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IN THE

Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, , ,

v.

AMNESTY INTERNATIONAL USA, .

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

AMICUS CURIAE

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Gun Owners Foundation, U.S. Justice Foundation, Downsize DC Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the

Petitioners assume their interest to be a privacy one under a long line of cases since Katz v. United States. But the search and seizure of Respondents' international communications is best viewed as a violation of their exclusive property rights in their communications. The nature of Fourth Amendment law has changed significantly since this case was litigated and decided below, with this Court's decision earlier this year in United States v. Jones. Jones

themselves the chief invaders, and there is no enforcement outside of court."

Lastly, an amicus curiae brief filed by six former Attorneys General urge the Court to block Respondents' access to the courthouse door in order to give another layer of protection to government officials from being sued for violations of the constitutional rights. The Attorneys General's unprecedented plea for immunity through standing suggest that there are alternative forums for Respondents to assert their rights — defense in criminal proceedings and Freedom of Information requests. Neither would be an adequate substitute for injunctive relief. The meaning of the Article III case and controversy text must not be constricted to insulate senior government officials from accountability for their actions.

The district court below originally held that the Respondents (plaintiffs below) lacked standing to challenge the FISA Amendments Act of 2008 ("FAA"),

believing that "[t]his case turns on whether the plaintiffs have met the irreducible constitutional minimum of personal, particularized, concrete injury in fact without turning to the additional prudential aspects of standing."[3] The district court did not view Respondents' fear of being monitored or the professional and economic costs they incurred to avoid surveillance as sufficient to support standing. Thus, the district court granted summary judgment for Petitioners and dismissed the complaint without reaching the merits of the Respondents' claims.[4]

The court of appeals disagreed. Observing that the

a long line of standing cases to first determine whether a plaintiff has suffered an "injury in fact" — generally defined as "an invasion of a

which is ... concrete and particularized ... and ... 'actual or imminent, not 'conjectural' or 'hypothetical....'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (emphasis added). However, both courts omitted any exposition of the "legally protected interest" involved. Identification of the specific constitutional right at issue in the case is a necessary prerequisite to determining if a plaintiff has suffered "injury in fact."

Respondents advance two theories of standing in this case. First, they argue that, due to the "substantial risk" that their communications may be intercepted, they have had to "take costly and burdensome measures to protect" themselves, which constitutes a concrete harm. Respondents Brief ("Resp. Br."), p. 24. Second, Respondents argue that there is a "threat of imminent surveillance" which "constitutes a

established 45 years ago by this Court in Katz v. United States, 389 U.S. 347 (1967).

Petitioners never discuss the nature of the right asserted by Respondents, but rather repeatedly focus on the absence of an search or seizure, and repeatedly downplay the intrusion into Americans' Fourth Amendment rights as " " to the non-U.S. persons who are the primary targets of electronic surveillance. Brief of Petitioners ("Pet. Br."), pp. 4, 7, 9, 10, 18, 19, 21, 23, 24, 29, 30, 33, 37, 39, 40; Petition for Certiorari, pp. 16, 18, 20, 23.

Petitioners never identify Respondents's rights as privacy, but their repeated discussion of incidental intrusion indicates they did not view Respondents as having a property right. Certainly neither party addressed the property interest that the Fourth Amendment was foremost designed to protect.

The FAA challenge below was filed after FAA was signed into law on July 10, 2008, the district court's opinion was issued on August 20, 2009, and the court of appeals decision came on March 21, 2011 — all well before this Court's January 23, 2012 decision in United States v. Jones, . As such, it is not surprising that the shift in Fourth Amendment law occasioned by Jones has played no part in the litigation of this case to this point.

In Jones, the government attached a GPS tracking device to Mr. Jones' vehicle and used it to track him for a prolonged period without a warrant. This Court found the placement of the device on the car was a search, and made it clear that whatever privacy interest might be protected by the Fourth Amendment, the threshold interest is one of property, and it is the property issue which must be addressed first. This primacy of property is dictated by (i) the historic tie of search and seizure law to the protection of property rights, (ii) the text of the Fourth Amendment, and (iii) this Court's holding in Jones.

First, as Justice Scalia explained, the intended property basis for the Fourth Amendment was illustrated by a case considered to be "'the true and ultimate expression of constitutional law' with regard to search and seizure" — Entick v. Carrington, 95 Eng. Rep. 807 (C.P. 1765) — where for purpose of search and seizure analysis, a man was declared to be "a trespasser, though he does no damage at all...." Jones, , p. 949.

Second, the constitutional text reinforced the property foundation of the Fourth Amendment:

> The text of the Fourth Amendment reflects its close connection to , since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their " would have been superfluous. [.(emphasis added).]

Lastly, Justice Scalia never applied an "expectation of privacy" test in the Jones case, having concluded that "Jones' Fourth Amendment rights do not rise or fall with the formulation." , p. 950. The lesson from Jones is that if a property right has been violated, the court's analysis can begin and end with the property analysis.

