


# Foreign Surveillance and the Future of Standing to Sue Post-*Clapper*

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# Summary

Recent news accounts (and government responses to those news accounts) have indicated that the government is reportedly engaged in a surveillance program that gathers vast amounts of data, including records regarding the phone calls, emails, and Internet usage of millions of individuals. The disclosures to the media reportedly suggest that specific telecommunication companies have been required to disclose certain data to the government as part of the intelligence community's surveillance efforts.

The recent controversy over the reports of government targeting efforts comes months after the Supreme Court ruled in a case called *Clapper v. Amnesty International.* In *Clapper*, the Court dismissed a facial constitutional challenge to section 702 of the Foreign Intelligence Surveillance Act on constitutional standing grounds. Specifically, the *Clapper* court found that the litigants, a group of attorneys and human rights activists who argued that their communications with clients could be the target of foreign intelligence surveillance, could not demonstrate they would suffer a future injury that was "certainly impending," the requirement the majority of the Court found to be necessary to establish constitutional standing when asking a court to prevent a future injury.

Notwithstanding the *Clapper* decision, in light of the recent revelations about the government's intelligence gathering methods, several lawsuits have been filed by individuals who are customers of the companies allegedly subject to court orders requiring the disclosure of data to the government. The litigants in these newly filed lawsuits would appear to have a stronger argument for how they have been injured than the plaintiffs in *Clapper* did. Notably, unlike the *Clapper* plaintiffs, the litigants in these new lawsuits have evidence that the government is actually using its authority to gather data that is pertinent to the plaintiffs. However, the plaintiffs in these lawsuits may still have significant difficulties in establishing standing, as they have arguably not alleged that they have been specifically targeted by the government or injured in any concrete and particularized way by the government's conduct. Moreover, gathering evidence to prove an injury will be difficult because of evidentiary privileges protecting the government information. As a consequence, litigation challenging the government surveillance programs that are the topic of recent media accounts may have the same difficulties found in the *Clapper* litigation.

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# Introduction

In recent weeks, several media accounts have reported that U.S. intelligence agencies are actively gathering data from a wide range of sources.[1] The records resulting from the alleged surveillance activity reportedly include vast sums of metadata on phone usage, emails, file transfers, and live chats.[2] In response to the media accounts, lawmakers and administration officials have acknowledged that the government, relying on authority in section 215 of the USA Patriot Act,[3] has obtained a court order allowing for the acquisition of metadata from service providers, such as the Verizon Business Network Services, Inc. (Verizon).[4] In addition, the Director of National Intelligence has acknowledged the existence of PRISM, "an internal government computer system used to facilitate the government's ... collection of foreign intelligence information from electronic communication service providers."[5] The acknowledgment by the Director of National Intelligence indicated that section 702 of the Foreign Intelligence Surveillance Act of 1970 (FISA) was the legal basis relied on by the government to gather the data associated with the PRISM system.[6] In describing the government surveillance efforts, the Director of National Intelligence notes that while targeting may "incidentally intercept[]" U.S. persons, targeting procedures "ensure that an acquisition targets non-U.S. persons reasonably believed to be outside

[1] *See* Barton Gellman and Laura Poitras, "U.S., British intelligence mining data from nine U.S. Internet companies in broad secret program," *Washington Post*, June 7, 2013, http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html; *see also* Glenn Greenwald, "NSA collecting phone records of millions of Verizon customers daily," *The Guardian*, June 5, 2013, pp. http://www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order; Glenn Greenwald, "NSA Prism program taps in to user data of Apple, Google and others," *The Guardian*, June 6, 2013, http://www.guardian.co.uk/world/2013/jun/06/us-tech-giants-nsa-data.

[2] Greenwald, *supra* footnote 1.

[3] *See* 50 U.S.C. § 1861. Section 215 of the USA PATRIOT Act of 2001 amended Foreign Intelligence Surveillance Act to create a procedure under which the FBI may apply to the Foreign Intelligence Surveillance Court for an order compelling a person to produce "any tangible thing," such as records held by a telecommunications provider. *Id.* at § 1861(b). The application must be made by an FBI official with a rank of Special Agent in Charge or higher, and must contain a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to a foreign intelligence, international terrorism, or espionage investigation. § 1861(a)-(b).

[4] *See, e.g.,* Statement of Senator Dianne Feinstein, June 6, 2013, http://www.washingtonpost.com/blogs/post-politics/wp/2013/06/06/transcript-dianne-feinstein-saxby-chambliss-explain-defend-nsa-phone-records-program/?print=1 ("I just had an opportunity to review the Guardian article [disclosing the National Security Agency's collection of Verizon telephone records] and I'd like to make the following points. As far as I know, this is the exact three month renewal of what has been the case for the past seven years. This renewal is carried out by the FISA Court under the business records section of the Patriot Act."); *see also* Statement of Senator Lindsey Graham, U.S. Congress, Senate Appropriations, Commerce, Justice, and Science, and Related Agencies, 113th Cong., June 6, 2013 ("I'm a Verizon customer. It doesn't bother me one bit for the National Security Administration to have my phone number, because what they're trying to do is find out what terrorist groups we know about, and individuals, and who the hell they're calling."); Statement of James R. Clapper, Director of National Intelligence, "DNI Statement on Recent Unauthorized Disclosures of Classified Information," press release, June 6, 2013, http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/868-dni-statement-on-recent-unauthorized-disclosures-of-classified-information ("The judicial order that was disclosed in the press is used to support a sensitive intelligence collection operation, on which members of Congress have been fully and repeatedly briefed. The classified program has been authorized by all three branches of the Government.").

