US Supreme Court dismisses lawsuit challenging secret wiretaps

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The US Supreme Court ruled 5-4 on Tuesday that a group of United States-based attorneys, journalists and human rights activists, along with their affiliated organizations, cannot sue to establish the unconstitutionality of a 2008 amendment to the Foreign Intelligence Surveillance Act (FISA).

The decision had nothing to do with the merits of the claim. Rather, the lawsuit was thrown out of court because the plaintiffs could not prove that the interception of their phone calls and emails was "certainly impending," a legal standard never before imposed to deny someone the right to sue.

At the core of the majority decision, authored by Associate Justice Samuel A. Alito, Jr. and joined by the other three extreme right-wing justices—Chief Justice John G. Roberts, Jr., Associate Justice Antonin Scalia and Associate Justice Clarence Thomas—along with the so-called "swing" voter, Justice Anthony A. Kennedy, is an obvious "Catch-22." Because the law authorizes secret wiretaps, there is no way to prove who might be a victim, but only victims have legal "standing" to file lawsuits, and therefore nobody can bring a case for judicial review of the law's constitutionality.

Clapper v. Amnesty International reverses a lower court ruling that said the lawsuit should go forward, in the process narrowing the doctrine of "standing" such that virtually all secret government activity can now be ruled immune from court challenges. In doing so, the Supreme Court majority adopted the positions urged by Obama administration lawyers in their briefs and at oral argument last October. (See, "Obama administration asserts unchecked powers")

The Fourth Amendment to the US Constitution forbids warrantless eavesdropping. Congress enacted FISA in 1978 following Watergate-era exposures of widespread and unchecked government spying on United States citizens engaged in constitutionally protected political and cultural activities. FISA limits wiretaps to the acquisition of "foreign intelligence information" by targeting a "foreign government or agent" outside the United States. With a nod to the Fourth Amendment, FISA requires federal agents to obtain a warrant for the specific target and facility from the Foreign Intelligence Surveillance Court in Washington, DC, the proceedings of which are kept secret.

In 2008, Congress, with the support of key Democrats, amended FISA to eliminate the requirements that the target must be a specified "foreign power or an agent of a foreign power" and that the warrant application must identify the precise facility where the electronic surveillance is to take place. In effect, the 2008 FISA amendment authorizes "roving wiretaps" of communications between places in the United States and foreign countries that are essentially warrantless.

The plaintiffs filed their lawsuit less than an hour after then-president George Bush signed the FISA amendment into law, asking the federal district court in New York to declare the measure unconstitutional and enjoin its enforcement.

The plaintiffs described themselves as persons and organizations who communicate by telephone and e-mail with people the government "believes or believed to be associated with terrorist organizations," with "people located in geographic areas that are a special focus" of so-called "counterterrorism" efforts, and with "activists who oppose governments supported by the United States."

To establish standing under the law as it then existed, the plaintiffs alleged a series of specific injuries flowing from the FISA amendment, such as the fact that the threat of secret wiretapping interferes with lawyers locating and interviewing witnesses or advising clients in confidence, journalists cultivating confidential sources to obtain information for news reports, and human rights organizations such as Amnesty International interacting

with foreign contacts. The threat of surveillance compelled some plaintiffs to travel abroad for in-person conversations, and others to undertake "costly and burdensome measures" to protect the confidentiality of sensitive communications.

The United States Court of Appeals for the Second Circuit, which includes New York City, ruled that the plaintiffs' allegations establish "an objectively reasonable likelihood that their communications will be intercepted" and therefore gave them standing to challenge the FISA amendment's constitutionality. The Supreme Court majority reversed this ruling.

Alito's majority opinion dramatically raised the bar for determining legal standing, ruling that the plaintiffs had to demonstrate "the threatened injury must be *certainly impending* " (the italics are Alito's), resurrecting a phrase from a long-forgotten 1923 opinion that actually found that the plaintiff in the case had standing on the basis that "one does not have to await the consummation of threatened injury to obtain preventive relief."

The "certainly impending" language has never previously been used by the Supreme Court to deny a plaintiff standing in any case, much less one challenging the constitutionality of a clandestine government program where the evidence to meet such a standard is, by definition, unavailable.

Alito went on, at considerable length, to discount the plaintiffs' claims that their communications would likely be intercepted as "highly speculative" and "relying on a highly attenuated chain of possibilities." Alito seemed to taunt the plaintiffs for the absence of "any evidence that their communications have been monitored" under a secret program put into effect the day their lawsuit was filed, calling it "a failure that substantially undermines their standing theory."

"Simply put," Alito wrote, the plaintiffs "can only speculate as to how the Attorney General and the Director of National Intelligence will exercise their discretion in determining which communications to target," and "even if [the plaintiffs] could demonstrate that the targeting of their foreign contacts is imminent, [they] can only speculate as to whether the Government will seek to use [FISA] surveillance (rather than other methods) to do so."

In other words, the spy program's secrecy—which is what chills the plaintiffs' exercise of their rights in the first place—is precisely what prevents anyone from seeking review of its constitutionality.

Alito next demeaned the plaintiffs' claims that the threat of surveillance forced them to travel and to undertake other expensive precautions to protect the confidentiality of their communications as "self-inflicted injuries" that, somehow, "are not fairly traceable" to the secret wiretapping program.

Finally, Alito wrote that even if "no one would have standing is not a reason to find standing," meaning that the Supreme Court could insulate the secret wiretapping program from all court challenges. Underscoring his contempt for the basic democratic right of people to challenge governmental action in court, Alito concluded that "any dissatisfaction" the plaintiffs had with the new law or the secret rulings of the FISA court "is irrelevant to our standing analysis."

Associate Justice Stephen G. Breyer wrote a dissenting opinion, joined by the other three moderate justices, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan, pointing out the many Supreme Court precedents which give the plaintiffs standing to bring suit. The dissent explicitly declined to address the constitutionality of the FISA amendment itself, however.

Jameel Jaffer, the deputy legal director of the American Civil Liberties Union and the lawyer for the plaintiffs, issued a statement calling the ruling "disturbing" because it denies "meaningful judicial review and leaves Americans' privacy rights to the mercy of the political branches."

"More than a decade after 9/11," Jaffer added, "we still have no judicial ruling on the lawfulness of torture, of extraordinary rendition, of targeted killings or of the warrantless wiretapping program. These programs were all contested in the public sphere, but they have not been contested in the courts."

In contrast, the spokesperson for the Department of Justice praised the majority decision, stating that the government was "obviously pleased" with the denial of standing to the plaintiffs.

Equally obvious is the fact that the Obama administration—to no less a degree than the administration of George Bush—is developing increasingly authoritarian forms of rule in conjunction with the Supreme Court.