

# **No Leg to Stand On: *Clapper v. Amnesty International USA* and the Dawn of an Increasingly Strict Standing Doctrine**

SEAN J. WRIGHT\*

In *Clapper v. Amnesty International USA*,<sup>1</sup> the Supreme Court recently held that a group of reporters, human rights activists, attorneys, and labor organizations lacked Article III standing to challenge the constitutionality of § 702 of the Foreign Intelligence Surveillance Act (FISA).<sup>2</sup> This 5–4 decision deals another blow to plaintiffs seeking to challenge government action. The Court’s sweeping language represents a harbinger of a more restrictive standing doctrine in the federal courts that will especially hinder civil rights and environmental plaintiffs.

## I. CLAPPER V. AMNESTY INTERNATIONAL USA

The challenged FISA section was created through the FISA Amendment Act of 2008 (FAA) and was meant to provide additional authority to address the challenges of international terrorism. The amendments established a broad authority in information collection.<sup>3</sup> This new framework, codified at 50 U.S.C. § 1881a, permits the Government to seek Foreign Intelligence Surveillance Court (FISC) approval of surveillance of non-U.S. persons abroad (and, incidentally, at home). The Government is required neither to demonstrate probable cause that the surveillance target is a foreign power or agent, nor to specify the nature and location of surveillance.<sup>4</sup>

*Clapper* involved a facial constitutional challenge to § 1881a. The plaintiffs’ jobs required them to communicate with foreign contacts regarding matters that could be deemed related to foreign intelligence information.<sup>5</sup> Consequently, their international communications could be intercepted, and as a

---

\*J.D. Candidate, The Ohio State University Moritz College of Law, expected 2013; M.A. in Public Policy and Management Candidate, The Ohio State University John Glenn School of Public Affairs, expected 2013; B.A. in Political Science and History, Miami University, 2009. I would like to thank Professor Christopher Walker for his helpful comments and continued support.

<sup>1</sup> 133 S. Ct. 1138 (2013).

<sup>2</sup> *Id.* at 1154–55 (referring to 50 U.S.C. § 1881a (2006 & Supp. V)).

<sup>3</sup> *Id.* at 1144 (citing DAVID KRIS & DOUGLAS WILSON, NAT’L SEC. INVESTIGATIONS & PROSECUTIONS § 9:11 (2d ed. 2012)).

<sup>4</sup> KRIS & WILSON, *supra* note 3, at § 16:16.

<sup>5</sup> See Brief in Opposition at 10, *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013) (No. 11-1025). The plaintiffs discussed a variety of reasons additional preventative actions were necessary, including the fear of surveillance inhibiting their ability to cultivate new sources or obtain information from family members and potential clients. *Id.* at 11. Additionally, the attorney-plaintiffs suffer an added burden from their professional obligation to ensure communications with clients remain confidential. *Id.* at 12.

result of this fear, they took costly, preventative measures to guard against interception.<sup>6</sup>

Both parties moved for summary judgment.<sup>7</sup> The plaintiffs argued that § 1881a violated the Fourth and First Amendments, Article III, and the separation of powers principle; and thus asked the court to permanently enjoin surveillance under the FAA.<sup>8</sup> The Government argued that plaintiffs lacked standing to sue. The district court agreed with the Government, finding that the plaintiffs lacked standing because they did not have a “personal, particularized, concrete injury in fact” and were not subjected to surveillance under the FAA.<sup>9</sup>

The Second Circuit reversed.<sup>10</sup> The court held that there was an objectively reasonable likelihood that the plaintiffs’ communications would be intercepted in the future and that the plaintiffs were suffering present injuries based on a reasonable fear of future governmental conduct.<sup>11</sup> The Second Circuit denied rehearing en banc by a bitterly divided vote.<sup>12</sup> Based on this, and “[b]ecause of the importance of the issue and the novel view of standing adopted by the Court of Appeals,” the Supreme Court granted further review.<sup>13</sup>

Ultimately, in an opinion authored by Justice Alito, the Court reversed the Second Circuit, particularly because the claim was premised on a series of speculative fears. The core of the Court’s reasoning was that too many speculative steps were needed to establish an injury.<sup>14</sup> The Court directed its reasoning to the first two prongs in standing analysis: injury and causation.

