

TIERS OF STANDING

The Supreme Court is charged with protecting the Constitution, but it is not a roving commission. It must wait for a case to arrive at its doorstep before determining whether the Constitution has been violated. Someone must claim that a policy or practice is unconstitutional and, in addition, show that he or she has been, or is likely to be, injured by it. Without this showing of injury, the Court will dismiss the suit on the theory that the party who initiated the suit or the plaintiff lacked “standing,” without ever addressing the merits of the claim advanced.

The standing requirement has, for generations, been a steadfast feature of our constitutional tradition.¹ Doctrinally, it has been understood as an extrapolation of Article III of the Constitution, which limits the jurisdiction of the federal judiciary to “cases” or “controversies.” In turn, the Court has read these terms to extend solely to those disputes in which the plaintiff is actually injured.

Text aside, the standing requirement has also been defended on the ground that it serves the constitutional principle requiring separation of powers. Cabining the jurisdiction of the judiciary to disputes where

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¹ Although the term “standing” first appears in Supreme Court decisions around the start of the twentieth century, it is rooted in concerns as old as the Constitution itself. See Daniel E. Ho and Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 Stan L Rev 591 (2010).

the plaintiff faces a threat of actual injury will, so it is argued, limit the judiciary to the task of adjudication and prevent it from usurping the functions of the legislative and executive branches of government, branches that also have the prerogative, even the duty, of construing the Constitution.

Others defend the standing requirement on more pragmatic grounds. It has been argued that it prevents the judiciary from wasting time on purely academic inquiries—matters of no practical import either for the operation of government or the lives of ordinary citizens. The standing requirement is also said to facilitate and strengthen the operation of our adversarial system, on the assumption that parties threatened with personal hardship will make more forceful presentations of the facts and law than litigants with merely abstract interests at stake.

In practice, the rigors of the standing requirement have shifted over time. During the 1960s, the heyday of the Warren Court, the standing requirement was read permissively—much in keeping with the broad conception of judicial power prevalent at that time. Starting in the mid-1970s, though, the Court became increasingly stringent in applying the standing requirement to all manner of cases, including constitutional ones. In particular, the Court became wary of citizen-initiated lawsuits in which plaintiffs alleged no personal injury beyond a concern that the government had acted or might soon act unlawfully. To curtail such challenges, the Supreme Court increasingly required that plaintiffs' injuries, or threats of injuries, be palpable and particularized.

In February 2013, more than a decade into the War on Terror, the Court continued along the same trajectory, but took a giant leap forward when it refashioned the standing requirement and gave it a new and special stringency in national security cases. This occurred in *Clapper v Amnesty International USA*,² where the Court was confronted with a constitutional challenge to a 2008 statute that had vastly enlarged the surveillance power of the federal government. The challenge raised vital constitutional questions, but the Court never reached them. Instead it dismissed the suit for lack of standing, even though doing so would virtually insulate the 2008 statute from judicial review. In reaching this result, *Clapper* fashioned an approach to justiciability that created “tiers of standing”: a higher and more

² 133 S Ct 1138 (2013).

stringent standing requirement—a new tier—should govern national security cases.³

In other contexts, most notably equal protection and free speech, the concept of “tiers of scrutiny” is familiar. In these cases, the Court often uses three different standards for reviewing the constitutionality of statutes: strict scrutiny (the most exacting tier), intermediate scrutiny, and rational basis review (the most permissive). In equal protection cases, for instance, strict scrutiny is reserved for statutes that employ a suspect category (such as race) or that curtail the exercise of a fundamental right (such as the right to vote). Likewise, in free speech cases, strict scrutiny is reserved for measures that regulate speech on the basis of its content, while lesser scrutiny is applied for measures that merely regulate speech on the basis of its time, place, or manner. In either instance, in the heightened tier the government is required to show that the statute in question is designed to serve a compelling purpose and that the means is narrowly tailored, indeed, the least restrictive way of achieving that purpose. Not surprisingly, in practice, strict scrutiny has usually turned out to be “fatal in fact”:⁴ laws falling in this tier are overwhelmingly struck down.

In just the same way, *Clapper* seems to have created a special, heightened tier of standing for national security cases—a tier analogous to strict scrutiny. Yet in the standing context, this strict or more demanding tier dictates an opposite result: the suit is dismissed and the statute challenged is kept in force without a ruling on the merits. The doors of the courthouse are shut and, as a result, the Court declines to resolve or even address crucial constitutional questions raised by a policy, provided it is designed to further national security. In adopting this new, tiered approach, the Court has failed in its responsibility, as essential in times of war as well as peace, to hold the legislative and executive branches accountable to the law.

THE 2008 STATUTE

The 2008 statute at issue in *Clapper* had its origins in the initial phases of the War on Terror. In the fall of 2001, President George W. Bush issued a secret executive order establishing the

³ The term “tiers of standing” was coined by Julie Verloff in my spring 2013 seminar on law and terrorism.

⁴ Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv L Rev 1, 17 (1972).

so-called Terrorist Surveillance Program. This order directed the National Security Agency to tap international telephone calls between persons in the United States and persons abroad who were suspected of having links to Al Qaeda or its allies. Initially, the president's order was hidden from public view. In December 2005, however, the program was publicly disclosed by the *New York Times* and became the subject of a heated controversy.⁵

Although some objections to the program were based on the Fourth Amendment, the main objection arose from the president's failure to abide by the requirements of the Foreign Intelligence Surveillance Act (FISA).⁶ This law was adopted by Congress in 1978 in the wake of revelations about the far-reaching, and largely uncontrolled, surveillance activities of American intelligence agencies. To address these concerns, FISA set out new protocols for the interception of electronic communications to or from foreign nationals within the United States.

As originally enacted, FISA applied to any electronic surveillance of "agents"—defined as an "officer or employee" of a "foreign power," when used to gather "foreign intelligence information."⁷ "Foreign power" was defined to include foreign nations and, crucially, any "group engaged in international terrorism." "Foreign intelligence information," in turn, was defined to include information about "clandestine intelligence activities," "sabotage," "international terrorism," and "the conduct of the foreign affairs of the United States."⁸ The 1978 law also provided that, before conducting any electronic surveillance governed by the statute, the executive must obtain permission from a special court—the Foreign Intelligence Surveillance Court (FISC). This court was to consist of eleven sitting federal judges, each designated for this special assignment by the Chief Justice of the United States. Each of these judges was authorized to act alone, and both their identities and their proceedings were to be kept secret. FISA declared that the procedures that it established were to be the exclusive avenue

⁵ James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, NY Times (Dec 16, 2005), archived at <http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html>.