[5] *See* James R. Clapper, Director of National Intelligence , "Facts on the Collection of Intelligence Pursuant to Section 702 of the Foreign Intelligence Surveillance Act," press release, June 8, 2013, http://www.dni.gov/files/documents/Facts%20on%20the%20Collection%20of%20Intelligence%20Pursuant%20to%20Section%20702.pdf.

[6] *Id.*

the United States for specific purposes" and minimization procedures prohibit the dissemination of information about a U.S. person unless it is "necessary to understand foreign intelligence or assess its importance, is evidence of a crime, or indicates a threat of death or serious bodily harm."[7]

The attention surrounding the allegedly massive government data gathering program has sparked outrage in some quarters,[8] with some entities contemplating filing lawsuits to challenge the government practices on constitutional grounds[9] and others going so far as to actually file suit.[10] The new filings only add to the litigation challenging the government's surveillance practices, as lawsuits that pre-date the recent media reports are pending in federal courts, awaiting disposition.[11]

The renewed interest in litigation regarding the government surveillance programs comes on the heels of a recent Supreme Court ruling in *Clapper v. Amnesty International*.[12] In *Clapper,* the Court held that a group of attorneys and human rights organizations did not have standing to challenge a provision of the 2008 amendments to the FISA,[13] which established new statutory authority for U.S. government surveillance directed at the communications of non-U.S. citizens abroad.[14] The Court reasoned that the *Clapper* plaintiffs did not have standing because the attorneys and interest groups bringing the lawsuit had not sufficiently shown that they would be

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[7] *Id.*

[8] *See, e.g.,* Jake Miller, "NSA data-gathering deja vu for privacy hawks," *CBS News*, June 8, 2013, http://www.cbsnews.com/8301-250_162-57588335/nsa-data-gathering-deja-vu-for-privacy-hawks/ ("With the revelations this week that the National Security Agency is gathering troves of data on Americans' telephone use, civil liberties advocates and privacy watchdogs are again on the warpath, accusing the administration of unconstitutionally invading Americans' privacy in a reckless pursuit of greater security.").

[9] *See, e.g.,* Alex Byers, "All things surveillance - What to expect this week," *Politico*, June 10, 2013, http://www.politico.com/morningtech/0613/morningtech10879.html?hp=l6_b7 ("There was plenty of chatter over the weekend over whether the disclosed FISA order and government acknowledgement of portions of its surveillance programs could give plaintiffs a better shot at successful litigation—and it looks likely that we're going to find out"); Aaron Blake, "Rand Paul planning class action lawsuit against surveillance programs," *Washington Post*, June 9, 2013, http://www.washingtonpost.com/blogs/post-politics/wp/2013/06/09/rand-paul-planning-class-action-lawsuit-against-surveillance-programs/ ("Sen. Rand Paul . . . said Sunday that he plans to file a class action lawsuit against the Obama administration for its "unconstitutional" surveillance programs.").

[10] *See, e.g. ACLU, et. al. v. Clapper, et. al.,* Case No. 1:13-cv-03994, Compl. ¶ 1 (S.D.N.Y. June 11, 2013) (herein *ACLU* Compl.) (challenging the government's so-called "dragnet acquisition of . . . telephone records under Section 215 of the Patriot Act"); *see also Klayman et. al. v. Obama et. al.,* Case No. 1:13-cv-0881, Compl. ¶ 2 (D.D.C. June 12, 2013) (herein *Klayman* Compl.) (seeking damages and equitable relief challenging the PRISM program). Similar to the ACLU's Complaint, Larry Klayman, a former federal prosecutor, has also filed a complaint with respect to the collection of telephony metadata by the NSA. *See Klayman et al.,v. Obama, et. al,* Case No. 1:13-cv-0851, (D.D.C. June 6, 2013). As this report is not intended to document all of Mr. Klayman's litigation, references to Klayman's lawsuit will be to the suit filed on June 12, 2013. On July 8, 2013, the Electronic Privacy Information Center (EPIC), a privacy advocacy group, filed a petition for a "writ of mandamus and prohibition or a writ of certiorari." *See In re Electronic Privacy Information Center*, Petition for a Writ of Mandamus and Prohibition, or a Writ of Certiorari, July 8, 2013, available at https://epic.org/EPIC-FISC-Mandamus-Petition.pdf (herein EPIC Pet.). EPIC's petition challenges the court order that requires Verizon to provide certain metadata to the government on statutory, as opposed to constitutional grounds. *Id.* Specifically, EPIC's petition argues that the order of the Foreign Intelligence Surviellance Court incorrectly interpreted the breadth of section 215 of the Patriot Act. *Id.*

[11] *See, e.g., In re Nat'l Security Agency Telecommunications Records Litigation,* No.3:06-cv-00672 (N.D. Cal.).

