FOREIGN SURVEILLANCE AND INCIDENTAL U.S. COMMUNICATION:
CONCERNS OF AMNESTY V. MCCONNELL

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Even with the most recent amendments to the Foreign Intelligence Surveillance Act, questions still remain regarding the constitutional protections implicated during foreign and U.S. communications. In particular, Amnesty v. McConnell concerns the incidental U.S. communications that could be acquired during warrantless surveillance of a non-U.S. person overseas. While explicit Fourth Amendment protections are in place for U.S. citizens and permanent residents, the same is not true for the non-U.S. person located outside the nation’s borders. In conjunction with the 2008 Amendments Act, FISA attempts to adhere to the murky constitutional requirements demanded in this situation. However, some critics are not convinced, challenging the act as an unconstitutional violation of their privacy rights.

With international communication increasingly available for millions of people, the privacy concern brought by Amnesty v. McConnell has a global effect. Although ultimately dismissed for a lack of standing, this recent development argues that on its face, the FISA Amendments Act is constitutional under the Fourth Amendment despite the reality that incidental U.S. communications may be acquired.

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INTRODUCTION

On July 10, 2008 President Bush officially altered the Foreign Intelligence Surveillance Act of 1978 (“FISA”)\(^2\) by signing the FISA Amendments Act (“FAA”)\(^3\) – setting forth controversial new procedures for conducting overseas surveillance. Filing a complaint in the Southern District of New York only hours later, the American Civil Liberties Union (“ACLU”), in *Amnesty v. McConnell*\(^4\) brought suit against, among others, John M. McConnell in his official capacity as then-current Director of National Intelligence.\(^5\) The complaint alleged, *inter alia*, that the FAA violated Americans’ Fourth Amendment rights and was therefore unconstitutional.\(^6\)

The lawsuit was ultimately dismissed on August 20, 2009 for a lack of standing.\(^7\) However, the decision shed light on an ongoing concern the new amendments failed to fully answer: What Fourth Amendment protections are due when incidental U.S. communication\(^8\) is

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\(^1\) For a detailed discussion of this recent development, see *Amnesty v. McConnell*, No. 08 Civ. 6259 (JGK), 2009 WL 2569138 (S.D.N.Y. Aug. 20, 2009).


\(^4\) *Amnesty Int’l USA v. McConnell*, No. 08 Civ. 6259 (JGK), 2009 WL 2569138 (S.D.N.Y. Aug. 20, 2009); it should be noted that between the filing of the complaint and the release of the court’s slip opinion, Director of National Intelligence John M. McConnell as well as other defendants to the lawsuit had been effectively substituted in their official capacity under the Obama Administration. Under Fed. R. Civ. P. 25(d), this substitution would alter the case name to now be filed as Amnesty v. Blair, referring to current Director of National Intelligence Dennis C. Blair. To minimize confusion, this recent development will refer to the case as Amnesty v. McConnell as it appears on all court documentation at the time of this writing.


\(^6\) *Id.*; The Fourth Amendment reads: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV; In addition to their Fourth Amendment claim, the *Amnesty* complaint also challenged the FAA as unconstitutional under the First Amendment and Article III of the Constitution. *See Complaint ¶ 3, 2008 WL 2773811.* However, the scope of this recent development involves incidental U.S. communications which primarily falls under the Fourth Amendment challenge.

\(^7\) *Amnesty*, 2009 WL 2569138, at *13. (“The plaintiffs’ failure to show that they are subject to the FAA in any concrete way is sufficient to conclude that the plaintiffs lack standing to challenge the FAA.”).

\(^8\) When a “non-U.S. person” located outside the U.S. communicates with a “U.S. person” located within the U.S., their communication may be acquired during the lawful surveillance of the former. This is referred to as “incidental U.S. communication”; *see infra* note 9 for a description of a “non-U.S. person”; for purposes of this recent
acquired during surveillance of non-U.S. persons located outside the U.S. (‘‘non-U.S. person’’)\(^9\)

To clarify, assume the following: Individual ‘‘A,’’ with no U.S. citizenship or residency and located overseas, is under surveillance in the U.S. by the American government. Without Fourth Amendment protections, the government is not required to procure a warrant to target ‘‘A’’ and therefore is accordingly approved for the surveillance subject to the FAA provisions. However, at some point individual ‘‘B,’’ a U.S. citizen protected under the Fourth Amendment, communicates with ‘‘A.’’ Since ‘‘A’’ is already under surveillance, any communication involving ‘‘B’’ is incidentally acquired by the U.S. government. At this point are ‘‘B’s’’ Fourth Amendment rights now being violated? Should the government be required at this juncture to cease all surveillance of ‘‘A’’ until a warrant is acquired? Under the FAA procedures, it is essentially possible for every Americans’ international phone call or email to be subject to warrantless surveillance in an incidental context. Indeed it formed the very basis for the *Amnesty* complaint.\(^10\) However, is the mere possibility a realistic concern or is it just a ‘‘hypothetical fear’’ as the *Amnesty* court suggests?\(^11\) Nonetheless, a degree of safeguards are arguably necessary to adhere to the constitutional requirements implicated during the above described foreign surveillance example. The FAA contains various safeguards, both ex ante and ex post,\(^12\) but what is deemed constitutionally reasonable is wholly dependent on what standard of Fourth Amendment protections are due.

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\(^9\) For purposes of this recent development, ‘‘non-U.S. person’’ refers to all non-U.S. citizens and residents that are reasonably believed to be located outside the U.S. See 50 U.S.C. § 1801(i) (2006).


\(^11\) See *Amnesty*, 2009 WL 2569138, at *16 (‘‘[T]he plaintiffs in this case have only a hypothetical fear of being harmed. . . .’’).