⁶ Pub L No 95-511, 92 Stat 1783, 50 USC ch 36.

⁷ 92 Stat at 1783–84, § 101 (a)–(b).

⁸ Id at § 101(b)(2), 92 Stat 1784.

by which the executive could gather foreign intelligence from electronic communications.

In launching the Terrorist Surveillance Program, Bush wholly bypassed the FISC, thus apparently violating FISA. His Attorney General, Alberto Gonzalez, initially defended this strategy on the theory that it was authorized by the congressional resolution of September 18, 2001.⁹ Gonzalez claimed that this resolution—which authorized the use of military force against those responsible for September 11—implicitly modified FISA, such that FISC review was no longer the exclusive procedure for conducting electronic surveillance of agents of Al Qaeda, the foreign power that directed the terrorist attacks of September 11.¹⁰

Gonzalez also treated the September 18 resolution as a declaration of war against Al Qaeda and maintained that requiring the president to submit to FISA's procedures unduly interfered with his constitutional prerogative to act as commander-in-chief of the armed forces. Article II of the Constitution vests the president with the authority and responsibility to act as commander-in-chief. Implicit in this power, accordingly to Gonzalez, is the authority to override any statute—including FISA—that unduly interferes with the discharge of his duties as commander-in-chief. Just as Congress cannot tell the president how to deploy the armed forces, Gonzalez claimed, it could not instruct the president on how to gather the intelligence needed for its war against Al Qaeda.

By 2007, however, the administration had changed its strategy and decided that it would no longer bypass FISA. Instead, Gonzalez turned to FISC to get what was wanted. In a letter to the chairman and ranking minority member of the Senate Judiciary Committee, Gonzalez reported that on January 10, 2007, a FISA judge had issued orders broadly authorizing the wiretapping that had previously been conducted through the clandestine Terrorist Surveillance Program. As Gonzalez put it, the FISA judge issued orders “authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al-

⁹ Authorization for Use of Military Force (AUMF), Pub L No 107-40, 115 Stat 224 (2001).

¹⁰ See Evidence to Committee on the Judiciary, US Senate, *Wartime Executive Power and the National Security Agency's Surveillance Authority*, 109th Cong, 2d Sess (2006) 10–15, archived at <http://perma.cc/N8M6-Z2F4>.

Qaeda.”¹¹ In light of this turn of events, Gonzalez said that there would be no need to continue the Terrorist Surveillance Program (though he reaffirmed his belief that the program “fully complies with the law”).

By April 2007, the administration grew uneasy with the strategy announced only months earlier. It felt that FISA, as it then stood, did not provide it with adequate tools to meet the threat of international terrorism. A decisive point came in March 2007, when, in the context of reviewing the original January orders, a FISA judge ruled that the authorization for wiretaps under the statute had to be made on a particularized or person-to-person basis, not on the broad grounds previously accepted.¹² This proved unacceptable to the Bush administration, which then turned to Congress for new legislation to “modernize” FISA—or, put differently, to give the intelligence agencies all the power that they thought they needed.

Congress responded favorably to the administration’s overtures. On August 5, 2007, it passed the Protect America Act.¹³ By its very terms, this law was set to expire in just six months, and in fact did expire (after a short extension) on February 16, 2008. Then, on July 10, 2008, Congress passed a replacement statute. This measure was presented as an amendment to the 1978 FISA statute, and was appropriately named the FISA Amendments Act of 2008.¹⁴ Originally it was scheduled to expire at the end of 2012. As expected, however, during the pendency of the *Clapper* case, it was renewed for another five years and will remain in effect until 2017—subject of course to further renewal.

The principal innovation wrought by the FISA Amendments Act concerns foreign nationals located abroad. As originally enacted, FISA only governed calls in or to the United States, or calls routed through the United States. While this feature of the 1978 law remained, the 2008 amendments reduced, almost to a vanishing point, the requirements for approval by a FISA judge for interceptions where the target of the investigation was a foreign national located

¹¹ Letter from Alberto R. Gonzales, Attorney General, to Senator Patrick Leahy and Senator Arlen Specter (Jan 17, 2007), archived at <http://perma.cc/GWU8-JXWP>.

¹² Michael Isikoff, *Terror Watch: Behind the Surveillance Debate*, Newsweek (July 31, 2007), archived at <http://perma.cc/69GQ-U5YM>.

¹³ Pub L No 110-155, 121 Stat 552, codified at 50 USC §§ 1801, 1803, 1805.

¹⁴ Pub L No 110-261, 122 Stat 2436, codified at 50 USC § 1881a.

abroad. When such individuals are investigated, the government need only allege that the target is a foreign national located abroad and that a purpose of the interception is to gather foreign intelligence information. Crucially, it mattered not that the other party on the line is an American citizen or a foreign national lawfully admitted to residence in the United States.

The 2008 amendments also authorized FISC to grant blanket permissions for interceptions that covered groups of persons. The statute also compelled the court to act promptly (within 30 days) and to grant the government's request for an interception if, in its application, "all the required elements" were present.¹⁵ No independent factual inquiries were to be undertaken by the FISA court.

CONSTITUTIONAL OBJECTIONS TO THE 2008 STATUTE

The *Clapper* suit was filed immediately after the enactment of the 2008 FISA amendments. The complaint largely focused on Congress's failure to require the government to obtain a judicial warrant prior to intercepting telephone conversations between American citizens and foreign nationals located abroad. Although the government was required to obtain prior judicial approval for electronic surveillance, the plaintiffs complained that the standards for granting this permission fell well below those specified by the Fourth Amendment. Specifically, the government was not required to show, as the Fourth Amendment mandates, "probable cause," which has long been construed to mean a reason to believe that the specific person whose calls are to be intercepted had committed, was committing, or would commit a crime.

Resolving this challenge to the 2008 statute would have required the Supreme Court to answer difficult constitutional questions. In particular, the Court would have had to determine whether the warrant requirement of the Fourth Amendment applies to electronic surveillance aimed at gathering foreign intelligence information. This was a question that the Court had avoided for decades and which was itself the product of an even earlier reluctance on the part of the Supreme Court to decide whether warrants are required for electronic surveillance designed to protect national security.

