WHO CAN SUE OVER GOVERNMENT SURVEILLANCE?

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The nature and scope of new government electronic surveillance programs in the aftermath of September 11 have presented acute constitutional questions about executive authority, the Fourth Amendment, and the separation of powers. But legal challenges to these new surveillance programs have been stymied—and decisions on the merits of core constitutional questions avoided—by court rulings that the challengers lack standing to sue under the Supreme Court's 1972 decision in Laird v. Tatum. *Last year, Congress amended the law governing foreign intelligence surveillance; the law has been challenged in court, and once again the issue of the challengers' standing is at the heart of the case.*

In light of the fundamental civil liberties and separation of powers questions that remain unanswered, it is vital to identify who, if anyone, has standing to challenge government surveillance. Unfortunately, the law of standing in the surveillance context remains murky and in important respects appears out of line with the larger body of standing jurisprudence. In some cases, courts impose on surveillance plaintiffs a stricter test for probabilistic injuries than exists in the rest of standing law; in other cases, courts do not recognize as injuries the significant chilling effects a broad and secretive surveillance program can create. This Article argues that the divergent strands of jurisprudence interpreting Laird *can be synthesized with general principles of standing law into a coherent and workable doctrine that will open the courthouse doors just wide enough to permit courts to adjudicate the crucial constitutional questions presented by new and emerging regimes of government surveillance.*

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INTRODUCTION

In the fall of 2001, President George W. Bush authorized the National Security Agency (NSA) to begin a program of warrantless electronic surveillance that did not comply with the Foreign Intelligence Surveillance Act (FISA),[1] the statute that had governed such surveillance since 1978.[2] The program had been secret until the *New York Times* disclosed its existence in December 2005, after which the president and senior members of his administration discussed the program publicly.[3] They explained that the program involved the warrantless interception of emails and telephone calls that originated or terminated inside the United States, and that NSA "shift supervisors" initiated surveillance under the program when they believed there was a "reasonable basis to conclude that one party to the communication [was] a member of al Qaeda, affiliated with al Qaeda, a member of an organization affiliated with al Qaeda, or working in support of al Qaeda."[4] An independ-

1. 50 U.S.C. §§ 1801–1829, 1841–46, 1861–62, 1871, 1881–81g, 1885–85c (2006).

2. *See* ACLU v. NSA, 493 F.3d 644, 648 n.1 (6th Cir. 2007) (opinion of Batchelder, J.); James Risen & Eric Lichtblau, *Spying Program Snared U.S. Calls*, N.Y. TIMES, Dec. 21, 2005, at A1; Press Briefing by Attorney Gen. Alberto Gonzales & Gen. Michael Hayden, Principal Deputy Dir. for Nat'l Intelligence (Dec. 19, 2005), *available at* http://www.politechbot.com/2005/12/20/transcript-of-briefing (General Hayden: "I can say unequivocally that we have used this program in lieu of [the FISA process] . . . ."); *see also id.* (General Hayden: "[T]his is a more . . . 'aggressive' program than would be traditionally available under FISA.").

3. *See* ACLU v. NSA, 493 F.3d at 648 n.1 (opinion of Batchelder, J.).

4. *Id.*; *see* Risen & Lichtblau, *supra* note 2.

ent analysis by the Congressional Research Service questioned the program's legality,[5] as did numerous legal scholars.[6]

In the flurry of legal activity that followed the disclosure of the program, *ACLU v. NSA*[7] was the first direct challenge to the program to reach a federal court of appeals.[8] In that case, a group of lawyers, journalists, and scholars asserted statutory, separation of powers, and First and Fourth Amendment claims against the program, which the plaintiffs alleged impeded their professional activities by chilling their speech or the speech of individuals integral to their work.[9] The district court had declared the program unconstitutional and enjoined it,[10] but in a splintered decision that produced no majority opinion, the Sixth Circuit reversed, with two judges concluding for different reasons that the plaintiffs did not have standing to bring the case.[11] This result perpetuated a troubling state of uncertainty regarding both the procedural and substantive issues presented. Serious questions remain both about the legality of the program itself[12] and who, if anyone, could have challenged the program in court.

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5. *See* ELIZABETH B. BAZAN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION (2006).

6. *See, e.g.*, Letter from Curtis A Bradley, et al. to Hon. Bill Frist, et al. (Jan. 9, 2006), *available at* http://www.cdt.org/security/20060109legalexpertanalysis.pdf (fourteen legal scholars and former government officials, including a former U.S. solicitor general, a former U.S. deputy attorney general, a former director of the FBI, the dean of Yale Law School, the former dean of Stanford Law School, and leading constitutional scholar Laurence Tribe, expressing doubt about the program's legality); Fletcher N. Baldwin, Jr. & Robert B. Shaw, *Down to the Wire: Assessing the Constitutionality of the National Security Agency's Warrantless Wiretapping Program: Exit the Rule of Law*, 17 U. FLA. J.L. & PUB. POL'Y 429, 449–61 (2006); Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 12–19 (2006); Evan Tsen Lee, *The Legality of the NSA Wiretapping Program*, 12 TEX. J. C.L. & C.R. 1, 12–40 (2006); *see generally* Tracey Maclin, *The Bush Administration's Terrorist Surveillance Program and the Fourth Amendment's Warrant Requirement: Lessons From Justice Powell and the* Keith *Case*, 41 U.C. DAVIS L. REV. 1259, 1293–1325 (2008) (arguing that the Supreme Court's opinion in *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972), effectively disposed of the Bush Administration's legal justifications for its warrantless wiretapping program).

7. 493 F.3d 644.

8. As of this writing, several cases challenging various other aspects of the program, including the involvement of telecommunications companies, remain pending. *See, e.g.*, *In re* Nat'l Sec. Agency Telecomm. Records Litig., No. M:06-cv-01791, 2009 WL 1561818 (N.D. Cal. June 3, 2009), *appeal filed* July 31, 2009; Jewel v. NSA, No. C:08-cv-4373 (N.D. Cal. filed Sep. 18, 2008).

9. ACLU v. NSA, 438 F. Supp. 2d 754, 758, 767–68 (E.D. Mich. 2006).

10. *Id.* at 782.

11. ACLU v. NSA, 493 F.3d 644.

12. *See supra* notes 2 and 6 and sources cited therein. The government has represented that it subsequently brought its surveillance activities into compliance with FISA, *see* Letter from Att'y Gen. Alberto R. Gonzales to Sens. Patrick Leahy & Arlen Specter (Jan. 17, 2007), *available at* http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf, and so the constitutionality

In 2008, Congress amended FISA to permit many of the controversial surveillance practices undertaken by the Bush Administration.[13] The new FISA Amendments Act was immediately challenged, but the action was dismissed on standing grounds;[14] an appeal is likely.

Unfortunately, the law of standing in the context of secretive government surveillance is in disarray, with serious consequences for the substance of constitutional adjudication and the separation of powers. A century of government surveillance—dating from the first whispers of the Red Scare at the turn of the twentieth century and continuing through the Cold War up through to the present day[15]—has raised fundamental questions about civil liberties and executive power. But without a consistent and clear jurisprudence of standing in this context, it remains unclear when courts can and should reach the merits of those questions. The U.S. Supreme Court's 1972 decision in *Laird v. Tatum*[16] purported to decide who can sue to enjoin a government surveillance program, but in practice that opinion ended up raising as many questions as it answered, producing lower court opinions that are in tension with one another and with general standing jurisprudence. Post-September 11 surveillance programs seem to have pushed the limits of executive power, but without a clear doctrine to guide judges through the threshold inquiry regarding standing, courts may never define those limits. As a result, the political branches, and chiefly the executive branch, will be able to develop and define the government's surveillance authority without judicial oversight.