\(^12\) Ex ante, or safeguards implemented beforehand, are necessary before approval can be given for surveillance. See, e.g., 50 U.S.C.S. § 1881a(b)-(e) (LexisNexis 2008) (describing the necessary “limitations,” “conduct of acquisition,” “targeting procedures,” and “minimization procedures” that must be explicitly in place before an approval for surveillance is granted); Once surveillance is underway, ex post procedures are implemented in the form of congressional oversight, Inspector General reviews, and semiannual assessments mandated by the statute. See, e.g., § 1881a(l) (“Assessments and reviews”).
Part I of this recent development briefly outlines FISA and the changes now implemented by the FAA that have raised the Amnesty concern. Part II analyzes the Amnesty opinion and argues that the court’s decision to dismiss the case on standing grounds was correct. This part also examines what the Amnesty and similar plaintiffs would have to show to overcome the court’s justiciability rationale and the inherent difficulties they may be presented with. Part III looks at the merits in Amnesty and concludes that on its face, the FAA is most likely constitutional under a Fourth Amendment analysis.

I. HOW FISA OPERATES

“Congress passed FISA to settle what it believed to be the unresolved question of the applicability of the Fourth Amendment warrant requirement to electronic surveillance for foreign intelligence purposes, and to ‘remove any doubt as to the lawfulness of such surveillance.’”

Although first enacted in 1978, various amendments have been enacted over the years that have attempted to address technological changes as well as appease the constitutional balance originally sought. Arguably, only the technological concerns have been met, leaving the

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13 The current FISA legislation is inherently complex and contains numerous provisions outside the scope of this recent development. For the sake of simplicity, the following description only outlines the relevant portions for the reader to understand the general process of acquiring approval for foreign surveillance as it pertains to the Amnesty v. McConnell litigation. Specifically challenged is section 702 of the FAA (50 U.S.C.S. § 1881a) entitled “Procedures For Targeting Certain Persons Outside the United States Other Than United States Persons.” Id.; see infra note 15 for in-depth articles describing other sections of FISA and many of the statute’s historical changes.


15 The full spread of FISA’s history is replete with various amendments that have created substantial concern and notoriety in the media. Some of the most noteworthy include the U.S.A. Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), and the Protect America Act, Pub. L. No. 110-55, 121 Stat. 52 (2007); For a detailed account of the history and changes that have been implemented prior to the enactment of the Amendments Act of 2008, see generally William C. Banks, The Death of FISA, 91 MINN. L. REV. 1209 (2007); David S. Kris, The Rise and Fall of the FISA Wall, 17 STAN. L. & POL’Y REV. 487 (2006); see also Stephanie Cooper Blum, What Really is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform, 18 B.U. PUB. INT. L.J. 269 (2009).
“unresolved question” and “doubt” to persist despite Congress’ intentions.\textsuperscript{16} The most recent change, made by the FAA, establishes the procedures and guidelines that are in effect today and form the basis of the \textit{Amnesty v. McConnell} challenge.

Currently, FISA operates by requiring government officials to seek an order from a special court that would allow them to conduct and collect “foreign intelligence” in particular circumstances.\textsuperscript{17} This special court, called the Foreign Intelligence Surveillance Court (“FISC”) is comprised of eleven appointed federal judges\textsuperscript{18} that review the government’s request and either approve it, by issuing an order granting the requested surveillance privileges (“FISC order”) or deny it, disallowing the government to conduct the requested surveillance.\textsuperscript{19} This FISC order as well as its approval process, as discussed below, encompass the “warrantless surveillance” that is alleged to be unconstitutional in the ACLU complaint.\textsuperscript{20}

Under U.S.C.S. § 1881a of the FAA, the Attorney General (“AG”) and the Director of National Intelligence (“DNI”) are able to authorize for one year, “the targeting of persons reasonably believed to be located outside the United States” if the “significant purpose” of their

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\textsuperscript{16} A major change the FAA brought to FISA was the removal of the “wire,” “wireless,” “cable,” and “radio” distinctions which had altered the surveillance requirements depending on the type of technology used by the targeted communication. Currently, the FAA is more technology-neutral in this regard.

\textsuperscript{17} Under 50 U.S.C. § 1801(e)(1), “foreign intelligence” information is defined as “information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against-- (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.” \textit{Id.} The definition also includes “information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to-- (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States. 50 U.S.C. §1801(e)(2).


\textsuperscript{19} FAA, 50 U.S.C.S. § 1881a(i) (LexisNexis 2008); The government may also appeal the FISC decision to the Foreign Intelligence Surveillance Court of Review (“FISCR”), § 1881a(i)(4)(A), as well as request a writ of certiorari from the U.S. Supreme Court under § 1881a(i)(4)(D). During an appeal, if surveillance had already begun, the government may continue under certain circumstances. \textit{See} § 1881a(i)(4)(B).

\textsuperscript{20} Complaint ¶ 34, Amnesty v. McConnell, No. 08 Civ. 6259 (JGK), 2008 WL 2773811 (filed July 10, 2008) (“[T]he FISA Amendments Act provides legislative sanction for the warrantless surveillance of U.S. citizens’ and residents’ communications.”).
acquisition is to obtain “foreign intelligence information.” However, four general limitations are implemented: A surveillance acquisition may not intentionally (1) “target any person known at the time of the acquisition to be located in the United States”; (2) “target a person reasonably believed to be located outside the United States if the purpose . . . is to target a . . . person reasonably believed to be in the United States”; (3) “target a United States person reasonably believed to be located outside the United States” or (4) “acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.” Although the government is not required to specifically identify any of the persons, places, or facilities that will be under surveillance, all acquisitions must be “conducted in a manner consistent with the Fourth Amendment.” Upon submitting the request for surveillance, the AG and DNI must provide guidelines which ensure that the limitations will be followed and are indeed consistent with the Fourth Amendment requirements. In addition to the FISC, these guidelines are provided to the congressional intelligence committees and the Committees on the Judiciary of the Senate and the House of Representatives. The request must also provide that specific targeting and minimization procedures are in place to prevent

