Rights, but no remedies

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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 \textit{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."
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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.
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