TAKING A STAND: ADDRESSING THE ISSUE OF ARTICLE III STANDING AGAINST THE NSA METADATA COLLECTION PROGRAM FOLLOWING *OBAMA V. KLAYMAN*

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"They who can give up essential Liberty to obtain a little temporary Safety, deserve neither Liberty nor Safety."[1]

INTRODUCTION

Following the coordinated terrorist attacks on September 11th, 2001, the United States Congress enacted the USA PATRIOT Act, a comprehensive piece of legislation aimed at bolstering the federal government's ability to anticipate and prevent future acts of terrorism on U.S. soil.[2] The PATRIOT Act contained many provisions directed at expanding the investigatory powers of various federal intelligence agencies, particularly the National Security Agency ("NSA").[3] Unfortunately, at the time of its enactment, few Americans closely examined how far the NSA and other federal agencies were authorized to go in the name of counterterrorism, as most were still reeling from the losses of 9/11 and caught in the zealous pursuit of justice and safety at all costs.[4]

As the initial panic caused by 9/11 subsided over the following decade, the American people began to reexamine the PATRIOT Act and the NSA's various programs to see what Congress had unleashed, and have been disturbed to find a seemingly untouchable web of intelligence gathering mechanisms that are frequently aimed at the American people, in addition to foreign threats.[5] The discovery of these mechanisms launched a fierce battle,

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1 Benjamin Franklin, *Franklin's Contributions to the Conference on February 17 (III)*, FRANKLIN PAPERS (Feb. 17, 1775), http://franklinpapers.org/franklin/framedVolumes.jsp?vol=21&page=497b.

2 USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 STAT. 272 (2001).

3 *Id.* at §§ 201–25 (codified as amended in scattered sections of 18 & 50 U.S.C.).

4 *See* Angela D. Bussone, *Security for Liberty: Ten Years After 9/11, Why Americans Should Care About the Extension of the PATRIOT Act and Its Civil Liberties Implications*, 13 FLA. COASTAL L. REV. 85, 87–88 (2011).

5 *Id.* at 87–90.

with individuals and civil rights organizations hoping to rein in the power and reach of the NSA.[6] One such fight has centered on the NSA's metadata collection program, authorized by the Foreign Intelligence Surveillance Act ("FISA"),[7] through which the NSA is able to request that telecommunications providers hand over user "metadata"—phone information such as call times, sender and receiver numbers.[8] The program has been characterized as a "blunt tool," as it allows the NSA to cast a wide net of data collection with relatively little justification.[9] In their attempts to challenge the NSA's metadata collection practices, civil rights groups and individuals have been hindered in their efforts by Article III standing doctrine, which requires plaintiffs to demonstrate evidence of a concrete injury traceable to the defendant.[10]

In 2015, two cases arose in the Second and D.C. Circuit Courts of Appeals that directly addressed the issue of standing in suits against the NSA metadata program. The first was *ACLU v. Clapper*,[11] in which the American Civil Liberties Union of New York claimed that the NSA violated the Fourth Amendment by collecting the organization's metadata information without a warrant.[12] The Second Circuit held that the ACLU had satisfied its standing requirement, finding that there was evidence that the NSA indeed obtained the ACLU's metadata.[13] The D.C. Circuit addressed a similar case three months later in *Obama v. Klayman*,[14] in which a Verizon Wireless subscriber argued that the court could infer that the NSA had collected his metadata based upon the NSA issuing an order requesting for the metadata of Verizon Business Network Service subscribers.[15] The court rejected this argument, holding that the plaintiff was required to show evidence that the NSA collected *his* individual data, rather than allowing for an inference from the general collection order.[16] This decision resulted in a circuit split that the Supreme Court will likely address in order to settle the issue of standing requirements for metadata suits.

Part I of this article addresses the background of the NSA metadata collection program, provides an overview of the concept of Article III standing requirements, and examines the conflict within the courts behind the recent decisions in *Clapper* and *Klayman*. Part II analyzes how the courts have approached Article III standing in other areas of administrative law, with a di-

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6 *See* ACLU v. Clapper, 785 F.3d 787, 795–96 (2d Cir. 2015); Bussone, *supra* note 4, at 93.

7 *See* Erin E. Connare, Note, ACLU v. Clapper: *The Fourth Amendment in the Digital Age*, 63 BUFF. L. REV. 395, 397 (2015).

8 *Id.* at 397–99.

9 *Id.* at 402 (quoting ACLU v. Clapper, 959 F. Supp. 2d 724, 729 (S.D.N.Y. 2013)).

10 *See* U.S. CONST. art. III, § 2, cl. 1; Connare, *supra* note 7,at 402–03.

11 785 F.3d 787 (2d Cir. 2015).

12 *Id.* at 792.

13 *Id.* at 801.

14 800 F.3d 559 (D.C. Cir. 2015) (per curiam).

15 *Id.* at 563.

16 *Id.* at 561, 563.

rect comparison to suits against the Environmental Protection Agency. Further, Part II discusses whether the NSA should be treated as any other administrative agency for standing, or whether its national security functions require that a higher standard for Article III standing. Part III examines the arguments in favor of a fear-based approach to Article III standing, in which plaintiffs do not necessarily require evidence of actual harm, but merely expected harm. This Part examines the various cases outlining the approach, and discusses two arguments in favor of variations to fear-based injuries for standing purposes. Finally, Part IV advocates for a more relaxed standard in Fourth Amendment challenges to the NSA metadata program, arguing that the D.C. Circuit erred in rejecting Klayman's reasonable inference argument. Instead, the courts should adopt a reasonable inference standard, in which a plaintiff need only provide concrete evidence that would allow the court to make a reasonable inference that the plaintiff suffered an injury. In this regard, the standard would act as a more regulated version of fear-based standing.

I. ARTICLE III STANDING AND THE NSA METADATA COLLECTION PROGRAM

In order to discuss the proper standard for Article III standing, it is necessary to understand the history of the relevant law. Section A briefly describes the basis of Article III standing, as well as the current standard in place. Section B examines the history of the NSA metadata collection program, including the PATRIOT Act and the program's pre-9/11 history. Finally, Section C discusses the courts' holdings in *ACLU v. Clapper* and *Obama v. Klayman*, highlighting the relevant issues.

A. *Article III Standing Requirements*

Of the first three articles of the Constitution, Article III, which outlines the powers and authorities of the judicial branch, is by far the shortest. Article III contains only three sections, compared to the ten sections of Article I, outlining the powers of Congress. Article III, Section 2 establishes the authority of the judiciary, stating: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies to which the United States shall be a Party."[17] Courts have discussed the vagueness of these terms, noting that aspects of the other two branches could use the exact same terms—"an executive inquiry can bear the name 'case' . . . and a legislative dispute can bear the name 'controversy . . .

[17] U.S. CONST. art. III, § 2, cl. 1.

.'"[18] Yet clearly such a use of those terms would not fall within the meaning of Section 2.[19] James Madison argued that, while there was some level of uncertainty regarding the exact bounds and authority of the legislative and executive branches, "the judiciary [is] described by landmarks still less uncertain," expressing the view that there was a common understanding of what fell within the judicial purview.[20]

One way courts implement this common understanding of the scope of their power is through the doctrine of standing, which "serv[es] to identify those disputes which are appropriately resolved through the judicial process."[21] The Court has long recognized standing as crucial in implementing the "Framers' concept of 'the proper–and properly limited–role of the courts in a democratic society,'" by limiting the exercise of judicial power.[22] Parties must satisfy the requisite standing to bring suit in federal court, requiring more than mere allegation of the unconstitutionality of a statute.[23] While in some cases, the requisite standing is determined by statute, in *Lujan v. Defenders of Wildlife*,[24] the Supreme Court outlined a minimum threshold for standing, requiring a plaintiff to demonstrate: (1) that the plaintiff has suffered an injury in fact—defined as an "invasion of a legally protected interest which is concrete and particularized and actual or imminent rather than conjectural or hypothetical;" (2) that there is a "causal connection between the injury and the conduct" of the defendant, such that the "injury is fairly traceable to the challenged action . . . and not the result of the independent action of some third party;" and (3) that it is likely, rather than "merely speculative, that the injury will be redressed by a favorable [court] decision."[25] To have standing, the plaintiff must establish all three elements, supporting each "in the same way as any other matter which the plaintiff bears the burden of proof."[26] However, the Court has allowed alternative standards for standing

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18 Lujan v. Defs. of Wildlife, 504 U.S. 555, 559 (1992).

19 *See id.* at 559–60.

20 *Id.* (quoting THE FEDERALIST NO. 48 (James Madison)). In Federalist No. 48, Madison argues that the greater threat to personal liberty comes from the legislative branch, finding that both the executive and judicial branches are better understood and defined in their powers and limitations compared to the legislative branch, thus usurpations of power by the executive or judiciary would "immediately betray and defeat themselves." THE FEDERALIST NO. 48 (James Madison).

21 *Lujan*, 504 U.S. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

22 John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1220 (1993) (quoting Allen v. Wright, 468 U.S. 737, 750 (1984)).