Applying a property analysis to this case, the attorney Respondents alleged a property interest in their confidential communications with clients. Lawyers are not only entitled to participate in obtaining such confidential communications, but are ethically obligated to maintain possession of those communications, whether written down or committed to memory, to the exclusion of all others.[7] A lawyer's duty of confidentiality can even extend to the identity of his client.[8] A lawyer's interest, therefore, is fundamentally a property interest in protecting communications with a client.

Likewise, the Respondent journalists have a possessory interest in their communications with others. The information journalists collect is generally later packaged and sold. A journalist often must protect the identity of a confidential informer. Unless

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[7] , American Bar Association, Model Rules of Professional Conduct, Comment on Rule 1:6 Confidentiality of Information. http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6.html.

[8] , Dietz v. Doe, 935 P.2d 611 (Wash. 1997).

such information is maintained exclusively until a journalist chooses to publish that information, and unless promised confidences are kept, the journalist cannot perform his function as a member of the fourth estate. His very livelihood depends upon his ownership of information he collects, and the cultivation and earned trust of confidential sources. Like the lawyer's interest then, the journalist's interest is best understood as a proprietary interest in his communications with others.

Because Respondents have a property right to the electronic communications they send over a wire, just as real as their property right in a letter they send through the mail,[9] the government's warrantless search or seizure of that communication is material, regardless of whether it was intentional or incidental.

In the majority opinion in Jones, Justice Scalia noted that "[t]he concurrence faults our approach for 'present[ing] particularly vexing problems' , such as those that involve the transmission of electronic signals." , 132 S.Ct. at 953. Justice Sotomayor too, noted that "[i]n cases of or other novel modes of surveillance that do depend upon a on property, the majority opinion's trespassory test may provide little guidance." at 955 (emphasis added). Both opinions seemed to assume the holding of the overruled Olmstead opinion that "electronic signals" are not property. As a result, the majority abandoned exclusive reliance on property principles, believing them insufficient to protect

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[9] Ex Parte Jackson, 96 U.S. 727, 733 (1878) ("No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.").

against electronic surveillance, and believing that only the Katz

By its decision in Jones, this Court has restored the property principle to its original provenance in its Fourth Amendment jurisprudence. Consequently, Respondents' legally protected interest is best understood not as a mere interest in privacy, but as a right to exclusive possession of their proprietary interest in their business communications. Thus, they have standing regardless of whether their communications were "targeted" or only "incidentally collected." Both actions trespass upon Respondents' right to exclude others from interfering with their possessory interests.

Neither Petitioners nor Respondents analyze the standing issue according to the constitutional text. Petitioners refer frequently to "Article III standing," "Article III injury in fact," "Article III jurisdiction," and "Article III purposes" (Pet. Br., p. 10, 24), and limit themselves to a discussion of selected Supreme Court cases. While Petitioners seek to avoid review by this Court, asserting the prerogatives of the Executive Branch, they do not explain the constitutional

underpinnings of their argument. Respondents use similar phrases, sometimes

Force nor Will, but merely judgment ... beyond comparison the weakest of the three departments of power..." Federalist No. 78, G. Carey & J. McClellan, The Federalist (1990), p. 402. Nevertheless, Hamilton identified the role of the judiciary to be a crucial defender of the people's constitution against legislative encroachment, the guardian of the limits placed by the people on the departments created by the other articles. These Constitutional limits, he believed,

> ; whose it must be to declare all acts contrary to the manifest tenor of the constitution void. , all the reservations of particular or privileges would . [p. 402 (emphasis added).]

This did not mean that the judiciary was empowered to substitute its judgment for the other branches. Rather, Hamilton stated:

> It only supposes that the is superior to both; and of the legislature declared in its statutes, stands in opposition to that , the judges ought to be governed by the latter, rather than the former. [p. 403 (emphasis added).]

As guardians of the Constitution as it is written, the court should take care to discharge its duty to the people without regard for prudential concerns, such as

fear of resistance to its authority by the other branches. Rather, it is obligated to do its duty as prescribed by its structural role.

Petitioners urge this court to bar Respondents access to the courthouse door for three basic reasons:

> 1. Respondents have not met an elevated standard for standing because of "separation-of-powers concerns" based on a congressional standing case, Raines v. Byrd, 521 U.S. 811, 819-820 (1997). Pet. Br., p. 23.
>
> 2. Respondents' injuries would not be redressed by judicial relief. Pet. Br., pp. 38-47.
>
> 3. Respondents alleged "injury in fact" is "conjectural," "speculative," and not "imminent" because plaintiffs "may not be targeted by surveillance ... and have not established that their communications have been or ever will be incidentally collected...." Pet. Br., p. 23.