21 § 1881a(a), (i)(3), (g)(2)(A)(v).
22 § 1881a(b)(1).
23 § 1881a(b)(2).
25 § 1881a(b)(4).
26 § 1881a(g)(4).
27 § 1881a(b)(5).
28 § 1881a(f).
29 § 1881a(g)(2)(A(iv).
31 § 1881a(f)(2)(A).
32 § 1881a(f)(2)(B).
33 “Targeting procedures” are procedures that are reasonably designed to ensure that any acquisition authorized is limited to the targeting of persons reasonably believed to be located outside the U.S. and that prevent the intentional acquisition of any purely domestic communication. § 1881a(d)(1)(A), (d)(1)(B).
34 “Minimization procedures” are defined under 50 U.S.C. § 1801(h). In pertinent part, they are (1) “specific procedures which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning the unconsenting United States persons consistent with the need of the
the acquisition and dissemination of intelligence beyond what is authorized. These procedures must forego a semiannual assessment where they are again submitted and reviewed by the FISC and various congressional committees. Further semiannual compliance is mandated in that the Inspector General of the Department of Justice as well as each Inspector General in every Intelligence Community element reviews all intelligence reports involving references to U.S. persons. Once the FISC approves that the guidelines and the request are in line with the FAA and the Fourth Amendment, surveillance may proceed pursuant to the order. It is also important to note that the FAA includes an exception for exigent circumstances. If “intelligence” important to “the national security of the United States” could be lost due to the timeliness of the FISC approval process the AG and the DNI may authorize the needed surveillance prior to approval. However, they are required in no more than seven days to apply for the FISC order, whereupon the standard request procedures and oversight mechanisms embedded in the statute apply. Surveillance is terminated if this subsequent request is denied.

United States to obtain, produce, and disseminate foreign intelligence information;” (2) “procedures that require that non publicly available information, which is not foreign intelligence information, as defined in [50 U.S.C. §1801(e)(1)], shall not be disseminated in a manner that identifies any United States person, without such person’s consent, unless such person’s identity is necessary to understand foreign intelligence information or assess its importance; [and] (3) “notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes[

36 § 1881a(l)(1); The FAA also includes an annual review under § 1881a(l)(3). See Amnesty, 2009 WL 2569138, at *6-6 (S.D.N.Y. Aug. 20, 2009).
37 § 1881a(l)(2)
38 See § 1881a(c)(2).
39 § 1881a(c)(2).
40 FAA, 50 U.S.C.S. § 1881a(g)(1)(B) (LexisNexis 2008)
41 § 1881a(i)(3)(B)(ii); The government may also appeal the FISC decision under § 1881a(i)(4).
II. AMNESTY V. MCCONNELL

A. The Complaint

The litigation brought forth by the ACLU claims that the FAA fails to protect Americans’ privacy interests in regards to their telephone calls and emails.\(^{42}\) In demonstrating this, the complaint includes a number of plaintiffs that claim to have been unconstitutionally harmed by the FAA.\(^{43}\) The plaintiffs are “attorneys and organizations in the United States” who maintain sensitive international communication via telephone and email with “people and organizations they believe to be likely targets of surveillance under the FAA.”\(^{44}\) The list of their international contacts include, “clients, journalistic sources, witnesses, experts, foreign government officials, and victims of human rights abuses”\(^{45}\) as well as “political and human rights activists,” some of who are opposed to governments “supported economically or militarily by the U.S.”\(^{46}\) The plaintiffs do not assert that their communications have been monitored nor do they allege that the government has sought or received a FISC order authorizing such surveillance.\(^{47}\) However, the plaintiffs maintain that due to the FAA, they have an “actual and well-founded fear” that they

\(^{42}\) *Amnesty*, 2009 WL 2569138, at *8; It should be noted that the plaintiffs only present a facial challenge to the FAA. *Id.*: “[A] plaintiff can only succeed in a facial challenge by ‘establish[ing] that no set of circumstances exists under which the Act would be valid,’ i.e., that the law is unconstitutional in all of its applications.” Wash. State Grange v. Wash. State Republican Party, 128 S.Ct. 1184, 1190 (2008) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

\(^{43}\) Complaint ¶ 1, Amnesty v. McConnell, No. 08 Civ. 6259 (JGK), 2008 WL 2773811 (filed July 10, 2008).

\(^{44}\) *Amnesty*, 2009 WL 2569138, at *1.


\(^{46}\) Undisputed Facts ¶ 9(C), *Amnesty*, No. 08 Civ. 6259 (JGK); see also Declaration of Sylvia Roycee ¶¶ 3-6, Amnesty, No. 08 Civ. 6259 (JGK) (filed Sept. 11, 2008 [hereinafter Roycee Decl.] (discussing communication with Guantanamo Bay prisoner Mohammedou Ould Salahi); Declaration of Joanne Mariner ¶ 8, *Amnesty*, No. 08 Civ. 6259 (JGK) (filed Sept. 11, 2008) [hereinafter Mariner Decl.] (discussing communication with past prisoners held abroad by the CIA); Declaration of John Walsh ¶¶ 5-6,11, *Amnesty*, No. 08 Civ. 6259 (JGK) (filed Sept. 11, 2008) [hereinafter Walsh Decl.] (discussing communications with individuals charged under El Salvador’s anti-terrorism legislation as well as individuals in Colombia, Cuba, and Venezuela).

