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NEWSLETTER

Do Lawyers Have Standing to Challenge Surveillance of Client Calls?

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On May 21, the U.S. Supreme Court announced that it will review this fall a Second Circuit decision holding that lawyers do have standing to challenge a statute authorizing broad surveillance of their foreign clients. *Clapper v. Amnesty International USA*, No. 11-1025. Review was requested by the government, which seeks to block judicial scrutiny of expanded statutory authority to monitor calls and emails with certain foreigners under a 2008 amendment to the Foreign Intelligence Surveillance Act (FISA). The upcoming decision on standing to sue could well have important future implications for whether courts will hear challenges to statutes authorizing dragnet surveillance.

The Suit Below

The litigation arose from a facial challenge, seeking declaratory and injunctive relief, as to Section 702 of the Foreign Intelligence Surveillance Act (50 USC §1881a), added by the FISA Amendments Act of 2008. The 2008 amendment changed the FISA procedures federal officials are required to follow to obtain authorization to conduct electronic surveillance for foreign intelligence purposes.

Prior to the amendment, FISA required that the Government obtain approval from a Foreign Intelligence Surveillance Court (FISC) judge of an application for specific surveillance activities directed toward a specific foreign target. The FISC judge entered a specific authorizing order based on a probable cause determination. Under the challenged amendment, the plaintiffs contended, the government did not have to specify individual targets, and the FISC did not make any probable cause finding. The plaintiffs argued this statutory change authorized the government to obtain broad authority such as to

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monitor all "telephone and e-mail communications to and from countries of foreign policy interest—for example, Russia, Venezuela, or Israel—including communications made to and from U.S. citizens and residents." The plaintiffs, objecting that the new procedures permit broader collection of intelligence with less judicial oversight, sought to challenge them as facially violating the Fourth Amendment, the First Amendment, Article III of the Constitution and the principle of separation of powers.

The district court granted the Government's motion for summary judgment of dismissal, ruling that the plaintiffs lacked standing, because they had not shown their communications had been surveilled or would be surveilled imminently. The plaintiffs appealed the dismissal to the U.S. Court of Appeals for the Second Circuit.

The Second Circuit Ruling

The Second Circuit reversed, holding that the plaintiffs did have standing to sue. *Amnesty International USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011). Judge Gerrard E. Lynch, writing for a unanimous panel that included Circuit Judges Calabresi and Sack, noted that one of the lawyer plaintiffs represents and communicates with a Saudi Arabian resident who had faced charges in the September 11 terror attacks and is a defendant in related pending civil cases. He also represents Khalid Sheik Mohammed and, in doing so, communicates with Mohammed's family members, experts and investigators around the world. Another attorney plaintiff represents a "Guantanamo Bay prisoner" who allegedly acted as an al Qaeda liaison and, in that representation, communicates with the client's brother in Germany and with foreign co-counsel.

The plaintiff attorneys maintained that such clients were themselves, or were in countries that likely would be, the targets of broad Government foreign intelligence surveillance under Section 702. Surveillance of such foreign persons would in turn result in interception of communications to or from the attorneys in the U.S. made in the course of their representations. The plaintiffs maintained that surveillance would likely produce interception by the government of attorney-client privileged communications and attorney strategy deliberations. They reasoned that to satisfy the attorney's ethical duty to safeguard confidential information, they were required to forego phone call and email communications with such clients. To communicate with them, the attorneys had to speak face-to-face, which increased their time expenditures and travel costs.

To establish standing, a plaintiff must establish "an injury in fact, a causal connection between the injury and the challenged statute, and redressability." The Second Circuit panel found that standard met because the "plaintiffs have established that they have a reasonable fear of injury and have incurred costs to avoid it," and an injunction would prohibit "the feared surveillance."

Rehearing *En Banc* Denied

The Government then sought reconsideration by the full Second Circuit Court of Appeals, which was denied by a 6 to 6 tie vote of the active judges, with panel members Calabresi and Sack not participating because they were senior judges. This denial was accompanied by extensive opinions by judges who believed full review was warranted, as well as by an extensive "concurrence" by Judge Lynch responding to the dissenters.

The dissenters contended that *en banc* review was warranted, because the panel decision did not follow Supreme Court precedent and would create a split between circuits, based on decisions where standing was denied on the ground that the claimed injury was speculative. They felt the plaintiffs had not established "actual or imminent FAA interception." The dissenters also questioned whether the plaintiffs and the panel decision had established that the suit could redress the injury claimed. They asserted that the requested injunction against Section 702 would not protect the plaintiffs' communications because of the "universe of alternative electronic surveillance options available to the [U.S.] government" and the electronic surveillance presumably conducted by other governments.

Supreme Court Review

The government's petition for Supreme Court review postured the issue as whether standing fails where plaintiffs "proffered no evidence that the United States would imminently acquire their communications" and did not show an injunction "would likely redress their purported injuries." Those will be the matters the Court will consider during its term beginning this October.