Written by **Jack Kenny** on October 31, 2012

High Court to Decide if Challenge to Government Surveillance Program Will Be Heard

Hurricane Sandy did not prevent the U.S. Supreme Court from hearing oral arguments Monday, October 29, but it remains unclear whether the high court will allow a lawsuit challenging the constitutionality of the government's warrantless surveillance of Americans' international communications to go forward.

In *Clapper v. Amnesty International*, a group of lawyers and human rights activists filed suit against the government over the monitoring of international phone calls and e-mails authorized under the 2008 amendments to the Foreign Intelligence Surveillance Act. In amending the 1978 law, Congress increased from 48 hours to seven days the amount of time the government may conduct surveillance of a suspect outside the United States before notifying the FISA court, while another provision, due to expire on December 31 of this year, allows the director of national intelligence and the attorney general to jointly authorize electronic surveillance without a warrant for one year if the target is a foreigner located outside of the United States. The plaintiffs argued that the secret, warrantless procedures are prohibited by the Fourth Amendment ban on unreasonable searches and violate attorney-client confidentiality whenever a phone call or an e-mail between a lawyer and a client in another country is intercepted and monitored.

The suit, naming Director of National Intelligence James R. Clapper as the defendant, was given the green light last year by the U.S. 2nd Circuit Court of Appeals in New York after the court dismissed the government's argument that the plaintiffs lacked legal standing to challenge the law, since none could show evidence of either past or imminent harm from it. The government then appealed to the Supreme Court, where some of the justices seemed skeptical of the legal standing argument.

"General is there anybody who has standing?" Justice Sonia Sotomayor asked Solicitor General Donald Virrilli. "As I read your brief, standing would arise at the moment the government decided to use the

information against someone in a pending case." Virrilli said a complication in the case arose from the fact that U.S. citizens whose calls or messages are being monitored are not the targets of the searches aimed at foreigners acting in other lands, whose privacy and communications are not protected by the U.S. Constitution. He also acknowledged that U.S. citizens who are aware of government interception of their communications might have a hard time making their case in court, because "a challenge to the application [of the law] gets into classified information pretty quickly."

If the court does find the plaintiffs have standing to sue, asked Justice Ruth Bader Ginsburg, "Wouldn't the government then say as far as the merits of the complaint, this information is classified, is a state secret, we can't — we can't go forward with the litigation?"

"That is a possibility," the Solicitor General conceded. But he doubted it would ever get to that point, since the plaintiff's claims of harm done to them by the statute amounts to "a cascade of speculation," he said. "The government conduct being challenged has to either have occurred or be certainly impending," Virrilli said in response to a question from Justice Anthony Kennedy.

"General Virrilli, but in this case the complainant can never know," Justice Ginsburg observed. "I mean, we know you emphasize the speculative nature of this claim, but it's not speculative if the government, being given this authority by Congress, is going to use it. Isn't that so?"

"Yes, that's not speculative, Justice Ginsburg," Virrilli replied, "but what is speculative is the connection between the grant of authority and a claim of injury."

Asked by Justice Stephen Breyer if it is a harm when someone's communication is intercepted against his will, Verrilli said it "may be."

"There may be a storm tomorrow, too," Breyer said as the hurricane was approaching the East Coast, forcing cancellation of Tuesday's hearings."Nothing is certain."

The surveillance program began with a presidential order signed by President George W. Bush in 2002, the *New York Times* reported in bringing the program to light with a front-page story on December 16, 2005. In the intervening three years, the National Security Agency had "monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants," the *Times* reported, in an effort to track numbers linked to al-Qaeda terrorists and intercept their plans. The program continued for another two years and was revived by Congress with the 2008 amendments that loosened the warrant requirements in the FISA law and granted legal immunity retroactively to telecommunications companies that had cooperated with the previously illegal surveillance. As a U.S. senator, Barack Obama spoke out against the Bush administration program, but then voted for the FISA amendments that effectively legalized it. As president, he has continued the surveillance and his Justice Department has frequently invoked either the legal standing or the "state secrets" defense to immunize the administration against lawsuits.

During Monday's hearing, Chief Justice John Roberts and Justice Antonin Scalia seemed to be leaning in favor of the Solicitor General's argument about standing. Roberts repeatedly interrupted American Civil Liberties Union attorney Jameel Jaffer's claims about his clients being monitored. They are being "incidentally monitored," the chief justice said.

"I don't think that's exactly right," replied Jaffer. "The whole point of this statute was to allow the government to collect Americans' international communications." President Bush, he said, "threatened to veto the law when it was proposed that Americans' communications should be segregated in some way."

Justice Scalia seemed to suggest the courts should stay out of the controversy, saying there have been previous cases “where it is clear that nobody would have standing to challenge what is brought before this Court.… And we’ve said that that just proves that under our system of separated powers, it is none of our business.”

Photo of United States Supreme Court building in Washington, D.C.: AP Images