\(^{47}\) *Amnesty*, 2009 WL 2569138, at *1.
will be subject to government surveillance and that they have already “incurred significant costs.”\footnote{Complaint ¶ 2, \textit{Amnesty}, 2008 WL 2773811. Additionally, one plaintiff claims that she will now have to travel abroad to gather information in person instead of using email or telephone. Mariner Decl. ¶ 10, \textit{Amnesty}, No. 08 Civ. 6259 (JGK); see also Declaration of Naomi Klein ¶ 9, \textit{Amnesty}, No. 08 Civ. 6259 (JGK) (filed Sept. 11, 2008) [hereinafter Klein Decl.] (claiming that due to the FAA, her political activist contacts may view her as an “extension of the U.S. government’s intelligence community” and she will be “force[d]” to travel to retrieve information instead of being able to use email and telephone).} Namely, they allege that the FAA “requires” them to take “costly and burdensome measures” in order to “protect the confidentiality of sensitive and privileged communications.”\footnote{\textit{Amnesty}, 2009 WL 2569138, at *1.} The plaintiffs argue, \textit{inter alia}, that on its face, the FAA is an unconstitutional intrusion on theirs and all Americans’ privacy interests under the Fourth Amendment.\footnote{U.S. CONST. art. III, § 2; \textit{see, e.g.}, Bennett v. Spear, 520 U.S. 154, 162 (1997) (“To satisfy the ‘case’ or ‘controversy’ requirement of Article III, which is the ‘irreducible constitutional minimum’ of standing, a plaintiff must, generally speaking, demonstrate that he has suffered ‘injury in fact,’ that the injury is ‘fairly traceable’ to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.”) (quoting \textit{Lujan v. Defenders of Wildlife}, 504 U.S. 555, 560-61 (1992); \textit{Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.}, 454 U.S. 464, 471-72 (1982)).}

\section*{B. Unable To Show Standing}

In dealing with the secretive nature that attaches to national security and electronic surveillance, perhaps one of the most difficult obstacles to overcome is standing, a necessary element to have the merits of a case heard. Indeed this burden presented itself forthright as the \textit{Amnesty} litigation never progressed past the “case” or “controversy” requirement.\footnote{One could only presume that the difficulty in acquiring standing in cases arising out of the national security and electronic surveillance context will increase as technology advances, causing evidentiary traces to diminish and} Although this recent development argues that the \textit{Amnesty} court correctly concluded that the plaintiffs lacked standing, a complete discussion – one beyond the scope of this recent development – surrounds the increasing difficulty a plaintiff encounters litigating in this realm.\footnote{One could only presume that the difficulty in acquiring standing in cases arising out of the national security and electronic surveillance context will increase as technology advances, causing evidentiary traces to diminish and}
In approximately half of the opinion, the *Amnesty* court addressed the two primary arguments the plaintiffs claimed as their basis for standing: First, that their fear of being monitored under the FAA is “actual and well-founded” and second, that in light of their fear, the “costs” they have incurred in order to “protect” their international communications provide the requisite harm. In holding that the plaintiffs did not meet the “irreducible constitutional minimum” of an “actual or imminent injury in fact” that was “personal, particularized, [and] concrete[,]” the court declared that the plaintiffs could “only demonstrate an abstract fear” that was both “speculative and hypothetical.” That they could not show that “surveillance has been conducted, authorized or even contemplated” against them nor that the FAA “require[d] the plaintiffs to do anything or refrain from doing anything,” despite their seemingly definitive allegations.


55 *Id.* at *10.

56 *Id.* at *12.

57 *Id.* at *11.

58 *Amnesty v. McConnell*, No. 08 Civ. 6259 (JGK), 2009 WL 2569138, at *15 (S.D.N.Y. Aug. 20, 2009); The court also made clear that “the FAA neither authorizes surveillance nor identifies on its face a class of persons that includes the plaintiffs.” *Id.* at *13.
Among many others, the court cited *ACLU v. NSA* as an analogous case that was also dismissed for a lack of standing. *ACLU v. NSA* concerned a constitutional challenge to the Terrorist Surveillance Program ("TSP") which involved the warrantless interception of telephone and email communications by the National Security Agency ("NSA"). There, the communication involved a party that was located outside the United States and whom the NSA had a reasonable basis to conclude was connected to al Qaeda. Similar to *Amnesty*, the plaintiffs in *ACLU v. NSA* challenged the surveillance as unconstitutional, claiming to have a reasonable belief that the individuals they communicated with overseas were suspected by the NSA as being linked to al Qaeda and therefore subject to TSP surveillance. Quoting the lead opinion in *ACLU v. NSA*, the *Amnesty* court stated that "it would be unprecedented for this court to find standing for plaintiffs to litigate a Fourth Amendment cause of action without any evidence that the plaintiffs themselves have been subjected to an illegal search or seizure." Not surprisingly, the court did not elaborate on the specific facts needed for the *Amnesty* case to be justiciable and granted the government’s motion for summary judgment.

Although the court premised their evidentiary findings – or lack thereof – as the basis for their judgment, a closer look at the length *Amnesty* and other like plaintiffs would have to travel

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59 See, e.g., United Presbyterian Church in the United States of America v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984) (rejecting plaintiffs attempt to rely upon the “threat” of surveillance); Babbitt v. United Farm Workers National Union, 422 U.S. 289, 302-03 (finding standing due to a “realistic danger” of enforcement under the statute); Pacific Capital Bank, N.A. v. Connecticut, 542 F.3d 341, 350 (2d Cir. 2008) (finding standing where plaintiffs “reasonably interpreted statute” to apply to them); Vt. Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 383 (2d. Cir. 2000) (finding standing where plaintiff’s activities “could easily be construed” to fall under the statute);
60 *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007).
61 *Id.*; cf. Laird v. Tatum, 408 U.S. 1, 6 (1972) (holding that because plaintiffs had failed to show a link between a surveillance program and their own speech, “[a]llegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm . . . .”).
62 *ACLU*, 493 F.3d 644.
64 *Amnesty*, 2009 WL 2569138, at *11; see *ACLU*, at 649.
65 *Id.* at *11 (quoting *ACLU*, at 673-74 (Batchelder, J.)).
66 See *Amnesty*, 2009 WL 2569138, at *13 (“It is unnecessary to seek to define the outer limits of what it would take for the plaintiffs to be subject to the FAA such that they would have standing to challenge its constitutionality.”).
to reach constitutional standing, may prove unquestionably cumbersome. In order to satisfy the court’s standing analysis, the *Amnesty* plaintiffs would arguably have been more successful had they been able to tangibly present two things: (1) that they were in a class of individuals “personally subject” to the FAA; and (2) that there was a “genuine threat of enforcement” against them. The initial difficulty is apparent in the ambiguity of the FAA. The statute itself does not particularize a discrete group of individuals that the plaintiffs could claim to be a part of and therefore subject to its authority. Following this dilemma is the fact that on its face the FAA does not authorize surveillance – the FISC does, pursuant to a request from the AG or the DNI. And presenting the court with more than a hypothetical claim that the FISC, the AG, or the DNI have proceeded through the FISC order procedures is a near impossible feat for plaintiffs similarly situated to those in the *Amnesty* lawsuit, in large part because the FISC order proceedings are held completely ex parte. Similarly, any evidence of surveillance would probably be beyond the reach of litigants due to its classified nature. However under this analysis, the plaintiffs could possibly show that they are subject to the FAA by presenting why their international contacts, and therefore they, will likely be targeted by the FAA. One suggestion would be to analyze past records or criminal proceedings that have arisen out of information collected during FISA approved surveillance to show direct and unequivocal

