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## Rights, but no remedies

Erwin Chemerinsky is dean and distinguished professor of law at the University of California, Irvine School of Law.



Is it possible that the U.S. government could systematically violate the First and Fourth Amendment rights of large numbers of its citizens, but no court could stop it? This seems unthinkable, but it is exactly what the Supreme Court recently held in *Clapper v. Amnesty International*, 2013 DJDAR 2452 (Feb. 23, 2013).

The court ruled 5-4 that no one has standing to challenge the secret wiretapping authorized by the Foreign Intelligence Surveillance Act (FISA) because no one can know if his or her communications were actually intercepted.

In 2008, Congress amended FISA to allow the government to intercept electronic communications with persons in foreign countries. Unlike under the previous version of FISA, the government is not required to show that the target of the electronic interception is an agent of a foreign power or to specify the nature and location of each place at which the electronic surveillance will occur. Upon the issuance of an order from the Foreign Intelligence Surveillance Court, "the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year ... the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." Interceptions include communications between these persons in foreign countries and those in the U.S.

On the day that the 2008 amendments were enacted, a lawsuit was brought on behalf of attorneys and human rights, labor, legal and media organizations who alleged that their work requires them to engage in sensitive and sometimes privileged telephone and email communications with colleagues, clients, sources and other individuals located abroad. The plaintiffs said that they believed that some of the people with whom they exchange foreign intelligence information are likely targets of surveillance. They claimed that their communications were chilled because of fear of interception and thus that their First Amendment rights were violated.

For example, plaintiff lawyers said that the concern over the interception of attorney-client communications required that they refrain from electronic communications altogether with those in foreign countries who might be targets of surveillance. The lawyers said that the only way to ensure secure communications with their clients would be to travel to the foreign countries at great cost and inconvenience.

The Supreme Court, in an opinion by Justice Samuel Alito, ordered the case dismissed and held that the plaintiffs lacked standing because they could not show that it was likely that their communications would be intercepted. The court declared: "[I]t is speculative whether the Government will imminently target communications to which respondents are parties." Because the government does not reveal which communications it intercepts under FISA, the court said that the plaintiffs "merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired."

### Government

#### Lawyers amplify chief justice's call for court funding

Chief Justice Tani G. Cantil-Sakauye warned of the consequences of recent budget cuts for the state's courts in her second annual "State of the Judiciary" address as lawyers walked the halls of the capitol urging legislators to support better

### Intellectual Property

#### Proposed FTC settlement with Google stirs divisions among technology companies

The Federal Trade Commission's proposed settlement with Google Inc. has lawyers for technology companies buzzing about how the outcome might affect their clients as well.

### Law Practice

#### Heller scores clawback victory for creditors

The Heller Ehrman LLP estate scored a major victory Monday in its pursuit of millions of dollars from four law firms that took on former Heller partners and allegedly profited from the unfinished business they brought with them.

### Houston firm opens Los Angeles office

Diamond McCarthy LLP, a national firm with a large presence in Texas, announced the opening of its first office west of Denver Monday, when it confirmed the launch of its new Los Angeles location.

### U.S. Court of Appeals for the 9th Circuit Television show clip is fair use in 'Jersey Boys' musical, 9th Circuit rules

A seven-second clip of Ed Sullivan in 1966 introducing the Four Seasons - shown as part of the current touring musical 'Jersey Boys' - is fair use under copyright law, a 9th U.S. Circuit Court of Appeals panel held Monday.

### Large Firms

#### Latham & Watkins LLP adds attorney from Manatt

Latham & Watkins LLP on Monday welcomed a litigator who represents Chinese and Taiwanese clients in a move intended to enhance the firm's ties with Asia and support its Asian practices.

### Corporate

#### WSGR, Goodwin assist in Trulia's follow-on offering

Wilson Sonsini Goodrich & Rosati PC and

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Nor would the court accept the fear of interception as a sufficient basis for standing. The court relied on its earlier decision in *Laird v. Tatum*, 408 U.S. 1 (1972). There the court dismissed a challenge to the Army's alleged spying on civilian groups, holding that the claim of speech being chilled was too speculative. The court in *Clapper* approvingly quoted *Laird*, which declared 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."

The result is that no one will have standing to challenge the constitutionality of the secret interception of communications between those in the U.S. and those in foreign countries. If these plaintiffs do not have standing, it is impossible to imagine who could sue. An allegedly unconstitutional government practice is rendered unreviewable in the courts. The court said that this does not matter. Quoting earlier decisions, the court stated: "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."