In order to facilitate the maintenance of constitutional checks and balances, this Article seeks to clarify the law of standing in the surveillance context and provide a concrete answer to the question of who can sue to enjoin allegedly illegal government surveillance. My analysis begins by identifying the two categories of harms that flow from surveillance regimes: first, the invasion of privacy that results from actually being spied on by the government (what I will call the "loss-of-privacy injury"); and second, the inhibiting or chilling effect that surveillance programs exert on the exercise of protected freedoms such as speech and association (the "chilling-effect injury"). I then

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of the warrantless wiretapping program in existence from at least 2001 to 2007 was never ultimately adjudicated.

13. *See* FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified at 50 U.S.C.A. §§ 1812, 1881–1881g, 1885–1885c (2008)).

14. *See* Amnesty Int'l USA v. McConnell, No. 08 Civ. 6259, 2009 WL 2569138 (S.D.N.Y. Aug. 20, 2009).

15. *See generally* Laura K. Donohue, *Anglo-American Privacy and Surveillance*, 96 J. CRIM. LAW. & CRIMINOLOGY 1059, 1073–1118 (2006) (chronicling the history of various American intelligence-gathering programs and laws throughout the past hundred years).

16. 408 U.S. 1 (1972).

trace how courts have applied the Supreme Court's *Laird* decision to claims of standing based on each type of injury. In considering loss-of-privacy injuries (that is, claims brought by plaintiffs alleging they were, or were going to be, targets of unlawful spying), I conclude that some courts have over the years departed from generally applicable principles of standing law to create a standard that is uniquely and unnecessarily stringent, recognizing standing only for plaintiffs who can prove with certainty that they have been spied on—a difficult showing to make in light of the broad "state secrets" doctrine that prevents most foreign intelligence surveillance targets from ever learning whether they are being surveilled. Regarding chilling-effect claims, I find that many courts have interpreted *Laird* too broadly, reading its narrow, context-specific holding as a nearly categorical barrier to standing for plaintiffs who allege that government surveillance has chilled their speech, association, or other activities.

To clarify the law of surveillance and standing and to foster doctrinal coherence, I offer two prescriptions. First, courts should evaluate loss-of-privacy claims under the same standard for probabilistic injuries that applies to any other allegation in support of standing to seek injunctive relief: The plaintiff must demonstrate only a reasonable likelihood—not a certainty—of ongoing or future injury. Second, courts should not overread *Laird* to foreclose nearly all claims of injury based on a chilling effect; instead, hewing to the Supreme Court's own contemporaneous and subsequent characterizations of that case, courts should understand *Laird* as barring chilling-effect claims only where it is not objectively reasonable for the plaintiff to feel his otherwise lawful activity has been chilled. Applying these two prescriptions would create a unified and workable standing doctrine in the surveillance context that would accord with general principles of standing and avoid imposing unnecessary obstacles to judicial rulings on the merits of crucial constitutional questions.

Two caveats about the scope of my discussion are appropriate here. First, I consider only the issue of standing to *enjoin* surveillance programs, not to seek damages for surveillance-related injuries. Although some victims of surveillance seek damages as well as injunctive relief, for the most part damages claims have historically been pressed when there is some evidence or allegation that the plaintiffs have actually been spied on[17]—a circumstance that presents an easy case for standing purposes.[18] The question that is in need of exploration

17. *See, e.g.*, Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976).

18. *See infra* note 54.

and clarification, and thus the question I seek to answer here, is when standing exists to enjoin a surveillance program.

Second, although the familiar standing test contains three constitutional prongs (injury-in-fact, causation, and redressability[19]), the heart of the battle over standing to challenge government surveillance concerns who, if anyone, has suffered a judicially recognized injury-in-fact.[20] Therefore, this first prong of the standing test will be the focus for this Article.[21]

Part I analyzes the two basic types of harm secretive surveillance programs may inflict—loss of privacy and chilling effect—and discusses the obstacles to translating these harms into injuries-in-fact sufficient to support standing. Part II surveys the landscape of surveillance standing jurisprudence and describes the current muddled state of the law regarding who can sue to enjoin government surveillance programs. In this Part, I discuss how courts have treated the two distinct forms of injury I have identified. Regarding the loss-of-privacy injury, I explore how *Laird* has led some courts to conclude that standing exists only in the rare case in which the plaintiff can prove she herself is actually being surveilled. Regarding the chilling-effect injury, I identify and contrast the two principal conflicting strands of jurisprudence—one that

19. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

20. *See, e.g.*, Michael C. Miller, Note, *Standing in the Wake of the Terrorist Surveillance Program*, 60 RUTGERS L. REV. 1039, 1067 (2008) (concluding based on an analysis of recent surveillance challenges that "the main difficulty that plaintiffs face in establishing standing in challenges to secret government surveillance . . . is demonstrating a sufficient injury in fact"). If I were writing on a jurisprudentially blank slate, it might be worth exploring whether some of the issues that have informed the injury inquiry might not fit better conceptually under the redressability or causation prongs of the standing test. For example, one of the major questions about chilling-effect injuries (that is, deterrence of a person's lawful or even protected conduct) arising from government surveillance programs is whether the chill is merely a "subjective" response to the surveillance or an objectively reasonable one. *See infra* Part II.B. This question is arguably one of causation—has the government's program actually caused the chill plaintiffs feel or is the injury self-inflicted?—rather than one of injury, as courts have usually discussed it. *See* ACLU v. NSA, 493 F.3d 644, 666–70 (6th Cir. 2007) (opinion of Batchelder, J.) (criticizing plaintiffs' chilling-effect argument from the standpoint of causation). But to conduct an analysis that is of practical use in helping courts and litigants untangle the knotted strands of surveillance jurisprudence, I will largely take the law as I find it and suggest how courts may go forward from here, rather than proposing an alternate conceptual framework that would require turning back the clock forty years and reconstructing surveillance standing jurisprudence from scratch.

21. This is not to suggest that causation and redressability are completely settled issues; claims of injury based on chilling effect, in particular, have at times been successfully attacked on causation and redressability grounds. *See, e.g.*, ACLU v. NSA, 493 F.3d at 666–73 (opinion of Batchelder, J.) (holding that plaintiffs' asserted injuries failed the causation and redressability prongs even assuming they satisfied the injury-in-fact requirement). But a comprehensive analysis of causation and redressability is difficult in the abstract because these two prongs tend to turn on the particular circumstances of each plaintiff and each surveillance program. This reason, in combination with the primacy of the injury-in-fact requirement in most standing decisions in this field, makes the injury-in-fact prong the more fruitful subject of analysis here.

reads *Laird* broadly as barring almost all standing claims based on a chilling effect, and another that reads *Laird* in a more restrained manner, barring only standing claims based on chilling effects that are merely "subjective."

Parts III and IV present my argument for the proper interpretation of standing doctrine in the surveillance context. In Part III, I show how courts' treatment of loss-of-privacy claims brought by plaintiffs alleging actual spying has deviated from general standing principles regarding probabilistic injuries, and I contend that there is no justification for this divergence. In Part IV, I argue that the restrained reading of *Laird* as to chilling effects is more faithful to *Laird* itself, more congruent with subsequent Supreme Court interpretations of that decision, and more defensible based on normative considerations about the rule of law and the importance of providing an opportunity for the judiciary to perform its role as constitutional arbiter in our divided system of government.

I conclude by synthesizing the lessons of my analysis and answering the question posed in the Article's title. I propose a unified jurisprudence of surveillance and standing under which an injury-in-fact exists when a plaintiff shows either that she is reasonably likely (though not necessarily certain) to be wiretapped, or that she has suffered a chilling effect that is objectively reasonable.

