925) (search incident to arrest); *Warden v. Hayden*, 387 U.S. 294, 298–99 (1967) (search during “hot pursuit”); *Zap v. United States*, 328 U.S. 624, 628 (1946) (search after suspect consents)).

106. *See United States v. White*, 401 U.S. 745, 792 n.30 (1971) (Harlan, J., dissenting) (“[T]he plain thrust of Title III appears to be to accommodate the holdings of *Berger* and *Katz* . . .”).

107. *See infra* Part II.B.1.

108. *See infra* Part II.B.2.

1. *The Fourth Amendment Does Not Protect Foreign Nationals from Surveillance*

Because standing requires plaintiffs show a cognizable right, one significant hurdle for claims like those in *Amnesty International* is that the Fourth Amendment does not reach searches conducted of foreign citizens in foreign countries.<sup>109</sup> In *United States v. Verdugo-Urquidez*,<sup>110</sup> the Supreme Court determined that the history of the Fourth Amendment showed that the Framers did not intend its protections to extend beyond U.S. territories.<sup>111</sup> The Court further explained that for an alien to benefit from Fourth Amendment protections while in the United States, she must develop “substantial connections with this country,”<sup>112</sup> which the plaintiff, by being detained in the United States for only a few days at the time of the search, had not done.<sup>113</sup> According to the Court, any additional protections were political issues and should be created “through diplomatic understanding, treaty, or legislation.”<sup>114</sup> Lower courts have interpreted *Verdugo-Urquidez* to mean that foreign nationals cannot challenge wiretap evidence on Fourth Amendment grounds.<sup>115</sup>

2. *The Fourth Amendment Does Not Protect Non-Targeted Individuals Whose Communications Are Incidentally Intercepted*

The Supreme Court approved the use of incidentally intercepted communications in *United States v. Kahn*.<sup>116</sup> In *Kahn*, the government had obtained a judicial order under Title III of the Omnibus Crime Control and Safe Streets Act of 1968<sup>117</sup> to wiretap a suspected bookmaker’s phone and intercept his conversations and the conversations of “others as yet

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109. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990).

110. 494 U.S. 259 (1990).

111. *Id.* at 266 (“[I]t was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.”).

112. *Id.* at 271.

113. *Id.* (“But this sort of presence—lawful but involuntary—is not of the sort to indicate any substantial connection with our country.”).

114. *Id.* at 275.

115. *See, e.g.*, *United States v. Stokes*, 726 F.3d 880, 893 (7th Cir. 2013) (finding that the Fourth Amendment’s warrant requirement does not apply to searches by U.S. agents in foreign territories); *United States v. Emmanuel*, 565 F.3d 1324, 1331 (11th Cir. 2009) (“Because the Fourth Amendment does not apply to nonresident aliens whose property is searched in a foreign country, there is no need to decide whether the Bahamian officials acted as agents of the United States or whether the wiretap was a joint venture. The Fourth Amendment exclusionary rule simply is not available to Emmanuel with respect to the Bahamian wiretap evidence.”).

116. 415 U.S. 143 (1974).

117. 18 U.S.C. §§ 2510–2522 (2012).

unknown.”<sup>118</sup> In the course of the wiretap, the government intercepted conversations implicating the bookmaker’s wife as being part of the gambling operation, and the couple was indicted on the basis of the wiretap evidence.<sup>119</sup> The Court determined that the wife’s conversations were properly intercepted under the order because the language broadened the targets of the wiretap to “others as yet unknown.”<sup>120</sup> The Court therefore refused to interpret the language of Title III as requiring law enforcement to identify all those who could possibly be intercepted.<sup>121</sup> In doing so, the Court denied that it was creating the possibility of “virtual general warrants” because the judicial order was limited by time, scope, and judicial monitoring requirements.<sup>122</sup> Although Congress had enacted Title III in part to protect privacy, the Court reasoned, the legislature had also intended to provide law enforcement with “a weapon against the operations of organized crime.”<sup>123</sup> Requiring law enforcement to identify everyone who could be intercepted by a wiretap would defeat that purpose.<sup>124</sup> As such, Title III did not require that intercepted communications be confined to those of a named party; intercepted communications could include conversations between individuals who were not listed as targets of the wiretap.<sup>125</sup>

Lower courts have interpreted *Kahn* to hold that interceptions of “incidental” parties do not violate the Fourth Amendment.<sup>126</sup> At least one

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118. 415 U.S. at 145.

119. *Id.* at 147–48.

120. *Id.* at 152–53 (“[T]he statute says: identification is required only of those ‘known’ to be ‘committing the offense.’ Had Congress wished to engraft a separate requirement of ‘discoverability’ onto the provisions of Title III, it surely would have done so in language plainer than that now embodied in § 2518.”).

121. *Id.*

122. *Id.* at 154.

123. *Id.* at 151.

124. *See id.* at 157 (“The clear implication of [the statutory] language is that when there is probable cause to believe that a particular telephone is being used to commit an offense but no particular person is identifiable, a wire interception order may, nevertheless, properly issue under the statute.”).

125. *Id.* (“Congress could not have intended that the authority to intercept must be limited to those conversations *between* a party named in the order and others, since at least in some cases, the order might not name any specific party at all.”).

126. *See, e.g.,* United States v. Reed, 575 F.3d 900, 910 (9th Cir. 2009) (finding that the government’s interception of the defendant’s communications was legal even though the defendant was not listed on the surveillance order because the order covered the device under surveillance, not individuals); United States v. Figueroa, 757 F.2d 466, 472 (2d Cir. 1985) (holding that Title III’s allowance for intercepting conversations of parties “as yet unknown” does not violate the Fourth Amendment); *In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1015 (Foreign Int. Surv. Ct. Rev. 2008) (citing *Kahn* for the proposition that “[i]t is settled beyond peradventure that incidental collections occurring as a result of constitutionally permissible acquisitions do not render those acquisitions unlawful”). *Kahn* confirmed holdings from lower courts that considered the issue previously.