The court said that its decision did not fully insulate the government from judicial review. Justice Alito said, "if the Government intends to use or disclose information obtained or derived from a [Section] 1881a acquisition in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition." In other words, if the government chooses to use the information in a criminal prosecution, there can be a suppression hearing. But that would be focused on the admissibility of the specific evidence gained against that defendant; the suppression motion provides no opportunity for a court to hold that the secret surveillance inherently violates the First Amendment.

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The plaintiffs argued that the government's interception chills their communication and that this violates the First Amendment. The court's error was in failing to recognize that the loss of these communications is itself a harm within the meaning of the First Amendment. The plaintiffs' injury does not depend on whether their communications are actually intercepted, but instead on whether they had a reasonable fear that this would occur such that they refrained from electronic communications with these clients. The reasonable fear of communications being intercepted, and the resultant chilling of speech, should have been sufficient for standing.

The court required far more certainty of harm than it did in prior cases. Justice Stephen Breyer, writing for the dissent explained: "As our case law demonstrates, what the Constitution requires is something more akin to 'reasonable probability' or 'high probability.' The use of some such standard is all that is necessary here to ensure the actual concrete injury that the Constitution demands. ... [T]hat standard is readily met in this case."

The court does not deny, or even address, whether the secret interception of their communication violates the rights of American citizens. The court's opinion focused entirely on whether the plaintiffs had standing to bring the lawsuit. In other words, even assuming, as the court was required to do, a serious violation of the First Amendment, no one would have standing to challenge it. This just cannot be right.

Goodwin Procter LLP represented real estate search engine Trulia Inc. and its underwriters in the company's planned \$150 million follow-on offering announced Monday.

### Law Practice

#### Law firms give students real-world experience, tuition assistance

The Corporate Work Study at Verbum Dei High School, an all-male Jesuit preparatory school in Los Angeles, allows students to work four full days a month at law firms and companies in exchange for a cut to tuition.

### Government

#### State prison critics seize on 2011 report in overcrowding debate

Amid allegations that overcrowding in state prisons has led to deficiencies in inmate care, a discovery dispute has uncovered a report that pegged capacity of prisons at 103,470 inmates - nearly 6,000 fewer than a court-ordered limit.

#### Los Angeles court 'hubs' gain opposition

Los Angeles County residents facing eviction will soon have to travel farther to have their day in court. On March 18, people will have to file limited jurisdiction unlawful detainer cases in one of five regional "hub" courthouses.

### Mergers & Acquisitions

#### Dealmakers

A roundup of recent mergers and acquisitions and financing activity and the lawyers involved.

### Law Practice

#### Experts warn changes to immigration rules will spark fraud

If Congress enacts major immigration reform, one thing is certain: It will be accompanied by widespread fraud targeting illegal immigrants desperate for a path to legalization, according to experts speaking at a State Bar program Monday.

### Government

#### Officials scrap plans for tunnel in San Diego courthouse project

Court officials are nixing a small part of a costly and controversial San Diego courthouse project.

### U.S. Supreme Court

#### Rights, but no remedies

In *Clapper*, the Supreme Court held that the plaintiffs lacked standing to challenge a secret wiretap because they had no way of knowing whether their communications were actually intercepted. This cannot be right. By **Erwin Chemerinsky**

### Law Practice

#### Get that man a dog

Dogs take you places that you wouldn't ordinarily

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go and, in so doing, open your awareness, stimulate your curiosity, and lead you to new discovery. By **Timothy Tosta**

#### Intellectual Property

##### **Divided infringement claims revived**

A 2012 Federal Circuit decision restores a type of patent infringement claim that it had extinguished five years earlier. By **Stan Panikowski**

#### Criminal

##### **Rethinking California's approach to mentally ill defendants**

In the wake of a series of shootings by mentally ill men, I thought it would be instructive to examine one way California treats the mentally ill. By **Richard La Fianza**

#### Perspective

##### **Baseball, a unique antitrust exemption**

"The Baseball Trust" is about one of the oddest features of our legal system, the near-complete exemption of baseball from antitrust law.

#### Judicial Profile

##### **Rebecca Connolly**

Superior Court Judge Santa Cruz County (Santa Cruz)

#### Law Practice

##### **Lawyers must plan for unforeseen end to practice, experts say**

With the ranks of senior attorneys growing dramatically, some worry that many lawyers have failed to take proactive steps to plan for their inevitable departure from the practice of law.