It is my hope that this Article will facilitate the work of advocates and judges by bringing some clarity to this unsettled but critical area of jurisprudence. Only after issues of standing are resolved may courts finally begin to address the merits of the fundamental separation of powers and civil liberties questions implicated by government surveillance programs.

I. SURVEILLANCE AND INJURY

Plaintiffs can satisfy the injury-in-fact prong of the standing inquiry if they demonstrate that they have suffered "concrete and particularized" harm that is "actual" or "imminent" rather than "conjectural" or "hypothetical."[22] Predictably, articulating these principles in the abstract is a much simpler task than applying them to specific cases, particularly, as it turns out, for plaintiffs challenging government surveillance programs. In the context of this sensitive and secretive government activity, what does it mean to allege a concrete and particularized injury? To satisfy Article III requirements, must a plaintiff show that she herself has been monitored under the challenged program? Answering these questions requires a clear understanding of the injuries that flow from government surveillance.

22. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180 (2000); *Lujan*, 504 U.S. at 560.

A. Two Types of Harm

Broadly speaking, government surveillance produces two types of adverse effects. First, for those who are spied on, surveillance results in a loss of privacy. It is well-established that the loss of one's privacy is an injury sufficient to confer standing: People value their privacy and do not expect to have to risk sharing their personal or professional secrets with strangers or government authorities whenever they send an email or place a phone call.[23]

The second type of injury, the chilling-effect injury, may appear more ephemeral but reaches more broadly. When people know their government is engaged in wiretapping, it affects not only those who know they are being spied on, but also those who fear they might be. People who believe that they are being surveilled might avoid discussing confidential matters or expressing opinions that could subject them to further investigation, and people who merely suspect they might be surveilled may avoid discussing certain subjects, or associating with certain people or groups, in the hope that by doing so they will avoid the government's surveillance dragnet.[24] As the Supreme Court has succinctly put it, "the threat of sanctions may deter almost as potently as the actual application of sanctions."[25] And as a Senate report on surveillance abuses of the 1960s and 1970s explained:

> Our Bill of Rights is concerned not only with direct infringements on constitutional rights, but also with government activities which effectively inhibit the exercise of these rights. The exercise of political freedom depends in large measure on citizens' understanding that they will be able to be publicly active and dissent from official policy, within lawful limits, without having to sacrifice the expectation of privacy that they rightfully hold.[26]

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23. *See* Katz v. United States, 389 U.S. 347, 352 (1967) (holding that even a user of a public pay telephone "is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world"); Berger v. New York, 388 U.S. 41, 56 (1967) ("By its very nature eavesdropping involves an intrusion on privacy that is broad in scope."); *see also* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (classifying privacy in telephone communications as part of "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men").

24. *See, e.g.*, Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 12–13 (2008); Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance, and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 645–53 (2004); Wilson R. Huhn, *Congress Has the Power to Enforce the Bill of Rights Against the Federal Government; Therefore FISA Is Constitutional and the President's Terrorist Surveillance Program Is Illegal*, 16 WM. & MARY BILL RTS. J. 537, 568–69 (2007); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 488, 493–94 (2006).

25. Keyishian v. Bd. of Regents, 385 U.S. 589, 604 (1967) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)) (internal quotation marks and ellipsis omitted).

26. S. REP. NO. 95-604(I), at 8 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 3904, 3909–10.

Whether the sanctions feared are criminal penalties, civil liability, or the loss of a government benefit, it is apparent that when the government attaches adverse consequences to the expression of certain ideas, it is deterring the expression of those ideas.[27] This phenomenon has long been recognized by the courts,[28] and the phrase "chilling effect" has made its way into legislative parlance as well.[29]

B. Obstacles to Translating Surveillance Harms Into Injuries-in-Fact

While it is clear that government surveillance can cause both loss-of-privacy and chilling-effect injuries, the fact that individuals suffer these adverse effects does not always translate cleanly into a solid claim of injury for the purpose of establishing standing. Under a justiciability jurisprudence that has grown increasingly restrictive over the past several decades, claims of standing based on each of these types of injury have their own particular limitations.

For instance, although there is judicial consensus that the invasion of privacy that results from being spied on is injurious,[30] plaintiffs have difficulty establishing that they are, in fact, being spied on. Since surveillance programs aimed at intelligence gathering (as opposed to general crime control) are almost always conducted in secret, the government often invokes the state secrets privilege to bar parties and courts from learning anything about whom specifically, or even what classes of people, a given surveillance program is targeting.[31] Under the state secrets privilege, "the government [may] bar the

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27. *See, e.g.*, Baird v. State Bar of Ariz., 401 U.S. 1, 6 (1971) (plurality opinion) ("Broad and sweeping state inquiries into these protected areas [of belief and association] . . . discourage citizens from exercising rights protected by the Constitution."); Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) ("Public officials like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'"); N.Y. Times v. Sullivan, 376 U.S. 254, 279 (1964) (observing that fear of negative consequences for expressing certain ideas can deter "would-be critics of official conduct . . . from voicing their criticism" and induce speakers "to make only statements which 'steer far wider of the unlawful zone'" (citation and internal quotation marks omitted)); *see also* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect*," 58 B.U. L. REV. 685, 693 (1978) ("A chilling effect occurs when individuals seeking to engage in activity protected by the [F]irst [A]mendment are deterred from doing so by government regulation not specifically directed at that protected activity.").

28. *See* Schauer, *supra* note 27, at 685 (tracing the origin of the concept back to Justice Frankfurter's concurrence in *Wieman v. Updegraff*, 344 U.S. 183 (1952)).

29. *See* Huhn, *supra* note 24, at 567–69 (noting the use of the concept in a Senate report on Nixon-era surveillance abuses).

30. *See infra* note 54.

31. *See, e.g.*, Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007); ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007); United Presbyterian Church in the U.S.A. v. Reagan,

disclosure of information if there is a reasonable danger that disclosure will expose military matters which, in the interest of national security, should not be divulged."[32] Because of this broad privilege, potential plaintiffs whose privacy is actually being invaded may never learn of it—and, astonishingly, even if they do, they may not be able to litigate based on their actual knowledge.[33] One court has noted, in the context of a challenge to government surveillance, the unfairness of allowing the government to argue that plaintiffs cannot show injury while simultaneously thwarting plaintiffs' attempts to discover the evidence necessary to show the injury they allege.[34] Unfortunately, this point does not tend to carry the day when state secrets are involved.[35] Thus, lacking particularized evidence that they are being targeted, plaintiffs who complain of a direct invasion of their privacy by government surveillance have instead tried to establish standing by demonstrating that there is some level of likelihood or possibility that they are or will be targets.[36] The questions of how courts have treated such probabilistic claims of injury and whether such treatment is consistent with standing jurisprudence generally are taken up in Parts II.A and III, respectively.

In contrast to the difficulty most plaintiffs have in demonstrating that they themselves have been or will be wiretapped, demonstrating a chilling effect is much easier, because the evidence of the injury actually resides with the plaintiffs. They themselves can attest to the ways in which the operation of a surveillance program affects their own behavior and the behavior of their friends, journalistic sources, clients, and business associates. For example, lawyers can attest that the operation of a surveillance program inhibits them from communicating telephonically or electronically because they cannot guarantee confidentiality; journalists can attest to sources' fear of surveillance and unwillingness to talk with them; religious organizations can attest to their members' unwillingness to come to worship or other events in the face of government agents' potential presence; government job applicants can attest

738 F.2d 1375 (D.C. Cir. 1984); Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006).

32. *Al-Haramain Islamic Found., Inc.*, 507 F.3d at 1196 (citation and internal quotation marks omitted); *see generally* Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1935–50 (2007) (discussing origins and modern applications of the privilege).