23 16 AM. JUR. 2d CONSTITUTIONAL LAW § 138 (Aug. 2016).

24 504 U.S. 555 (1992).

25 *Id.* (citing *Lujan*, 504 U.S. at 560–61).

26 *Lujan*, 504 U.S. at 561. The Court also requires plaintiffs to satisfy "prudential requirements for standing," meaning that a plaintiff must "assert his own legal rights and interests, and cannot rest his claim of relief on the legal rights or interests of third parties," and must "present a claim that is more than a generalized grievance." Smith v. Jefferson Cty. Bd. of School Comm'rs, 641 F.3d 197, 206 (6th Cir. 2011) (first quoting Valley Forge Christian College v. Americans United for Separation of Church and State,

in certain administrative cases, namely in addressing the "injury-in-fact" requirement.[27]

For most cases, the court's standing analysis is fairly straightforward. However, the passage of the PATRIOT Act and rise of the NSA's surveillance scheme has complicated that analysis, as discussed in Section B.

B. *The USA PATRIOT Act and NSA Surveillance Programs*

In the wake of 9/11, the American people looked to Congress not only for answers, but for solutions that would prevent such a tragedy from every occurring again.[28] One month later, Congress introduced the PATRIOT Act, passed by overwhelming majorities in both the House and Senate.[29] The Act expanded several areas of the federal intelligence community by including additional provisions to the existing FISA.[30] Proponents of the Act claimed it was a "necessarily hard-minded response to a national crisis," while critics feared an "unwarranted . . . expansion of state power."[31]

Before Congress enacted the initial version of FISA in 1978, counterintelligence agencies faced "very little oversight," falling largely under the FBI and restrained only by guidelines set by the Attorney General.[32] However in the 1960s and 1970s, the public became aware of various abuses by the FBI, CIA, and Department of Justice, causing Congress and the executive branch to institute a "higher degree of regulation" for counterintelligence operations.[33] The "enduring concern" that counterintelligence operations not violate constitutional protections informed the reform efforts of this period.[34]

The current debate over federal counterterrorism surveillance focuses on two provisions of FISA.[35] First, the business records provision added by PATRIOT Act § 215[36] grants the authority to request production of "any

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Inc., 454 U.S. 464, 474 (1982); then quoting City of Cleveland v. Ohio, 508 F.3d 827, 835 (6th Cir. 2007)) (internal quotation marks omitted).

27 *See infra* Parts I & II.

28 *See* Bussone, *supra* note 4, at 90.

29 *Id.* at 90–91. According to the Department of Justice, only one Senator voted against the Act, at least as it was written, and only sixty-six House representatives voted against the Act. *Detailed Senate and House Vote on the USA PATRIOT Act*, U.S. DEPT. OF JUSTICE, http://www.justice.gov/archive/ll/subs/detailed_vote_2001.htm (last visited Aug. 5, 2016).

30 *See* Bussone, *supra* note 4, at 91; Alan Butler, *Standing Up to* Clapper*: How to Increase Transparency and Oversight of FISA Surveillance*, 48 NEW ENG. L. REV. 55, 57 (2013).

31 Michael J. Woods, *Counterintelligence and Access to Transactional Records: A Practical History of USA PATRIOT Act Section 215*, 1 J. NAT'L SECURITY L. & POL'Y 37, 37 (2005) (footnotes omitted).

32 *Id.* at 40.

33 *Id.*

34 *Id.*

35 Butler, *supra* note 30, at 57.

36 *Id.*

tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities . . . ."[37] The second provision, established under Section 702 of the FAA, targets non-U.S. persons reasonably believed to be outside the United States.[38] While some challenged these provisions during the initial passing of the PATRIOT Act, particularly Section 215, the provisions quickly faded from public view.[39] When Congress reauthorized PATRIOT Act in 2011, there was little discussion about the wisdom or legality of Section 215.[40]

Prior to the PATRIOT Act, the government could only obtain business records through physical searches or limited national security letters.[41] Further, earlier versions of FISA required FBI agents to establish probable cause for the surveillance and seizure of records.[42] The FBI could only establish this probable cause through the use of "the least intrusive means first."[43] Congress later approved the use of national security letters, through which counterintelligence agencies could obtain transactional information about a suspect.[44] The statutory definition of transactional information "broadly describe[d] information that documents financial or communications transactions without necessarily revealing the substance of those transactions."[45] In the 1970s, the public learned that nearly "all transactional information resides beyond . . . the Fourth Amendment," prompting challenges to the provision.[46] In *United States v. Miller*,[47] the Court held that the Fourth Amendment does not protect an individual's financial records kept at a bank, as such records were not "private papers."[48]

As time passed, Congress became more open to the idea of broadening counterintelligence authorities. By the 1980s, the nation viewed international terrorism as a "serious national security threat," and Congress established the foundations for the later PATRIOT Act provisions.[49] One change was the reduction in the standard of proof necessary to justify electronic surveillance,

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37 50 U.S.C. § 1861 (2012).

38 Butler, *supra* note 30, at 58.

39 Bussone, *supra* note 4, at 91–92.

40 *Id.* at 92.

41 Butler, *supra* note 30, at 62; Woods, *supra* note 31, at 41.

42 *See* Woods, *supra* note 31, at 41.

43 *Id.* ("These less intrusive means include interviews, review of publicly available information, surveillance in areas where no reasonable expectation of privacy exists, consensual monitoring, 'mail covers,' and the use of undercover operatives.") (footnotes omitted).

44 *Id.*

45 *Id.*

46 *Id.* at 42.

47 425 U.S. 435 (1976).

48 *See* Woods, *supra* note 31, at 42 (citing *Miller*, 425 U.S. at 440).

49 *Id.* at 44–45.

with the House believing that "probable cause" was an inappropriately high standard for these type of investigations.[50] This process continued into the late-1990s, when Congress adopted the 1998 FISA amendment which created two new tools for obtaining transactional information: the "pen register" and the "trap and trace."[51] These two provisions marked a departure from the usual distinction between counterintelligence and criminal investigations, allowing counterintelligence agents to prospectively monitor records of suspects with less than probable cause.[52]

In the post-9/11 world and under the PATRIOT Act's provision, the government has much broader authority to request documents and records from businesses. Though the 2005 USA PATRIOT Improvement and Reauthorization Act[53] established a "reasonable grounds" requirement,[54] the PATRIOT Act obscures these requirements with its nondisclosure provision, which prohibits companies from disclosing to the public the nature of the records sought or even the actual order itself.[55] As a result, the public is unaware of many of the PATRIOT Act's programs.

An additional concern is the development of a "secret body of law" by the Foreign Intelligence Surveillance Court ("FISC"), which establishes rules and regulations outside of the public view.[56] FISC authorizes much of the counterterrorism surveillance, and since 2006, has authorized orders directing certain telecommunications service providers to produce all business records created that contain information between their users.[57] The orders usually focus on those making calls to a foreign country, but some even include those making purely domestic calls.[58] This information is referred to as "metadata," and includes the "telephone numbers that placed and received the call, other session-identifying information, trunk identifier, telephone calling card number, and the date, time, and duration of the call."[59] The NSA then maintained this metadata in a mainframe, where it could review any point of data, should it need to, for the proceeding five years.[60] While a 2006 amendment to the PATRIOT Act opened up challenges to Section 215's nondisclosure requirement, since challengers must petition the FISC rather than

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50 *Id.* at 46.

51 *Id.* at 50. A "pen register" is a device which records the phone numbers that a selected phone line dials to, while a "trap and trace" device does the opposite, capturing the numbers that call the selected phone line. *Id.* at 47 n.64.

52 *Id.* at 50–51.

53 USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 STAT. 192 (2006).

54 *See* Butler, *supra* note 30, at 62–63.

55 *See* Bussone, *supra* note 4, at 93; *see also* Woods, *supra* note 31, at 51.

56 *See* Butler, *supra* note 30, at 63–64.

57 Butler, *supra* note 30, at 58; Connare, *supra* note 7, at 398–99;

58 Connare, *supra* note 7, at 398–99.

59 *Id.* at 398.

60 *Id.* at 399.

traditional federal courts, many details of the surveillance programs remain obfuscated.[61]

The greatest danger posed by the metadata program is that the collection expands beyond the direct telecommunications subscribers, including users within a two "hop" range.[62] This expansive scope grants the NSA a far wider target pool, potentially encompassing private citizens who, though completely unrelated to a particular foreign operation, may be implicated simply through communication within two degrees of separation from a suspected individual.

On June 2, 2015, President Obama signed the USA Freedom Act into law, which reformed various aspects of the PATRIOT Act.[63] Among the various reforms, the Freedom Act transferred the storage of bulk metadata from the NSA to private telecom companies.[64] However, the law still grants federal agencies the authority to request metadata production through FISA orders, with little change in the scope or requirements of that authority.[65] Arguably the most significant reform to the program is an increase in transparency, with the Director of National Intelligence now required to provide an annual report to Congress regarding certain details of the bulk collection program.[66] Further, the Director must provide a publicly accessible report containing the number of "FISA applications submitted and orders granted, modified, or denied under specified FISA authorities," as well as the number of targets of FISA orders and the search terms used in database reviews.[67] These reforms will hopefully provide greater public insight into the program, which could lead to more suits like those discussed in Section C.