¹⁵ Pub L No 110-261, 122 Stat 2436, 2444, codified at 50 USC § 1881a(a)(i)(3)(A).

The Court first extended the Fourth Amendment warrant requirement to wiretapping or electronic surveillance in its decision *Katz v United States* in 1967.¹⁶ In crafting its opinion, the Court was careful to note that the case before it arose from an investigation into gambling, an ordinary domestic crime, and that no view—one way or the other—was being expressed on whether a warrant satisfying the strictures of the Fourth Amendment would be needed if the investigation were instead aimed at protecting national security.¹⁷

The Court returned to this unresolved issue in the so-called *Keith* case of 1972, a case that arose from the bombing, as part of the sometimes violent protests against the Vietnam War, of a CIA office in Ann Arbor, Michigan.¹⁸ The telephone calls of one of the defendants had been tapped without a warrant and the attorney general defended this action on the ground that he had been investigating a threat to national security. The Court rejected the attorney general's defense. In so doing, the Court denied that there was an exception to the Fourth Amendment warrant requirement for investigations aimed at protecting national security. However, the Court went on to distinguish between two types of national security threats—domestic and foreign—and made clear that its ruling applied only to the first category. The Court said that it was leaving open the question of whether a warrant would have been required for gathering foreign intelligence.¹⁹

Rather than wait for the Court to return to the issue left dangling in *Keith*, in 1978 Congress took the lead and enacted FISA. In Fourth Amendment terms, the 1978 act was a compromise: it required judicial approval for surveillance aimed at gathering foreign intelligence information, but it did not require the link to criminality entailed by the Fourth Amendment's insistence on probable cause. Indeed, the government only had to file an affidavit showing that the purpose of the surveillance was to gather foreign intelligence and that the person whose calls would be intercepted was an agent of a foreign power. The 2008 measure built on, and in fact extended, the breadth of the 1978 act. In cases where the target was a foreign national lo-

¹⁶ 389 US 347 (1967).

¹⁷ *Id.* at 358 n 23.

¹⁸ *United States v United States District Court*, 407 US 297 (1972).

¹⁹ *Id.* at 308.

cated abroad, the 2008 amendments enlarged the government's surveillance powers by dispensing with the requirement that it show that the target is an agent of a foreign power.

While the Supreme Court never ruled on the constitutionality of the 1978 act, a number of circuit courts upheld the law, so long as the "primary purpose" of the interception was to gather foreign intelligence (as opposed to advancing a criminal prosecution).²⁰ These lower-court rulings, in turn, led to the emergence of the so-called primary purpose test, a halfway measure intended to preserve the integrity of the rules announced by the Court in *Katz* and *Keith*. For decades, this rule was followed, not only by the lower federal courts, but also by the executive branch itself.

Matters changed after September 11, 2001. In the USA PATRIOT Act,²¹ originally adopted soon after those terrorist attacks, Congress abandoned the primary purpose test, directing FISC to allow government interceptions as long as the gathering of foreign intelligence was a significant (as opposed to the primary) purpose of the interception. This particular statutory change compromised the protections of *Katz* and *Keith*, since any wiretap might have any number of purposes—including the gathering of foreign intelligence and supporting a criminal prosecution—and each of them might be "significant." The 2008 FISA amendments incorporated this enlargement of the FISA regime effectuated by the PATRIOT Act. It then compounded this dilution of the protection of privacy afforded by *Katz* and *Keith* by dispensing with the requirement that the target of the interception be an agent of a foreign power.

Apart from questions about the warrant requirement and its applicability to investigations aimed at gathering foreign intelligence or protecting national security, the *Clapper* suit also raised issues about the scope of persons protected by the Fourth Amendment. True, the standards for obtaining permission from FISC for an interception were significantly lowered by the 2008 act, but this new rule applied only in cases where the target of an investigation was a foreign national living abroad. What protections, if any, do these individuals have under the Fourth Amendment?

²⁰ See, for example, *United States v Pelton*, 835 F2d 1067, 1075–76 (4th Cir 1987); *United States v Badia*, 827 F2d 1458, 1464 (11th Cir 1987); *United States v Megabey*, 553 F Supp 1180 (E D NY 1982), *aff'd* under name *United States v Duggan*, 743 F2d 59 (2d Cir 1984).

²¹ Pub L No 107-56, 115 Stat 272 (2001).

At first blush, the answer of Chief Justice William Rehnquist, writing for the Court in *United States v Verdugo-Urquidez* in 1990,²² seems decisive: none. In that case, Rehnquist ruled that a warrantless search by U.S. officials of the home in Mexico of a Mexican citizen did not offend the Fourth Amendment, and that therefore evidence seized as part of the search could be used in the trial of that Mexican citizen to take place in the United States. Rehnquist had focused on the introductory phrase of the Fourth Amendment, which referred to “the right of the people” when it spoke about the guarantee against unreasonable searches and seizures. According to Rehnquist, the “people” consisted only of persons with a voluntary connection to the United States, such as American citizens or foreign nationals lawfully admitted to residence in the United States. The Fourth Amendment would protect no others.

Although Rehnquist claimed to be speaking for the Court, one of the Justices, Anthony Kennedy, who was needed to form a majority, wrote a separate concurrence in which he espoused a more cosmopolitan conception of the Constitution.²³ Kennedy said that he joined the Chief Justice’s opinion, but nonetheless insisted that U.S. officials must always act reasonably, no matter where they were acting or against whomever they were acting. He rejected the Mexican citizen’s Fourth Amendment claim, not because the individual had no Fourth Amendment rights, but only because the U.S. officials had, within the meaning of the Fourth Amendment, acted reasonably.

Later developments only further diminished the force of Rehnquist’s stark stance in *Verdugo-Urquidez*. In the 2008 Supreme Court decision in *Boumediene v Bush*,²⁴ Kennedy, now writing the opinion of the majority, concluded that a federal statute that denied the writ of habeas corpus to foreign nationals detained at Guantánamo violated the Constitution. On the surface, Kennedy seemed less motivated by a regard for the constitutional rights of the prisoners than by a regard for separation of powers—the need to preserve the judiciary’s role in reviewing the legality of executive detentions. Yet the implication of *Boumediene* for the rights of the Guantánamo prisoners was unmistakable, for there would be no point to protecting the authority of the

²² 494 US 259 (1990).

²³ *Id.* at 275.

