COURTS WON'T BE REVIEWING LEGALITY OF COUNTERTERRORISM PROGRAMS ANYTIME SOON

By a 5-4 party line vote, SCOTUS denied standing in Amnesty v. Clapper today.

The majority opinion, written by Sam Alito, emphasizes separation of power.

> The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.
>
> [snip]
>
> In keeping with the purpose of this doctrine, "[o]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."
>
> [snip]
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> and 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 the fields of intelligence gathering and foreign affairs,

It uses a high standard for the imminence of harm, including what I consider a highly ironic passage, considering the Administration's own standards for imminence.

> "Although imminence is concededly a somewhat elastic concept, it cannot be

> stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." Id., at 565, n. 2 (internal quotation marks omitted). Thus, we have repeatedly reiterated that "threatened injury must be certainly impending to constitute injury in fact," and that "[a]llegations of possible future injury" are not sufficient.

It even says it can't use in camera review in this case, because doing so would establish a precedent terrorists could use to find out whether they're being wiretapped.

> It was suggested at oral argument that the Government could help resolve the standing inquiry by disclosing to a court, perhaps through an in camera proceeding, (1) whether it is intercepting respondents' communications and (2) what targeting or minimization procedures it is using. See Tr. of Oral Arg. 13–14, 44, 56. This suggestion is puzzling. As an initial matter, it is respondents' burden to prove their standing by pointing to specific facts, Lujan v. Defenders of Wildlife, 504 U. S. 555, 561 (1992), not the Government's burden to disprove standing by revealing details of its surveillance priorities. Moreover, this type of hypothetical disclosure proceeding would allow a terrorist (or his attorney) to determine whether he is currently under U. S. surveillance simply by filing a lawsuit challenging the Government's surveillance program. Even if the terrorist's attorney were to comply with a protective order prohibiting him from sharing the Government's disclosures with his client, the court's postdisclosure decision about whether to dismiss the suit for lack of standing

> would surely signal to the terrorist whether his name was on the list of surveillance targets.

Ultimately, though, it said the plaintiff's fears were too speculative to amount to standing.

It does so by ignoring — and indeed, misrepresenting — the details presented about what is new in this program. Here's how Stephen Breyer, in his dissent, describes them.

> The addition of §1881a in 2008 changed this prior law in three important ways. First, it eliminated the require ment that the Government describe to the court each specific target and identify each facility at which its sur veillance would be directed, thus permitting surveillance on a programmatic, not necessarily individualized, basis. §1881a(g). Second, it eliminated the requirement that a target be a "foreign power or an agent of a foreign power." Ibid. Third, it diminished the court's authority to insist upon, and eliminated its authority to supervise, instance-specific privacy-intrusion minimization procedures (though the Government still must use court-approved general minimization procedures). §1881a(e).

By contrast, Alito claims the new program only allows the government to target individuals (h/t Julian Sanchez who first pointed this out).

By looking at the new aspects of the program, Breyer shows that the plaintiffs' communications could now be collected whereas before they wouldn't have been.

> First, the plaintiffs have engaged, and continue to engage, in electronic communica tions of a kind that the 2008 amendment, but not the prior Act, authorizes the Government to intercept.

> These com munications include discussions with family members of those detained at Guantanamo, friends and acquaintances of those persons, and investigators, experts and others with knowledge of circumstances related to terrorist activ ities. These persons are foreigners located outside the United States. They are not "foreign power[s]" or "agent[s] of . . . foreign power[s]." And the plaintiffs state that they exchange with these persons "foreign intelligence infor mation," defined to include information that "relates to" "international terrorism" and "the national defense or the security of the United States."
>
> [snip]
>
> The upshot is that (1) similarity of content, (2) strong motives, (3) prior behavior, and (4) capacity all point to a very strong likelihood that the Government will intercept at least some of the plaintiffs' communications, including some that the 2008 amendment, §1881a, but not the pre 2008 Act, authorizes the Government to intercept

Much of the rest of Breyer's dissent pertains to Alito's inconsistency on applying standing (without saying, which I would, that Alito seems to value the standing of property owners more than owners of less tangible rights). After doing so, Breyer argues at least some of the plaintiffs have standing.

> In sum, as the Court concedes, see ante, at 15–16, and n. 5, the word "certainly" in the phrase "certainly impending" does not refer to absolute certainty. 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. The considerations set forth in Parts II and III, supra, make clear that the standard is readily met in this case

Ultimately, that's what this decision is about: standing. But it will serve as a precedent for a number of other counterterrorism cases — including the NDAA one working through the 2nd. Which, given any more particularized suit would be thrown out under state secrets claims, means it will be almost impossible to get SCOTUS to review counterterrorism programs anytime soon.

Mind you, Alito says this ruling in no way insulates this program from judicial review, because the FISA Court conducts such a review.

> Second, our holding today by no means insulates §1881a from judicial review. As described above, Congress created a comprehensive scheme in which the Foreign Intelligence Surveillance Court evaluates the Government's certifications, targeting procedures, and minimization procedures—including assessing whether the targeting and minimization procedures comport with the Fourth Amendment. §§1881a(a), (c)(1), (i)(2), (i)(3). Any dissatisfaction that respondents may have about the Foreign Intelligence Surveillance Court's rulings—or the congressional delineation of that court's role—is irrelevant to our standing analysis. [my emphasis]

There are a lot of problems with that, with respect to this program, particularly given that court has no oversight over what the government does with intercepts after they've collected them (which gets to Breyer's point about minimization).

But Alito is right on one point. A big part of the problem in this case (as in the NDAA case,

frankly) is that Congress wanted to create a review-free program that gutted citizens' rights. This review-free process is by design.

And they're about to do it again with targeted killing.

Update: ACLU's Jameel Jaffer emphasizes the degree to which this punts our rights back to the political classes as well.

> "It's a disturbing decision. The FISA Amendments Act is a sweeping surveillance statute with far-reaching implications for Americans' privacy. This ruling insulates the statute from meaningful judicial review and leaves Americans' privacy rights to the mercy of the political branches," said ACLU Deputy Legal Director Jameel Jaffer,