court, however, has refused to expand the definition of “incidental” to include individuals whom the government knew were probably involved in the illegal activities being investigated.<sup>127</sup> In *United States v. Bin Laden*,<sup>128</sup> the District Court for the Southern District of New York held that the government should have obtained permission before intercepting the communications of an American citizen who was suspected of being involved in al Qaeda activities.<sup>129</sup> The government argued that the noncitizen targets of the wiretap could not assert a Fourth Amendment violation, and the incidental interception exception permitted the government to intercept the communications of citizens who used the tapped lines.<sup>130</sup> The court, however, distinguished the precedent cited by the government because the cases referred to incidentally discovered crimes, not incidentally intercepted people.<sup>131</sup> The court concluded that the citizen was one of the potential targets because of his suspected affiliation with the targeted organization.<sup>132</sup> In doing so, the court refused to expand the definition of “incidental” beyond “unanticipated.”<sup>133</sup> The defendant, the court concluded, had a “reasonable expectation of privacy in his home and cellular phones.”<sup>134</sup> Critically, the court’s interpretation still permits incidental, warrantless interceptions, so long as they are truly incidental.<sup>135</sup>

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*See, e.g.,* *United States v. Tortorello*, 480 F.2d 764, 775 (2d Cir. 1973) (“If probable cause has been shown as to one such participant, the statements of the other participants may be intercepted if pertinent to the investigation.”).

127. *United States v. Bin Laden*, 126 F. Supp. 2d 264, 281–82 (S.D.N.Y. 2000) (“Ultimately, the Court holds that with respect to the electronic surveillance of the home and cellular phones, El-Hage was not intercepted ‘incidentally’ because he was not an unanticipated user of those telephones and because he was believed to be a participant in the activities being investigated.”), *aff’d sub nom. In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 157 (2d Cir. 2008).

128. 126 F. Supp. 2d 264 (S.D.N.Y. 2000).

129. *Id.* at 269, 281–82.

130. *Id.* at 281.

131. *Id.*

132. *Id.* (“The Government asks the Court . . . to find that, although the Government clearly foresaw the interception of El-Hage’s conversations and suspected his involvement with al Qaeda, the interception was nonetheless incidental. . . . El-Hage was a known and contemplated interceptee of electronic surveillance of his home and cellular phones (even if he was not officially deemed a target) . . .”).

133. *Id.* Judge Sand ultimately concluded that, although the government should have obtained executive permission before tapping the citizen’s phone lines, the evidence obtained would not be subject to exclusion “because it would not have the deterrent effect which the exclusionary rule requires and because the surveillance was undertaken in good faith.” *Id.* at 282.

134. *Id.* at 281.

135. *See id.* (calling the government’s conceptualization of the incidental interception exemption an “expan[sion]”).



## III. THE COURT'S REASONING

In *Clapper v. Amnesty International USA*, the Supreme Court reversed the United States Court of Appeals for the Second Circuit, rejecting the lower court's "novel view of standing" and concluding that the plaintiffs had not alleged sufficient injury for Article III standing.<sup>136</sup> Justice Alito, writing for the majority, found that the threat of injury based on fear of surveillance was "too speculative" and that plaintiffs cannot be permitted to create an injury by taking steps to prevent surveillance that may never occur.<sup>137</sup>

The majority first explained that Article III standing is crucial to maintaining separation of powers within the federal government because it "prevent[s] the judicial process from being used to usurp the powers of the political branches."<sup>138</sup> In accordance with this function, the majority reasoned, the Court has required a more stringent standing analysis when considering cases challenging the constitutionality of actions taken by the legislative or executive branches.<sup>139</sup> In all cases, the majority continued, standing based on future injuries requires that the injurious event be "certainly impending," not just "possible."<sup>140</sup> The majority distinguished this standard from the "objectively reasonable likelihood" standard the Second Circuit used when that court held that the plaintiffs had standing, calling the latter standard "inconsistent" with the former.<sup>141</sup>

The Court cited five reasons why the plaintiffs' fears of surveillance were too speculative to constitute standing. First, the individuals with whom the plaintiffs communicated were not certain targets of government surveillance and the plaintiffs "ha[d] set forth no specific facts demonstrating that the communications of their foreign contacts will be targeted."<sup>142</sup> Second, the government could conduct surveillance without invoking Section 1881a, perhaps by using an older provision of FISA, which would prevent the plaintiffs from claiming their alleged injury was

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136. 133 S. Ct. 1138, 1146 (2013).

137. *Id.* at 1143, 1151 ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.").

138. *Id.* at 1146.

139. *Id.* at 1147 (citing *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997)). According to the majority, the judiciary has been especially hesitant "to review actions of the political branches in the fields of intelligence gathering and foreign affairs." *Id.*

140. *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

141. *Id.* The Court acknowledged that plaintiffs can occasionally show standing based on a "substantial risk" of injury, but concluded that the plaintiffs had failed to meet even that reduced burden. *Id.* at 1150 n.5.

142. *Id.* at 1148–49. The Court concluded that the plaintiffs could not be targets because Section 1881a does not authorize surveillance that intentionally targets U.S. persons. *Id.* at 1148. *But see* Part IV.B.

“fairly traceable” to Section 1881a.<sup>143</sup> Third, the FISC might decline to authorize the government’s request and the surveillance would not occur.<sup>144</sup> Fourth, even if it did obtain FISC authorization under Section 1881a, the government could fail to intercept the targeted communications.<sup>145</sup> Fifth, the government could successfully conduct surveillance of the targets, but not conduct surveillance of any of the plaintiffs’ communications with the targeted individuals.<sup>146</sup> The sum total of this “chain of possibilities” amounted to too much speculation for the Court.<sup>147</sup>

The majority also rejected the plaintiffs’ claim that they suffered present injury because they took measures to safeguard the confidentiality of their communications from government surveillance.<sup>148</sup> The Court pointed out that the Second Circuit had “improperly water[ed] down the fundamental requirements of Article III [standing]” by allowing the plaintiffs to claim self-incurred harm based on fear of an event that was “not certainly impending.”<sup>149</sup> Furthermore, the Court continued, the plaintiffs had a “similar incentive” to take precautions before the FISA Amendments Act, when the government could still conduct surveillance of their clients’ communications, albeit under different circumstances.<sup>150</sup> The Court compared the plaintiffs’ fear of surveillance with that of the plaintiffs in *Laird*, reiterating that “[a]llegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”<sup>151</sup> Likewise, the Court distinguished this case from other cases in which plaintiffs established standing based on fear because in those cases the plaintiffs had provided “concrete evidence” that the challenged action would “unquestionably” affect them.<sup>152</sup>

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143. *Id.* at 1149. The majority explained that the government could also obtain surveillance information from foreign governments or possibly “conduct FISA-exempt human and technical surveillance programs that are governed by Executive Order 12333.” *Id.*

144. *Id.* at 1149–50.