²⁴ 553 US 723 (2008).

judiciary to review the legality of executive detentions, and thus for preserving the writ of habeas corpus, unless it could further be assumed that the Guantánamo prisoners—all of whom were foreign nationals originally apprehended abroad and now imprisoned abroad—possessed some constitutional rights.

Ultimately, the lawyers bringing the *Clapper* suit decided not to test the limits of *Verdugo-Urquidez*. Instead, they chose to name as plaintiffs American citizens residing and working in the United States—a category of persons unquestionably protected by the Fourth Amendment. Although the specific surveillance powers that they challenged were limited to cases in which the target of the investigation was a foreign national abroad, any telephone call or electronic communication must have another party on the line, and this party might well be an American. Under the 2008 act, the American citizen cannot be the target of the investigation and, for this reason, might be referred to as an “incidental victim” of the interception. Yet this is purely a technical classification, and it does not lessen the significance of the interception or the invasion of his or her right to privacy. The incidental victim’s personal or private information is as vulnerable as that of the target.

From the very beginning, FISA sought to regulate interceptions that required access to facilities located in the United States. It created a procedure for granting the executive authority to tap telephone calls to and from the United States as well as calls between parties located in foreign nations but which were routed through the United States. The authors of the original legislation were mindful of the risks that such a grant of authority created for the privacy rights of Americans. Therefore, they required the attorney general, in seeking authorization from FISC for an interception, to attest under oath that there would be “no substantial likelihood that the surveillance would acquire the contents of any communication to which a United States person is a party.”²⁵ (“United States persons” is a category that includes American citizens and foreign nationals lawfully admitted to residence in the United States.)

Following the 2008 FISA amendments, however, the attorney general did not need to meet this standard. Instead, he only needed to assure the FISA judge that procedures were in place to “prevent the

²⁵ Pub L No 95-511, 92 Stat 1783, at 1787, § 102 (a)(1)(B).

intentional acquisition of any communication in which the sender and all intended recipients are known at the time of acquisition to be located in the United States.”²⁶ The introduction of an intentionality requirement and the use of the word “all” (as opposed to “any”) profoundly diminished the protection of privacy interests of persons living and working in the United States, including American citizens.

Strategically, shifting the focus from foreign nationals located abroad to Americans working and living in the United States was intended to avoid the need to reexamine *Verdugo-Urquidez*. Yet it created a difficulty from another branch of Fourth Amendment doctrine: it has long been established, at least in ordinary criminal prosecutions, that although probable cause must be shown for the target of the interception, the statement of anyone who engages in a conversation with a target properly covered by a warrant might be used by the government in a criminal prosecution against those other persons.²⁷ In other words, the so-called incidental victims of a properly authorized wiretap are not protected by the exclusionary rule.

The question remains, however, whether this rule, fashioned in the context of a criminal prosecution, would apply in *Clapper*, where the issue was not the exclusionary rule, but a grant of authority, one that posed a much greater danger to the privacy of those American citizens whose calls would be intercepted on the theory that they were mere incidental victims of the interception. In particular, under the 2008 amendments, the target of the FISA interception need not be an individual—it can instead consist of broad categories or groups of foreign nationals, such as “Afghans affiliated with Al Qaeda.” The amendments also removed the need to establish for the target the probable cause—suspicion of criminality—contemplated by *Katz* and *Keith*. Instead the government would only have to give reasons for believing the targets were foreign nationals located abroad, and that

²⁶ Pub L No 110-261, 122 Stat 2439, § 702(d)(1)(B), codified at 50 USC § 1881a(d)(1)(B).

²⁷ See, for example, *United States v Perillo*, 333 F Supp 914, 919–21 (D Del 1971), citing *Alderman v United States*, 394 US 165, 175 n 10 (1969) (deeming constitutional the government’s use of conversations between the target of surveillance and a third party in a subsequent criminal prosecution of the third party, where the surveillance was conducted pursuant to a warrant applying only to the target of surveillance). See also *United States v Kahn*, 415 US 143, 157 (1974) (holding that the government’s interception of incriminating telephone calls by the wife of a target of surveillance, and the subsequent use of those calls in a criminal prosecution against the wife, did not violate the Fourth Amendment even though the government had not established probable cause regarding the wife before beginning surveillance).

a significant purpose of the interception was to gather foreign intelligence information. The threshold for an interception is dramatically lower than that of the original 1978 act and, as a consequence, the so-called incidental victims—American citizens or foreign nationals lawfully residing in the United States who speak to foreign nationals abroad—are more exposed than ever to interceptions of their private conversations.

THE PLAINTIFFS AND THEIR INJURY

The plaintiffs—all American citizens residing and working in the United States—had professional interests that led them to be in touch on a regular basis with persons who were in the Middle East. As part of the War on Terror, these individuals were each likely targets of government surveillance and wiretapping. Some of the plaintiffs were human rights researchers; others were journalists; still others were attorneys. In fact, one of the lawyers was, at the time the suit was filed, representing before a military commission in Guantánamo, Khalid Sheik Mohammad, the alleged mastermind of the September 11 attacks.

Most Fourth Amendment challenges arise in a criminal prosecution where the accused seeks to exclude or suppress evidence obtained in violation of the Constitution. Such cases present no doubt about justiciability: whatever the merits of the claim, the individual complaining of the Fourth Amendment violation surely has been personally and directly injured and thus has standing. Beyond these cases, however, Fourth Amendment challenges have also been made against statutes granting the government authority to engage in certain surveillance practices.²⁸ In such instances, the question is whether the statutory grant of authority itself offends the Fourth Amendment because the legislation fails to limit the authority to engage in surveillance to the circumstances that the Fourth Amendment permits.

In such cases, plaintiffs might seek a judgment declaring the grant of authority unconstitutional. Additionally, as happened in *Clapper*, plaintiffs can seek an injunction preventing the government from exercising the power the statute conferred. Typically, an injunction

²⁸ See, for example, *Berger v State of N.Y.*, 388 US 41 (1967).

prohibits a defendant from engaging in a certain course of conduct and implicitly threatens contempt for violations of that prohibition. The prohibition and threat of contempt are in effect from the moment the injunction is issued and they remain in effect until the judge dissolves the injunction. In this sense, the injunction governs the future, and that is why it is often deemed a prospective remedy. A distinction needs to be made, however, between the action that is governed by the injunction and the allegedly wrongful act that serves as the predicate for the issuance of the injunction.