[12] *See Clapper v. Amnesty International USA,*—U.S.—, 133 S. Ct. 1138 (2013).

[13] *Id.* at 1143.

[14] 50 U.S.C. § 1881a.

injured by the 2008 law because their fears of being subject to government surveillance were dependent on a chain of speculative contingences.[15] This report discusses the doctrine of standing and explores how that doctrine formed the basis of the *Clapper* decision. After discussing the *Clapper* decision, the report will conclude with a discussion about how the Supreme Court's most recent discussion of standing may affect litigation over recently revealed government surveillance efforts.

# Background on the Doctrines of Constitutional and Prudential Standing

In every case that is filed in federal court, the party bringing suit must establish standing to prosecute the action.[16] The essential question of standing is whether a litigant is "entitled to have the court decide the merits of the dispute or of particular issues."[17] The doctrine of standing primarily[18] derives from the text of Article III, section 2 of the Constitution, which extends federal judicial power to certain "cases" and "controversies."[19] In limiting the judicial powers to "cases" and "controversies," the Supreme Court has held that Article III restricts the federal courts to exercising the "traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violations of law."[20] In other words, the "cases" or "controversies" language of Article III has been interpreted to be a "fundamental limit[]" on the jurisdiction of federal courts such that a federal court cannot exercise its power unless it is founded upon the facts of a controversy between truly adverse parties.[21] The Supreme Court has called the "Article III doctrine that requires a litigant to have 'standing' to invoke the powers of a federal court to be perhaps the most important of [the case-or-controversy] doctrines."[22]

The "irreducible constitutional minimum" of standing contains three elements.[23] First, the plaintiff must have suffered an "injury in fact," which is an "invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[24] Second, there must be a "causal connection" between the injury and the conduct that is complained of, such that the injury is "fairly traceable" to the challenged action.[25] Finally, it must be likely that the injury will be redressed by a favorable decision.[26] Moreover, if the

[15] *Clapper*, 133 S. Ct. at 1148.

[16] *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

[17] *Warth v. Seldin,* 422 U.S. 490, 498 (1975).

[18] Congress can also impose additional standing requirements in a statute. *See, e.g., Block v. Community Nutrition Institute,* 467 U.S. 340, 352 (1984) (noting that the structure of a statute can imply that Congress intended to preclude certain litigants from seeking relief under a statutory cause of action).

[19] U.S. Const. Art. III, § 2, cl. 1.

[20] *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009).

[21] *Allen v. Wright*, 468 U.S. 737, 750 (1984).

[22] *Id.*

[23] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[24] *Id.*

[25] *Id.*

[26] *Id*.

plaintiff is seeking prospective equitable relief, such as a declaration from the court that certain conduct is illegal (a declaratory judgment) or an order preventing certain conduct from taking place (an injunction), a mere allegation of past harm is insufficient to establish standing.[27] Instead, when declaratory or injunctive relief is sought, a plaintiff "must show that he ... 'is immediately in danger of sustaining some direct injury' as a result of the challenged ... action."[28]

Beyond the three requirements of Article III standing, the Court has also endorsed the so-called prudential standing doctrine, which embodies "judicially self-imposed limits on the exercise of federal jurisdiction."[29] Among the principles that encompass the prudential standing doctrine are the prohibition on one litigant raising another person's legal rights, the rule barring adjudication of generalized grievances, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.[30] While the doctrine of prudential standing does not derive from the text of Article III—the Court has described the prudential dimensions of standing as non-jurisdictional and a matter of "judicial self-governance"[31]—the two doctrines are "closely related" and overlap.[32]

Collectively, by insisting on these requirements for standing, Article III and prudential standing doctrines ensure that legal injuries that are shared in equal measure by all or a large class of citizens are properly a subject for the elected branches and not the judiciary.[33] As a consequence, the standing doctrine is part and parcel of the doctrine of separation of powers, as requiring a litigant to have standing to pursue a federal lawsuit allows the judiciary to avoid unnecessarily intruding on the powers vested in the executive and legislative branch.[34] Moreover, the doctrine of standing, by requiring litigants to have suffered an injury, is intended to allow legal questions to be presented to a federal court only in a concrete factual context by individuals who have a serious stake in the litigation.[35]

[27] *See City of Los Angeles v. Lyons,* 461 U.S. 95, 105 (1983).

[28] *Id.* at 101-02.

[29] *Allen*, 468 U.S. at 751.

[30] *Id.*

[31] *Warth,* 422 U.S. at 498-500.

[32] *Id.; see also Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 80-81 (1978) ("Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met.").

[33] *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 472 (1982).

[34] *Doremus v. Board of Education,* 342 U.S. 429, 480 (1952) ("Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'") (internal citations omitted).

[35] *See Valley Forge Christian College,* 454 U.S. at 472 ("It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.").