145. *Id.* at 1150.

146. *Id.*

147. *Id.*

148. *Id.* at 1150–51. The Court was unimpressed by the plaintiffs’ evidence supporting their claim of present injury. According to the Court: “For all the focus on respondents’ supposed need to travel abroad in light of potential § 1881a surveillance, respondents cite only one specific instance of travel: an attorney’s trip to New York City to meet with other lawyers.” *Id.* at 1151 n.6.

149. *Id.* at 1151.

150. *Id.* at 1152 (citing one plaintiff’s declaration that he was aware of government surveillance of his clients’ communications before Section 1881a was enacted).

151. *Id.* at 1152 (quoting *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972)) (internal quotation marks omitted).

152. *Id.* at 1153–54. Specifically, the Court distinguished *Friends of the Earth v. Laidlaw* because the injury in *Laidlaw*—the discharge of pollutants—was “concededly ongoing,” rather than speculative. *Id.* at 1153 (quoting *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC)*,

Finally, the majority was unconvinced that denying the plaintiffs standing would “insulate the government’s surveillance activities from meaningful judicial review.”<sup>153</sup> The Court first pointed to the FISC as evidence of judicial review and protection from Fourth Amendment violations.<sup>154</sup> The Court also noted that individuals could challenge the acquired surveillance if the government attempts to use it “in judicial or administrative proceedings.”<sup>155</sup> Alternatively, the Court suggested, “any electronic communications service provider” can challenge a governmental directive under Section 1881a before the FISC.<sup>156</sup> The plaintiffs, however, lacked standing because their alleged injury was not a “certainly impending” injury and the protections against such an injury cannot be used to “manufacture” standing.<sup>157</sup>

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented from the majority opinion, claiming that the harm posed by government surveillance was highly likely to occur, not “speculative.”<sup>158</sup> Additionally, based on the Court’s previous explanations of “certainly impending,” Justice Breyer contended that the plaintiffs had shown sufficient injury for standing.<sup>159</sup>

Justice Breyer first outlined the changes in FISA that occurred due to the FISA Amendments Act, emphasizing that the government could now conduct “programmatically” surveillance of a broader category of foreign individuals with less judicial oversight.<sup>160</sup> Next, Justice Breyer explained that the plaintiffs frequently engage in the types of communications subject to surveillance under FISA with individuals, such as family members and

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528 U.S. 167, 183–184 (2000)). In a second case cited by the plaintiffs, *Meese v. Keene*, the Court pointed out that the government had already used the law in question to deem the films the plaintiff wished to display illegal “political propaganda.” *Id.* at 1153 (citing *Meese v. Keene*, 481 U.S. 465, 467, 473–75 (1987)). Finally, the Court rejected the plaintiffs’ reliance on *Monsanto v. Geertson* because the farmers in *Monsanto* were able to provide scientific evidence of bee pollination behaviors that substantiated their fears of cross-pollination, raising it above “mere conjecture about possible . . . actions.” *Id.* at 1153–54 (citing *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2754–55, 2754–55 n.3 (2010)).

153. *Id.* at 1154 (quoting Brief for Respondents at 60, *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013) (No. 11-1025), 2012 WL 4361439, at \*60) (internal quotation marks omitted).

154. *Id.*

155. *Id.*

156. *Id.* at 1154–55. Thus, AT&T or Verizon could challenge an order issued under Section 1881a, but as of July 29, 2013, no telecommunications provider had done so. Letter from Reggie B. Walton, Presiding Judge of FISC, to Patrick J. Leahy, U.S. Senator 7–10 (July 29, 2013), available at <http://www.leahy.senate.gov/download/honorable-patrick-j-leahy>.

157. *Amnesty Int’l*, 133 S. Ct. at 1155.

158. *Id.* at 1155 (Breyer, J., dissenting).

159. *Id.* at 1155, 1160. Justice Breyer did not address the merits of the plaintiffs’ claims, only whether they had standing. *Id.* at 1165.

160. *Id.* at 1156.

friends, who would not have been subject to surveillance before Section 1881a was enacted.<sup>161</sup> This fact, combined with the government's motivation to investigate terrorist threats using electronic surveillance, documented use of electronic surveillance to investigate terrorist threats, and "expanding" ability to conduct electronic surveillance, led Justice Breyer to conclude "there is a high probability that the Government will [use Section 1881a to] intercept at least some electronic communication to which at least some of the plaintiffs are parties."<sup>162</sup>

Justice Breyer also disagreed with the majority's interpretation of "certainly impending" injury, claiming that in many cases "the word 'certainly' . . . emphasizes, rather than literally defines, the immediately following term 'impending.'"<sup>163</sup> Justice Breyer cited several cases in which the Court had found standing based on the realistic probability of injury or a "genuine threat," which Justice Breyer found the plaintiffs had shown in this case, in addition to present harm incurred attempting to minimize the threat.<sup>164</sup> Further, Justice Breyer distinguished the cases on which the majority relied to deny standing, particularly *Lujan*, which the dissent claimed focused on "when, not whether, the threatened harm would occur."<sup>165</sup> According to Justice Breyer, "when" the harm will occur in the instant case was not at issue because "the ongoing threat of terrorism means . . . the relevant interceptions will likely take place imminently, if not now."<sup>166</sup>

#### IV. ANALYSIS

In *Clapper v. Amnesty International USA*, the Supreme Court found it detrimental to standing that the plaintiffs, as U.S. persons, could not be

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161. *Id.* at 1157–58.

162. *Id.* at 1160.

163. *Id.* at 1161.

164. *Id.* at 1162–63. For example, Justice Breyer cited *Pennell v. City of San Jose*, 485 U.S. 1 (1988), in which the Court found sufficient injury in an ordinance forbidding landlords from raising rent prices "even though the landlords had not shown (1) that they intended to raise the relevant rents to the point of causing unreasonably severe hardship; (2) that the tenants would challenge those increases; or (3) that the city's hearing examiners and arbitrators would find against the landlords." *Id.* at 1161 (citing *Pennell*, 485 U.S. at 8). Justice Breyer also cited *Davis v. Federal Election Commission*, 554 U.S. 724 (2008), in which a candidate for office was found to have standing to challenge a campaign financing law even though his opponent "had decided not to take advantage of the increased contribution limits that the statute would have allowed," because the Court thought the chance that the opponent would invoke the statute was "realistic and impending." *Id.* at 1161–62 (quoting *Davis*, 554 U.S. at 734) (internal quotation marks omitted).