The wrongful act that is the basis for the issuance of the injunction can be one that, at the time of the suit, is likely to occur in the future. An example of this type of injunctive suit can be found in the lawsuit brought to prevent the targeted killing of Anwar Al-Aulaki. He was an American citizen living and working in Yemen who, on September 30, 2011, was killed as a result of a drone attack launched by the United States. The year before this attack, Naser Al-Aulaki, Anwar's father, fearing that his son was on a "kill list" maintained by the U.S. government, brought a suit in the federal district court in Washington, D.C., seeking an injunction to prevent this act from ever occurring.²⁹ The complaint charged that such a killing would deprive Anwar of his life without due process of law.

Although an injunction could be predicated, as in the *Aulaki* case, on a future wrong, it need not be. Sometimes the wrongful act might have already occurred and the injunction would then seek to prevent that wrong from recurring and to eradicate the effects of that wrong. For example, an individual rejected from a job on the basis of race might seek an injunction prohibiting such discrimination from recurring. The injunction might also order the firm to grant this individual seniority in the firm that would be backdated to the time of the initial rejection.

The act the plaintiff seeks to declare unlawful and prohibit from occurring might also take place at the time the suit is filed (or perhaps a moment before). In such a case, the injunction sought would seek to restrain a present wrong. For example, imagine an injunctive suit filed immediately after a state enacts a law prohibiting abortions. In that case, the present wrong would consist of the threat a doctor confronts

²⁹ *Al-Aulaki v Panetta*, 35 F Supp 3d 56 (D DC 2014).

if he or she performs an abortion, regardless of exactly when that abortion is performed, either a moment after the enactment of the statute or sometime in the future.

The plaintiffs in *Clapper* brought their suit soon after the enactment of the 2008 statute and, as in the imagined abortion case, they were complaining of a present wrong. To succeed on the merits, they would have to show that the grant of authority contained in the 2008 act was unlawful—that it authorized surveillance on conditions weaker than those permitted by the Fourth Amendment. To establish that they had standing to complain of this wrong, they would also need to show that the grant of authority was likely to be used by the government. Given the history of the 2008 statute and its origins in the Terrorist Surveillance Program, there could be little doubt on this issue.

President Bush fought hard for the enactment of the 2008 statute, insisting that without this enlargement of its powers, the government would not have adequate means to identify and respond to terrorist threats. His successor shared this view. As a senator, Barack Obama voted for the measure, and as president he has acted in ways indicating that he, too, believed the government needed the powers granted under the 2008 statute. Indeed, even as the *Clapper* case was pending before the Supreme Court, the 2008 statute was, at the urging of Obama, renewed for another five years. Power granted under these circumstances is likely to be used.

To be sure, the standing requirement, as conventionally understood, not only requires that the power granted be used; it also requires that plaintiffs show that this power will be used against them. In *Clapper*, this meant proving, with sufficient likelihood, that the newly created power would be used to intercept telephone calls in which plaintiffs were a party. Importantly, the conjecture implied by this understanding of the burden the plaintiffs face—we can only speak of likelihoods—derives not from the fact that their claim concerns what the government might do at some future time, but rather from the secrecy of the government's action: as a general matter, no one knows whether his or her calls are being intercepted, and as a result, the plaintiffs can only make a guess—albeit a good or informed guess—about whether their calls are being tapped. In such circumstances, all that can be reasonably required of plaintiffs is that they show there is a substantial risk that some of their calls would be

intercepted by the government under the procedures established by the 2008 act.

In *Clapper*, this burden seemed amply met. The professional activities of the plaintiffs—lawyers, journalists, human rights researchers—were described with particularity in the complaint. These activities required that the plaintiffs regularly communicate with persons in the Middle East who were suspected members of terrorist groups, or with the friends and relatives of members of terrorist organizations, or with persons who might be familiar with the recruitment practices or planned attacks of terrorist organizations. Such communications most commonly occurred by phone. So, even if it were assumed the plaintiffs were not themselves targets of the government's taps, the persons abroad with whom they are in touch over the telephone are likely to be targets of the FISA approved interceptions. As a result, the *Clapper* plaintiffs routinely confronted the risk—a substantial risk—that the government would hear what they were saying and what was being said to them.

Admittedly, the government has many different ways of conducting terrorist investigations and may not, in any given case, use the specific powers granted by the 2008 act when investigating individuals abroad with whom plaintiffs abroad regularly communicate. In the world of secret surveillance, anything is possible. But when the executive branch pushed for the 2008 measure and its renewal, it did so on the ground that the powers it already possessed were inadequate, and that more was needed. This insistent demand for new forms of surveillance authority should be taken as a reliable indication that the authority eventually created by the 2008 enactment would, in all likelihood, be used, and that given the particular focus of the War on Terror, it would be used against people with whom the plaintiffs regularly speak on the telephone.

In principle, the government may criminally prosecute one of the parties to a telephone conversation intercepted under the authority created by the 2008 act, even if he or she were not the original target. During oral argument before the Supreme Court, the solicitor general assured the Justices that if such a prosecution ensued, the accused would be informed of the interception, and then any Fourth Amendment objections to the interdiction could be aired and, if they had merit, evidence obtained from the interdiction could be excluded from the trial. As it turned out, it proved difficult for the solicitor general to deliver on his promise—his control of the staff attorneys

in charge of security prosecutions was more attenuated than he imagined.³⁰ Eventually, though, his assurance to the Justices became departmental policy, and in two prosecutions, one in Colorado³¹ and the other in Oregon,³² defendants were notified that their calls had been intercepted under the provisions of the 2008 act. In both cases, the validity of the 2008 statute was raised in motions to suppress evidence derived from these interceptions, but these motions were denied. Yet even if the motions had been granted, this would not obviate the core constitutional danger posed by the 2008 act, for the Fourth Amendment seeks to protect the privacy of telephone conversations—not just the use in a criminal trial of the evidence gathered through an interdiction of such a conversation.

Although a great deal of Fourth Amendment litigation arises from the exclusion of evidence in criminal trials, the exclusionary rule that renders evidence unconstitutionally obtained inadmissible at trial should be seen only as a means to enhance the Constitution's protection of private information. Deny the government the benefits of Fourth Amendment wrongdoing, it is reasoned, and the government will have far less incentive to transgress constitutionally protected privacy. Yet the protection provided by the exclusionary rule does

³⁰ Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, NY Times (Oct 17, 2013), archived at <https://www.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-secret-wiretaps.html> (detailing some of the challenges of ensuring compliance with the Solicitor General's announced policy change).