# *Clapper v. Amnesty International*

The *Clapper* case was a constitutional challenge to section 702 of the FISA, a 2008 amendment that generally provides the federal government with the authority to engage in eavesdropping to gather foreign intelligence information from foreign nations and non-state actors while they are abroad, so long as there is no intentional targeting of U.S. persons.[36] Specifically, section 702 provides that the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to one year, the "targeting of persons reasonably believed to be located outside of the United States to acquire foreign intelligence information."[37] The statute provides, however, that in acquiring such foreign intelligence the government may not intentionally (1) target any person known to be or reasonably believed to be in the United States; (2) target a U.S. person; or (3) acquire any communication where the sender and all recipients are known to be located in the United States.[38] Moreover, the statute requires that the Attorney General and the Director of National Intelligence conduct such acquisitions pursuant to targeting and minimization procedures that have been approved by the Foreign Intelligence Surveillance Court (FISC), a non-adversarial court authorized under FISA.[39]

After the 2008 law went into effect, a wide range of litigants challenged section 702 of FISA on First and Fourth Amendment grounds in federal court, seeking an order enjoining enforcement of the law.[40] The litigants included a group of attorneys with clients with connections to terrorist-related cases,[41] several journalists who have overseas sources in countries where terrorism may be ongoing,[42] and human rights researchers who claimed to be seeking to talk to people subjected to torture in secret prisons overseas.[43] The litigants had two theories for why they had suffered a sufficient injury such that they had standing to raise their claims in federal court. First, the plaintiffs argued that they would be injured in the future because the extensive monitoring authorized by section 702 would allow interceptions of their conversations and would chill their speech and invade their privacy interests.[44] Second, the plaintiffs also argued that because of their belief that they were being monitored, they had already been injured because they were required to take steps to protect their confidential contacts at allegedly considerable expense.[45] For example, one plaintiff averred in a sworn statement that they had to travel to their contacts in

[36] *See* 50 U.S.C. § 1881a. A United States person is defined as a citizen of the United States, an alien lawfully admitted for permanent residence, an unincorporated association with a substantial number of members who are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power. 50 U.S.C. § 1801(i).

[37] *Id.* § 1881a(a).

[38] *Id.* § 1881a(b)(1)-(4).

[39] *Id.* § 1881a(g), (i).

[40] *See Amnesty International USA, et al. v. John M. McConnell, et. al.,* Case No. 08-CIV-6259 (S.D.N.Y.) (filed July 10, 2008). The complaint was a facial challenge to the legislation, meaning that the plaintiffs had to establish that there is "no set of circumstances . . . under which the Act would be valid." *See United States v. Salerno,* 481 U.S. 739, 745 (1987). The Supreme Court has described a facial challenge to a legislative Act as the "most difficult challenge to mount successfully." *Id.*

[41] *See Amnesty International USA, et al. v. John M. McConnell, et. al.,* Case No. 08-CIV-6259 (S.D.N.Y.), Compl. ¶¶ 10; 15-18.

[42] *Id.* ¶¶ 11

[43] *Id.* ¶¶ 6-9; 12-14.

[44] *See Clapper*, 133 S. Ct. at 1149.

[45] *Id.* at 1151.

person to avoid having their electronic or wired communications monitored.[46] However, the litigants could not offer any sort of proof that their conversations were actually being targeted through the section 702 surveillance.[47]

In August of 2009, a federal judge in New York City ruled that the litigants had not sufficiently alleged that they would be targeted by government surveillance and dismissed the case on standing grounds.[48] Specifically, the court held that the plaintiffs had failed to establish standing because an injury for Article III purposes requires something more than an "abstract fear that [one's] communications will be monitored."[49] On appeal to the Second Circuit Court of Appeals, the circuit court disagreed.[50] The Second Circuit stated that to determine whether a plaintiff who has not yet been injured has standing to challenge a federal law or policy, a court needs to find that the law or policy creates an "objectively reasonable likelihood" of injury.[51] With respect to the plaintiffs challenging section 702 of FISA, the Second Circuit ruled that the plaintiffs had shown an "objectively reasonable likelihood" of being overheard because, "unlike most Americans," the plaintiffs engage in professional activities that make it reasonably likely that their privacy will be invaded and their conversations overheard.[52] The Supreme Court granted certiorari to hear the case in May of last year[53] and heard argument last October.[54]

## The Majority Opinion

On February 26, 2013, Justice Alito, writing for a five-member majority of the Court, reversed the Second Circuit and rejected the two theories of standing proposed by the plaintiffs.[55] Before discussing the merits of each of the litigants' standing theories, the Court reasoned that, because of the separation of powers concerns that underlie the doctrine of Article III standing, an inquiry into standing must be "especially rigorous" when reaching the merits of a dispute that would require a court to opine on whether an action taken by another branch of the federal government would be unconstitutional.[56] Relatedly, the Court also emphasized that standing will often be lacking in cases in which the judiciary reviews "actions of the political branches in the fields of intelligence gathering and foreign affairs."[57] With those broad principles in mind, the Court turned to the plaintiffs' specific arguments as to why they had standing.

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[46] *Id.*

[47] *Id.* at 1148.

[48] *See Amnesty Int'l United States v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009)

[49] *Id.* at 645.

[50] *See Amnesty Int'l United States v. Clapper,* 638 F.3d 118 (2d Cir. 2011).

[51] *Id.* at 134.

[52] *Id.* at 149.

[53] *See Clapper v. Amnesty Int'l USA*, 132 S. Ct. 2431 (2012).