165. *Id.* at 1165 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564–65 n.2 (1992)).

166. *Id.*

targets of Section 1881a surveillance.<sup>167</sup> As such, the majority opinion focused on the string of events that needed to occur for plaintiffs' communications to be intercepted, leading the Court to decide there were too many unlikely events to find standing based on imminent interception.<sup>168</sup> This conclusion, aside from its troubling implications for privacy, stretches the limits of plausibility. Section 1881a surveillance is entirely different from conventional wiretapping; it is broad, indiscriminate, and long-lasting.<sup>169</sup> The assumed targets are exactly the types of clients with whom the plaintiffs speak, and precisely the types of targets that were not permitted under the previous law.<sup>170</sup> It seems incredible that, of the numerous plaintiffs, none will have at least one conversation intercepted under Section 1881a's authority.<sup>171</sup> The reasoning that supports the Court's assertion to the contrary will further confuse the analysis for imminent injury in future cases.<sup>172</sup>

This case gave the Court an opportunity, subsequently missed, to reexamine the limits of the incidental interception exception to the Fourth Amendment. Even if the plaintiffs could have shown the government used Section 1881a to intercept their communications, the incidental interception exception could have prevented the plaintiffs from asserting a Fourth Amendment violation.<sup>173</sup> The existence of the Fourth Amendment provisions and the other minimization requirements in Section 1881a, however, indicate Congress was concerned with incidental interception of U.S. persons.<sup>174</sup> The Court should have therefore analyzed the plaintiffs' standing to bring a pre-enforcement Fourth Amendment challenge under a

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167. *Amnesty Int'l*, 133 S. Ct. at 1148 (majority opinion).

168. *Id.* at 1148.

169. *Id.* at 1156 (Breyer, J., dissenting) (describing the breadth of surveillance authorized by § 1881a); *Amnesty Int'l v. Clapper*, 667 F.3d 163, 166–67 (2d Cir. 2011) (Lynch, J., concurring) (explaining the new powers obtained when Section 1881a was enacted); Caroline Wilson, *A Guide to FISA § 1881a: The Law Behind It All*, PRIVACYINTERNATIONAL.ORG (June 13, 2013), <https://www.privacyinternational.org/blog/a-guide-to-fisa-ss1881a-the-law-behind-it-all> (summarizing the provisions of the law and noting that Congress originally enacted FISA “in response to abuses in domestic intelligence surveillance powers”). Surveillance authorizations under Section 1881a can be effective for up to a year. 50 U.S.C. § 1881a(a) (Supp. 2012).

170. *Amnesty Int'l*, 133 S. Ct. at 1157–58.

171. *See* *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (“The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.”).

172. *See, e.g.,* *Hedges v. Obama*, 724 F.3d 170, 195 (2d Cir. 2013) (claiming, before discussing the Court's analysis of imminent injury in *Amnesty International*, that “[t]he Supreme Court's jurisprudence regarding how imminent a threat must be in order to support standing . . . has been less than clear”).

173. *See infra* Part IV.C.

174. *See infra* Part IV.B.

less burdensome imminence standard.<sup>175</sup> In conducting that analysis, the Court would have been forced to examine when incidental interceptions become so anticipated and comprehensive as to become too much like targeted interceptions.<sup>176</sup> As the government's ability to conduct surveillance improves, a narrower incidental interception exception would better preserve existing Fourth Amendment privacy rights.<sup>177</sup> Nonetheless, even if the Court had been unwilling to read the Fourth Amendment more broadly, a complete definition of the limits of the incidental interception doctrine would have helped Congress determine whether Section 1881a should be amended to afford greater protection to U.S. persons who communicate with foreign nationals.<sup>178</sup>

A. *The Standing Analysis in Amnesty International Creates an Unacceptably Broad Exception for Government Surveillance*

In *Amnesty International*, the Supreme Court explained that the standing analysis is “especially rigorous” when the Court must decide whether the executive or legislative branch has violated the Constitution.<sup>179</sup> While not explicitly admitting that it was creating an exception for intelligence gathering activities, the Court stressed that it “ha[s] often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs.”<sup>180</sup> To support this implied deference to the executive, the Court cited the importance of separation of powers and limiting judicial authority.<sup>181</sup>

The Court's deference is misplaced and ill-suited for the problems broad, indiscriminate surveillance poses. The FISA's only check on the executive branch is the FISC system,<sup>182</sup> which has shown itself unwilling to deny surveillance applications, rejecting only eleven since 1979.<sup>183</sup> At the same time, the number of applications has increased dramatically to more

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175. See *infra* Part IV.B.

176. See *infra* Part IV.C.1.

177. See *infra* Part IV.C.2.

178. See *infra* Part IV.C.2.

179. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (majority opinion) (quoting *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997) (internal quotation marks omitted)).

180. *Id.*

181. *Id.* at 1146.

182. See 50 U.S.C. § 1803 (2006) (describing the composition and function of the FISC).

183. *Amnesty Int'l*, 133 S. Ct. at 1159 (Breyer, J., dissenting) (explaining that the FISC rarely fails to approve an application); see also *Foreign Intelligence Surveillance Act Court Orders 1979–2012*, EPIC (May 4, 2012), [http://epic.org/privacy/wiretap/stats/fisa\\_stats.html](http://epic.org/privacy/wiretap/stats/fisa_stats.html).

than nine times the amount submitted in the first year.<sup>184</sup> This imbalance is hardly a countervailing check on a substantial executive power.<sup>185</sup> In addition, the FISC has admitted it has inadequate resources and information to monitor the activities of agencies once the application has been approved.<sup>186</sup> Given the immense power at stake and the weakness of the current judicial check, the correct way to create a balanced separation of powers would have been to expand the Supreme Court's authority through standing, or at least not to constrict it.