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67 ACLU v. NSA, 493 F.3d at 691 (Gibbons, J., concurring).
68 Id. at 689 n.2 (Gibbons, J., concurring).
69 See Amnesty, 2009 WL 2569138, at *10 (“Indeed, the FAA neither authorizes surveillance nor identifies on its face a class of persons that includes the plaintiffs.”).
70 See Id. at *12 (“[T]he FAA does not authorize surveillance but rather authorizes the FISC to do so pursuant to the procedures set forth in the statute.”).
71 Id. at *2; see also United States v. Megahey, 553 F. Supp. 1180, 1197 (E.D.N.Y. 1982) (“Applications for electronic surveillance submitted to FISC pursuant to FISA involve concrete questions respecting the application of the Act and are in a form such that a judge is capable of acting on them, much as he might otherwise act on an ex parte application for a warrant.”).
72 Boumediene v. Bush, 128 S.Ct. 2229, 2276 (2008) (“We recognize . . . that the Government has a legitimate interest in protecting sources and methods of intelligence gathering.”); cf. United States v. Reynolds, 345 U.S. 1, 10 (1953) (“[T]here is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”).
similarities between those individuals and the plaintiffs’ international contacts, attempting to reasonably show the distinct type of target the FAA will pursue. Of course, the plaintiffs would still be obligated to show the similarities between themselves and the past FAA targets. This might be done by showing that communication with the non-U.S. person is constant, that if surveillance is conducted, there is a high probability that the plaintiff would be subjected to it.73 Trying to connect these dots would obviously be challenging, and in the case of *Amnesty* impossible, due to the fact that the complaint alleging the FAA harmed them was curiously filed only hours after its enactment. If anything, the almost impractical suggestions above tend to show that it would certainly be rare for plaintiffs’ like those in *Amnesty v. McConnell* not to have their case dismissed, leaving unanswered the proper Fourth Amendment analysis due when incidental communication is acquired under the FAA. Or perhaps by chance, the standing difficulties inherent in the national security context exist to prevent the judiciary from intruding into an area that is arguably more appropriate for the political branches to convene.74

III. ON THE MERITS: *AMNESTY*, THE FAA, AND THE FOURTH AMENDMENT

Assuming that standing had been met and the plaintiffs’ claim had been deemed justiciable, would the FAA on its face have been declared unconstitutional as a Fourth

73 *But see* Halkin v. Helms, 690 F.2d 977, 1006 (D.C. Cir. 1982) (“The fact that an individual is more likely than a member of the population at large to suffer a hypothesized injury, while perhaps lending support to his standing to complain, makes the injury no less hypothetical.”).
74 *See e.g.*, United States v. Truong, 629 F.2d 908, 914 (4th Cir. 1980) (noting that the Executive Branch has been “constitutionally designated as the preeminent authority in foreign affairs,” and that “the separation of powers requires [the court] to acknowledge the principal responsibility of the President . . . for foreign intelligence surveillance.”); Bush v. Lucas, 462 U.S. 367 (1983) (citing cases for when decisions should be deferred to the appropriate branch); *Cf.* Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc., 476 U.S. 837, 865 (1984) (“The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: ‘Our Constitution vests such responsibilities in the political branches.’ ”) (quoting TVA v. Hill, 437 U.S. 153, 195) (1978).
Amendment violation? This recent development argues that it most likely would not. In the following, this conclusion will be supported in two respects: First, by inquiring as to what Fourth Amendment standards apply to individuals affected by the FAA, and second, by applying that standard to the facts under Amnesty.

A. The Fourth Amendment Requires Reasonableness

Under the Amnesty facts, there are two groups of individuals that are affected by the FAA: the plaintiffs, all whom are located within the United States, and the individuals on the other end of their communication line, non-U.S. persons located outside the United States. This recent development does not dispute that the plaintiffs and similarly situated Americans should receive Fourth Amendment protections. However, the same cannot be said for the latter, the only group of the two the FAA as challenged applies to: non-U.S. persons. This situation exemplifies the irony of the constitutional paradox at the heart of the Amnesty concern. On one hand, there is a class of individuals who are arguably without Fourth Amendment rights and directly subject to the statute. On the other, there is a class with constitutional safeguards who may be indirectly affected by the FAA. As explained later, all that the Constitution requires to reconcile the possible implications arising when the two communicate with each other is the fundamental principle of reasonableness.

First, support for the inference that the Fourth Amendment in fact does not apply to the non-U.S. persons targeted by the FAA is found in the 1990 decision United States v. Verdugo-

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In *Verdugo-Urquidez*, the U.S. Supreme Court discussed the Fourth Amendment rights that were due to non-U.S. citizens with no substantial connection to the United States. The Court first looked to the historical data in determining that “the purpose of the Fourth Amendment was to protect the people of the United States” and that it was “never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.” Further analyzing the cases where aliens are afforded constitutional protections, they found that non-U.S. persons only receive “constitutional protections” when they have at least been to the United States and have developed “substantial connections” while there. It would further be impracticable to suggest that wholly non-U.S. persons are afforded any Fourth Amendment rights while located outside the United States.