For the injury analysis, without showing any threat of government interception of communication that was “certainly impending,” the plaintiffs could not establish a sufficient injury in fact.<sup>15</sup> The Court also quickly addressed the second injury argument raised—that the preventative measures taken by plaintiffs (based upon fear of interception) was a sufficient injury. To permit this, the Court stated, would “water[] down the fundamental

---

<sup>6</sup> *Id.* at 16.

<sup>7</sup> *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 127 (2d Cir. 2011).

<sup>8</sup> *Clapper*, 133 S. Ct. at 1146.

<sup>9</sup> *Amnesty Int’l USA v. McConnell*, 646 F. Supp. 2d 633, 644, 658 (S.D.N.Y. 2009).

<sup>10</sup> *Amnesty Int’l USA*, 638 F.3d at 122.

<sup>11</sup> *Id.* at 133–34, 138–39.

<sup>12</sup> *Amnesty Int’l USA v. Clapper*, 667 F.3d 163, 164 (2d Cir. 2011) (en banc) (noting that the Court denied rehearing by a six to six vote).

<sup>13</sup> *Clapper*, 133 S. Ct. at 1146.

<sup>14</sup> *Id.* at 1148. (“[R]espondents’ argument rests on their highly speculative fear that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under § 1881a rather than utilizing another method of surveillance; (3) the Article III judges who serve on the [FISC] will conclude that the Government’s proposed surveillance procedures satisfy § 1881a’s many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents’ contacts; and (5) respondents will be parties to the particular communications that the Government intercepts.”).

<sup>15</sup> *Id.* at 1143.

requirements of Article III.”<sup>16</sup> However, footnote 5 muted this hard line. Justice Alito stated that a “substantial risk” of future harm would be sufficient when a plaintiff pleads and proves concrete facts showing that the defendant’s actions caused the risk.<sup>17</sup>

Further, the plaintiffs were unable to establish a causal link between the harm and the Government. The Court held that the alleged harm was tenuously connected to the Government’s potential future surveillance. Without a “certainly impending” harm, the plaintiffs could not manufacture injury by inflicting themselves through economic expenditures.<sup>18</sup>

Justice Breyer, writing for the four dissenters, vigorously opposed the majority’s reliance upon the “certainly impending” standard. In fact, Justice Breyer argues that in footnote 5, “the majority appears to concede, *certainty* is not, and never has been, the touchstone of standing.”<sup>19</sup> Throughout his dissent, Justice Breyer highlights that the uncertainty of future harm has not been dispositive; rather, the Court has routinely entertained actions for injunctive and declaratory relief aimed at preventing future activities that were reasonably likely or highly likely to occur. The dissenters would have found the likelihood of future interception of confidential communications abroad sufficiently likely to establish standing.<sup>20</sup>

## II. THE CONTINUATION OF A STRICTER STANDING DOCTRINE UNDER THE ROBERTS COURT

Under the Roberts Court, Article III standing has become a threshold question<sup>21</sup> that blocks public interest litigation.<sup>22</sup> *Clapper* fits the trend. But, the

---

<sup>16</sup> *Id.* at 1152.

<sup>17</sup> *Clapper*, 133 S. Ct. at 1150 n.5.

<sup>18</sup> *Id.* at 1151. Additionally, the Court found that many of the incentives to protect communications with their sources pre-existed the FAA; thus, the alleged harm could not be traced to the specific changes brought by the 2008 amendments. *Id.* at 1152.

<sup>19</sup> *Id.* at 1160 (Breyer, J., dissenting) (internal citation omitted).