Instead, the Supreme Court has crafted a standing requirement that is more difficult for plaintiffs to meet because of the inherent nature of governmental surveillance. Based on the Court's reasoning in *Amnesty International*, to prove they have standing, plaintiffs must show they have been or will certainly be the targets of surveillance.<sup>187</sup> Assuming the plaintiffs are able to reach the discovery phase,<sup>188</sup> the government is likely to invoke the state secrets doctrine to avoid disclosing information, as it has in the past.<sup>189</sup> The end result is that the plaintiffs will be unable to show the requisite actual injury since they will be unable show specific knowledge of the surveillance, yet they cannot show specific knowledge of surveillance if they are not permitted discovery.<sup>190</sup> This "catch-22" essentially insulates government surveillance programs from constitutional scrutiny.<sup>191</sup>

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184. *Foreign Intelligence Surveillance Act Court Orders*, *supra* note 183. In 1979, the FISC was presented with 199 applications. *Id.* In 2012, there were 1,856 applications. *Id.*

185. Carol D. Leonnig, *Court: Ability to Police U.S. Spying Program Limited*, WASH. POST, Aug. 15, 2013, [http://www.washingtonpost.com/politics/court-ability-to-police-us-spying-program-limited/2013/08/15/4a8c8c44-05cd-11e3-a07f-49ddc7417125\\_story.html?hpid=z1](http://www.washingtonpost.com/politics/court-ability-to-police-us-spying-program-limited/2013/08/15/4a8c8c44-05cd-11e3-a07f-49ddc7417125_story.html?hpid=z1).

186. *Id.*

187. *See Amnesty Int'l*, 133 S. Ct. at 1148 (majority opinion) (asserting that the plaintiffs' allegations of interception were not "certainly impending").

188. *See Jewel v. NSA*, 673 F.3d 902, 911 (9th Cir. 2011) (finding standing when considering a motion to dismiss pre-discovery, but noting that "[u]ltimately [the plaintiffs] may face similar procedural, evidentiary and substantive barriers as the plaintiffs" in cases considered after a record has been developed through discovery).

189. *See, e.g., ACLU v. NSA*, 493 F.3d 644, 650, 650 n.2 (6th Cir. 2007) (explaining that the government invoked the evidentiary elements of the state secrets doctrine when refusing to provide plaintiffs with information about surveillance, but adding that had the surveillance program in question not been public knowledge, the nonjusticiability elements of the state secrets doctrine may have also applied).

190. *See Jewel*, 673 F.3d at 911 (explaining the evidentiary hurdles facing plaintiffs challenging a governmental surveillance program); *see also id.* at 908 (citing 50 U.S.C. § 1801(k)) (describing FISA's private right of action).

191. While the recent revelations of Edward Snowden as to the NSA surveillance program do provide more concrete information for plaintiffs, there is questionable wisdom in relying on government leaks as a check on executive power. *See generally The NSA Files*, THE GUARDIAN, <http://www.theguardian.com/world/the-nsa-files> (last visited Mar. 8, 2014) (explaining the timeline of the Snowden leaks and what little is known of the entire content). *See also* Mark Mazzetti and Michael S. Schmidt, *Officials Say U.S. May Never Know Extent of Snowden's Leaks*, N.Y. TIMES, Dec. 1, 2013, at A1 (reporting that due to technological inadequacies the government

Although the Court in *Amnesty International* suggested that, at a criminal trial, plaintiffs could challenge the law if the government attempts to use evidence collected through surveillance,<sup>192</sup> this approach has been unsuccessful in the past and neglects the large bulk of surveillance that does not result in criminal trials.<sup>193</sup> Because showing actual interception is almost impossible, the Court has inadvertently granted the government functional immunity for broad surveillance programs, provided the government keeps the program details a secret.<sup>194</sup> The problem is, of course, that the very secretiveness of the program is part of the harm.<sup>195</sup>

*B. Because Congress Contemplated That Section 1881a Would Affect U.S. Persons Like the Plaintiffs, Plaintiffs' Standing to Bring Suit Should Be Analyzed Without Focusing on the Actions of Third Parties*

The Court found it notable that the plaintiffs were not in a class of people targeted by the statute,<sup>196</sup> but the text of Section 1881a indicates Congress considered the statute would possibly affect U.S. persons.<sup>197</sup> If, as it seems likely, the plaintiffs are individuals who are directly affected by the statute, they should have been permitted to assert standing without showing

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may never know what data Snowden took). Similarly, government officials' voluntary disclosure promises seem to be inadequate protection. See Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES, Oct. 17, 2013, at A3 (reporting that the government announced it will be more diligent about disclosing to defendants when evidence has been obtained through a FISC order, but this had not been the practice in the past).

192. *Amnesty Int'l*, 133 S. Ct. at 1154 n.8 (providing as an example *United States v. Damrah*, 412 F.3d 618 (6th Cir. 2005), in which a defendant unsuccessfully attempted to suppress evidence collected through FISA-approved surveillance).

193. See Savage, *supra* note 191 (“[N]ational security prosecutors . . . had not been alerting . . . defendants that evidence in their cases had stemmed from wiretapping their conversations without a warrant.”).

194. At least one court has found that the state secret doctrine cannot apply when the details of the purportedly secret program are public knowledge. See *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007) (“In light of extensive government disclosures about the [Terrorist Surveillance Program], the government is hard-pressed to sustain its claim that the very subject matter of the litigation is a state secret.”).

195. See Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1952–58 (2013) (describing the potential harms of secret surveillance).

196. *Amnesty Int'l*, 133 S. Ct. at 1148.

197. This is supported by the legislative debates on the amendment. See Jonathan W. Gannon, *From Executive Order to Judicial Approval: Tracing the History of Surveillance of U.S. Persons Abroad in Light of Recent Terrorism Investigations*, 6 J. NAT'L SEC. L. & POL'Y 59, 59–60 (2012) (“Although Congress eventually passed the [FISA Amendment Act of 2008] with bipartisan support, the legislative debate focused on several issues, including the incidental collection of communications of U.S. persons and the minimization of U.S. person information . . .”).



that the “choices [of independent third parties] have been or will be made in such manner as to produce causation and permit redressability of injury.”<sup>198</sup>

The text of Section 1881a undoubtedly indicates that the overall focus of the statute is surveillance of “certain persons outside the United States,”<sup>199</sup> but there is also language that implies, if not directly states, that U.S. persons like the plaintiffs were thought to be affected, although not targeted, by the law. The limitations provision of Section 1881a specifies that authorizations may not “intentionally target” U.S. persons living in the United States or abroad.<sup>200</sup> Based on the term “intentionally,” this provision appears to permit the acquisition of such communications if the acquisition occurs incidentally or accidentally. The targeting provision also requires that the government “prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.”<sup>201</sup> This language does not mean, however, that the targeting must prevent the intentional acquisition of communications between individuals located outside the United States and individuals located in the United States. This was the exact scenario facing the plaintiffs in *Amnesty International*.<sup>202</sup>