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61 *See* Bussone, *supra* note 4, at 94–95.

62 *See* Connare, *supra* note 7, at 399. An individual with direct contact with a targeted subscriber is within one "hop;" any individual in contact with that person is within two "hops". *Id.*

63 *See* Frank Thorp V, *Barack Obama Signs 'USA Freedom Act' to Reform NSA Surveillance*, NBC NEWS (June 2, 2015), http://www.nbcnews.com/storyline/nsa-snooping/senate-vote-measure-reform-nsa-surveillance-n368341.

64 Erin Kelly, *Senate Approves USA Freedom Act*, USA TODAY (June 2, 2015), http://www.usatoday.com/story/news/politics/2015/06/02/patriot-act-usa-freedom-act-senate-vote/28345747/.

65 *See* USA FREEDOM Act of 2015, Pub. L. No. 114-23 §101, 129 STAT. 268, 269–71 (2015) (amending 50 U.S.C. §§ 1861(b)(2), (c)(2) (2012)).

66 *See* USA FREEDOM Act of 2015, Pub. L. No. 114-23 § 603(a), 129 STAT 268, 292 (to be codified at 50 U.S.C. § 1873 (2018)); *Summary: H.R.2048 – 114th Congress (2015-2016)*, CONG. RES. SERV. https://www.congress.gov/bill/114th-congress/house-bill/2048 [hereinafter *USA FREEDOM Act Summary*] (report is to include "the total number of: (1) FISA court orders issued for electronic surveillance, physical searches, the targeting of persons outside the United States, pen registers and trap and trace devices, call detail records, and other tangible things; and (2) national security letters issued" as well as various specifics for each FISA order); *see also* Devon Ombres, *NSA Domestic Surveillance from the PATRIOT Act to the FREEDOM Act: The Underlying History, Constitutional Basis, and the Efforts at Reform*, 39 SETON HALL LEGIS. J. 27, 43–44 (2015).

67 *See* USA FREEDOM Act of 2015, Pub. L. No. 114-23 § 603(a), 129 STAT. 268, 292 (to be codified at 50 U.S.C. § 1873 (2018)); *USA FREEDOM Act Summary*, *supra* note 65.

C. *ACLU v. Clapper and Obama v. Klayman*

In *ACLU v. Clapper*, the ACLU of New York alleged that the NSA collected the organization's phone records through a request to Verizon Wireless (the organization's telephone provider), claiming that the metadata collection program exceeded the bounds of §215 and violated the First and Fourth Amendments of the Constitution.[68] While the suit was pending, the ACLU also sought a preliminary injunction against the program.[69] Though the case was ultimately dismissed, it did find that the ACLU had met its standing requirements.[70]

The government argued that the ACLU failed to establish standing, as it had not demonstrated that the government ever actually reviewed or would review the data it collected—though it conceded that the data was indeed collected.[71] In this regard, the government argued that because it had not truly conducted a Fourth Amendment search, there was no concrete or imminent injury to confer standing.[72] Without the prerequisite "injury-in-fact," the government argued that the ACLU could not possibly satisfy its standing requirements.[73]

The court found that the government mischaracterized the nature of the dispute—this was not a case of a Fourth Amendment search, but rather a Fourth Amendment *seizure*, as the government had obtained and maintained the ACLU's private metadata without warrant.[74] Thus, given that the government had conceded that it collected the ACLU's metadata and maintained it in a database, the Court found that the ACLU had indeed met its standing requirements.[75]

In *Obama v. Klayman*, the D.C. Circuit faced a similar claim: Klayman alleged that the NSA had collected his metadata in violation of his Fourth Amendment protection against unlawful searches.[76] Much like the plaintiff in *Clapper*, Klayman sought a preliminary injunction against the program while the court decided the matter.[77] However, in Klayman's case, the evidence of the collection was far less clear. Klayman produced evidence that

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68 ACLU v. Clapper, 785 F.3d 787, 799 (2d Cir. 2015).

69 *Id.* at 799–800.

70 *Id.* at 801–02.

71 *Id.* at 800. Though the D.C. Circuit noted that in the government's brief for *ACLU*, it claimed that not all the metadata from Verizon was collected—indeed it appears that the Second Circuit simply assumed that NSA had collected all the metadata, based solely upon the language of the order. Benjamin Wittes, *Standing Confusion in* Obama v. Klayman, LAWFARE (Aug. 31, 2015), https://www.lawfareblog.com/standing-confusion-obama-v-klayman.

72 *Clapper*, 785 F.3d at 800.

73 *Id.* at 800–01.

74 *Id.* at 801.

75 *Id.*

76 Obama v. Klayman, 800 F.3d 559, 561 (D.C. Cir. 2015) (per curiam).

77 *Id.*

the NSA had placed an order for metadata collection from Verizon Business Network Services ("VBNS") subscribers—Klayman, however, was not a VBNS subscriber.[78] Rather, Klayman was simply a Verizon Wireless subscriber.[79] The D.C. District Court held that this was not dispositive of Klayman's claim, arguing that the court could make a reasonable inference that his data was also collected, based upon the NSA's stated goal of creating a "comprehensive metadata database."[80]

The D.C. Circuit disagreed. In its per curiam decision to remand the matter to the district court, the court relied upon the concurring judgments of Judges Brown and Williams, with Judge Sentelle dissenting.[81] While Brown and Williams agreed that the issue should be remanded for further discovery, they disagreed about whether Klayman had indeed satisfied his standing requirements.[82] According to Judge Brown, Klayman had "barely fulfilled the requirements for standing."[83] While Judge Brown found the lower court's reasoning convincing, she still found that Klayman did not meet the higher burden of proof necessary for a preliminary injunction.[84] By remanding, Klayman would have an opportunity to make discovery requests, hopefully obtaining the necessary information to fully satisfy the burden.[85] Unfortunately, Judge Brown also noted that due to the clandestine nature of the program, it was unlikely that Klayman would be successful in this endeavor.[86]

Contrary to Judge Brown, Judge Williams found that Klayman did not meet the standing requirements, precisely because he only provided evidence of the NSA ordering metadata collection from VBNS subscribers.[87] Judge Williams found this to be insufficient, even for a reasonable inference, as the government consistently represented that its collection "never encompassed all, or even virtually all, call records."[88] While noting that the Second Circuit in *Clapper* observed that the "government had not 'seriously' disputed the

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78 *Id.* at 563.

79 *Id.*

80 Klayman v. Obama, 957 F. Supp. 2d 1, 27 (D.D.C. 2013) (emphasis omitted). The D.C. Circuit also noted that this distinguished Klayman's case from the earlier *Amnesty International USA v. Clapper*, in which the plaintiff relied on a purely hypothetical, fear-based standing argument, as they had no knowledge the actual surveillance targeting practices nor could they even demonstrate that the alleged surveillance programs even existed at the time. Amnesty Int'l USA v. Clapper, 133 S. Ct. 1138, 1144–45 (2013). *Amnesty International* was decided prior to the leaks by Edward Snowden, which opened details of the NSA metadata collection program to the wider public.

81 *Klayman*, 800 F.3d at 561.

82 *Id.* at 564, 570; *see also* Wittes, *supra* note 71.

83 *Klayman*, 800 F.3d at 564.

84 *Id.*

85 *Id.*

86 *Id.* (Judge Brown states that "[p]laintiffs must realize that secrecy is yet another form of regulation, prescribing not 'what the citizen may do' but instead 'what the citizen may know.'" (quoting DANIEL P. MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE 59 (1999))).

87 *Id.* at 565.

88 *Id.* (internal quotation marks omitted).

contention that 'all significant service providers' were subject to the bulk collection program," this was irrelevant, as the details of the program's scope remained classified.[89] As far as Judge Williams was concerned, this left Klayman in the same position as Amnesty International, an organization that challenged the metadata collection program before the Snowden leaks, as Klayman had "no actual knowledge of the [g]overnment's . . . targeting practices" and was merely speculating that the NSA targeted him.[90] Despite the evidence of the metadata collection program's existence and targeting of VBNS subscribers, Judge Williams held that the "relevant inquiry is whether that evidence indicates that the program targets plaintiffs," an inquiry in which "plaintiffs here do no better than those in *Clapper*."[91]

Klayman represents the fundamental defect with the current standing regime, particularly in cases against clandestine government surveillance programs. Despite the findings in the Second Circuit, the D.C. Circuit was divided on whether there was sufficient evidence to satisfy standing. Unlike the Second Circuit, the D.C. Circuit was unwilling to make the inference that Klayman's data was among the NSA's targeted collection. Further complicating matters is both Judge Brown and Williams' concession that the secretive nature—arguably the most objectionable aspect—of the program created a nearly insurmountable barrier for plaintiffs like Klayman to cross.