<sup>20</sup> *Id.* at 1165. The dissent discussed a number of cases involving probabilistic injuries that were sufficient to support standing. *Clapper*, 133 S. Ct. at 1162–63. Also, the dissent reviewed cases where the Court found standing when future injuries were accompanied with present injuries based on efforts to mitigate these future effects. *Id.* at 1163–64. Finally, the dissent argues that the majority cannot find support in the cases that rely upon “certainly impending” to deny standing. *Id.* at 1164–65.

<sup>21</sup> See Jess Bravin, *Court Under Roberts Limits Judicial Power: Conservative Shift Sets Hurdles for Litigants; Businesses Get a Break*, WALL ST. J., July 2, 2007. But see Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1064 (2009) (discussing how the Roberts Court had made it easier for some litigants to pursue their claims in federal court).

<sup>22</sup> The term “public interest litigation” broadly refers to cases against government action—frequently in the context of environmental and civil rights litigation. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 555 (1992) (denying Article III standing for claims of injuries to interests in studying and observing wildlife overseas).

Court's broad language and reliance upon "certainly impending" harm to establish injury in fact could herald an even stricter standard for all claims. The application of *Clapper* by the lower courts is likely to be even more restrictive—throwing out civil rights and environmental suits on procedural grounds.<sup>23</sup>

*Clapper* coincides with a number of recent cases that have narrowly viewed standing requirements. In *Summers v. Earth Island Institute*,<sup>24</sup> the plaintiffs challenged a Forest Service regulation that exempted certain timber sales from public comment and administrative appeal. There, the plaintiffs based standing upon the regulation's impact on their aesthetic enjoyment and recreational use of the forest. The Court, in a 5–4 decision, found this harm too remote and unlikely to occur.<sup>25</sup> Specifically, while there was a chance this harm would occur, it was hardly likely that plaintiff's "wanderings will bring him to a parcel about to be affected."<sup>26</sup> In *Daimler Chrysler Corp v. Cuno*,<sup>27</sup> the Court found taxpayers challenging the constitutionality of a tax break offered to car manufacturers lacked standing because their injury depended upon two additional actions occurring before being harmed.<sup>28</sup>

The *Clapper* decision raises the already high bar for public interest plaintiffs. A straightforward reading of *Clapper* means, in contexts like environmental litigation, that plaintiffs would need to challenge discrete actions rather than overarching government regulations or policy statements.<sup>29</sup> *Clapper's* reliance upon the stricter "certainly impending" standard means plaintiffs must show a more particularized injury to sue. For example, since scientific disagreement on future harm based on exposure to environmental toxins exists, it may be virtually impossible for a claimant to show with *certainty* that their exposure will lead to imminent harm.<sup>30</sup> This places environmental groups with limited resources at a strategic disadvantage.

---

<sup>23</sup> See Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 879–80 (2008) ("The Supreme Court's increasingly prominent conservative center of gravity coincides with an overwhelmingly conservative set of federal courts of appeals.").

<sup>24</sup> 555 U.S. 488 (2009).

<sup>25</sup> *Id.* at 495–96.

<sup>26</sup> *Id.* at 495.

<sup>27</sup> 547 U.S. 332 (2006).

<sup>28</sup> *Id.* at 344 (including the depletion of local treasures resulting in the state legislature raising taxes to compensate for the loss).

<sup>29</sup> Eric Biber, *Did the Supreme Court Just Shut the Courthouse Door on Environmental Plaintiffs?*, LEGAL PLANET (Mar. 1, 2013), <http://legalplanet.wordpress.com/2013/03/01/did-the-supreme-court-just-shut-the-courthouse-door-on-environmental-plaintiffs/>.

<sup>30</sup> These concerns are not unrealistic. See *Natural Res. Def. Council v. EPA*, 440 F.3d 476, 484 (D.C. Cir. 2006), *rev'd en banc*, 464 F.3d 1 (D.C. Cir. 2006) (initially finding that plaintiffs lacked standing even when they could establish that exposure to methyl bromide would increase cancer deaths in the United States).