33. *See Al-Haramain Islamic Found., Inc.*, 507 F.3d at 1205 (upholding the government's state secrets claim even though plaintiffs possessed leaked documents proving they had been monitored).

34. *See* Riggs v. City of Albuquerque, 916 F.2d 582, 586–87 (10th Cir. 1990).

35. *See, e.g.*, *Halkin*, 690 F.2d at 1000 (acknowledging that state secrets privilege will foreclose many surveillance challenges).

36. *See, e.g.*, *United Presbyterian*, 738 F.2d at 1380; *Halkin*, 690 F.2d at 999, 1006.

to their unwillingness to associate with radical groups if their associations may be the subject of government scrutiny.[37]

The difficulty these plaintiffs encounter is not in demonstrating that such consequences occur as a matter of fact; it is in convincing courts to recognize these consequences as constitutionally cognizable injuries-in-fact that give rise to justiciable controversies as a matter of law. Unlike the loss of privacy that accompanies actual wiretapping, the chilling effect that stems from potential wiretapping is not always recognized as an injury. Instead, as discussed in Part II.B, some courts recognize surveillance-based chilling effects as injuries provided such chilling effects are not "subjective" (that is, self-invented or unreasonable); other courts will not recognize surveillance-based chilling effects as injuries unless they result from government activity that is "regulatory, proscriptive, or compulsory"[38] in nature. Whichever of these views is correct—a question taken up in Part IV—courts tend to agree that some types of chilling effect are simply too ephemeral or idiosyncratic to constitute an injury.

In sum, surveillance plaintiffs asserting loss-of-privacy injuries face different obstacles from surveillance plaintiffs asserting chilling-effect injuries. Though both types of injury require a certain degree of likelihood that a particular adverse consequence will befall the plaintiff, one type of injury claim is difficult to establish because likelihood is hard to show, and the other type is difficult to establish because it is not clear which types of adverse consequence confer standing. Specifically, the adverse consequence associated with a loss-of-privacy claim—namely, being spied on—is well-established as injurious, but its likelihood of occurring hard to show. By contrast, a plaintiff asserting a chilling effect can easily show that an adverse consequence is occurring, but must struggle to demonstrate that the adverse consequence is, constitutionally speaking, an injury. Because of these differences in how these two types of injury have been analyzed and the different challenges presented by each, it is useful to analyze them separately for the purpose of determining who can sue over government surveillance. In the remainder of this Article, I will discuss the problematic and sometimes contradictory ways courts have treated each type of injury, and I will offer a prescription for improving both the consistency and the substance of standing jurisprudence regarding both types of injury in the context of government-surveillance challenges.

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37. Each of these examples is drawn from an actual case in which such injuries have been asserted. *See* ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007); Presbyterian Church v. United States, 870 F.2d 518 (9th Cir. 1989); Ozonoff v. Berzak, 744 F.2d 224 (1st Cir. 1984); Muslim Cmty. Ass'n of Ann Arbor v. Ashcroft, 459 F. Supp. 2d 592 (E.D. Mich. 2006).

38. The meaning and the significance of this phrase, drawn from *Laird v. Tatum*, 408 U.S. 1, 11 (1972), are discussed extensively in Part II.

II. INJURY AND JUSTICIABILITY IN THE COURTS

From the start of the Cold War well into the 1970s, the executive branch engaged in widespread warrantless electronic surveillance of people within the United States, ostensibly for reasons of national security.[39] After extensive congressional investigation of these practices, the public learned that federal agencies had engaged in warrantless wiretapping of numerous United States citizens—including journalists, activists, and members of Congress—"who engaged in no criminal activity and who posed no genuine threat to the national security."[40]

It was in the midst of this tumultuous period that the Supreme Court decided *Laird v. Tatum*,[41] a case that established the parameters that have guided (and sometimes misguided) standing doctrine in the surveillance context ever since. This Part will introduce that consequential decision and then discuss how courts have interpreted *Laird* in adjudicating standing claims based on loss-of-privacy and chilling-effect injuries.

In *Laird*, the Supreme Court considered a challenge to the army's "surveillance of lawful and peaceful civilian political activity."[42] Dividing 5–4, the Court held that the plaintiffs (whose identities and specific allegations are not mentioned in the opinion) had not presented a justiciable controversy.[43] The Court observed that the *Laird* plaintiffs had complained of "no specific action of the Army against them" and presented "no evidence of illegal or unlawful surveillance activities"; in fact, "[s]o far as is yet shown the information gathered [was] nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand."[44] Yet the Court also recognized the analytical distinction, identified in Part I of this Article, between a claim that the plaintiffs' privacy was invaded because they were actually being spied on themselves (which is how the government sought to

39. *See* SELECT COMM. TO STUDY GOV'T OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755 [hereinafter CHURCH COMMITTEE REPORT], Book II, at 6–7 (1976).

40. S. REP. NO. 95-604(I), at 8 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 3904, 3909 (quoting CHURCH COMMITTEE REPORT, Book II, at 12); *see also* Huhn, *supra* note 24, at 567 ("Between 1968 and 1978 came the notorious administration of President Richard M. Nixon, with its multiple scandals involving grievous abuses of presidential power. FISA was adopted, and Title III was amended in reaction to widespread eavesdropping abuses conducted by the Nixon administration in the name of national security.").

41. 408 U.S. 1.

42. *Id.* at 2 (internal quotation marks omitted).

43. *Id.* at 2–3, 16.

44. *Id.* at 9 (quoting Tatum v. Laird, 444 F.2d 947, 953 (D.C. Cir. 1971)).

characterize plaintiffs' claim) and a claim of chilling effect (which the D.C. Circuit found sufficient for standing in the decision under review). The Supreme Court quoted with approval the lower court's framing of the issues: Responding to the government's argument "that nothing (detrimental to respondents) has been done" and "that nothing is contemplated to be done," the D.C. Circuit explained that the government's position "does not accord full measure" to the plaintiffs' "conten[tion] that the present existence of this system . . . exercises a present *inhibiting effect* on their full expression and utilization of their First Amendment rights."[45] The Court thus endorsed the D.C. Circuit's distinction between a loss-of-privacy claim and a chilling-effect claim, as well as that court's identification of the issue for decision as "whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a[n overly broad] governmental investigative and data-gathering activity."[46]

Nevertheless, the Court went on to conclude that the lower court had decided the issue incorrectly. The Court distinguished several of its prior cases holding that a chilling effect produced a First Amendment violation: These earlier cases all involved challenges to exercises of government power that were "regulatory, proscriptive, or compulsory"[47] insofar as they regulated the plaintiff's action (for example, by conditioning a bar applicant's admission on her willingness to disclose her organizational memberships,[48] or by making the swearing of an oath a condition of employment with a government agency[49]), effectively forbade certain conduct by the plaintiffs (for example, punishing teachers for their political acts and associations by firing or threatening to fire them[50]), or required the plaintiff to take particular action (for example, a regulation providing that individuals had to make a special request to the post office in order to be permitted to receive certain types of political literature through the mail[51]). "In none of these cases," the *Laird* Court explained, "did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that

45. *Id.* at 9–10 (quoting *Tatum*, 444 F.2d at 954) (internal quotation marks and emphasis altered).
46. *Id.* at 10.
47. *Id.* at 11.
48. *See* Baird v. State Bar of Ariz., 401 U.S. 1 (1971).
49. *See* Baggett v. Bullitt, 377 U.S. 360 (1964).
50. *See* Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).
51. *See* Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

individual."[52] The Court went on to hold that the plaintiffs' claims were not justiciable, because "[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."[53]

In the first dozen years or so after *Laird* was decided, lower courts worked out a few clear rules about constitutionally cognizable injuries arising out of government surveillance. Plaintiffs who are personally subjected to surveillance that is unlawful in and of itself have standing to challenge the surveillance.[54] So do plaintiffs subjected to surveillance undertaken for illegitimate reasons[55] or used to damage the target's reputation.[56] Plaintiffs whose surveillance files

52. *Laird*, 408 U.S. at 11.