[54] *See Clapper v. Amnesty Int'l USA,* Oral Argument, October 29, 2012, http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-1025.pdf.

[55] *See Clapper*, 133 S. Ct. at 1140.

[56] *Id.* at 1147.

[57] *Id.* at 1147. The Court cited to three cases to support its statement regarding standing in intelligence gathering cases. First, the Court cited from *United States v. Richardson,* a 1974 opinion of the Court which held that a taxpayer lacked standing to challenge the constitutionality of a statute permitting the Central Intelligence Agency to account for its expenditures solely on the certificate of the CIA director. *See* 418 U.S. 166, 167-170. Second, the Court relied on *Schlesinger v. Reservists Committee to Stop the War,* an opinion that was released the same year as *Richardson* and (continued...)

With respect to the plaintiff's "future injury" argument, the Court held that a future injury, for constitutional standing purposes, must be "certainly impending" or "imminent," and allegations that an injury is "possible" in the future are insufficient.[58] Applying that test to the *Clapper* plaintiffs, the Court found that the litigants' claims that they would be targeted by surveillance authorized under section 702 were too speculative to bestow Article III standing based on a future injury.[59] The Court noted that the litigants' theory for how they would be injured in the future by section 702 was based on a series of assumptions that all had to occur in order for them to have an injury that could be traced to the federal law and redressed by a favorable court ruling.[60] Amongst the plaintiffs' assumptions, the Court noted that the *Clapper* litigants were assuming that (1) the government is thinking of imminently targeting the communication of the plaintiffs' foreign contacts; (2) the government would use section 702, as opposed to other sources of authority, to engage in the surveillance;[61] (3) the FISC would authorize such surveillance;[62] (4) the government would actually succeed in eavesdropping on one of their contacts; and (5) the eavesdropping would actually capture the contents of the conversations of one of the litigants, injuring them.[63] In other words, for the Court, the *Clapper* litigants' standing theory was based too much on a speculative chain of events that might never occur, and, because an injury for standing purposes must be "certainly impending," the plaintiffs could not satisfy the constitutional requirement for being allowed to sue.[64]

In a footnote, the Court opined on the argument that, given that a lack of proof was fatal to the plaintiffs' standing, the government could help "resolve the standing inquiry by disclosing to a court" in private whether it was intercepting particular communications and what minimization procedures it was using.[65] The Court rejected this suggestion because it was not the government's burden to prove standing and such proceedings would provide a means by which a terrorist could determine whether the government was conducting surveillance against a specific target.[66]

(...continued)

held that an association of present and former members of the Armed Forces Reserve lacked standing to challenge an alleged violation of the Incompatibility Clause of Article I by Members of Congress who participated in the Armed Forces Reserve. 418 U.S. 208, 209. Lastly, the Court cited to *Laird v. Tatum,* a 1972 case that dismissed a challenge to an Army intelligence-gathering program on standing grounds, holding that allegations of a "'subjective chill' are not an adequate substitute for a claim of present objective harm or a threat of specific future harm." 408 U.S. 1, 13-14.

[58] *Clapper*, 133 S. Ct. at at 1143.

[59] *Id.* at 1150.

[60] *Id.* at 1148.

[61] This assumption not only implicates injury concerns, but also implicates redressability concerns. As the Court noted, even if the plaintiffs could demonstrate injury because of government surveillance, a court, to be able to redress the injury, had to know that the surveillance was a product of section 702, as opposed to, for example, a warrant issued pursuant to the Fourth Amendment. *Id.*at 1148.

[62] The fact that the plaintiffs' future injury theory was based on the assumption that another government agency would take a particular action made *Clapper* similar to *Whitmore* v. *Arkansas*, 495 U.S. 149 (1990), where the Court found that a petitioner, whose standing theory was based on the assumption that a federal court would issue habeas relief, lacked standing to challenge his state court death sentence. *Id.* at 156-157.

[63] *Clapper*, 133 S. Ct. at 1148-1150.

[64] *Id.* at 1150.

[65] *Id.* at 1149 n.4.

[66] *Id.* ("[T]he court's postdisclosure decision about whether to dismiss the suit for lack of standing would surely signal to the terrorist whether his name was on the list of surveillance targets.").

The Court also rejected the argument that the plaintiffs had already been injured because they had incurred expenses in taking measures to avoid being monitored while talking with their foreign contacts.[67] Specifically, Justice Alito stated that a plaintiff cannot "manufacture standing" by choosing to make expenditures on a hypothetical future harm or else an "enterprising plaintiff would be able to secure ... standing simply by making an expenditure based on a nonparanoid fear."[68] The Court also noted that any expenses that the plaintiffs incurred to avoid government monitoring were not the product of section 702, but of their own subjective fear of surveillance, and, as a result, failed to meet the second requirement of Article III standing that injury be caused by the challenged conduct.[69]