II. ARTICLE III STANDING IN ADMINISTRATIVE LAW

Although the Court in *Lujan* outlined a minimum standard for Article III standing, over the years the Court also provided for alternative requirements for standing, particularly in administrative cases. This Part discusses examples of these alternative approaches, ranging from environmental cases to Establishment Clause suits. Section B looks at whether any of these alternative approaches could be applied to the NSA by examining whether the NSA qualifies as an administrative agency.

A. *Alternative Standing Approaches in Administrative Cases*

In other areas of administrative law, the courts have utilized alternative standards for Article III standing.[92] In such instances, statutory procedures grant a plaintiff a procedural right to protect his "concrete interests" without

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89 *Klayman*, 800 F.3d at 566 (quoting ACLU v. Clapper, 785 F.3d 787, 797 (2d Cir. 2015)).

90 *Id.* at 566–67 (internal quotation marks omitted).

91 *Id.* at 567.

92 *See generally* Devin McDougall, Note, *Reconciling* Lujan v. Defenders of Wildlife *and* Massachusetts v. EPA *on the Set of Procedural Rights Eligible for Relaxed Article III Standing*, 37 COLUM. J. ENVTL. L. 151 (2012).

meeting all of the normal standing requirements of redressability and immediacy.[93] Further, in many cases challenging administrative actions, the plaintiff is an organization representing its members, who allege some violated interest related to the action.[94] In these cases, the courts treat "injury" as a "term of art with a flexible meaning," often making it difficult to define.[95]

1. Traditional Standing Claims

The Court has long held that standing analysis is closely connected to the "nature and source" of the claim at hand.[96] In fact, the "concept cannot be reduced to a one-sentence or one-paragraph definition."[97] Though the traditional view of injury-in-fact focuses on a concrete interest, such an economic injury, the Court has accepted a variety of noneconomic injuries, such as environmental, election law, privacy, and reputation claims.[98]

The Court in *Lujan* carved out an exception to the typical "injury-in-fact" requirement, primarily for instances where the claimed injury was related to a procedural right.[99] Procedural rights guarantee access to a "certain kind of process," rather than "a specific outcome."[100] Because of these rights, the Court noted that in most circumstances, plaintiffs would be burdened by trying to demonstrate a concrete injury resulting from a "flawed process would necessarily be redressed by a court order directing proper process."[101] In this regard, the Court outlined a new framework for standing, analyzing three types of standing claims: (1) claims based on a concrete injury, though without a relevant procedural right;[102] (2) claims in which a plaintiff can demonstrate both a concrete claim and a procedural right;[103] and (3) claims without any possible concrete injury and thus failing to meet any standing

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93 Massachusetts v. EPA, 549 U.S. 497, 517–18 (2007) (internal quotation marks omitted); McDougall, *supra* note 92, at 162 (internal quotation marks omitted);

94 *See generally* Massachusetts v. EPA, 549 U.S. 497 (2007); Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., 528 U.S. 167 (2000); Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992); *see also* Paula E. Berg, *When the Hazard is Human: Irrationality, Inequity, and Unintended Consequences in Federal Regulation of Contagion*, 75 WASH. U. L.Q. 1367, 1411–13 (1997).

95 Ashley C. Robson, Note, *Measuring a "Spiritual Stake": How to Determine Injury-in-Fact in Challenges to Public Displays of Religion*, 81 FORDHAM L. REV. 2901, 2909 (2013).

96 *Id.* (internal quotations omitted).

97 Valley Forge Christian Colls. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982).

98 Robson, *supra* note 95, at 2910–11.

99 *Lujan*, 504 U.S. at 572 n.7; *see also* McDougall, *supra* note 92, at 156.

100 McDougall, *supra* note 92, at 156.

101 *Id.*

102 *Lujan*, 504 U.S. at 560–61; *see also* McDougall, *supra* note 92, at 157.

103 *Lujan*, 504 U.S. at 572 n.7; *see also* McDougall, *supra* note 92, at 157.

requirements.[104] The first type of standing claims face the normal requirements for causation and redressability.[105] The second type, however, does not have to meet the normal causation and redressability requirements.[106]

2. Procedural Standing Claims

While the Court in *Lujan* did not specify what constituted a "procedural right," past case law points towards a potentially wide application of this standard. For example, in *Association of Data Processing Service Organizations, Inc. v. Camp*,[107] the Court stated that protected interests "may reflect 'aesthetic, conservational, and recreational' as well as economic values."[108] The primary baseline requirement is that the interest is "protected or regulated by [a] statute or constitutional guarantee."[109] However, the Court has also refrained from applying the "procedural rights" analysis in other cases where it may have been relevant.

In *Steel Co. v. Citizens for a Better Environment*,[110] the Court found it unnecessary to analyze whether the plaintiffs' claim qualified as a concrete injury in fact, as the "complaint fail[ed] the third test of standing, redressability."[111] The plaintiffs, a group of environmentalists, sued a steel company for failing to release information about toxic chemicals released into local community, as required by the Emergency Planning and Community Right-To-Know-Act of 1986 ("EPCRA").[112] The complaint set out six requests:

> (1) a declaratory judgment that petitioner violated EPCRA; (2) authorization to inspect periodically petitioner's facility and records (with costs borne by petitioner); (3) an order requiring petitioner to provide respondent copies of all compliance reports submitted to the EPA; (4) an order requiring petitioner to pay civil penalties of $25,000 per day for each violation of [the EPCRA]; (5) an award of all respondent's [costs related to the investigation and prosecution of the violations as authorized by EPCRA]; and (6) any such further relief the court deem[ed] appropriate.[113]

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104 *Lujan*, 504 U.S. at 562.

105 *Id.* at 560.

106 *Id.* at 572 n.7 ("Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.").

107 397 U.S. 150 (1970).

108 *Id.* at 154 (quoting Scenic Hudson Pres. Conf. v. FPC, 354 F.2d 608, 616 (2d Cir. 1965)).

109 *Id.* at 153.

110 523 U.S. 83 (1998).

111 *Id.* at 105.

112 *Id.* at 86.

113 *Id.* at 105.

The Court found that none of the requests would "serve to reimburse" the plaintiff for the company's violations.[114] Declaratory judgment was worthless as there was no contention that the company failed to file reports and thus violated the statute.[115] The civil penalties failed to reimburse the plaintiffs for their damages as the statute only authorized payments to the U.S. Treasury.[116] Further, the plaintiff's request for the costs of "investigation and prosecution" could not satisfy the redressability requirement, because "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit."[117] Finally, the second and third requests were not remedial, instead serving as injunctive measures meant to deter future violations.[118] Oddly enough, the Court did not apply the *Lujan* procedural rights analysis. Had the Court examined the procedural rights aspect, its redressability analysis could have come to a different conclusion, given the more lax requirements for procedural standing.[119]

In addition to the "procedural right" exception, the Court has employed a looser standard for "injury-in-fact" analysis in other areas of administrative law.[120] While the Occupational Safety and Health Act ("OSH Act") contains language similar to that of the APA, courts have still required OSH Act suits to meet the "zone of interests test."[121] Notably, the "zone of interests test has been construed rather broadly" in APA suits, however, the courts have been more restrictive when applying the test to OSH Act suits.[122]

In *Fire Equipment Manufacturers' Association, Inc. v. Marshall*,[123] the Seventh Circuit held that the OSH Act only protected the interests of employees and employers.[124] *Marshall* involved a trade association of manufacturers of fire-fighting equipment which challenged portions of amendments to fire-fighting equipment regulations issued by the Occupational Safety and Health Administration ("OSHA").[125] The association's suit was based on the agency's failure to give proper notice of the amendments, which the association alleged were "not appropriate to provide a safe workplace."[126] However,

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114 *Id.* at 105–06.

115 *Id.* at 106.

116 *Steel Co.*, 523 U.S. at 106 (the Court found this request to instead serve as "vindication of the rule of law" rather than remediation of plaintiffs' injury).

117 *Id.* at 107.

118 *Id.* at 108.

119 *See* McDougall, *supra* note 92, at 160.

120 *See* Berg, *supra* note 94, at 1411.

121 *Id.*; *see also* Calumet Indus., Inc. v. Brock, 807 F.2d 225, 228 (D.C. Cir. 1986) (holding that a litigant must show that his violated interest is within the "zone of interests" protected or regulated by the cited statute in order to obtain judicial review of an agency decision).

122 Berg, *supra* note 94, at 1411–12; *see also Brock*, 807 F.2d at 228.

123 679 F.2d 679 (7th Cir. 1982).

124 *See id.* at 682.

125 *Id.* at 680.