As the Court pointed out, the statute requires that all authorizations conform to the requirements of the Fourth Amendment.<sup>203</sup> This requirement appears four times in total<sup>204</sup> but seems somewhat redundant regardless of its frequency. The targets Section 1881a permits—foreign nationals located abroad—do not have the ability to assert Fourth Amendment rights, and the limiting procedures required by the law preclude the intentional targeting of persons located within the United States who could assert Fourth Amendment rights.<sup>205</sup> The remaining class of people who could be intercepted is composed of unintentionally intercepted individuals whose communications would potentially not be protected by the Fourth Amendment because they are not the targets of the surveillance.<sup>206</sup> If, however, unintentionally intercepted people have conceivable Fourth Amendment claims, these provisions make more sense and indicate the drafters of Section 1881a were concerned about the

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198. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

199. 50 U.S.C. § 1881a (Supp. 2012).

200. 50 U.S.C. § 1881a (b) (emphasis added).

201. 50 U.S.C. § 1881a (d)(1)(B).

202. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1145–46 (2013).

203. *Id.* at 1148.

204. *See* 50 U.S.C. § 1881a(b)(5), (g)(2)(A)(iv), (i)(3)(A), (i)(3)(B) (requiring that the authorized action be consistent with the Fourth Amendment).

205. *See supra* Part II.B.1.

206. *See supra* Part II.B.2.

potential for intercepting the communications of non-targeted individuals.<sup>207</sup>

Despite evidence that the drafters of Section 1881a were concerned with people like the plaintiffs in *Amnesty International*, the Court determined that because the plaintiffs could not be surveillance targets under the statute, the statute did not regulate them.<sup>208</sup> This perfunctory determination forced the Court to perform the causation and foreseeability analysis because the Court assumes the injuries of non-targeted plaintiffs are predicated on the actions of independent third parties, which decreases the probability the injury will occur.<sup>209</sup> Yet, the drafters of Section 1881a recognized the language permitted the interception of U.S. persons and therefore added the Fourth Amendment requirements.<sup>210</sup> The evidence that Congress thought the plaintiffs were potential “objects” of the statute’s authorized actions should have been sufficient for the Court to consider whether the plaintiffs were asserting injury to a cognizable right.<sup>211</sup>

*C. The Court in Amnesty International Should Have Considered  
Narrowly Interpreting the Incidental Interception Exception in  
Response to Broad Surveillance Programs*

The plaintiffs in *Amnesty International*, even if the Court had found they were regulated under Section 1881a, would still have needed to overcome the incidental interception exception, which exempts from Fourth Amendment protection intercepted communications of individuals who are not surveillance targets.<sup>212</sup> Supported by Title III wiretapping precedent,<sup>213</sup> the exemption has its foundation in physical search and seizure law, which does not allow non-targeted individuals to challenge searches on Fourth

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207. See *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (“It is the duty of the court to give effect, if possible, to every clause and word of a statute . . .”).

208. *Amnesty Int’l*, 133 S. Ct. at 1148.

209. See *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (“Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.”).

210. 50 U.S.C. § 1881a(b)(5), (g)(2)(A)(iv), (i)(3)(A), (i)(3)(B) (Supp. 2012).

211. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992) (“When the suit is one challenging the legality of government action . . . , the nature and extent of facts that must be averred . . . depends considerably upon whether the plaintiff is himself an object of the action . . . . If he is, there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing or requiring the action will redress it.”).

212. See, e.g., *United States v. Tortorello*, 480 F.2d 764, 775 (2d Cir. 1973) (“If there is probable cause as to one of the parties to a conversation . . . incriminating statements made by another party to the conversation can be intercepted and used even though probable cause is not established as to him.”).

213. See, e.g., *United States v. Kahn*, 415 U.S. 143, 153 (1974) (holding that the Fourth Amendment does not require law enforcement to identify on requests for wiretapping orders all those who may be intercepted).

Amendment grounds.<sup>214</sup> The new characteristics of Section 1881a surveillance, however, make these precedents inapplicable because what was once “incidental” now has the potential to swallow a significant portion of intercepted communications and turn a class of U.S. persons into inadvertent targets.

*1. Broad-scope Surveillance Will Intercept More Than “Incidental” Communications of U.S. Persons*

“Incidental” is typically thought to mean something that happens unexpectedly when another action occurs, something that happens as a secondary occurrence of another action, or something that is likely to happen if another action occurs.<sup>215</sup> The overall impression is one of subordination to another activity or event.<sup>216</sup> In programs of broad, indiscriminant surveillance, by contrast, the likelihood of acquiring incidental communications increases to the point that the amount of incidental communications may engulf the amount of targeted communications.<sup>217</sup> By definition, communication requires more than one person.<sup>218</sup> Although in some situations both parties will be targets, the sheer number of conversations being intercepted makes it almost certain that the majority of interceptions will be of non-targets.<sup>219</sup> In cases like *Amnesty International*, if the government is intercepting nearly all of the communications of the plaintiffs’ clients, the government will likely

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214. See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 134 (1978) (“A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person’s premises or property has not had any of his Fourth Amendment rights infringed.”); *Alderman v. United States*, 394 U.S. 165, 174 (1969) (“Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.”).

215. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 966 (2d ed. 1987).

216. See BLACK’S LAW DICTIONARY 762 (6th ed. 1990) (“[d]epending upon . . . something else as primary”).

217. It is hard to believe that, if the government is requesting all communications from a country, as the lower court in *Amnesty International* suggested was entirely within the scope of Section 1881a authority, the majority of those communications would be of national security interest. See *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 126 (2d Cir. 2011) (describing the scope of potential authorizations); cf. Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST, July 19, 2010, <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/> (reporting that the NSA collects “1.7 billion e-mails, phone calls and other types of communications” a day).