53. *Id.* at 13–14. Prior to *Laird*, two D.C. Circuit cases set forth different tests for analyzing when a chilling effect qualifies as an injury sufficient to confer standing. *See* Davis v. Ichord, 442 F.2d 1207, 1214 (D.C. Cir. 1970) ("Among the considerations pertinent to determining the existence of a chilling effect upon the exercise of First Amendment rights which give rise to a case or controversy are the source of the chill, the extent to which it focuses upon the conduct of those who allege it, and the likelihood that it will affect that conduct."); Nat'l Student Ass'n v. Hershey, 412 F.2d 1103, 1115 (D.C. Cir. 1969) ("[W]e conclude that we should decide the justiciability of suits predicated on alleged chilling effects on a case-by-case basis. In determining whether a given chilling effect is sufficient, it would seem relevant to consider inter alia: (1) the severity and scope of the alleged chilling effect on First Amendment freedoms, (2) the likelihood of other opportunities to vindicate such First Amendment rights as may be infringed with reasonable promptness, and (3) the nature of the issues which a full adjudication on the merits must resolve, and the need for factual referents in order properly to define and narrow the issues."). After *Laird*, however, neither of these tests was widely followed in the case law assessing the justiciability of challenges to government surveillance.

54. *See* Alliance to End Repression v. City of Chicago (*Alliance II*), 627 F. Supp. 1044, 1053 (N.D. Ill. 1985); Jabara v. Kelley, 476 F. Supp. 561, 568–69 (E.D. Mich. 1979), *vacated on other grounds sub nom.* Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982); Berlin Democratic Club v. Rumsfeld (*Alliance I*), 410 F. Supp. 144 (D.D.C. 1976); Alliance to End Repression v. Rochford, 407 F. Supp. 115, 118 (N.D. Ill. 1975); Lowenstein v. Rooney, 401 F. Supp. 952, 958 (E.D.N.Y. 1975); Phila. Resistance v. Mitchell, 58 F.R.D. 139, 143 (E.D. Pa. 1972); *see also* Halkin v. Helms, 690 F.2d 977, 999 (D.C. Cir. 1982) (dicta).

55. *See Alliance I*, 410 F. Supp. at 151 (stating the general rule); *Lowenstein*, 401 F. Supp. at 958–59 (finding justiciable controversy where a political candidate claimed a rival politician conspired with the FBI to investigate the plaintiff and use the information collected against the plaintiff in an election campaign); Handschu v. Special Servs. Div., 349 F. Supp. 766, 770 (S.D.N.Y. 1972) (finding justiciable controversy where law enforcement "systematically engage[d] in . . . excesses and abusive tactics and activities with the purpose and effect of sowing distrust and suspicion among plaintiffs").

56. *See* Riggs v. City of Albuquerque, 916 F.2d 582, 585 (10th Cir. 1990) (finding justiciable a challenge to government surveillance of controversial individuals and organizations because "plaintiffs allege more than a chilling of their First Amendment rights; they also allege harm to their personal, political, and professional reputations in the community"); *Alliance II*, 627 F. Supp. at 1050–52 (finding justiciable a challenge to the surveillance and infiltration of two organizations, in part because law enforcement officers gave false congressional testimony that identified one organization as a "Communist Party Front Group" and facilitated false news reports associating the other organization with "radicals" and "Communists"); *Jabara*, 476 F. Supp. at 568 (finding justiciable controversy where government surveillance of the plaintiff resulted in injury to his reputation, law practice, and willingness of others to associate with him); *Alliance I*, 407 F. Supp. at 118 (finding justiciable a challenge to

are disclosed by the government have standing to challenge the disclosure.[57] By contrast, the government's use of informants is not injurious in and of itself,[58] unless the government actively disrupts an organization.[59] And plaintiffs lack standing to challenge surveillance that amounts to nothing more than sitting in on meetings open to, or gathering information available to, the public.[60] Although there were a few questions and disagreements at the margins,[61] it was possible, at least in these early years, to describe a relatively coherent body of doctrine in the field of standing and surveillance.

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widespread surveillance in part because authorities' dissemination of the fruits of their investigations resulted in "damage to [plaintiffs'] academic or professional lives" and "subject[ed] them to ridicule").

57. *See, e.g.*, Phila. Yearly Meeting of the Religious Soc'y of Friends v. Tate, 519 F.2d 1335, 1338–39 (3d Cir. 1975) (finding justiciable a claim against local law enforcement for the maintenance of publicly available intelligence files about surveilled individuals and for the disclosure on national television of identities of surveillance targets); *Alliance I*, 410 F. Supp. at 149–51 (finding justiciable a claim for surveillance and related activities that included the dissemination of intelligence information; court held "public dissemination of [collected] information in a false or defamatory manner and with no lawful purpose" is "subject to challenge as beyond 'legitimate surveillance activities'").

58. *See Handschu*, 349 F. Supp. at 769–70 (holding that government may use informers generally, but not to solicit unlawful activity or create mutual distrust and suspicion among group members); *see also* Founding Church of Scientology v. FBI, 459 F. Supp. 748, 761 (D.D.C. 1978) (same).

59. *See* Ghandi v. Police Dep't of Detroit, 747 F.2d 338, 349–50 (6th Cir. 1984) (finding justiciable controversy where FBI-paid informant infiltrated labor organization, publicly misrepresented its goals, disrupted its political campaign, stole organization's mail and mailing list, and became political candidate for organization); *Alliance II*, 627 F. Supp. at 1050–52 (finding justiciable controversy where undercover agents became board members of one organization and the treasurer of another); *Founding Church of Scientology*, 459 F. Supp. at 760 (finding justiciable controversy where the FBI surveillance and infiltration of a religious organization and blacklisting of its members "have had the effect, inter alia, of: interfering with the lawful associational and religious activities of the plaintiff; disrupting the plaintiff's organization and its growth; harassing and intimidating practitioners of plaintiff and denying of government benefits; and preventing the free practicing of religious beliefs and other associational activities, as well as deterring supporters from joining the plaintiff" (citations omitted)); *Handschu*, 349 F. Supp. at 770 (finding justiciable controversy where plaintiffs claimed law enforcement "informers and infiltrators provoked, solicited and induced members of lawful political and social groups to engage in unlawful activities," thereby "sowing distrust and suspicion among plaintiffs and others").

60. *See Phila. Yearly Meeting*, 519 F.2d at 1337–38 ("[M]ere police photographing and data gathering at public meetings, . . . without more, is legally unobjectionable and creates at best a so-called subjective chill which the Supreme Court has said is not a substitute for a claim of specific present harm or a threat of specific future harm."); *see also* Gordon v. Warren Consol. Bd. of Educ., 706 F.2d 778, 780–81 (6th Cir. 1983) (finding no justiciable claim arising from placement of undercover policewoman in high school classes because no disruption of classroom activities was alleged); Fifth Ave. Peace Parade Comm. v. Gray, 480 F.2d 326, 332 (2d Cir. 1973) (finding nonjusticiable a challenge to the FBI's collection of information about individuals expected to participate in an upcoming war-protest demonstration, because plaintiffs did not show that the collected information was misused).