### The Dissenting Opinion

Justice Breyer filed a dissenting opinion for four members of the Court.[70] The dissenting opinion's central disagreement with the majority opinion was with respect to the "certainly impending" standard for evaluating whether a plaintiff had standing to complain of a future injury.[71] Specifically, the dissenters found that while the Court had used the language of "certainly impending" in the past, it was never meant to be a necessary standard by which to adjudge an injury-in-fact.[72] Instead, akin to the Second Circuit's "objectively reasonable likelihood" of injury test, the dissenters argued that the Court should have used a standard of "reasonable probability" or "high probability" to determine "standing" instead of a standard that the injury must be "certainly impending."[73] If the probabilistic standard were used in this case, the dissenters said, the challengers would have met it because the government had a strong motive and the capacity to engage in the interception of communications of the litigants.[74]

## Future of Litigation Challenging the Foreign Surveillance Practices

Four months after the Supreme Court's ruling in *Clapper* came the avalanche of news stories alleging that the U.S. intelligence community was engaged in broad intelligence gathering measures, including the capturing of a broad universe of records from particular companies.[75] The

[67] *Id.* ("Respondents' alternative argument – namely, that they can establish standing based on the measures that they have undertaken to avoid § 1881a-authorized surveillance – fares no better.").

[68] *Id.* at 1151. For example, the Court noted that if the alternative held, a plaintiff, for the price of a plane ticket, could transform their standing burden such that a response to a subjective fear that was not otherwise "fanciful, irrational, or clearly unreasonable" would be sufficient to bestow the court with jurisdiction. *Id.*

[69] *Id.* at 1152.

[70] *Id.* at 1163 (Breyer, J., dissenting).

[71] *Id.*

[72] *Id.* at 1164 ("The majority cannot find support in cases that use the words 'certainly impending' to deny standing. While I do not claim to have read every standing case, I have examined quite a few, and not yet found any such case."); *see also id.* at 1160 ("Sometimes the Court has used the phrase 'certainly impending' as if the phrase described a *sufficient,* rather than a *necessary,* condition for jurisdiction") (emphasis in original).

[73] *Id.* at 1165.

[74] *Id.*

[75] *See supra* "Introduction"

question, raised by some,[76] is whether recent media accounts, coupled with the government's acknowledgement of a vast surveillance program, breathe new life into the *Clapper*-like challenges to government surveillance.

On one hand, the ability of a plaintiff to muster enough evidence to establish standing has been arguably boosted by recent revelations about government surveillance efforts. For example, the ACLU's recent lawsuit against the government challenging the use of section 215 of the Patriot Act to cull telephone metadata alleges that the plaintiffs are either former recent or "current customers of Verizon ..."[77] The *ACLU* Complaint, noting media reports that have published an order from the FISC directing Verizon to produce "all call detail records or 'telephony metadata'" of its customers, including those "wholly within the United States,"[78] alleges that as a customer of Verizon, the ACLU and other plaintiffs' records are covered by the court order and given to the government.[79] Likewise, in its petition to the Supreme Court challenging the FISC order requiring Verizon to produce certain metadata, EPIC, a privacy advocacy group, also contends that it is a Verizon customer and subject to the FISC order.[80] A lawsuit brought by former federal prosecutor Larry Klayman, which challenges both the telephony metadata gathering program and the PRISM program, makes a similar allegation.[81] The newly filed legal challenges also note that the surveillance threatens confidential work that the litigants respectively undertake, such as communicating with potential "witnesses, informants, or sources."[82] As such, the arguments of the new litigants on how they have been injured are more specific and theoretically less speculative than the arguments made by the plaintiffs in *Clapper*. For example, unlike the plaintiffs in *Clapper*, the *ACLU* plaintiffs and EPIC can prove that the government has obtained court approval and is using specific authority to acquire data that necessarily includes the data pertaining to the litigants' communications.[83] Moreover, the ACLU's and EPIC's respective lawsuits are arguably distinguishable from *Clapper* suit. The new lawsuits challenge a concrete application of a statute[84] premised on past and future injuries.[85] In *Clapper*, by contrast, the

[76] *See, e.g.,* Ty McCormick, "Does the PRISM leak expose the NSA's surveillance program to legal challenge," *Foreign Policy*, June 10, 2013, http://blog.foreignpolicy.com/posts/2013/06/10/does_edward_snowden_leak_expose_nsa_s_surveillance_program_to_legal_challenge.

[77] *See ACLU* Compl. ¶¶ 28-29.

[78] *Id.* ¶ 30. While some may argue that the illegal disclosure of a classified document cannot be used to support standing, in civil cases, even illegally obtained evidence may be admissible at trial. *See State v. Taylor*, 721 S.W.2d 541, 551 (Tex. App. 1986) ("Evidence illegally obtained is admissible in civil cases under the common-law rule.") (citing 8 Wigmore, *Evidence* § 2184a (McNaughton ed. 1961)); *see also Sims v. Cosden Oil & Chem. Co.*, 663 S.W.2d 70, 73 (Tex. App. 1983) ("[C]ourts do not concern themselves with the method by which a party to a civil suit secures evidence pertinent and material to the issues involved . . . hence evidence which is otherwise admissible may not be excluded because it has been illegally and wrongfully obtained.").

[79] *See ACLU* Compl. ¶ 35.

[80] *See EPIC* Pet. at 10

[81] *See Klayman* Compl. ¶ 11 (alleging that plaintiff Klayman is a subscriber and user of Verizon Wireless, Apple, Microsoft, YouTube, Yahoo, Google, Facebook, AT&T, and Skype).