³¹ This case involved pretrial notification given to a defendant accused of providing material support to an Uzbekistan-based terror group. Order Denying Motion to Suppress Evidence Obtained or Derived Under FISA Amendments Acts or for Discovery, No 1:12-cr-00033-JLK (D Colo, Nov 19, 2015).

³² In this case, a student at Oregon State University was convicted for attempting to use a weapon of mass destruction. *United States v Mobamud*, 941 F Supp 2d 1303 (D Or 2013). Months after his conviction, the defendant was told that information obtained or derived from traditional FISA might have been augmented by information gathered under the 2008 act's provisions. Government's Supplemental FISA Notification, *United States v Mobamud*, No 3:10-CR-00475-KI (D Or, Nov 19, 2013). The ruling denying the motion is presented in Opinion and Order, *United States v Mobamud*, No 3:10-CR-00475-KI (D Or, Mar 19, 2014).

In a third case involving an individual accused of providing material support to a terrorist organization, the government provided the requisite notice after the accused had already pled guilty, but Loretta Lynch, then U.S. Attorney for the Eastern District of New York, on the theory that he had forfeited his right to appeal by pleading guilty, refused this individual the opportunity to withdraw his plea or otherwise attack the conviction. Letter from Loretta E. Lynch, United States Attorney, E D NY, to Agron Hasbajrami (Feb 24, 2014), available at <https://www.documentcloud.org/documents/1028728-hasbajrami-supplemental-notice-2-24-2014.html>. For further discussion of these cases, see Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 Harv J L & Pub Pol 117, 251 n 565 (2015).

little to shield the privacy of all those American journalists, lawyers, and activists who are “incidental victims” of eavesdropping aimed at foreign nationals suspected of terrorism or having links to terrorists.

At the time their suit was brought, the plaintiffs feared that their calls would be intercepted and adjusted their behavior accordingly—forgoing telephone conversations altogether or significantly limiting them. The chance that a motion to suppress might eventually be granted in a criminal prosecution that has not yet been brought, and that might not involve any of the plaintiffs, does little to reduce the substantiality of the danger posed by an interception and the loss of privacy that these individuals faced when they filed their suit, and continued to face over the five years during which their case wound its way through the federal courts. Such speculative protection from the exclusionary rule would not be a reason for denying them standing. In sum, traditional concepts of standing would suggest the *Clapper* plaintiffs were clearly entitled to a ruling on the merits.

REFORMULATING THE TEST FOR STANDING?

In a sharply divided, five-to-four ruling, the *Clapper* Court reached a different conclusion, denying the plaintiffs standing. Justice Samuel Alito wrote the opinion for the five. Yet even this bare majority was internally splintered: although five Justices agreed on dismissing the suit for lack of standing, there was disagreement among them on the proper standard to apply.

Throughout much of his opinion, Justice Alito maintained the plaintiffs lacked standing because they did not establish that their claimed injury was “certainly impending.”³³ This formula, and in particular, the word “impending,” suggests the wrong the *Clapper* plaintiffs complained about was one they feared would occur in the future. But this was not in fact the case. Instead, the plaintiffs were concerned with the harms they experienced in the present from surveillance practices instituted by the government at the time the suit was filed. They were complaining of a current wrong. These practices may continue into the future or in fact might be commenced at some later date, but the plaintiffs’ conjecture was not about the future. Rather, given the secrecy of the surveillance program, their

³³ For example, *Clapper v Amnesty Int’l USA*, 133 S Ct 1138, 1143 (2013) (internal citation omitted).

conjecture derives from the inevitable, currently felt fear that people the plaintiffs regularly spoke with were, in fact, targets of wiretaps allowed under the 2008 statute. Yet even if the plaintiffs' claim were intended to describe a future wrong—thus making the word “impending” proper—the word “certainly” would seem misplaced. As Justice Breyer said in his dissent, no one can be certain about the future.

In any event, it is doubtful that Alito's “certainly impending” standard had the backing of a majority of the Justices. At least one Justice who supported the dismissal—there may have been more—seemed unwilling to subscribe to this test. This is tellingly revealed by footnote 5 of Alito's opinion, which declares: “Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about.”³⁴ Importantly, the substance of this footnote, its literary style, the fact that it quotes language used in the body of Alito's opinion, and then refers to the test rejected as “clearly impending” rather than “certainly impending,” each suggest that the footnote was not written by Alito himself, but another Justice, one who insisted that it be appended to Alito's opinion as a condition for obtaining his vote.

After distancing itself from the “certainly impending” test, footnote 5 invokes what might be regarded as the “substantial risk” test, though there is an ambiguity as to what the risk might be. Given that

³⁴ In its entirety, the footnote reads as follows:

Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a “substantial risk” that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm. *Monsanto Co. v Geertson Seed Farms*, 561 US 139, —, 130 S.Ct. 2743, 2754–2755, 177 L.Ed.2d 461 (2010). See also *Pennell v City of San Jose*, 485 US 1, 8, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988); *Blum v Yaretsky*, 457 US 991, 1000–1001, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982); *Babbitt v Farm Workers*, 442 US 289, 298, 99 S Ct 2301, 60 L.Ed.2d 895 (1979). But to the extent that the “substantial risk” standard is relevant and is distinct from the “clearly impending” requirement, respondents fall short of even that standard, in light of the attenuated chain of inferences necessary to find harm here. See *supra*, at 1148–1150. In addition, plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm. Plaintiffs cannot rely on speculation about “the unfettered choices made by independent actors not before the court.” *Defenders of Wildlife*, 504 US, at 562, 112 S.Ct. 2130.

Clapper v Amnesty Int'l USA, 133 S Ct 1138, 1150 n 5 (2013).

the suit was brought upon the enactment of the statute, in my view, the risk that needs to be ascertained is the risk that the plaintiffs are currently being harmed. Footnote 5, however, speaks of the risk that the plaintiffs *will be* harmed, as though what the plaintiffs feared was a future wrong. “In some instances,” the footnote explains, “we have found standing on a ‘substantial risk’ that the harm will occur.”³⁵ This version of the “substantial risk” test is then applied and the footnote concludes that the plaintiffs have failed that test.