This result can be replicated in most public interest-oriented litigation. For example, in *City of Los Angeles v. Lyons*,<sup>31</sup> a plaintiff challenging the citywide use of a deadly chokehold could not establish standing to enjoin the policy because it was unlikely he would be subjected to the chokehold again.<sup>32</sup> But, hypothetical scenarios can be imagined.<sup>33</sup> Under *Clapper*, these scenarios would never reach a level of certainty. Without subjecting themselves to a potentially harmful policy, a plaintiff's claims will be barred by the heightened *Clapper* standard.

Additionally, there is merit to the belief that this case is really about ripeness<sup>34</sup> rather than standing.<sup>35</sup> This distinction has caused recent confusion; the parties in *Summers* believed ripeness would be dispositive before the Court ruled on standing grounds.<sup>36</sup> If plaintiffs must wait to challenge discrete actions to meet the "certainly impending" standard, earlier challenges will not be ripe for review. The Court can clarify the standing-ripeness boundaries next term when it reviews challenges to National Forest planning decisions.<sup>37</sup> Simultaneously, this case may be a simple example of the Court's hesitancy to weigh-in on national defense and security issues.<sup>38</sup>

Regardless, *Clapper's* impact should influence not only how plaintiffs determine what challenges to raise and how to plead their case, but also how defendants should respond to the suit. Now, plaintiffs will be required to wait until actual injury has occurred.<sup>39</sup> Primarily, this will "force plaintiffs to focus on challenging individual projects [or actions], rather than agency regulations or policy statements."<sup>40</sup> In doing so, litigation will inevitably develop around the

---

<sup>31</sup> 461 U.S. 95 (1983).

<sup>32</sup> *Id.* at 109.

<sup>33</sup> Lyons would need to establish factors which illustrate that future harm is not speculative by personalizing the likely future harm. See *Thomas v. Cnty. of L.A.*, 978 F.2d 504, 508 (9th Cir. 1992) (noting that plaintiffs lived within a six to seven block area where repeated occurrences of police mistreatment occurred).

<sup>34</sup> Ripeness is the doctrine which states that judicial review is premature until the government program is applied in a particular context. See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990).

<sup>35</sup> Biber, *supra* note 29.

<sup>36</sup> See Eric Biber & Amanda Leiter, *Ripeness and Standing in Environmental Law*, CONST. L. COMM. NEWSL. (A.B.A. Sec. of Env't, Energy, & Res., Chicago, Ill.), June 2009, at 3.

<sup>37</sup> *Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012 (9th Cir. 2012), *cert. granted sub nom.*, *U.S. Forest Serv. v. Pac. Rivers Council*, 81 U.S.L.W. 3293 (U.S. Mar. 18, 2013) (No. 12-623).

<sup>38</sup> Nina Totenberg, *Supreme Court Makes It Harder to Challenge Foreign Intelligence Surveillance Act*, NPR (Feb. 26, 2013, 3:00 PM), <http://www.npr.org/2013/02/26/172998760/supreme-court-makes-it-harder-to-challenge-foreign-intelligence-surveillance-act>.

<sup>39</sup> This is because "plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm." *Clapper*, 133 S. Ct. at 1150 n.5 (majority opinion).

<sup>40</sup> Biber, *supra* note 29.

scope of footnote 5. As Justice Breyer's dissent insists, and the Court's language suggests, the degree of certainty required is amorphous.<sup>41</sup> Discerning when courts can rely upon a "substantial risk" rather than the "certainly impending" standard is unclear at best. Ultimately, the *Clapper* decision presents itself as a continuation in the trend of heightened procedural hoops for public interest plaintiffs seeking access to the federal court. Now, more than ever, the Roberts Court seems disinterested in "throw[ing] open the doors of the United States courts."<sup>42</sup>

---

<sup>41</sup> *Clapper*, 133 S. Ct. at 1160 (Breyer, J., dissenting) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 n.2 (1992) ("[I]mminence is concededly a somewhat elastic concept.") (internal quotation marks omitted)).

<sup>42</sup> *Patsy v. Bd. of Regents of Florida*, 457 U.S. 496, 504 (1982).