126 *Id.*

because the association did not represent any relevant employers or employees who could be harmed by the alleged dangers, the court held that it could not satisfy the injury requirements of Article III standing.[127] Further, the court found that the association could not base its claim to lost profits on the OSH Act, as those interests fell outside the purpose of the Act.[128]

The D.C. Circuit made a similar finding in *Calumet Industries, Inc. v. Brock*,[129] in which an oil manufacturer challenged an OSHA regulation redefining "carcinogenic" oils.[130] As part of its complaint, the manufacturer cited the notice and comment procedures of the APA and OSH Act, and further argued that the OSHA change was "arbitrary and capricious."[131] However, the court found that the manufacturer failed its standing requirement because it failed to show that its economic interests were covered by either the APA or OSH Act.[132]

3. Cases of Less Tangible Injuries for Standing Purposes

The issue of standing becomes even less clear when the claimed injury becomes less tangible, such as claims related to the Establishment Clause.[133] The Court has held that "[a] person or family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause."[134] The leading Establishment Clause standing case is *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*[135] In *Valley Forge*, a nonprofit Christian college received surplus land in Pennsylvania as a gift from the federal government, to which the plaintiff organization objected.[136] The organization argued that the gift violated the Establishment Clause of the First Amendment.[137] When analyzing the organization's standing claim, the Court noted that when an organization asserts no alleged injury distinct from

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127 *Id.* at 681 ("A plaintiff must generally assert his own legal rights and interests, not those of a third party. . . . [The court does] not believe that manufacturers or trade associations are the most effective advocate of employee interests.").

128 *Id.* at 681–82; Berg, *supra* note 94, at 1412.

129 807 F.2d 225 (D.C. Cir. 1986).

130 *Id.* at 226.

131 *Id.* (quoting Administrative Procedure Act, 5 U.S.C. § 706(a)(A) (1982)).

132 *Id.* at 228 ("Petitioners gain standing under the APA not because their interests are merely 'implicated' by the agency action but because 'Congress intended . . . that class to be relied upon to challenge agency disregard of the law.") (quoting Block v. Cmty. Nutrition Inst., 467 U.S. 340, 347 (1984)).

133 *See* Robson, *supra* note 95, at 2912; *see also* David Spencer, Note, *What's the Harm? Nontaxpayer Standing to Challenge Religious Symbols*, 34 HARV. J.L. & PUB. POL'Y 1071, 1074 (2011).

134 Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970) (citing Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963)).

135 454 U.S. 464 (1982).

136 *Id.* at 468–69.

137 *Id.* at 469.

the alleged injuries of its taxpaying citizens, the issue of standing should be viewed no differently than the standing of those individual members.[138] In the end, the Court held that the organization failed to meet its standing requirements because its claimed injury was nothing more than "the psychological consequence presumably produced by observation of conduct with which [it] disagree[d]."[139]

Roughly twenty years later, the Court decided *Elk Grove Unified School District v. Newdow*[140] and held that there were two "strands" of standing jurisprudence: the Article III requirements as discussed by *Lujan* and "prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'"[141] Prudential standing covered three areas, including a prohibition on representation of a third party's interests, restriction of a plaintiff's complaint within the "zone of interests" of the relevant statute, and "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches."[142] However, the Court later held that the concept of "prudential standing" was a misnomer and simply referred to the "zone of interests" test, rather than a method of deferring decisions to the legislature.[143]

Given these three areas, it is clear that the issue of standing is not as clear cut as the three *Lujan* requirements suggest. Rather, the issue has been fairly malleable under a variety of claims within administrative and constitutional law. This causes one to wonder why the courts have typically employed such a rigid approach to Article III standing in cases involving the NSA and other covert government surveillance programs.

B. *The NSA – Administrative Agency or Something Else?*

Given the different standards courts apply to the NSA compared to agencies such as the EPA or IRS, it is unclear whether the NSA is truly an administrative agency. Federal law defines "executive agencies" as "an Ex-

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138 *Id.* at 476–77.

139 *Id.* at 465. The Court in *Valley Forge* further indicated the sort of noneconomic, intangible Establishment Clause claim that would satisfy standing by distinguishing the facts of *Valley Forge* from the facts in *School District of Abington Township v. Schempp*. *See id.* at 487 n.22 (1982) (noting that in *Schempp*, the plaintiffs were minor students and their parents who lived in a state that legally required Bible reading in the public schools and were thus directly impacted by the "laws and practices against which their complaints [were] directed" (quoting *Schempp*, 374 U.S. at 224, n.9)).

140 542 U.S. 1 (2004).

141 *Id.* at 11 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

142 *Newdow*, 542 U.S. at 12 (quoting *Allen*, 468 U.S. at 751).

143 Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 (2014) (citing Ass'n of Battery Recyclers, Inc. v. EPA, 716 F.3d 667, 675–76 (D.C. Cir. 2013) (Silberman, J., concurring)).

ecutive department, a Government corporation, and an independent establishment."[144] As it currently stands, the NSA falls under the direction of the Department of Defense, which provides administrative and technical support, as well as fiscal management of the agency.[145] Black's Law Dictionary defines an "administrative agency" as an "official body . . . with the authority to implement and administer particular legislation."[146] Generally speaking, an agency is any authority of the U.S. government, barring institutional organizations such as Congress or the Presidency.[147]

Many administrative agencies come about through congressional acts, which delegate a level of legal authority to an agency to carry out the purposes of the legislation.[148] Agencies are further broken down into two categories: executive agencies, which are directly accountable to the President, and "independent" agencies, which are accountable to neither the President nor Congress.[149] A prime example of an executive agency is the EPA, whose director is appointed by the President and ultimately works at the President's discretion. Most administrative agencies focus on regulatory actions, set to control and regulate a certain area of the U.S. economy or policy matters.[150] Supporters of the administrative regulatory system justify these quasi-legislative bodies as necessary, given Congress' natural limitations when legislating for a complex society.[151] Indeed, much of the controversy surrounding administrative agencies focuses on the regulatory aspects, rather than enforcement operations.[152]

The origins of the NSA date back to the early years of the Cold War, under President Harry S. Truman.[153] President Truman established the NSA to organize and manage all communications intelligence for the federal government.[154] Truman believed that communications intelligence was more

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144 5 U.S.C. § 105 (2012).

145 Exec. Order No. 12,333 United States Intelligence Activities, 46 Fed. Reg. 59941, 59947–48 (Dec. 4, 1981).

146 *Agency*, BLACK'S LAW DICTIONARY (10th ed. 2014).

147 *See Definition of "Agency" Under Federal Administrative Procedure Act*, 2 AM. JUR. 2D ADMINISTRATIVE LAW § 21 (2015).

148 *See A Note on Administrative Agencies*, THE HERITAGE FOUNDATION, http://www.heritage.org/constitution/#!/articles/2/essays/101/a-note-on-administrative-agencies (last visited Nov. 6, 2015).

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 *See NSA 60th Anniversary*, NSA|CSS, https://www.nsa.gov/about/cryptologic-heritage/historical-figures-publications/nsa-60th/index.shtml (last visited Oct. 15, 2015).

154 *See* Memorandum from President Harry S. Truman to the Secretary of State and Secretary of Defense, Communications Intelligence Activities (Oct. 24, 1952), https://www.nsa.gov/news-features/declassified-documents/truman/assets/files/truman-memo.pdf.

than merely a military operation, but rather one of "national responsibility."[155] Truman's decision to create the agency originated from recommendations from the Brownell Committee, a presidential commission directed to investigate the "efficiency and organization of the entire U.S. communications intelligence effort[s]."[156] The Brownell Committee sought a reform to the existing communications intelligence structure, in light of the recent failings during the Korean War.[157] In light of the often overlapping and disorganized nature of the existing structure, the committee determined that a singular organization was necessary, which could manage and coordinate the entirety of the communications intelligence activities of the U.S.[158] Further, the committee advocated that this unifying organization be incorporated as part of the civilian government, admonishing the "almost total autonomy of the military in [communications intelligence] matters."[159]

Prior to the creation of the NSA, the military largely controlled U.S. communications intelligence operations.[160] However, a struggle emerged following the establishment of the CIA in 1947, as the fledgling agency attempted to gain greater authority in the intelligence community, as well as the Department of State seeking reduced military control.[161] The conflict between civilian and military agencies was highlighted by the military's proposal to create a new military intelligence agency, which the CIA and Department of State viewed as an attempt by the military to further establish its dominance in even the administrative aspects of intelligence gathering.[162] Though the proposal ultimately failed, the civilian agencies saw this, along with the failings of the existing structure, as the perfect opportunity to push for substantial reforms to the intelligence community.[163] Particularly, the agencies relied on the fact that the Truman administration was "extremely budget conscious and was known to favor centralizing and consolidating intelligence responsibilities and functions."[164] Further aiding the CIA's chances, the newly appointed Director of Central Intelligence, General Walter Bedell Smith, held the respect of the president, after serving as General Eisenhower's chief of staff from 1942 to 1945 and U.S. ambassador to the

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155 *See* Thomas L. Burns, THE QUEST FOR CRYPTOLOGIC CENTRALIZATION AND THE ESTABLISHMENT OF NSA: 1940–1952 81 (2005), http://permanent.access.gpo.gov/gpo2007/quest_for_centralization.pdf.

156 *Id.*

157 *Id.*

158 *Id.* at 81–82.

159 *Id.* at 81.

160 *See id.* at 81–82.

161 Burns, *supra* note 155, at 82.

162 *Id.*

163 *Id.*

164 *Id.* (footnote omitted).