218. See BLACK’S LAW DICTIONARY 279 (6th ed. 1990) (“sharing of knowledge by one with another”).

219. See Siobhan Gorman & Jennifer Valentino-DeVries, *New Details Show Broader NSA Surveillance Reach*, WALL ST. J. ONLINE, Aug. 20, 2013, <http://online.wsj.com/news/articles/SB10001424127887324108204579022874091732470> (reporting that although the NSA attempts to filter conversations originating between U.S. persons, “officials say the system’s broad reach makes it more likely that purely domestic communications will be incidentally intercepted and collected in the hunt for foreign ones”).

intercept the plaintiffs' communications with the clients.<sup>220</sup> In fact, such communications may be highly desirable to the government because of their content, more so than mundane social communications.<sup>221</sup> It is difficult to imagine, therefore, that any interception of the plaintiffs' communications with the surveillance targets will be totally inadvertent<sup>222</sup> even if their acquisition was not the government's stated intent.

## 2. *Section 1881a Surveillance Is Distinct from the Surveillance the Court Previously Considered*

As further argument against an exception, the situation in *Amnesty International* is distinguishable from cases in which incidental interceptions were held to be exempt from Fourth Amendment protection. In *United States v. Kahn*, the Title III wiretap order was limited in duration and scope.<sup>223</sup> It was also monitored frequently by the court.<sup>224</sup> By contrast, Section 1881a authorizations are longer in duration, broader in scope, and less monitored by the FISC.<sup>225</sup> Because the likelihood and potential severity of government intrusion are much greater under Section 1881a, there is more reason to protect those who are not targets of the search.<sup>226</sup> For similar reasons of scope, the non-target exception for physical searches offers inappropriate guidance. Physical searches are subject to bright-line,

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220. NSA minimization procedures specifically refer to attorney-client communications, so the government apparently understands that such interceptions will occur. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, 2011 MINIMIZATION PROCEDURES USED BY THE NATIONAL SECURITY AGENCY IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED, § 4 (2011), available at <http://www.dni.gov/files/documents/Minimization%20Procedures%20used%20by%20NSA%20in%20Connection%20with%20FISA%20SECT%20702.pdf> (last visited Mar. 8, 2014).

221. See *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1157–58 (2013) (Breyer, J., dissenting) (arguing that the government would want to intercept the types of conversations plaintiffs have with foreign nationals and would need Section 1881a's expanded scope to do so).

222. Cf. *United States v. Bin Laden*, 126 F. Supp. 2d 264, 281 (S.D.N.Y. 2000) (holding that the government's interception of the communications of an American who was suspected of working with al Qaeda was not "incidental" because the government should have anticipated that it would have intercepted his communications).

223. *United States v. Kahn*, 415 U.S. 143, 154 (1974).

224. *Id.*

225. See generally 50 U.S.C. § 1881a(i)(1)–(3) (Supp. 2012) (detailing the FISC's responsibilities in reviewing certifications and minimization procedures); see also *Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 166 (2d Cir. 2011) (explaining that the FISC reviews only "the government's general procedures," not individual surveillance activities).

226. *But see Skinner v. Railway Labor Execs.' Ass'n*, 489 U.S. 602, 640–41 (1989) (Marshall, J., dissenting) (claiming that the balancing test used to excuse special exemptions to Fourth Amendment warrant requirements inexcusably weakens the protections afforded by the Constitution).

geographical limitations,<sup>227</sup> unlike global communication surveillance, which can involve many individuals in many countries.<sup>228</sup> The potential for substantial government intrusion militates against an exception.<sup>229</sup>

Additionally, all U.S. persons do not bear this risk of intrusion generally and equally. The only U.S. persons who risk incidental interception are those who interact with non-U.S. citizens living abroad.<sup>230</sup> Thus, a risk of significant intrusion is borne by a limited, yet large,<sup>231</sup> class of people. This is not unheard of in Fourth Amendment jurisprudence, as many classes of people have been held to be exempt from various Fourth Amendment search protections.<sup>232</sup> The existence of a phenomenon, however, does not mean it is equally defensible in all cases. For example, the Court held in *New Jersey v. T.L.O.*<sup>233</sup> that school administrators are not required to show probable cause before conducting searches of students.<sup>234</sup> The Court reached this conclusion by balancing the intrusion upon the students' privacy with the school's need to create a safe learning environment.<sup>235</sup> Crucially, the Court decided that warrantless school searches must be "reasonable[]," not that students had no expectation of

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227. See, e.g., *Bailey v. United States*, 133 S. Ct. 1031, 1043 (2013) (holding that law enforcement can only search a person incident to the execution of a search warrant when they are in the immediate vicinity of the premises being searched).

228. Cf. *United States v. Bin Laden*, 126 F. Supp. 2d 264, 280 (S.D.N.Y. 2000) (describing the scope of surveillance as incorporating five phone lines and a "safehouse" where numerous individuals stayed "when passing through Nairobi").

229. See *United States v. White*, 401 U.S. 745, 756 (1971) (Douglas, J., dissenting) ("[T]he concepts of privacy which the Founders enshrined in the Fourth Amendment vanish completely when we slavishly allow an all-powerful government, proclaiming law and order, efficiency, and other benign purposes, to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life around them and give them the health and strength to carry on."); see also *id.* ("Electronic surveillance is the greatest leveler of human privacy ever known.").

230. See 50 U.S.C. § 1881a(a) (permitting the targeting of individuals "located outside the United States").

231. The exact number of U.S. persons who could be subject to surveillance is difficult to determine, but it is indisputable that the government has "overcollect[ed]" information. Eric Lichtblau & James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. TIMES, Apr. 16, 2009, at A1. The ACLU requested information about the extent of FISA surveillance, but the FBI replied that it would not comply because if people were aware the telecommunication companies were cooperating, they might sue the companies. Alex Abdo, *FBI: If We Told You, You Might Sue*, ACLU BLOG OF RIGHTS (May 10, 2011, 1:02 PM), <https://www.aclu.org/blog/national-security/fbi-if-we-told-you-you-might-sue-0>.

232. See, e.g., *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995) (holding that public schools could conduct suspicionless drug testing of student athletes); *Skinner v. Railway Labor Execs.' Ass'n.*, 489 U.S. 602, 633 (1989) (holding that the Federal Railway Administration regulations allowing for the suspicionless drug testing of railroad workers did not violate the Fourth Amendment).

233. 469 U.S. 325 (1985).

234. *Id.* at 342.