61. For example, a federal district court and a state supreme court disagreed over whether the effect of surveillance on the willingness of the target's personal associates to continue to associate with him qualifies as an injury that can support standing. *Compare Jabara*, 476 F. Supp. at 568 (finding justiciable controversy where government surveillance of the plaintiff resulted in, among other things, decreased willingness of others to associate with him), *with* Weber v. City of Cedarburg, 384 N.W.2d

But core disputes about the meaning of *Laird* remained, and the subsequent history of standing jurisprudence in the surveillance context has been driven in no small part by courts' efforts to identify the implications of the *Laird* holding, and the key factors behind it. Was the plaintiffs' failure to allege that they themselves had been spied on fatal to their standing, or could they have rendered their claim justiciable by demonstrating a reasonable possibility (or likelihood) that they would be spied on in the future? Did *Laird* mean that a chilling-effect injury could never suffice to confer standing, or only that a "subjective" chill was insufficient? If a chilling-effect injury could confer standing, was the Court's reference to "regulatory, proscriptive, or compulsory" laws a substantive limitation on the types of chilling-effect claims permitted, or was the Court merely distinguishing other cases without marking the outer limit of viable chilling-effect claims? All of these interpretive questions have continued to trouble and divide courts as they have applied *Laird* to challenges to government surveillance.

In the remainder of this Part, I consider how courts have applied *Laird* to each of the two broad categories of injury caused by government surveillance. Regarding the loss-of-privacy injury, some courts have come to view *Laird* as requiring that the plaintiff be able to prove she herself is a surveillance target—this in spite of a state secrets doctrine that makes such a showing practically impossible in many cases. Regarding the chilling-effect injury, courts are divided between those holding that *Laird* bars all chilling-effect claims not resulting from "regulatory, proscriptive, or compulsory" government action, and those holding that *Laird* forbids only claims based on subjective chills (while allowing objectively reasonable chilling-effect claims to proceed).

333, 340 (Wis. 1986) (refusing to find injury based on claim that people would not associate with plaintiff as a result of government surveillance and accusations). Two courts recognized a theory of "cumulative injury," *see Alliance I*, 407 F. Supp. at 119; Phila. Resistance v. Mitchell, 58 F.R.D. 139, 145 (1972), but it fell out of use after the 1970s. And one court suggested—in a singular analysis later repudiated by then-Judge Scalia—that the presence or absence of a chilling effect was a subjective inquiry that turned on whether the plaintiff was actually prevented from doing something. *Compare* Donohoe v. Duling, 465 F.2d 196, 199 (4th Cir. 1972) (finding no justiciable controversy because plaintiffs themselves "had not been deterred . . . from participating in demonstrations or 'chilled' in the exercise of their First Amendment rights"), *with* United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375, 1379 (D.C. Cir. 1984) ("[T]o require that the harm of 'chilling effect' actually be suffered by the plaintiff would destroy the whole purpose of the concept, which is to enable even those who have not been chilled to vindicate the First Amendment interests of those who have.").

A. *Laird* and Loss of Privacy

There is a broad consensus that the invasion of privacy that results from actually being spied on by the government qualifies as a sufficient injury for justiciability purposes.[62] But what of plaintiffs who—as is much more typical—cannot demonstrate they themselves have been spied on, and instead claim standing to challenge a surveillance program on the grounds that they are likely to be surveilled in the future (or are likely to be under surveillance at present but unable to prove it)?

The few cases addressing such claims have interpreted *Laird* to defeat standing claims predicated on the mere likelihood of being wiretapped. According to these decisions, a likelihood or possibility of being surveilled is merely another subjective condition of the type that *Laird* found insufficient to support a justiciable claim.

The leading case espousing this view is *Halkin v. Helms*,[63] in which the D.C. Circuit held that former Vietnam War protestors who had been placed on a CIA watchlist that influenced the selection of NSA surveillance targets, lacked standing to seek an injunction barring the government from surveilling them.[64] The court explained that, although "there can be little doubt that . . . interception of plaintiffs' private communications . . . if proved would constitute an injury in fact," the plaintiffs' case foundered because "evidence of the fact of acquisition of plaintiffs' communications by NSA cannot be obtained from the government, nor can such fact be presumed from the submission of watchlists to that Agency."[65] Under *Laird*'s requirement that plaintiffs ultimately show "either a 'specific present objective harm or a threat of specific future harm,'" the court concluded, "the absence of proof of actual acquisition of appellants' communications is fatal" to their claims for injunctive relief.[66] The court brushed aside plaintiffs' suggestion that their political activism made them likely targets of future surveillance and therefore conferred standing: Even as the court seemed to accept the plaintiffs' contention that they were more likely to be targeted, the court concluded this fact "adds nothing to their case. 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."[67]

62. *See supra* note 54 (collecting cases).
63. 690 F.2d 977 (D.C. Cir. 1982).
64. *See id.* at 999, 1002–03, 1005–06.
65. *Id.* at 999; *see also id.* at 1002–03, 1005–06.
66. *Id.* at 999–1000 (quoting Laird v. Tatum, 408 U.S. 1, 14 (1972)).
67. *Id.* at 1006.

The D.C. Circuit and its district court have continued to adhere to *Halkin*'s broad interpretation of *Laird* as an almost insuperable bar against probabilistic claims of actual wiretapping. In *United Presbyterian Church in the U.S.A. v. Reagan*,[68] a coalition of political and religious activists, journalists, and a member of Congress brought a constitutional and statutory challenge to certain provisions of an executive order establishing the framework for the government's intelligence-gathering activities.[69] The court held that the non-congressional plaintiffs lacked standing for essentially the reasons given in *Halkin*.[70] Once again, the plaintiffs' allegations that they themselves could be spied on were insufficient because "they have not adequately averred that any specific action is threatened or even contemplated against them . . . [e]ven if it were conceded that [plaintiffs' history of being surveilled and their present activities] place the plaintiffs at greater risk than the public at large."[71] More recently, *Al-Owhali v. Ashcroft*[72] followed *United Presbyterian* and found no justiciable controversy where an inmate convicted of bombing the U.S. embassy in Kenya challenged a regulation authorizing the attorney general to order that a terrorism suspect's communications with his attorney be monitored.[73] The plaintiff lacked standing because he asserted merely "that he is within the class of persons subject to monitoring, not that he has actually been the subject of such monitoring."[74]

In *ACLU v. NSA*,[75] the first federal court of appeals opinion addressing the legality of President Bush's post-September 11 warrantless wiretapping program, Judge Julia Smith Gibbons' short concurring opinion came to effectively the same conclusion.[76] Brushing aside the plaintiffs' allegations that the government's program produced collateral injurious effects, Judge Gibbons summed up her analysis in her first sentence: "The disposition of all the plaintiffs' claims depends upon the single fact that the plaintiffs have failed to provide evidence that they are personally subject to the [challenged program]."[77] According to Judge Gibbons, the targets of the program could not be determined

68. 738 F.2d 1375 (D.C. Cir. 1984).

69. *See id.* at 1377. The gravamen of the challenge was that the intelligence-gathering regime violated the separation of powers and plaintiffs' privacy and freedom of speech and religion. *See id.*

70. *See id.* at 1381 (characterizing the standing questions presented in the case as a "needless replay of *Halkin*" (citation omitted)). The court separately denied standing to the Congress member, whom the court characterized as asserting nothing more than a "generalized grievance." *See id.* at 1381–82.

71. *Id.* at 1380.

72. 279 F. Supp. 2d 13 (D.D.C. 2003).

73. *Id.* at 16–19.

74. *Id.* at 27 (internal quotation marks omitted).

75. 493 F.3d 644 (6th Cir. 2007).