Soviet Union from 1946 to 1949.[165] In December 1951, Director Smith utilized his report with the president and other within the military to convince the National Security Council to review the communications intelligence structure.[166]

Truman assigned Director Smith, as well as Secretary of State Dean Acheson and Secretary of Defense Robert Lovett, to investigate the matter; the three then created the Brownell Committee, named for committee head George A. Brownell, a New York City attorney.[167] The committee consisted of member from across the three civilian agencies, though the military intelligence authorities were not included.[168] This led to months of negotiations between the committee and military leadership, who did not wish to fall under intrusive civilian oversight.[169] In the end, Truman directed Secretary Lovett to establish the NSA, though Lovett was largely responsible for laying out the specific responsibilities and guidelines of the agency.[170] In his November 1952 memorandum, Secretary Lovett converted the existing Armed Forces Security Agency ("AFSA") into the NSA, redirecting all AFSA assets to the new agency, and declared that all communications intelligence "collection and production resources of the Department of Defense" now fell under the "operational and technical control of the [NSA] Director."[171] The agency's top leadership was comprised of officers from the existing military intelligence agencies, and Major General Ralph J. Canine became the first NSA Director.[172] With this move, the Department of Defense seized control of U.S. communications intelligence activities away from the Joint Chiefs of Staff.[173]

In examining the origins of the NSA, it is plain to see that the NSA was designed predominately as a managerial organization. Indeed, as discussed, the agency came about in response to failings within the intelligence community during the Korean War, spurred by competition between civilian and military intelligence agencies. Though the NSA falls outside the more commonly known regulatory agency category, it still falls within the broader definition of an administrative agency. The Director of the NSA is appointed by and accountable to the President, and all funding and scope of the agency's power is derived from congressional legislation. In this regard, it is clear that the NSA is indeed an administrative agency, just as the EPA or IRS.

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165 *Id.*

166 *Id.* at 82–83.

167 Burns, *supra* note 155, at 83.

168 *Id.*

169 *Id.* at 87–89.

170 *Id.* at 90.

171 *Id.* at 90–91.

172 *Id.* at 91.

173 *See* Burns, *supra* note 155, at 91.

III. THE DOCTRINE OF FEAR-BASED STANDING

As noted previously, the Court has permitted alternative standards for Article III standing.[174] One such approach is a fear-based standing, which addresses the "injury-in-fact" requirement. Section A examines the Court's handling of fear-based standing across the years, as highlighted by a series of environmental law cases. Section B then discusses various proposals for a fear-based framework for Article III standing, noting the possible flaws in each proposal.

A. *The Court's Approaches to Fear-Based Standing*

Noting the potential flaws of narrowly interpreting the "injury-in-fact" requirement, some scholars advocate for the adoption of fear-based standing.[175] Under a fear-based standing test, fear of some harm would be sufficient to establish a "cognizable injury-in-fact" for Article III purposes.[176] Unfortunately, there is no bright line test to determine whether the alleged fear is sufficient to create a cognizable injury-in-fact. As a result, there is a "complex jurisprudence of fear-based standing" following a long line of cases.[177] Throughout the case law, courts have developed three approaches to determining when fear can be a cognizable injury-in-fact: "(1) as chilling effect injury; (2) as fear of the enforcement of a statute or regulation before it is enforced; and (3) as fear of anticipated, future harm."[178]

The Supreme Court restrained fear-based standing in the 1972 case, *Laird v. Tatum*,[179] in which the Court held that, in a challenge against a government action, a plaintiff must make more than "[a]llegations of a subjective 'chill'" towards their own conduct.[180] The plaintiffs in *Laird* claimed that an Army intelligence data-gathering system created a "constitutionally impermissible chilling effect upon the exercise of their First Amendment rights."[181] The Court found, however, that the plaintiffs' argument boiled down to a desire to conduct a "broad-scale investigation" of the Army's intelligence programs by using the "subpoena power of a federal district court and the

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174 *See supra* Part II.

175 *See* Andrew C. Sand, Note, *Standing Uncertainty: An Expected-Value Standard for Fear-Based Injury in* Clapper v. Amnesty International USA, 133 MICH. L. REV. 711, 713–14 (2015); *see also* Brian Calabrese, Note, *Fear-Based Standing: Cognizing an Injury-in-Fact*, 68 WASH. & LEE L. REV. 1445, 1446–47 (2011).

176 *See* Calabrese, *supra* note 175, at 1447.

177 *Id.*

178 *Id.*

179 408 U.S. 1 (1972).

180 *Laird*, 408 U.S. at 13 (quoting United Pub. Workers v. Mitchell, 330 U.S. 75, 89 (1947)); Sand, *supra* note 175, at 716.

181 *Laird*, 408 U.S. at 13.

power of cross-examination" to search for any possible constitutional violations.[182] The Court feared that such an approach would allow federal courts to serve as "virtually continuing monitors" of all executive actions, which the Court found to be an inappropriate role for the judiciary.[183] However, the Court did not "preclude fear from leading to sufficient injury for standing," so long as such fear exists beyond merely the "mind of the plaintiff."[184]

Since *Laird*, the courts have typically employed the ruling as a limitation on fear-based standing.[185] However, the courts have varied in how they apply *Laird*, falling roughly into three variations: (1) a broad, high-likelihood standard, which holds that fear-based injury is permitted only in instances of "'regulatory, proscriptive, or compulsory' government action"[186]; (2) a restrained, reasonable-likelihood standard, which allows all "objectively reasonable claims" if the plaintiff can show that "a reasonable person would have felt legally cognizable apprehension under the circumstances;"[187] and finally, (3) an independent, risk-of-injury standard, which "examines the likelihood and magnitude" of harm based on a reasonably objective standard.[188]

The courts began reexamining the possibility of a fear-based approach with the Supreme Court's 2000 decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[189] In *Laidlaw*, the Court found that the plaintiff organization adequately established injury-in-fact by demonstrating that several of its members used the affected area and were persons "'for whom the aesthetic and recreational values of the area [would] be lessened' by the challenged activity."[190] Citing *Los Angeles v. Lyons*,[191] the Court held that the issue turned on the "reasonableness of [the] fear" that led to the plaintiffs foregoing their use of the area.[192] Given that it was undisputed that Laidlaw was illegally discharging pollutants into nearby rivers, the Court found that there was nothing "improbable" about the plaintiffs' argument that Laidlaw's continued pollution of the river system would "cause nearby residents to curtail their recreational use of that waterway and would subject

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182 *Id.* at 14.

183 *Id.* at 15. The Court also emphasized that its ruling did not constitute even cursory support of the challenged intelligence program, noting a long tradition of Americans to "military intrusion into civilian affairs." *Id.* It reiterated that any actual or threatened injury "by reason of unlawful activities of the military" would be remedied by the courts in future actions. *Id.* at 16.

184 Calabrese, *supra* note 175, at 1457 (citing *Laird*, 408 U.S. at 2, 15).

185 *See* Sand, *supra* note 175, at 716.

186 *Id.* at 717, 719 (quoting United Presbyterian Church in the USA v. Reagan, 738 F.2d 1375, 1378 (D.C. Cir. 1984)).

187 *Id.* at 717, 719 (citing Ozonoff v. Berzak, 744 F.2d 224, 229–30 (1st Cir. 1984)).

188 *Id.* at 717, 720 (citing Meese v. Keene, 481 U.S. 465, 472 (1987)).

189 528 U.S. 167 (2000); *see also* Calabrese, *supra* note 175, at 1448–49.

190 *Laidlaw* 528 U.S. at 183 (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)).

191 461 U.S. 95 (1983).

192 *Laidlaw*, 528 U.S. at 184 (citing *Lyons*, 461 U.S. at 108).

them to other economic and aesthetic harms."[193] Despite this language, the Court still left a great deal of uncertainty around this issue.[194]

Nine years later, Justice Scalia chose to apply the high-likelihood approach in *Summers v. Earth Island Institute*,[195] which held that an environmental organization failed to meet the injury requirement based on its "vague desire to revisit a timber site in the future."[196] In this regard, Scalia likened the plaintiffs' interests to those found in *Lujan*, based solely on an undefined, "some day" intention.[197] Further, Scalia rejected Justice Breyer's laxer, reasonable-likelihood standard, arguing that it "would make a mockery of [the Court's] prior cases."[198] Scalia found that the significant problem with Breyer's approach was that it "accept[ed] the organizations' self-descriptions of their membership" without any independent evaluation on the part of the Court.[199] The Court, according to Scalia, could not rely on the speculation that one of the organization's members may have used the specific sites in question and found their recreational use "burdened" by the government's actions.[200]

The primary benefit of a fear-based injury structure is that it allows a plaintiff to bring an injunction or suit against an agency under lower standards of proof than under the traditional "injury-in-fact" approach.[201] This is particularly beneficial in cases of covert government surveillance programs, in which the public is mostly kept in the dark and may never discover concrete evidence of the harms committed. In most of these cases, the government relies upon the lack of direct evidence to halt litigation, hiding behind the "injury-in-fact" standard.[202]

Indeed, this was the argument made in *Clapper v. Amnesty International USA*,[203] in which the organization challenged the constitutionality of Section 702 of FISA,[204] which was added by the FISA Amendment Act of 2008.[205] Under Section 702, the Attorney General and the Director of National Intelligence can jointly authorize the targeting of any person "reasonably believed to be located outside the United States to acquire foreign intelligence information," for a period of up to one year.[206] Further, many of the limitations to

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193 *Id.*

194 *See* Calabrese, *supra* note 175, at 1449.