[82] *See ACLU* Compl. ¶ 26; *see also Klayman*, Compl. ¶ 56; *EPIC* Pet. at 11 ("EPIC attorneys use EPIC's telephones to conduct privileged attorney-client communications regarding ongoing legal proceedings.")

[83] *Cf. Clapper*, 133 S. Ct. at 1149-50 (rejecting standing because plaintiffs could not demonstrate that the government is interested in acquiring certain communications and that the FISC would authorize the acquisition of such communications).

[84] The ACLU's lawsuit is premised on the argument that the government's conduct, denoted as "Mass Call Tracking," was a misapplication of the authority provided in the Patriot Act and violated the First and Fourth Amendments. *See ACLU* Compl. ¶¶ 36-38. Similarly, EPIC's petition argues that the FISC has misinterpreted the Patriot Act when issuing an order that necessarily included metadata regarding EPIC's communications. *See EPIC* Pet. at 19 ("The FISC lacks the legal authority to order programmatic domestic surveillance under 50 U.S.C. § 1861.")

Supreme Court was only addressing litigation where the plaintiffs did not allege any past or ongoing interception of their communications, but only the possibility of *future* interception, which appears to strengthen the standing arguments for the newly filed lawsuits.[86] Moreover, while the fact that plaintiffs like the ACLU and EPIC are complaining of an injury that is arguably shared by the millions of other Verizon customers, that fact in and of itself does not make the claim a generalized grievance.[87]

Nonetheless, while recent revelations in the press may have helped boost an argument for establishing standing, demonstrating Article III standing remains a difficult task, especially in light of *Clapper*. While the plaintiffs, such as those in the *ACLU, Klayman,* and *EPIC* cases may be able to demonstrate that they use Verizon in their communications and that Verizon's data is the subject of a FISC order, the litigants are still arguably making a series of the same assumptions that troubled the *Clapper* court. For example, the plaintiffs in these newly filed cases still have "no actual knowledge of the Government's ... targeting practices," and are assuming not only that the government has been successful in acquiring the data in question[88] but also that the government is actually using or it is "certainly impending" that the government will use targeting techniques that cause the specific injury alleged, an erosion of the confidentiality of certain communications.[89] For example, the ACLU's complaint merely speculates that the information provided to the government "*could* readily be used to identify those who contact Plaintiffs for legal assistance ..."[90] Similar statements were viewed as insufficient to establish standing in *Clapper,* as having the capability to injure cannot be equated with the concept that an injury is

(...continued)

[85] *See ACLU* Compl. ¶¶ 28-35; *EPIC* Pet. at 10 ("EPIC is also Verizon customer, and has been for the entire period the FISC order has been in effect.").

[86] *Clapper*, 133 S. Ct. at 1150; *see also Jewel v. NSA,* 673 F.3d 902, 911 (9th Cir. 2011) ("Jewel has much stronger allegations of concrete and particularized injury than did the plaintiffs in *Amnesty International*. Whereas they anticipated or projected future government conduct, Jewel's complaint alleges past incidents of actual government interception of her electronic communications, a claim we accept as true."). However, the Court in *Lyons* established that to demonstrate standing to obtain equitable relief, as both new lawsuits seek, a plaintiff must show a "sufficient likelihood" that an individual will be wronged. 461 U.S. at 111. Arguably, the *Clapper* Court further defined the sufficient likelihood standard as being "certainly impending." *See Clapper*, 113 S. Ct. at 1160 (Breyer, J., dissenting) (arguing that the *Clapper* majority had displaced other standards for measuring imminence, including "substantial likelhood," with a certainty standard). Nonetheless, lawsuits, like the Klayman suit, which seeks monetary damages, *see Klayman* Compl. ¶ 116 (seeking $20 billion in damages), can establish standing based on past injury alone. *See Taylor v. Stewart*, 479 Fed. Appx. 10, 13 (7th Cir. 2012) ("Injunctive relief requires future injury whereas damages require past injury . . .").

[87] *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 686-688 (1973).

[88] For example, the *ACLU* Complaint and the *EPIC* Petition do not allege that Verizon is complying with the order or that the government has been able to utilize the data allegedly provided in any particularly useful way. *Cf. Clapper*, 133 S. Ct. at 1150 ("Even if the Government were to obtain the Foreign Intelligence Surveillance Court's approval to target respondents' foreign contacts under §1881a, it is unclear whether the Government would succeed in acquiring the communications of respondents' foreign contacts."). Moreover, it may be equally speculative that the government is using section 215 of the Patriot Act (in the case of the *ACLU* complaint and the EPIC petition) or section 702 of the FISA (in the case of the *Klayman* complaint), as opposed to other sources of legal authority, to acquire plaintiffs' records. *See id.* at 1149 ("Second, even if respondents could demonstrate that the targeting of their foreign contacts is imminent, respondents can only speculate as to whether the Government will seek to use § 1881a authorized surveillance (rather than other methods) to do so. The Government has numerous other methods of conducting surveillance, none of which is challenged here.")

[89] *See Clapper*, 133 S. Ct. at 1148 ("[I]t is speculative whether the Government will imminently target communications to which respondents are parties.").