Along these lines, the FAA as challenged only indirectly and incidentally implicates the plaintiffs’ constitutional protections. The statute is not geared towards the *Amnesty* plaintiffs or others like them. To quite the contrary, the statute is in place to implement the necessary procedures used when conducting foreign surveillance. Nonetheless, explicitly in the FAA are limitations and procedures in order to ensure that individuals like the plaintiffs are not “targeted” and on the occasion they are, to properly treat the situation under the strict Fourth Amendment requirements. Although the plaintiffs’ claim that “the FAA licenses . . . a ‘roving commission

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78 Id.
79 Id. at 265.
80 Id. at 259.
81 And if the plaintiffs were claiming their rights had been violated while they were outside the U.S., their Fourth Amendment protections generally follow them. See 50 U.S.C.S. § 1881c(a)(2) (LexisNexis 2008) (“No element of the intelligence community may intentionally target, for the purpose of acquiring foreign intelligence information, a United States person reasonably believed to be located outside the United States under circumstances in which the targeted United States person has a reasonable expectation of privacy and a warrant would be required if the acquisition were conducted inside the United States for law enforcement purposes . . . .”); see generally Jonathan D. Forgang, “The Right of the People”: The NSA, The FISA Amendments Act of 2008, and Foreign Intelligence Surveillance of Americans Overseas, 78 FORDHAM L. REV. 217 (analyzing Fourth Amendment jurisprudence regarding government surveillance of U.S. citizens abroad); see also 50 U.S.C. § 1881b (LexisNexis 2008).
82 See 50 U.S.C. § 1881a(d)(1), (g)(2)(A)(i); see also supra Part I, HOW FISA OPERATES.
to seize any and all conversations[,]” \(^{83}\) absent evidence to the contrary, the government is presumed to follow the policy.\(^{84}\) Mere allegations with nothing more could hardly support such a serious claim. An analogous case that exemplifies this conclusion is *In re Directives Pursuant to Sec. 105B*.\(^{85}\) Decided in 2008 by the FISA review court, the court held that when “a statute has been implemented in a defined context, an inquiring court may only consider the statute’s constitutionality in that context; the court may not speculate about the validity of the law as it might be applied in different ways . . . .”\(^{86}\) As no such evidence supporting their claim exists in *Amnesty*, it follows that the Fourth Amendment requirements would only be raised to a level necessitated in the “context” of the plaintiffs telephone and email conversations.\(^{87}\) Simply put, because the plaintiffs in *Amnesty* cannot show that they have been “intentionally targeted” by surveillance pursuant to the FAA, they are only protected so far as mere incidental contact requires.\(^{88}\)

The next inquiry is to discern if the government would be required to obtain a warrant, knowing that there is a possibility U.S. communications could be intercepted. If this were to be true as the *Amnesty* plaintiffs claim, acquiring a FISC order under the FAA and proceeding with FISC approved surveillance would be unconstitutional. However, this claim that the Fourth

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\(^{84}\) See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 660 (1995) (“[W]hen respondents choose, in effect, to challenge the Policy on its face, we will not assume the worst.”).

\(^{85}\) *In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (Foreign Int. Surv. Ct. Rev. 2008).

\(^{86}\) *In re Directives*, at 1010; see also United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (“The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”).

\(^{87}\) *In re Directives*, at 1010.

\(^{88}\) See supra Part I, How FISA OPERATES; see also United States v. Bin Laden, 126 F.Supp.2d 264, 280 (S.D.N.Y. 2000) (holding that in a limited context “incidental interception of a person’s conversations during an otherwise lawful surveillance is not violative of the Fourth Amendment.”); cf. United States v. Figueroa, 757 F.2d 466 (2d. Cir. 1985) (holding that even though Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-20 (1982), allows the interception of conversations of “others as yet unknown,” on its face, the statute is not rendered unconstitutional).
Amendment requires the government to acquire a warrant in this type of scenario is unprecedented in our history of Fourth Amendment rationale. Generally speaking, the Fourth Amendment prohibits “unreasonable searches and seizures” and requires a “warrant” to be issued upon a showing of “probable cause.” However, the Supreme Court has found a few narrow exceptions where the warrant clause does not apply due to the surrounding circumstances. This long-held precedent is founded not upon the idea that the Fourth Amendment is determinative on a bright-line rule, but that it is flexible, adhering to the circumstance as reasonableness requires. “Although the underlying command of the Fourth Amendment is that searches and seizures always be reasonable, what is reasonable depends on the context within which a search takes place.”

In 2008, one of these “exceptions” was reaffirmed, compounding the conclusion that there is no warrant requirement for circumstances involving the Amnesty plaintiffs and other Americans similarly situated. In re Directives upheld an applicable “foreign intelligence exception” for surveillance involving “national security purposes.” Although this holding applied the exception to surveillance targeted at “foreign powers” or “agents of foreign powers,”

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89 U.S. CONST. amend. IV.
92 In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1012 (Foreign Int. Surv. Ct. Rev. 2008) (“[W]e hold that a foreign intelligence exception to the Fourth Amendment’s warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States.”); See also Constance Pfeiffer, Note, Feeling Insecure?: United States v. Bin Laden and the Merits of a Foreign-Intelligence Exception For Searches Abroad, 23 REV. LITIG. 209 (2004) (discussing the applicability of a foreign intelligence exception to the Fourth Amendment’s warrant requirement).
which is narrower than what the FAA entails, the court’s reasoning expressed the need for an exception when “the purpose behind the governmental action went beyond routine law enforcement” and requiring a warrant would “materially interfere” with accomplishing that purpose. This holds especially true in regards to the government concerns at stake here – concerns that justify a reasonable adoption of surveillance prerequisites that are “less stringent” than those required during “the issuance of a warrant for a criminal investigation.” Quite frankly, in light of the inherent issues involved in gathering foreign intelligence, applying a warrant requirement would be entirely untenable. Essentially, it would require the government to apply for and acquire a warrant for every instance of surveillance just because a single occurrence of U.S. communication, regardless of how minimal, may be involved. Accordingly, the doctrine exempting foreign intelligence matters from the strict warrant requirements could arguably apply to the nature and purpose behind the FAA as well – extending the foreign intelligence exception to the facts in Amnesty.