First, Raines v. Byrd involved a challenge to the Line Item Veto Act by six members of Congress who believed that their legislative power was diluted by that law. Chief Justice Rehnquist opined that "'The law of Art. III standing is built on a single basic idea — the idea of separation of powers' ... [an] overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere...."

Raines, at 820 (citations omitted). However, that statement should be understood in view of this case being brought by "renegade members of Congress to bring down a law they disliked but could not defeat...."

his experience, Justice Jackson knew, and asserted, that Fourth Amendment rights:

> belong in the catalog of
> . Among deprivations of rights, none
> is so effective in

government which does not respect the property rights of the people.

In a book written later by Whitney Harris, Executive Trial Counsel to Justice Jackson at Nuremberg, the lessons learned were expounded further. In Germany, Harris wrote, "[t]he Weimar Constitution contained positive guarantees of basic civil rights. Chief among them were personal freedom ... inviolability of the home [and] secrecy of letters and other communications...."[12] However, Harris continued, the Weimar Constitution also contained:

a special provision under which the Reich TD.0002 Tc.6278 9kdi6il(t)5(1

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> of the Weimar Constitution, on the representation that the building had been burned by the Communists and a national emergency had resulted.... It provided in part:
>
> "[personal freedom ... inviolability of the home [and] secrecy of letters and other communications] are suspended until further notice [and] of the privacy of postal,
>
> , and warrants for house-searches, orders for
>
> , are also beyond the legal limits unless otherwise prescribed."
>
> The decree made possible the seizure of political opponents without danger of judicial interference. It was utilized to destroy all effective political opposition.... The voice of the people had been stilled. Neither constitutional liberties nor power of government would be returned to them under Hitler. [Tyranny on Trial, pp. 45-47 (emphasis added).]

While Petitioners would have this court simply trust the executive branch with the FISA Amendments Act, Justice Jackson believed the Court's role could not be delegated to the Executive Branch:

> [T]he right to be secure against
> is
> since the
> , there is

. [Brinegar,

officials monitor “ .” AG Brief, pp. 19, 22 (emphasis added).

The Attorneys General make the novel argument that the “standing doctrine provides important legal protections to federal government defendants who must be able to perform their duties without the distraction of litigation....” AG Brief, p. 1. The Attorneys General argue that “changes to the nature and conduct of national security activities ... have spurred a barrage of premised on policy disagreements....” AG Brief, p. 3 (emphasis added). The brief cites no specific objectionable cases.

Although the AG Brief acknowledges that the standing doctrine is designed to ensure “the existence of a concrete ‘case or controversy’” (AG Brief, p. 1), it urges this Court to use the standing doctrine as a tool to enable government officials to avoid accountability for their actions. The Attorneys General argue that “[h]igh-ranking government officials are often sued in their personal capacity long after their service concludes” and that finding standing in this case will “divert[] the attention of government officials” (AG Brief, p. 12, 13). The standing doctrine was never designed to insulate the federal government from constitutional violations, and the Attorneys General cite no case or legal principle in support of this contention.

The Attorneys General also argue that it is not important to find standing here, because Plaintiffs and others will have opportunities to challenge FISA in (i) “criminal proceedings” or (ii) “a Freedom of

Information Act Request." AG Brief, p. 23. But those avenues are in no way comparable or sufficient. An American should not need to be charged with commission of a crime to have his day in court. An FOIA request will not force the disclosure of classified documents. And, of course, in the vast majority of situations where the violation by government leads to neither prosecution nor awareness by the victim, there is no remedy.

As Justice Jackson explained in his Brinegar dissent, there are limited judicial remedies for executive violations of the Fourth Amendment: "[o]nly occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted." Brinegar at 181. As Justice Jackson believed, "there are ... many unlawful searches ... about which courts do nothing, and about which we never hear." This problem is exponentially magnified where, as here, government officials act in secret, its activities never being exposed to the light of day.

In Jones, concurring Justice Sotomayor warned that, because much electronic surveillance "proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices" and "'alter[s] the relationship between citizen and government in a way that is inimical to democratic society.'" , 132 S.Ct. at 956 (citation omitted). Justice Sotomayor questioned the "appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable

to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent 'a too permeating police surveillance'...." (citation omitted). In a regime of surreptitious electronic surveillance when government agents simply eavesdrop on a phone call, or read an email, there is no battered-in door or ransacked file cabinet to alert the victim. As Justice Jackson concluded, "[t]he citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence." at 182.

If there somehow were a way to ensure that FISA surveillance was done perfectly, and entirely in secret, its fruit never used in criminal proceedings, no victim ever discovering that he had been the subject of secret surveillance — then there would never be a way to challenge to the FISA Amendments. It simply cannot be the answer that standing does not arise till a violation has occurred — a violation of which the victim will most likely have no knowledge.

For the reasons set out above, the judgment of the U.S. Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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