The doctrinal significance of footnote 5 is unclear. At a minimum, we can say it means that Alito lacked a majority for the “certainly impending” test, and that at least one Justice who joined his opinion instead applied the more appropriate “substantial risk” test (which was elaborately defended by Justice Breyer in his dissent). On the other hand, in applying the “substantial risk” test, the Justice or Justices who insisted on the inclusion of footnote 5 agreed with Alito’s ultimate conclusion, namely, that the plaintiffs lacked standing. And in explaining why the risk the plaintiff complained about was not substantial, the author of footnote 5 relied on the same two factors Justice Alito had used for explaining why the harm was not “certainly impending”: (1) the plaintiffs’ claim involved too attenuated a chain of inferences to find harm, and (2) the plaintiffs’ allegations depended too heavily on speculations about the choices of independent actors not before the Court. In my view, however, neither of these factors—whether considered under the “certainly impending” or the “substantial risk” test—offers adequate ground for denying standing to the plaintiffs.

The first factor used to justify the dismissal for lack of standing is that plaintiffs rely on an “attenuated chain of inferences necessary to find harm.”³⁶ In truth, however, the chain of inferences needed to show harm to plaintiffs—the interception of private telephone calls of plaintiffs under the procedures authorized by the 2008 statute—is not nearly as attenuated as either Alito or the Justice or Justices responsible for footnote 5 would have us believe. Granted, the interception of a telephone conversation depends on a decision by the government to utilize the powers given to it by the 2008 statute, and to do so in a way that targets persons the plaintiffs regularly speak with

³⁵ Id.

³⁶ Id.

by the telephone. But there is nothing improbable about this claim. It is based upon a concrete understanding of the origins of the 2008 statute, the imperatives of the War on Terror, and the professional activities of the plaintiffs. Although the War on Terror may have the global scope that President Bush had originally claimed for it, the operations of Al Qaeda, the principal adversary in that war, are centered in the Middle East and in the mountainous region between Afghanistan and Pakistan. The *Clapper* plaintiffs regularly make calls to these regions, and regularly speak with people who are likely suspected of links to Al Qaeda or other terrorist organizations.

The second factor used to deny plaintiffs' standing, under both Alito's "certainly impending" test and the footnote 5 "substantial risk" standard, was the charge that the plaintiffs depended on "speculation about 'the unfettered choices' made by independent actors not before the court."³⁷ This argument is also unpersuasive. The so-called "independent actors" referred to were presumably the FISA judges to whom the government must, under the 2008 statute, apply before intercepting plaintiffs' calls. It is true that the plaintiffs' calls could not be intercepted without the approval of a FISA judge, and that these judges possess the full powers of Article III judges. And while I would not say FISA judges, or any other Article III judge, have "unfettered discretion," FISA judges do have the authority to withhold the permission the government seeks. Although by its very terms, the 2008 statute ostensibly constrains the freedom of FISA judges—they must grant the government's request if all the elements required for an interception are present—FISA judges could declare this constraint invalid under either the Fourth Amendment or the doctrine guaranteeing separation of powers (on the ground that it is an impermissible interference with the judicial power).

Yet while the theoretical power of FISA judges to make such a ruling cannot be denied, in practice, the chances of such an exercise of power are quite remote. This conclusion does not rest on cynical speculations—inflamed by the fact that FISA judges are handpicked by the Chief Justice—about the capacity of federal judges to resist the executive in its effort to investigate international terrorism. Rather, it is derived from two essential features of the FISA scheme. One is that FISA judges act *ex parte*—they hear from only one side (the gov-

³⁷ *Id.*

ernment).³⁸ The other is that FISA judges are not obliged to abide by the strictures of public reason—they do not publicly announce the decision nor are they required or expected to justify their decisions on the basis of principle. In acting this way, FISA judges are no different than any other federal judge (or magistrate) passing on applications for search warrants. Still, the failure to abide by the procedural rules that generally govern the exercise of the judicial power makes it deeply unlikely that the constitutional power possessed by FISA judges will be exercised in such a way to protect the privacy interests of plaintiffs that are guaranteed by the Fourth Amendment.

For these reasons, the two factors—the attenuated chain of causation and the role of independent actors in this chain—offered by the author of footnote 5 to explain why, even under the substantial risk test, the *Clapper* suit should be dismissed for lack of standing seem unpersuasive. On top of this, I am troubled, as indeed the Justices should be, by the practical consequences of the application of this test, for it would effectively insulate the 2008 statute from any judicial review. In the body of his opinion, Justice Alito addresses this contingency and his willingness to do so is entirely appropriate, for the prospect of insulating the 2008 statute from judicial review seems even more evident under his “certainly impending” test. By its very terms—by its use of the word “certainly”—Alito’s test would inevitably have this effect.

In confronting this objection, Alito’s first strategy is to minimize the chance that the danger would ever materialize. To this end, he conjured several scenarios that might provide for judicial review of the statute—a constitutional judgment by a FISA judge when the government seeks permission to tap a telephone; a ruling by a federal judge presiding over a criminal trial granting a motion to suppress when a party in an intercepted conversation is criminally prosecuted; or a proceeding before the FISA court when an electronic communication services provider objects to an order granting access to its facilities. Yet while all of these imagined scenarios are possible, they could arise only in the most unusual of circumstances, and even if

³⁸ Two years after *Clapper*, new legislation was enacted that authorized FISA judges to designate civil liberties experts as amicus curiae to articulate “legal arguments that advance the protection of individual privacy and civil liberties.” Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 (USA Freedom Act), Pub L No 114-23, 129 Stat 268, § 401(4)(C).

they someday did, the 2008 statute would have already taken its toll on the plaintiffs and others in the plaintiffs' position. Fearing that their telephone conversations will be intercepted, the plaintiffs will be especially guarded or perhaps may decide to forgo the telephone conversation altogether and arrange their lives in a way to have key conversations face to face.

After trying to minimize the risk that the Court's ruling and his "certainly impending" test would insulate the 2008 statute from judicial review, Alito then expressed an indifference to such a result. Alito said that even if he were to concede that the dismissal of the plaintiffs' suit would in effect insulate the 2008 statute from judicial review, such a consequence, if it materialized, would be a legal irrelevance, reasoning that "the assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."³⁹

As a purely technical matter, Justice Alito is correct: standing, under traditional doctrine, is an independent legal requirement. Yet the practical consequences of such an outcome offer good reason to scrutinize all the steps in the reasoning that led to it—the chosen test for standing and the way it was applied. Alito should be troubled, not indifferent, to the likely practical consequences of the test he applies and the decision to dismiss the plaintiffs' suit for lack of standing.