195 555 U.S. 488 (2009).

196 *Id.* at 496; Sand, *supra* note 175, at 721–22.

197 *Summers*, 555 U.S. at 496 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1992)).

198 *Id.* at 498.

199 *Id.* at 499.

200 *Id.*

201 *See* Calabrese, *supra* note 175, at 1448.

202 *Id.*

203 133 S. Ct. 1138 (2013).

204 *Id.* at 1142.

205 *See* 50 U.S.C. § 1881a (2012).

206 50 U.S.C. § 1881a(a) (2012).

Section 702 focus on intentionally targeting restricted persons, rather than holding the agency to at least a reasonable expectation standard.[207] In light of this, Amnesty International filed suit the day the act was enacted, seeking declaration that Section 702 was facially unconstitutional.[208] The Second Circuit found that the organization had satisfied its standing requirements by demonstrating (1) an "objectively reasonable likelihood that their communications will be intercepted at some time in the future," and (2) that they were suffering present injuries resulting from "costly and burdensome measures [taken] to protect the confidentiality of their international communications."[209]

The Supreme Court, however, found Amnesty International's argument lacking, holding that it could not "manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending."[210] The Court found that the Second Circuit's "objectively reasonable likelihood" standard was inconsistent with the precedent requiring that the injury be "certainly impending."[211] The Court further rejected Amnesty International's argument by pointing out that its claim relied on the prediction that the government would decide to target their communications under the authority Section 702, rather than through another surveillance method, that the FISC would find the surveillance within the Section 702 and Fourth Amendment safeguards, that government would succeed in obtaining the targeted communications, and that the organization would be a party in any legal actions related to those communications.[212] Without any concrete substance to back the argument, the Court found that the claims could not hold up to the "certainly impending" standard.[213]

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207 50 U.S.C. § 1881a(b) (2012) (stating that an acquisition "(1) may not intentionally target any person known at the time of acquisition to be located in the United States; (2) may not intentionally target a person 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; (3) may not intentionally target a United States person reasonably believed to be located outside the United States; (4) may not intentionally 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; and (5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.").

208 *Amnesty Int'l*, 133 S. Ct. at 1142.

209 *Id.* at 1146 (discussing Amnesty Int'l USA v. Clapper, 638 F.3d 118, 133–34, 139 (2d Cir. 2011)).

210 *Id.* at 1143.

211 *Id.* at 1147.

212 *Id.* at 1148.

213 *Id.* (the Court also noted that even if Amnesty International could demonstrate an injury-in-fact with its chain of possibilities, the very fact that the second link in the chain was a possibility, rather than a certainty, would result in the organization failing the second standing requirement of demonstrating that their injury was "fairly traceable" to Section 702).

B. *An Expected-Value Standard to Fear-Based Standing*

Some advocates for fear-based standing propose a framework based upon an "expected-value standard," in which the court would analyze the fear based upon the "likelihood and magnitude of harm according to an objectively reasonable inquiry."[214] Andrew Sand outlined his approach to expected-value, based upon an analysis of footnote 5 of *Amnesty International*, in which the Court created a doctrinal conflict with its majority opinion.[215] In its majority opinion, the Court established what Sand described as a high-likelihood standard, requiring a plaintiff to demonstrate that the feared harm was "certainly impending."[216] Further, the Court directly cited Scalia's opinion from *United Presbyterian v. Reagan*, in which Scalia advocated for a high-likelihood approach to *Laird*.[217]

Meanwhile, footnote 5 took a far different approach, relying upon a substantial-risk standard.[218] The Court distinguished this standard from the majority's "certainly impending" standard and Justice Breyer's reasonable-likelihood standard, stating that the "'substantial risk' standard is . . . distinct from the 'clearly impending' requirement," while still finding it as an acceptable alternative.[219] While the majority's "certainly impending" standard was appropriate for "uncertain, threatened injur[ies]," it was ill-equipped for analyzing fear-based injuries, as it failed to take into account the magnitude of the excepted harm.[220] Because fear-based injuries are actually focused on actions taken by the plaintiff to avoid or mitigate the anticipated harm, they should be considered "present" injuries, rather than the future-harms covered by the majority's approach.[221] Yet, as Sand highlighted, the majority's approach completely discounts the magnitude of a plaintiff's fear-based harms, focusing solely on the likelihood of the harm.[222] As a result, Sand concludes that a substantial-risk approach should control in fear-based injury claims, as it can balance both the likelihood of the expected harm and the magnitude of the costs the plaintiff endured to avoid that harm.[223]

With this established, Sand set out to construct a standard by which the courts could employ the substantial-risk standard.[224] Here, Sand advocated

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214 Sand, *supra* note 175, at 733; *see also* Calabrese, *supra* note 175, at 1490.

215 Sand, *supra* note 175, at 728–30, 733–37.

216 *Id.* at 729 (citing *Amnesty Int'l*, 133 S. Ct. at 1151–52).

217 *Id.*

218 *Amnesty Int'l*, 133 S. Ct. at 1150 n. 5 (citing Monsanto Co. v. Geerston Seed Farms, 561 U.S. 139, 153–55 (2010) (using a substantial-risk approach to standing requirements)); Sand *supra* note 175, at 730.

219 *Amnesty Int'l*, 133 S. Ct. at 1150 n.5; *see also* Sand, *supra* note 175, at 730.

220 Sand, *supra* note 175, at 731–32.

221 *Id.* at 732.

222 *Id.*

223 *Id.*

224 *Id.* at 733.

for the "expected-value approach," expanding upon earlier frameworks proposed by Mr. Brian Calabrese and Professor Bradford Mank.[225] Under Calabrese's framework, a fear-based injury claim satisfies the injury-in-fact requirement when "(1) there is a subjective fear of the harm; and (2) this fear is reasonable, (a) because objective evidence shows the actual existence of a threatened harm, or (b) because some evidence suggests the existence of a grave harm."[226] This system does not distinguish between the types of fear-based injuries—the chilling effect, pre-enforcement, and fear of anticipatory harm—but instead analyzes each claimed injury individually under the same standard.[227]

Calabrese argues that a unified approach was necessary for fear-based injury, arguing that such an approach was justified "not only theoretically, but also—and perhaps more importantly—empirically."[228] On a theoretical level, a unified approach would achieve the goals of clarity and easy applicability that the Court often seeks when it establishes a standardized framework. On an empirical level, Calabrese argues that a unified approach is in line with the Court's apparent tendency towards such an approach.[229] The Court often creates an ad hoc version by combining "elements of the doctrines" and "refer[ring] to cases that explain one particular strain of the doctrine to decide issues pertaining to other strains of the doctrine."[230]

Mank also argues for a more robust fear-based standard.[231] Mank specifically rejects Scalia's standard from *Summers*, finding that it directly conflicted with the standard laid out in *Laidlaw*.[232] The reasonable concerns test found in *Laidlaw* would take into account not only evidence of the harm's actual existence, but also the actions taken by the plaintiff.[233] However, Scalia's strict standard would not take any of that into account, only finding standing in instances where there is actual harm involved.[234] As such, Mank concludes that either *Laidlaw* or *Summers* should be overruled, and argues that because *Laidlaw* benefited from a seven-justice support, the Court is not likely overrule that case.[235]

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225 *Id.* at 734 n.177 (citing Calabrese, *supra* note 175 at 1493–1500; Bradford Mank, Summers v. Earth Island Institute *Rejects Probabilistic Standing, but a "Realistic Threat" of Harm is a Better Standing Test*, 40 ENVT'L L. 89, 134–37 (2010)).

226 Calabrese, *supra* note 175, at 1494.

227 *Id.* at 1495.

228 *Id.* at 1499.

229 *Id.*

230 *Id.* at 1500.

231 *See* Mank, *supra* note 225, at 134–37.

232 *Id.* at 134.

233 *Id.*

234 *Id.*

235 *Id.* at 135.

In place of Scalia's standard, Mank advocates for an adoption of Justice Breyer's "realistic threat" test, found in his dissent to *Summers*.[236] At least under an environmental law approach, Mank argued that Breyer's standard reflected the scientific realities of environmental and health threats, which often only affect a certain percentage of the population.[237] Compared to Scalia's standard, a "realistic threat" test would actually examine the reasonableness of the claimed threat, and not bar a plaintiff for being unable to prove with a high degree of certainty that they will suffer from that threat.[238] In this regard, Mank concluded that the Breyer test would create far more positive policy outcomes.[239]

Both Mank and Calabrese lay out the foundation for a reasonable inference standard. Both authors point to defects in the current Article III standing regime, albeit from the perspective of environmental law. However, the Sand-Calabrese framework is not without its own flaws, which makes it untenable for application to the metadata program. Part IV addresses these flaws by advocating for a more restrained framework, that still allows plaintiffs to get around the clandestine nature of the program that prevents concrete evidence of injury from being discovered.