[90] *See ACLU* Compl. ¶ 35 (emphasis added).

"certainly impending."[91] An "individual's ... fear that, armed with the fruits of" the surveillance, the government "might in the future take some *other* and additional action detrimental to that individual" is not a "specific present objective" injury sufficient to demonstrate Article III standing.[92]

While the plaintiffs and the petitioner in the newly filed litigation will likely argue that the general existence of a known surveillance program causes a chilling effect, resulting in an injury,[93] it is questionable whether that injury in and of itself is sufficient to establish Article III standing. The Supreme Court in 1972 rejected the argument that standing can be crafted from the "very existence of ... [a] data-gathering system produc[ing] a constitutionally impermissible chilling effect."[94] An "abstract injury" is not enough for standing, but instead a plaintiff must show that the injury is both "real and immediate."[95] It is unclear whether claims that surveillance that is alleged to have the potential to erode the confidentiality of certain conversations is a sufficiently concrete and particularized injury necessary to demonstrate constitutional standing. Relatedly, where the injury alleged is of an "abstract and indefinite nature" and shared by "large numbers of Americans," the Court has found that the "political process, rather than the judicial process, may provide the more appropriate remedy for" such a "widely shared grievance."[96]

Finally, as *Clapper* makes clear, any attempt by a plaintiff to try to obtain evidence to substantiate claims regarding the sufficiency of a particular injury will likely not go very far. The *Clapper* Court reiterated that it was the plaintiffs' burden to "prove their standing by pointing to specific facts."[97] Attempts to obtain discovery of specific evidence to prove standing may face other obstacles, such as the state secrets doctrine.[98] In addition, the *Clapper* court called requests for *in camera* review by a district court of evidence to determine if the state secrets doctrine is even applicable "puzzling" because of its potential to disclose to terrorists details about the actual targets of government surveillance.[99] As a consequence, an affidavit from the government that the state secrets doctrine is applicable to any discoverable material may be sufficient to squash any efforts at jurisdictional discovery aimed at establishing standing. Given this and given the *Clapper* court's statement that the standing inquiry must be "especially rigorous" in cases seeking

[91] *See Clapper*, 133 S. Ct. at 1148 ("Instead, respondents merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired under § 1881a."); *see generally id.* at 1147 ("Thus, we have repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact," and that '[a]llegations of *possible* future injury' are not sufficient.")

[92] *Laird*, 408 U.S. at 11-13 (emphasis in original); *see also United Presbyterian Church v. Reagan,* 738 F.2d 1375, 1378 (D.C. Cir. 1984) ("All the Supreme Court cases employing the concept of 'chilling effect' involve situations in which the plaintiff has unquestionably suffered some concrete harm (past or immediately threatened) apart from the 'chill' itself.") (Scalia, J.).

[93] Indeed, this is the argument that EPIC makes in its petition to the Supreme Court. *See EPIC* Pet. at 34 ("A non-profit advocacy group engaging in political speech must be able to have private telephone communications without fear of constant monitoring by the government.")

[94] *Laird,* 408 U.S. at 13 ("Allegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.").

[95] *Lyons*, 461 U.S. at 684.

[96] *See FEC v. Akins,* 524 U.S. 11, 23 (1998) (citing several cases).

[97] *Clapper,* 133 S. Ct. at 1149 n.4.

[98] *See, e.g., Al-Haramain Islamic Found., Inc. v. Bush,* 507 F.3d 1190, 1205 (9th Cir. 2007) (holding that evidence that is privileged under the state secrets doctrine cannot be admitted to establish standing). For more on the state secrets privilege, *see* CRS Report R41741, *The State Secrets Privilege: Preventing the Disclosure of Sensitive National Security Information During Civil Litigation*, by Todd Garvey and Edward C. Liu.

[99] *Clapper,* 133 S. Ct. at 1149 n.4.

a court to "review actions of the political branches in the fields of intelligence gathering and foreign affairs,"[100] it appears that standing will remain an obstacle for litigants challenging government surveillance programs.[101] As a consequence, the recent news accounts and disclosures by the government may not be enough to allow a federal court to reach the merits of the legality of certain government surveillance efforts.[102]

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[100] *Id.* at 1147.

[101] Additionally, at least with respect to lawsuits challenging the government gathering of the metadata created by third parties on Fourth Amendment grounds, there may be other standing concerns. Fourth Amendment rights are personal and may be enforced only by persons whose own protection under the Amendment has been violated. *Rakas v. Illinois,* 439 U.S. 128, 133-34 (1978). A person who is aggrieved through an illegal search of a third person's premises or property "has not had any of his Fourth Amendment rights infringed." *Id.* In the case of acquiring metadata created by Verizon, which reportedly does not include the "substantive content of any communication" or the "name, address, or financial information of a subscriber or customer," *see supra* Greenwald footnote 1, it is arguable that the data involved is Verizon's and that an individual has no possessory interest in that data.

[102] As the recent news accounts demonstrate, however, the stories and available information about alleged government surveillance efforts are extremely fluid, and additional information could change the calculus with respect to whether a particular plaintiff has standing to sue.