What might justify such indifference? Alito viewed his extravagant application of the standing requirement as furthering separation of powers. According to Alito, separation of powers dictates that the judiciary be careful not to intrude on the other branches of government. Such a reading views separation of powers as a "negative" principle—a restraint on judicial power. From this perspective, a ruling that has the effect of insulating the 2008 statute from judicial review coincides with what Alito takes as the principal requirement of separation of powers—that the judiciary should leave the other branches of government alone—and this coincidence may well explain his indifference to the practical consequence of his ruling or the "certainly impending" test itself.

In taking this view, however, Alito ignored the crucial "affirmative" dimensions of the separation-of-powers doctrine. Separation of pow-

³⁹ 133 S Ct 1138, 1154 (2013), quoting *Valley Forge Christian Coll. v Americans United for Separation of Church & State, Inc.*, 454 US 464, 489 (1982).

ers does not only work to preserve the boundaries between the three branches, to prevent one branch of government from usurping the function of another. It also serves a positive function: assuring that each branch perform its assigned function. So while the judiciary must not usurp the functions of the other branches, it is equally important that the judiciary perform its assigned duty, namely, to protect and safeguard the Constitution and to determine whether the action of political branches is in accord with that law. Thus, I would say that a ruling that has the practical effect of insulating a statute from judicial review interferes with the discharge of that duty and should be viewed accordingly—skeptically.

Alito's emphasis on the negative dimensions of separation of powers and his willingness to embrace a standing rule that would have the effect of insulating the 2008 FISA amendments from judicial rule may well reflect a familiar deference that the judiciary has shown the political branches in matters of national security. Indeed, soon after announcing that the standing requirement prevents the judicial process from usurping the power from political branches, Alito added a crucial statement: "we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in fields of intelligence gathering and foreign affairs."

Following this statement, Alito cites three cases from the early 1970s—handed down at the same time as *Keith*—in which suits were dismissed for lack of standing. One involved a challenge to a statute that blocked congressional review of CIA expenditures;⁴⁰ the second involved a challenge to the army's intelligence gathering program;⁴¹ and the third challenged the practice of allowing members of Congress to serve in the armed forces reserve.⁴² None of these cases sought to apply Alito's "certainly impending" test. (That formula was derived from a case in which one prisoner challenged a death penalty that was to be imposed on a fellow prisoner.)⁴³ Moreover, none of these cases suggested that a higher or stricter standing requirement should be applied to cases involving intelligence gathering or foreign affairs. Alito is careful in his choice of words, as though he were merely de-

⁴⁰ *United States v Richardson*, 418 US 166 (1974).

⁴¹ *Laird v Tatum*, 408 US 1 (1972).

⁴² *Schlesinger v Reservists Comm. to Stop the War*, 418 US 208 (1974).

⁴³ *Whitmore v Arkansas*, 495 US 149 (1990).

scribing a practice (he uses the word “often”). In context, though, the message conveyed is prescriptive; it is as though Alito is announcing a rule that should henceforth govern the Court for assessing standing in national security contexts. Indeed, this announcement, heralding a heightened tier of standing for national security cases, may well be the takeaway point of *Clapper*.

In many contexts, we are accustomed to demands for judicial restraint when reviewing the work of the other branches in national security cases. According to this familiar rule, in the conflict between freedom and security, the judiciary should defer to the balance struck by the political branches. Alito defines the domain of deference a little differently—he speaks of “intelligence gathering” and “foreign affairs” as opposed to national security⁴⁴—but little turns on that difference. In either case, the demand for deference to the political branches can be countered, or at least tempered, by an understanding of the affirmative dimensions of separation-of-powers doctrine—so forcefully vindicated by *Boumediene v Bush*.⁴⁵ As that case teaches, although it may be the responsibility of the political branches to determine the nature and magnitude of the threat the nation faces and what the appropriate response to that threat might be, it remains the responsibility of the judiciary to determine whether the course of action chosen by the political branches is in accord with the Constitution.

In charting their course of action, the legislative and executive branches must inevitably take a view on the meaning of the Constitution, for as members of Congress and the president well understand, their actions are limited by the grants of authority and overreaching principles contained in it. The right of the judiciary to second-guess the judgments of the political branches on the meaning of the Constitution does not arise from any moral expertise possessed by those who wield the judicial power—in the moral domain, they do not differ in any significant respect from those who serve in Congress or work in the White House. Rather, the right to review the judgments of the political branches on issues of law stems from the fact that judges are limited, in the exercise of this extraordinary power, by the strictures of public reason: They must confront grievances they might otherwise prefer to ignore, hear from all aggrieved persons, remain

⁴⁴ *Clapper v Amnesty Int'l USA*, 133 S Ct 138, 1147 (2013).

⁴⁵ *Boumediene v Bush*, 553 US 723 (2008).

insulated from political agencies, conduct their affairs in public, and justify their decisions on the basis of principle.⁴⁶ Adherence to the strictures of public reason entitles the judiciary to review a judgment about the law that undergirds the action of the political branches, and under our scheme of government this right has become a responsibility.

When, in the context of national security, the Court defers to the judgment of the political branches on a constitutional question, it is failing in the discharge of this responsibility of judicial review. When it applies a more exacting test for standing in national security cases and then dismisses the suit for lack of standing, it may seem that the Court is committing the same error. In fact, however, I believe the error is much worse, for the Court is dismissing the suit without ever considering the merits of the claim before it. This outcome not only frustrates and disappoints the plaintiffs, but, more importantly, constitutes an offense to the polity, for, in effect, the Court has refused to address in any way the disputed question of law before it—whether the 2008 FISA amendments violate the Fourth Amendment—and thus relieves itself of any responsibility for the operation of the statute or the infringement of the Constitution that the statute might well represent. In so doing, the Court may be protecting its sway in certain circles, including those interested in preserving the Court's so-called political capital, which arguably might be needed for other ventures.⁴⁷ That objective, however, should never be achieved at the expense of defaulting on its responsibility—long thought its primary responsibility, even in times of war—of holding the political branches accountable to the law.

⁴⁶ For more on the role of public reason and the judicial role, see generally Owen M. Fiss, *The Law as It Could Be* (NYU Press, 2003).

⁴⁷ See, for example, Justice Robert Jackson's famous dissent in *Korematsu v United States*, 323 US 214, 248 (1944) (Jackson, J, dissenting), and Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, 1962).