Nonetheless, the government would not be justified in discarding the Amnesty plaintiffs’ Fourth Amendment rights altogether because they are still potentially implicated, albeit indirectly, and “governmental action intruding on individual privacy interests must comport with the Fourth Amendment’s reasonableness requirement.”

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93 See 50 U.S.C.S. § 1881a (LexisNexis 2008) (“. . . persons outside the United States other than United States persons.”); see also supra notes 22-25 and accompanying text (listing the limitations under the FAA of the “persons” the act may target).
94 In re Directives, at 1010; see also Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (“[S]pecial needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”).
96 Cf. United States v. Tuong Dinh Hung, 629 F.2d 908, 914 (4th Cir. 1980) (“[B]ecause of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance.”); United States v. Butenko, 494 F.2d 593, 605 (3d Cir. 1974) (en banc) (“[I]ntelligence gathering is a clandestine and highly unstructured activity, and the need for electronic surveillance often cannot be anticipated in advance.”).
97 See also Forgang, supra note 81, at 245 (examining various cases involving the “foreign intelligence exception”).
98 In re Directives, at 1012 (emphasis added).
B. The FAA is Reasonable

The analysis above only demonstrates that in the context of incidental U.S. communication, there is no warrant requirement to stay in bounds of the Fourth Amendment. The FAA would still have to pass muster insofar as it indirectly triggers the Amnesty plaintiffs’ privacy interests, invoking the less stringent protections of the Fourth Amendment. This requires an examination of the “reasonableness” of the FAA in regards to the possible incidental U.S. communication. Although the precise wording differs slightly between cases, the Supreme Court has consistently held that the reasonableness of a government action is determined by balancing the private interests at stake against the government’s legitimate interests in accomplishing the action.99 The test looks at the “totality of the circumstances”100 as well as “the nature of the government intrusion and how the intrusion is implemented.”101 The FISA Court of Review described the weight shifting as follows:

If the protections that are in place for individual privacy interests are sufficient in light of the governmental interest at stake, the constitutional scales will tilt in favor of upholding the government’s actions. If, however, those protections are insufficient to alleviate the risks of government error and abuse, the scales will tip toward a finding of unconstitutionality.102

99 See, e.g., United States v. United States District Court (Keith), 407 U.S. 297 (1972) (“As the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy. . . .”); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995) (“[W]hether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”) (internal quotations omitted); Samson v. California, 547 U.S. 848 (2006) (same); New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (“The determination of the standard of reasonableness governing any specific class of searches requires ‘balancing the need to search against the invasion which the search entails.’”) (quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)).

100 See Samson v. California, 547 U.S. at 848; see also Tennessee v. Garner, 471 U.S. 1, 8-9 (1985) (“[T]he question was whether the totality of the circumstances justified a particular sort of search or seizure.”).

101 In re Directives, at 1012; see also Tennessee v. Garner, 47 U.S. at 8.

102 Id. at 1012.
Looking towards the government’s interest first, it can hardly be contested that national security is of utmost importance. The security of our nation remains a foundational undertaking that we expect our government to strive for. Despite the multitude of competing beliefs asserting when the nation is at the requisite safety threshold, what is most important and fundamentally contested, are the means that the government may or may not employ to advance us there. In this process and at the pinnacle of what Amnesty questions is whether the privacy rights of individuals who may be subjected to incidental electronic surveillance are unreasonably intruded upon by the FAA.

The FAA is in place to conduct and collect foreign intelligence from non-U.S. persons located overseas. On its face, an assortment of checks are implemented, both ex ante and ex post, which attempt to minimize and prohibit any digression from the above mentioned purpose. Hence, an intrusion on the privacy interests in question would occur either when it is incidental to a lawful surveillance procedure or when the government knowingly subjects them to surveillance. The latter, referred to as “reverse targeting” occurs when the government lawfully targets a non-U.S. person outside the United States with the actual goal of acquiring the communication of a U.S. person. This could essentially work as a loophole for the government to legally acquire U.S. communications. However, in addition to the continuous deterrence and surveillance checks active throughout the surveillance process, there are two arguments that support the suppression of abuse. First and foremost, the FAA explicitly prohibits this kind of maneuver, stating that an authorized acquisition “may not intentionally target a person

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103 In re Directives, at 1012; see Haig v. Agee, 453 U.S. 280, 307 (1981) (“It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)).
105 See supra Part I, HOW FISA OPERATES.
106 See Blum, supra note 15, at 297.
reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States.”

Second, assuming the government disregarded the protocol, which as discussed above would conflict with the presumption a lack of evidence would establish, it is reasonable to see how “reverse targeting” may not be a tempting measure to take. As the Director of National Intelligence stated in a hearing before the Senate Judiciary Committee, “for operational reasons, the Intelligence Community has little incentive to engage in reverse targeting. If a foreign intelligence target who poses a threat is located within the United States, then we would want to investigate that person more fully. In this case, reverse targeting would be an ineffective technique. . . .”

Essentially, per chance that the incidental contact was considered a potential threat, the FAA would not allow that person to be targeted because as a U.S. citizen or permanent resident they would still fall outside the ambit of the statutes express limitations, necessitating traditional Fourth Amendment requirements. Additionally, the congressional and FISC assessment mechanisms would provide oversight during the various mandated reviews where any incidental U.S. communications that had been acquired would be analyzed and destroyed as per the statute.