IV. ADVOCATING FOR A REASONABLE-INFERENCE STANDARD IN STANDING IN CHALLENGES TO NSA METADATA COLLECTION

Though the Sand-Calabrese fear-based standing framework vastly reduces the burden upon plaintiffs to establish Article III standing, in many ways it opens the floodgates too far. Instead, the Court should adopt a more restrained, reasonable-inference standard. Section A outlines the reasonable-inference standard, based largely off of the Sand-Calabrese framework and the plaintiff's argument in *Klayman*. Section B then applies the reasonable-inference standard to both *ACLU v. Clapper* and *Klayman*, demonstrating how it both provides a lesser burden for plaintiffs facing clandestine government operations and still maintains the Article III standing's gatekeeper function for the Court.

A. *The Reasonable-Inference Standard*

As discussed above, the harms often cited in cases challenging the NSA's surveillance programs are hampered by the very clandestine nature of

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236 *Id.* at 136; (citing Summers v. Earth Island Inst., 555 U.S. 488, 505 (2009) (Breyer, J., dissenting)).

237 *See* Mank, *supra* note 225, at 136 (citing Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665, 735, 739 (2009)).

238 *See id.*

239 *Id.*

the programs. This is akin to the anticipated harms found in cases like *Laidlaw* and *Laird*. In light of the alternative standards held in other administrative cases, the Court should establish a relaxed standard for standing requirements in the case of the NSA metadata collection program. This Note argues that the Court should employ a framework of reasonable inference of harm, inspired by the expected-value standards discussed above, particularly in cases challenging covert intelligence gathering programs that target U.S. citizens.

Under this framework, a plaintiff would satisfy the injury-in-fact requirement if he could provide actual evidence of a government action and circumstances that would allow a court to make a reasonable inference that the plaintiff also suffered the harm, even in the absence of direct evidence. Unlike the standard proposed by Calabrese, this standard would still require evidence that directly demonstrated the existence of the government action, rather than relying on a likelihood analysis. Plaintiffs could not simply point to their apprehension of possible violations, bolstered by whatever measures they allegedly took to avoid or mitigate that possible violation. This would maintain the screening purpose of Article III standing.

At the same time, this framework would loosen the standing requirements for plaintiffs challenging covert government surveillance programs. Given the nature of these programs, few ever actually have firm evidence that they were targeted. Indeed, until the 2013 Snowden leaks, the public was not even aware of the metadata program, let alone who was being targeted. However, since Snowden's revelations, the government has been able to avoid direct litigation on the constitutionality of its various surveillance programs by hiding behind the strict requirements to establish standing.

By adopting a reasonable-inference framework, plaintiffs would not be nearly as constrained. Instead of hoping for another miraculous leak of details, plaintiffs could connect their circumstances to the confirmed instances of metadata collection. Thus, in the case of Mr. Klayman, evidence that the NSA requested metadata from a subset of Verizon users would allow the court the reasonably infer that other Verizon users were also targeted. From there, the court could move beyond the threshold issue and actually examine the substance of the claim itself.

B. *Applying the Reasonable-Inference Standard to Clapper and Klayman*

As discussed, the Court has shown reluctance in employing a fear-based "injury-in-fact" for Article III standing.[240] Part of the reluctance is that such a standard would open the floodgates, defeating the central purpose of Article III standing requirements: to filter out baseless claims. While a reasonable-inference standard does loosen the strict standard enacted by *Lujan*, it is not

240 *See supra* Part III.

so loose as to invalidate Article III standing as a whole. Rather, a reasonable-inference standard still ensures that a plaintiff must bring some evidentiary basis for their claim.[241] This is demonstrated by applying the standard to *Clapper*, *Amnesty International,* and *Klayman*. Each case represents the spectrum of standing claims that the Court faces.

ACLU v. Clapper represents the best case scenario for a plaintiff in a standing dispute. Unlike *Amnesty International* or *Klayman*, the plaintiff presented the court with direct evidence that the government had targeted the ACLU for metadata collection.[242] Not only did the ACLU present an order indicating that the NSA collected and maintained its metadata in a database, the government conceded that point.[243] The government's primary argument instead rested on whether its action qualified as an unreasonable search or seizure.[244] In this regard, the Second Circuit had little choice but to find that the ACLU had standing to sue.

The same cannot be said of *Amnesty International* or *Klayman*. On their surface, the plaintiffs in *Amnesty International* and *Klayman* made similar arguments.[245] In both cases, the plaintiffs requested declaratory action from the court, though they lacked direct evidence that the metadata collection program had infringed on their rights.[246] However, in *Klayman*, the plaintiff at least had evidence of the program's existence.[247] The plaintiff in *Amnesty International* relied solely on the statutory authorization for the program, without any evidence that the government actually acted upon it—certainly not in an unconstitutional manner.[248] In this regard, Amnesty International's argument was much more speculative than Klayman's.

This is where a reasonable-inference standard would provide its role of moderating standing requirements, while not serving to "open the floodgates." Though it turned out to be justified in its fears, at the time of its suit, Amnesty International had no evidence of government abuse in regards to metadata collection.[249] Its claim was a near perfect example of a fear-based claim, based predominately on a speculation of abuse. Thus, *Amnesty International* represents the worst-case scenario for a plaintiff.

Klayman, however, presented the Court with evidence demonstrating not only that the government was collecting private metadata without warrant, but further that it had coordinated with Verizon Wireless to obtain that

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241 *See supra* Part III.

242 *See* ACLU v. Clapper, 785 F.3d 787, 801 (2d Cir. 2011).

243 *Id.*

244 *Id.*

245 *See supra* Part I.

246 *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1142 (2013); Obama v. Klayman, 800 F.3d 559, 561–63 (D.C. Cir. 2015) (per curiam).

247 *Klayman*, 800 F.3d at 561.

248 *Amnesty Int'l*, 133 S. Ct. at 1142.

249 *Id.*

data.[250] While it is true that the order Klayman presented was limited to Verizon Business Network Service subscribers, the D.C. District Court pointed to the NSA's stated goal of creating a "comprehensive metadata database" as substantive justification for the belief that the NSA had not stopped at VBNS subscribers.[251] Had the D.C. Circuit employed the reasonable-inference standard, as the District Court did, it would have found Klayman's claims satisfactory for standing. Unlike Amnesty International, Klayman had evidence of the collection program and had evidence that the NSA directed its collection to at least a subset of Verizon subscribers. Though Klayman's evidence was not as strong as the ACLU's, combined with the NSA's stated goal, the D.C. Circuit could have reasonably inferred that Klayman's data—along with other general Verizon subscribers—had been collected, at least for standing purposes. This would then force the court to examine the actual merits of the issue, rather than hiding behind a technicality.

CONCLUSION

The NSA's metadata collection program and other FISA surveillance programs represent a quintessential threat to the foundations of our democratic society. Under the fear of international terrorism, we unwittingly ceded broad investigatory authority to shadowy agencies who have operated under a separate body of law from other administrative agencies.[252] For over a decade, the public was unaware that the NSA was authorized to cast wide nets against not only foreign nations, or even visitors to the U.S., but also U.S. citizens themselves.[253] The dangers of such a program are extensive, holding significant ramifications for Fourth Amendment protections in the seemingly unending war on terrorism.

Unfortunately, even upon revelation of the program's nature, curtailing the expansion of the NSA's reach has been impeded by a strict technicality, caught up in the clandestine nature of the very program opponents seek to challenge. The courts have avoided addressing the direct issue of the program by holding these cases to a rigid standard of Article III standing.[254] Without concrete and direct evidence of personal injury, plaintiffs are denied the opportunity to have the merits of their arguments heard under the current standard. However, this need not be the case.

This Article calls on the Court to treat the NSA metadata cases much like it has other administrative law cases, such as those involving environ-

250 *See Klayman*, 800 F.3d at 561, 563.

251 *Id.* at 563 (emphasis omitted).

252 *See supra* Part I.B.

253 *Id.*

254 *See supra* Part I.C.

mental or religious freedom claims. Rather than continue to provide unreasonable protections for this program, the Court should relax the standards for establishing standing in suits against the NSA metadata collection program. Under this alternative standard, plaintiffs would not be required to provide concrete and direct evidence of personal injury. Instead, they could point to evidence that creates a reasonable inference of injury, as the Second Circuit held in *ACLU v. Clapper*.[255] Plaintiffs would still be required to meet a certain threshold of evidence to substantiate their claim of standing, however, a reasonable inference standard would free plaintiffs from the unduly restrictive nature of these sorts of cases. And this in turn will force the Court to confront the bigger issue of the constitutionality of the program itself, rather than allowing the judges to hide behind a technicality.

255 *See* ACLU v. Clapper, 785 F.3d 787, 801–03 (2d Cir. 2015); *supra* Part IV.