76. This case and Judge Batchelder's lead opinion announcing the judgment are discussed in more detail in Part II.B.1.

77. ACLU v. NSA, 493 F.3d at 688 (Gibbons, J., concurring in the judgment).

because of the state secrets privilege, and therefore the plaintiffs could not demonstrate their standing.[78]

Just recently, in August 2009, a federal district judge dismissed a challenge to the FISA Amendments Act of 2008[79] on the same standing theory.[80] According to Judge John G. Koeltl, the plaintiffs' case against the law was nonjusticiable because "[t]hey have not shown or alleged that surveillance of their communications has ever taken place under the challenged statute."[81]

Thus, according to the D.C. Circuit (and a handful of other federal judges), the claim (however plausible) that a plaintiff faces a realistic threat of being wiretapped is insufficient to confer standing: Only those who have actually been wiretapped have been injured in a manner that is more than hypothetical. But, as I discuss in Part III, there is reason to question whether this rule is consistent with generally applicable principles regarding standing and probabilistic injuries.

B. *Laird* and Chilling Effects

Courts considering standing to challenge surveillance based on the second category of injury—chilling effects—are sharply divided about how to interpret *Laird*. One view, exemplified by certain D.C. Circuit surveillance cases and Judge Alice M. Batchelder's lead opinion in *ACLU v. NSA*, reads *Laird* broadly to permit claims based on a chilling effect only when that effect is the result of "regulatory, proscriptive, or compulsory" government action—a category that *Laird* made clear does not encompass government surveillance. The opposing, more restrained view of *Laird*, exemplified by two Supreme Court opinions and several federal appellate decisions, reads *Laird* as barring only those standing claims based on a chilling effect that is unreasonable and subjective.[82]

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78. *See id.* at 692.

79. 50 U.S.C.A. §§ 1881–1882, 1885 (2008).

80. Amnesty Int'l USA v. McConnell, No. 08 Civ. 6259, 2009 WL 2569138 (S.D.N.Y. Aug. 20, 2009).

81. *Id.* at *11. In a somewhat related vein, a district court recently used similar logic to dismiss a claim by a corporation arising out of the government's alleged acquisition of its financial information. *See* Amidax Trading Group v. S.W.I.F.T. SCRL, 607 F. Supp. 2d 500, 508 (S.D.N.Y. 2009) (finding no standing because the plaintiff could not prove that its information had been accessed). But the posture of this case meaningfully distinguishes it from the others discussed in this section, because all of the plaintiff's claims related to an alleged event in the past and not to ongoing or future surveillance. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (distinguishing between standing to recover for past injuries and standing to obtain equitable relief for future ones); *see also infra* Part III.

82. It is possible to identify a third position, one that reads *Laird* even more broadly than either of the two interpretations I have identified. Specifically, Judge Gibbons, concurring in *ACLU*

The sharp divergence of these two positions has produced confusion in the law of surveillance and standing. The effect of the first, expansive reading of *Laird*, combined with the rejection of probabilistic claims of actual wiretapping, is to foreclose all challenges to government surveillance except in those rare circumstances in which the plaintiff can prove (without running up against the state secrets privilege) that she herself was spied on by the government. The effect of the second, restrained reading of *Laird* is to permit challenges to government surveillance when the plaintiff can show that the chilling effect of the surveillance is a concrete injury that amounts to something more than her subjective apprehension. The remainder of this Part will contrast the leading cases espousing these two conflicting positions and explore their implications for surveillance standing law.

1. The Broad View

The D.C. Circuit's surveillance cases from the early 1980s, discussed in Part II.A above, maximized *Laird*'s scope in barring challenges to government surveillance. Not only did the *Halkin* and *United Presbyterian* cases reject probabilistic claims of actual wiretapping; they also took a dim view of chilling-effect injuries. Although the watchlisting of the *Halkin* plaintiffs gave them a much more concrete reason than the *Laird* plaintiffs to believe they were surveillance targets, the *Halkin* court found the two cases indistinguishable and held that *Laird*'s bar against subjective chilling effects was controlling in *Halkin*.[83] And the plaintiffs in *United Presbyterian* lacked standing under *Laird* to challenge the president's intelligence-gathering regime because—unlike the "regulatory, proscriptive, or compulsory" actions at issue in the cases *Laird* distinguished—the executive order involved "no commands or prohibitions to these plaintiffs, and set[ ] forth no standards governing their conduct."[84]

v. NSA, strongly suggested she would not recognize a chilling-effect claim under any circumstances: for her, "the single fact that the plaintiffs have failed to provide evidence that they are personally subject to the [challenged program]" was dispositive. 493 F.3d at 688 (Gibbons, J., concurring in the judgment). Judge Koeltl's opinion in the recent *Amnesty International* decision might be read the same way. *See Amnesty Int'l*, 2009 WL 2569138, at *17 (characterizing a chilling effect claim as "not truly independent" from a claim that plaintiffs are actually being surveilled). Though conceptually distinct from what I have identified as the broad view of *Laird*, the categorical dismissal of chilling effects does not merit independent analysis, both because it is not prevalent in the case law (only two judges have espoused this view), and because it is not functionally distinct from the broad view in cases of governmental surveillance. In these cases, the broad view works out to be just as categorical as the Gibbons/Koeltl position: Because government surveillance does not qualify as a "regulatory, proscriptive, or compulsory" program, no chilling effect can qualify as an injury for purposes of standing.

83. *See* Halkin v. Helms, 690 F.2d 977, 999, 1002 (D.C. Cir. 1982).

84. United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375, 1378 (D.C. Cir. 1984). Curiously, *United Presbyterian* made no mention of or attempt to distinguish *Socialist Workers*

The D.C. Circuit's expansive reading of *Laird* continues to influence courts considering government responses to the terror attacks of September 11. For example, in a recent case challenging the federal government's practice of disseminating immigration information to state and local law enforcement, a district court found immigrants'-rights organizations lacked standing in part because of *Laird*.[85] According to the court, under *Laird*, "a reluctance to engage in First Amendment protected activity prompted solely by a fear of future government malfeasance is not sufficient to confer standing."[86]

The lead opinion for the Sixth Circuit announcing the judgment in *ACLU v. NSA*[87] also embraced the broad view of *Laird* regarding chilling effects.[88] *ACLU v. NSA* was a challenge to the Bush Administration's program of intercepting communications, including those of United States citizens, without probable cause, without warrants, and without oversight by the Foreign Intelligence Surveillance Court as prescribed by the Foreign Intelligence Surveillance Act of 1978.[89] The plaintiffs in the case were lawyers, scholars, and journalists whose work involved foreign clients, witnesses, or sources; the main injury the plaintiffs alleged was that the warrantless wiretapping program interfered with the performance of their respective jobs.[90] Specifically, the enhanced possibility of U.S. government surveillance deterred the plaintiffs' clients, sources, witnesses, and research contacts from speaking with the plaintiffs via phone or email, and thus hindered the lawyers' efforts to provide legal representation, the scholars' efforts to conduct research, and the

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Party v. Attorney General, 419 U.S. 1314 (1974) (Marshall, Circuit Justice), which (as discussed below) rejected the argument that, after *Laird*, only "regulatory, prospective or compulsory" government actions exerted sufficient chill to support standing to challenge them. *Id.* at 1318.

85. *See* Nat'l Council of La Raza v. Gonzales, 468 F. Supp. 2d 429 (E.D.N.Y. 2007).

86. *Id.* at 443 (quoting Keene v. Meese, 619 F. Supp. 1111, 1117 (E.D. Cal. 1985)) (internal quotation marks omitted). The court's reliance on the standing discussion in *Keene v. Meese*, which the Supreme Court ultimately reversed, *see* Meese v. Keene, 481 U.S. 465 (1987), is questionable. *La Raza* characterizes the Eastern District of California's holding as having been "reversed on other grounds," but this is somewhat misleading. Although it is true that the district court's decision was not reversed because of its interpretation of *Laird*—the district court held, in fact, that *Laird* did not bar standing—the Supreme Court took a significantly more liberal view of the standing question than is reflected in the passage quoted from the district court. *See id.* at 473–74 (holding that the plaintiff raised a justiciable claim because he alleged that the government's classification of certain films as "political propaganda" chilled his right to show the films by threatening the plaintiff with damage both to his reputation in the community and to his political prospects); *see also infra* Part II.B.2.

