

## **Attorneys Lacked Standing to Raise Constitutional Challenge to Government Surveillance of International Communications**

Under the Foreign Intelligence Surveillance Act, which was amended in 2008 (“the Act”), the Attorney General and the Director of National Intelligence may jointly authorize a surveillance program intended to gather foreign intelligence information by targeting the international communications of foreign persons reasonably believed to be located abroad. 50 U.S.C. § 1881a. Surveillance under the Act has been the subject of Constitutional challenges by various groups and individuals. In order to raise such Constitutional challenges, a party must establish standing to bring the challenge. To have standing under Article III of the U.S. Constitution, a party must establish an injury that is “concrete, particularized, and actual or imminent; fairly traceable to the challenged action and redressable by favorable ruling.” *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010).

The United States Supreme Court granted review of whether a group of US attorneys (and others) had standing to bring a facial challenge to §1881a of the Act. In *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), the U.S Supreme Court concluded that Amnesty International lacked standing because Amnesty International could not demonstrate that the future injury claimed was “certainly impending” and because costs to avoid surveillance of its communications did not constitute an injury.

On the day the Act was enacted, Amnesty International filed a lawsuit seeking a declaration that §1881a was unconstitutional and also sought a permanent injunction against surveillance under the Act. Amnesty International argued that it engaged in sensitive and privileged communications with persons abroad who are likely targets of surveillance under §1881a of the Act. The district court dismissed Amnesty International’s action, finding that these groups lacked standing to challenge the statute. The United States Court of Appeals for the Second Circuit disagreed and reversed, holding that Amnesty International had standing because it incurred expenses associated with taking greater precautions in order to keep its conversations confidential, i.e., traveling abroad to have in person conversation in order to avoid email and telephone calls.

On February 26, 2013, the U.S. Supreme Court reversed. The Court first noted that the Second Circuit’s “objectively reasonable likelihood” standard was inconsistent with U.S. Supreme Court precedent and the requirement that threatened injury must be “certainly impending to constitute injury in fact.” Thus, the Court held, Amnesty International’s fear that its communications with persons abroad will be intercepted by the government was speculative and not “certainly impending.” The U.S. Supreme Court further held that Amnesty International did not suffer a present injury in fact because the extra precautions taken by Amnesty International were taken to comply with professional ethical obligations and rules, i.e., “a lawyer would engage in malpractice if he talked on the telephone with some of these clients, given the statute.” Hence, Amnesty International did not incur any added expenses beyond what it was required to incur anyway due to its professional obligations.

For Further Information, Please Contact:

Nicholas P. Connon, Managing Partner; Chair, Middle East Practice Group  
Tel: +1.626.638.1757