235. *Id.* at 340.

privacy at all.<sup>236</sup> The distinction is important because it indicates that even when faced with dire social problems, such as student drug use or violence,<sup>237</sup> the Court has still adhered to the Fourth Amendment cornerstone of “reasonableness” by engaging in a balancing of interests.<sup>238</sup> This balancing requirement is incompatible with the blanket acceptance that the Fourth Amendment does not protect incidentally intercepted people, no matter the level of intrusion.<sup>239</sup>

The goal of this Note is not to discount the threat of terrorism and the government’s need to investigate potential dangers,<sup>240</sup> but merely to argue that the Court should have reassessed the proper balance in light of the government’s increased authority, rather than using standing to defer to Congress and the Executive.<sup>241</sup> This is also not to suggest that the government abuses its power by intentionally acquiring information from U.S. persons. The system of rules created to prevent interception of domestic information is complex,<sup>242</sup> even if it occasionally fails to protect as intended or if some consider the level of protection unsatisfactory.<sup>243</sup> Had the Court reached the merits of the claims in *Amnesty International*, it could have spoken to the sufficiency of the minimization measures as well

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236. *Id.* at 343.

237. *See id.* at 339 (“[I]n recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.”).

238. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 27 (1968) (concluding that “the proper balance” between individual privacy and police safety requires that an officer have “narrowly drawn authority” to conduct a search for weapons, “where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime”).

239. This acceptance was apparent in the opinions dissenting from the denial of rehearing en banc. *See, e.g., Amnesty Int’l USA v. Clapper*, 667 F.3d 163, 177 (2d Cir. 2011) (Raggi, J., dissenting) (“Coincidental interceptees, however, cannot claim a personal Fourth Amendment right to be identified or to have probable cause established *as to themselves* as a precondition to reasonable surveillance.”).

240. *Cf. Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (arguing that upholding civil liberty to the detriment of safety “will convert the constitutional Bill of Rights into a suicide pact”).

241. The Court in *Amnesty International* explicitly stated that the “standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.” 133 S. Ct. 1138, 1147 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997)).

242. *See Stewart Baker, Why the NSA Needs Your Phone Calls . . . and Why You (Probably) Shouldn’t Worry About It*, FOREIGN POLICY (June 6, 2013), [http://www.foreignpolicy.com/articles/2013/06/06/why\\_the\\_nsa\\_needs\\_your\\_phone\\_calls](http://www.foreignpolicy.com/articles/2013/06/06/why_the_nsa_needs_your_phone_calls) (labeling the minimization procedures “elaborate”).

243. *See, e.g., Barton Gellman, NSA Broke Privacy Rules Thousands of Times per Year, Audit Finds*, WASH. POST, Aug. 15, 2013, [http://www.washingtonpost.com/world/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125\\_story.html](http://www.washingtonpost.com/world/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125_story.html) (describing the results of an internal NSA audit as finding mostly unintended violations, but “[t]he most serious incidents included a violation of a court order and unauthorized use of data [of] about more than 3,000 Americans and green-card holders”).

as the legal framework that created them. Instead, the opinion artfully dodged the question by focusing on the probability of injury.

Hence, *Amnesty International* was a lost opportunity. The drafters of Section 1881a took care to include protections for U.S. persons by explicitly prohibiting the government from intentionally targeting them for surveillance and by requiring that Section 1881a surveillance conform to the Fourth Amendment.<sup>244</sup> The incidental interception exception skirts both these protections. Because the nature of this surveillance is so different from the exception's existing applications, the Supreme Court should have analyzed whether all interceptions of non-targeted individuals are actually "incidental." Even if the Court had found that the incidental interception exception applied and that the plaintiffs still lacked standing because they had not asserted a cognizable right, the opinion would have alerted Congress as to whether additional statutory protections were needed. It would also have provided guidance for the lower courts. Instead, the decision rests on a chain of causation argument that seems incredulous to even a casual observer of current events,<sup>245</sup> which, contrary to the majority's assertions,<sup>246</sup> have shown the government is very likely to conduct broad-scope surveillance successfully.<sup>247</sup>

## V. CONCLUSION

In *Clapper v. Amnesty International USA*, the Supreme Court refused to grant standing to U.S. persons who feared the U.S. government would intercept their communications with non-U.S. persons living in foreign countries.<sup>248</sup> The Court found that since the plaintiffs could not be actual targets of surveillance authorized under the challenged statute, 50 U.S.C. Section 1881a, they could not show their interception was sufficiently certain to occur.<sup>249</sup> For similar reasons, the plaintiffs' expenditures in response to their fear of surveillance could not constitute sufficient injury to confer standing.<sup>250</sup> By refusing to grant standing, the Court severely limited

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244. See 50 U.S.C. § 1881a(b) (Supp. 2012) (forbidding the targeting of U.S. persons located within the United States and requiring that surveillance comply with Fourth Amendment requirements).

245. See, e.g., *Timeline of Edward Snowden's Revelations*, AL-JAZEERA AM., <http://america.aljazeera.com/articles/multimedia/timeline-edward-snowden-revelations.html> (last visited Mar. 8, 2014) (detailing the documents and information about domestic surveillance leaked by former NSA contractor Edward Snowden).

246. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013).

247. See *id.* at 1156 (Breyer, J., dissenting) (describing how the 2008 amendments to FISA have made it more likely the government will collect surveillance).

248. *Id.* at 1146 (majority opinion).

249. *Id.* at 1150.

250. *Id.* at 1152–53.

the ability of U.S. persons to challenge the increasingly broad surveillance programs conducted by the federal government.<sup>251</sup> Additionally, the Court's inquiry into the imminence of the injury will do little to remedy the confusion and uncertainty regarding when an injury is sufficiently likely to occur such that a plaintiff can bring suit in federal court.<sup>252</sup> The Court's analysis will likewise do little to clarify whether incidentally intercepted U.S. persons can challenge surveillance laws.<sup>253</sup> The Court could have given more guidance to lower courts and Congress had it recognized the plaintiffs were a class of individuals the drafters of Section 1881a contemplated as being potentially intercepted individuals<sup>254</sup> and, as such, their claim for standing should have been analyzed under a more lenient standard.<sup>255</sup> Although the Court still could have denied standing by refusing to narrow the incidental interception exception, the need for robust Fourth Amendment protection from ever-increasing governmental invasions of privacy suggests that the Court should reverse its course of selecting certain activities and people for less Fourth Amendment protection.<sup>256</sup>

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251. *See supra* Part IV.A.

252. *See supra* Part IV.C.

253. *See supra* Part IV.C.

254. *See supra* Part IV.B.

255. *See supra* Part IV.C.

256. *See supra* Part IV.C.2.