Since the facts in Amnesty and the discussion above represent that nothing had been presented showing anything other than the possible occurrence of coincidental surveillance, it is difficult to understand how the FAA intrudes unreasonably, if at all, onto the privacy interests of

107 50 U.S.C.S § 1881a(b)(2); see also Paul M. Schwartz, Warrantless Wiretapping, FISA Reform, and the Lessons of Public Liberty: A Comment on Holmes’s Jorde Lecture, 97 CAL. L. REV. 407, 411 (2009) (“The statute also contains a prohibition on ‘reverse targeting.’ [T]he FAA permits surveillance of foreign-to-domestic communications that have a nexus to ‘foreign intelligence.’ Reverse targeting would involve the government using this link as a pretext to gather intelligence about the domestic party to the communication.”).


109 See 50 U.S.C. § 1881a(b)(1) (“An acquisition . . . may not intentionally target any person known at the time of acquisition to be located in the United States.”)

110 See § 1881a(l) (outlining the mandatory “assessment and review” guidelines).
the *Amnesty* plaintiffs. Further, the list of mandatory procedures contained in the FAA is in place to minimize this very concern.\(^{111}\) Aside from being personally affected, the plaintiffs raise the concern that these minimization techniques still give the executive branch “unfettered access to Americans’ communications” because any uncertainty about the location of an individual is “resolved in favor of the government.”\(^{112}\) However, the line need only be drawn at reasonableness in determining the constitutionality of the FAA; a compromise resolved in favor of both the government’s interests as well as the U.S. person’s interests. And adding onto the already systematic oversight and preapproval requirements in place may put an unreasonable burden on the intelligence community, especially when trying to address the already increasing difficulty of globally locating individuals in the midst of rapid technological improvements. The reality is that minimization procedures are there to minimize, not remove the occurrence altogether. Besides, requiring certainty from the government is untenable and most importantly, not required by the Fourth Amendment. “[T]he Fourth Amendment demands reasonableness, not perfection.”\(^{113}\)

Raising concerns along these lines, the *In re Directives* plaintiffs had argued that, “by placing discretion entirely in the hands of the Executive Branch without prior judicial involvement, the procedures cede to that Branch overly broad power that invites abuse.”\(^{114}\) And directly applicable to *Amnesty*, the court addressed the concern three-fold: (1) “[T]he fact that

\(^{111}\) See *supra* Part I, HOW FISA OPERATES.


\(^{114}\) *In re Directives* Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1014 (Foreign Int. Surv. Ct. Rev. 2008).
there is some potential for error is not a sufficient reason to invalidate the surveillances.”;\(^{115}\)

(2) “A prior judicial review process does not ensure that the types of errors complained of here would have been prevented.”\(^{116}\); and (3) “The petitioner’s concern with incidental collections is overblown. It is settled beyond peradventure that incidental collections occurring as a result of constitutionally permissible acquisitions do not render those acquisitions unlawful.”\(^{117}\) It is understandable to address any concerns one may have with governmental intrusion on their privacy interests. However, the precedent\(^{118}\) speaks clearly that the double-edged sword of reasonableness sits between the government and the people, and the FAA does its job of preventing any one side from unreasonable harm.

**CONCLUSION**

Our government is tasked with protecting an interest of utmost significance to the nation—the safety and security of its people. But the Constitution is the cornerstone of our freedoms, and government cannot unilaterally sacrifice constitutional rights on the altar of national security. Thus, in carrying out its national security mission, the government must simultaneously fulfill its constitutional responsibility to provide reasonable protections for the privacy of United States persons. The judiciary’s duty is to hold that delicate balance steady and true.\(^{119}\)

\(^{115}\) *In re Directives*, at 1015.

\(^{116}\) *Id.*

\(^{117}\) *Id.; see also* S. Select Comm. On Intelligence, *Implementation of the Foreign Intelligence Surveillance Act of 1978*, S. Rep. No. 97-691, at 9-10 (1982) (supporting views of Sen. Wallop) (“The proper cure for abuses of surveillance for purposes of intelligence is examination after the fact, and punishment of those who abuse their trust. But it is nonsense to think one can draw up a formula beforehand which will ensure that everyone is surveilled who should be.”).

\(^{118}\) *See, e.g.*, United States v. Butenko, 494 F.2d 593 (3d Cir. 1974) (en banc), *cert. denied sub nom.* Ivanov v. United States, 419 U.S. 881 (1974) (holding that electronic surveillance conducted without a warrant would be lawful under the Fourth Amendment even if incidental conversations were heard, so long as the primary purpose was to obtain foreign intelligence information); United States v. Brown, 484 F.2d 418 (5th Cir. 1973) *cert. denied*, 415 U.S. 960 (1974) (holding that surveillance where an American was incidentally overheard during foreign intelligence surveillance authorized by the Attorney General was constitutional).

\(^{119}\) *In re Directives*, 551 F.3d at 1016.
Amnesty v. McConnell stressed a genuinely valid concern regarding incidental U.S. communication that is acquired under the FAA. Although this recent development concludes that the statutory guidelines used in this circumstance are constitutional, improvements to the overall structure of FISA are not only warranted, but may be necessary to ease the tension between the government and its private citizens. The virtual preclusion imposed on litigants attempting to establish standing as well as a lack of statutory language specifically addressing incidental U.S. communication, presumably shows how the current FISA, replete with the recent FAA guidelines, is not nearly a work of art but a work in progress. On September 17, 2009, Senator Russ Feingold of Wisconsin celebrated Constitution Day by introducing the JUSTICE Act. The Judicious Use of Surveillance Tools In Counterterrorism Efforts (JUSTICE) Act was introduced, among other things, to address various concerns in current FISA including certain FAA provisions. It is still too early to decide whether the fate of the JUSTICE Act will set forth new procedures for foreign intelligence surveillance or if the FAA will remain as is until its 2012 sunset provision triggers its expiration. Regardless, the judiciary will continue to seek out the reasonable balance demanded by the Constitution.

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120 S.1686, 111th Congress (as Introduced in Senate, Sept. 17, 2009).