87. 493 F.3d 644.

88. The splintered panel failed to produce a majority opinion, with Judge Batchelder writing a lengthy lead opinion, Judge Gibbons briefly concurring in the result, and Judge Ronald Lee Gilman dissenting.

89. ACLU v. NSA, 493 F.3d at 648–49, 653 (opinion of Batchelder, J.); *id.* at 693, 713–15 (Gilman, J., dissenting).

90. *See id.* at 648–49, 661–62, 665 (opinion of Batchelder, J.).

journalists' efforts to report the news.[91] In some cases, in order to do their jobs, plaintiffs had to take costly trips to meet in person with their overseas contacts to ensure the level of confidentiality that plaintiffs' ethical responsibilities (in the case of the lawyers) or the sources themselves (in the case of the journalists) demanded.[92]

Judge Batchelder found *Laird* at least partially controlling.[93] According to her lead opinion announcing the judgment, the plaintiffs' claims of injury were "just as attenuated" as those in *Laird* because the alleged injuries "derive[d] solely from the fear of secret government surveillance, not from some other form of direct government regulation, prescription [sic] or compulsion."[94] Judge Batchelder concluded that the plaintiffs' professional injuries were purely subjective, like those in *Laird*, because they arose from the mere possibility that they would be wiretapped—which concededly none of them could prove—and plaintiffs' own personal decisions in reaction to that possibility.[95] To Judge Batchelder, the reasonableness of the actions by plaintiffs and their overseas contacts was irrelevant, because *Laird* "did not discuss the reasonableness of its plaintiffs' response; it held that the mere subjective chill arising from the government's investigative activity—reasonable or not—is insufficient" to establish injury.[96] Like the D.C. Circuit in *United Presbyterian*, Judge

91. *See id.* at 661–62, 665.

92. *See id.* at 662, 665.

93. It is unclear from Judge Batchelder's opinion to what extent *Laird* was outcome determinative. At one point, she suggested that, despite her lengthy analysis of *Laird* and the plaintiffs' attempts to distinguish it, the injury requirement discussed in *Laird* was "not determinative" because she believed plaintiffs could not demonstrate causation or redressability. *Id.* at 666. Elsewhere, Judge Batchelder indicated that *Laird* "control[led] the First Amendment claim" but not the entire case. *Id.* at 664–65. This latter view appears to stem from Judge Batchelder's premise that standing for each claim requires an injury related to that claim, *id.* at 652–53—an analytical move that enabled her easily to reject several of plaintiffs' claims on the grounds that no injury matched particular claims, *see, e.g.*, *id.* at 673–74 (rejecting Fourth Amendment claim because a plaintiff suffers a Fourth Amendment injury only when his or her personal privacy is invaded, and plaintiffs lacked evidence that their own communications were intercepted). But Judge Batchelder offered no support for this claim-specific approach to the injury requirement, which the Supreme Court has repeatedly rejected. *See* INS v. Chadha, 462 U.S. 919, 935–36 (1983); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 78–79 (1978); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 225 n.15 (1974). Regardless of the precise extent to which *Laird* influenced Judge Batchelder's analysis, it is clear from her extensive discussion that it played some significant role, and that her view of that case lines up with the broad reading espoused by the D.C. Circuit in *Halkin* and *United Presbyterian*.

94. ACLU v. NSA, 493 F.3d at 663.

95. *Id.* at 661–62. Judge Batchelder also engaged in a novel analysis concerning the type of speech being chilled: She reasoned that, if *Laird* had found no injury based on the alleged chilling of political speech, then a fortiori the chilling of "professional speech" by plaintiffs cannot count as a constitutionally cognizable injury, because such a result would elevate commercial speech over political speech. *Id.* at 660–61.

96. *Id.* at 663.

Batchelder interpreted *Laird* as permitting standing based on a chilling effect *only* in the face of "the exercise of government power that is regulatory, proscriptive, or compulsory in nature."[97]

Thus, though they differ in some of the details, courts espousing the broad view of *Laird* and applying that interpretation to stymie challenges to government surveillance programs agree that, under *Laird*, a chilling effect does not confer standing unless it results from "regulatory, proscriptive or compulsory" government action; all other chilling effects, including a plaintiff's or third-party's response to government surveillance, are necessarily "subjective," and therefore cannot give rise to justiciable controversies.

2. The Restrained View

Many courts have read *Laird* differently and applied it more cautiously to surveillance claims. Those courts' decisions derive support from the Supreme Court's own interpretations of *Laird*. The seeds for a more restrained understanding of *Laird* were sown in Justice Marshall's opinion as Circuit Justice in *Socialist Workers Party v. Attorney General*.[98] There, the Court of Appeals had vacated a district court's order enjoining the FBI from attending or monitoring a political organization's national convention.[99] Though Justice Marshall denied the petition to stay the appellate court's order and reinstate the injunction,[100] he first ruled that the controversy was justiciable because the plaintiffs' allegations about FBI surveillance were much more specific than those presented in *Laird*.[101] For standing purposes, Justice Marshall held that it was sufficient that "the applicants have complained that the challenged

97. *Id.* In her brief concurrence, Judge Gibbons did not take a position on *Laird* other than to caution it was "not clear . . . that *Laird* must be read" as Judge Batchelder read it. *Id.* at 692 n.3 (Gibbons, J., concurring in the judgment). More generally, Judge Gibbons rejected the entire category of chilling effects as a basis for standing in a surveillance case; in her view, only the actual targets of a surveillance program are injured by it. *See supra* text accompanying notes 76–78. In his recent dismissal of a challenge to the FISA Amendments Act of 2008, Judge Koeltl of the Southern District of New York essentially followed Judge Gibbons' approach of rejecting chilling effect injuries as a category. *See* Amnesty Int'l USA v. McConnell, No. 08 Civ. 6259, 2009 WL 2569138, at *17–18 (S.D.N.Y. Aug. 20, 2009) (characterizing this basis for standing as merely a "repackaged version" of a standing claim based on the prospect of the plaintiffs themselves being surveilled, and holding that the plaintiffs lacked standing because they "have failed to show that they are subject to the [challenged] statute"). Judges Gibbons' and Koeltl's views notwithstanding, it is worth noting that, in *Laird* itself, the Supreme Court thought the distinction between the loss-of-privacy and the chilling-effect injuries was a meaningful one. *See Laird v. Tatum*, 408 U.S. 1, 9–10 (1972); *see also supra* text accompanying notes 42–46.

98. 419 U.S. 1314 (1974).

99. *Id.* at 1314–15.

100. *Id.* at 1319.

101. *Id.* at 1317–19.

investigative activity will have the concrete effects of dissuading some [Young Socialist Alliance] delegates from participating actively in the convention and leading to possible loss of employment for those who are identified as being in attendance."[102] Justice Marshall also specifically rejected the government's contention that the *Laird* Court's reference to "regulatory, proscriptive, or compulsory" government actions established that the presence of a regulation, proscription, or compulsion was a necessary condition of justiciability in cases in which plaintiffs allege a chilling effect.[103] Such an interpretation would read *Laird* too broadly, according to Justice Marshall, who explained that in referencing these three types of actions, the Court "was merely distinguishing earlier cases, not setting out a rule for determining whether an action is justiciable or not."[104]

A decade later, in a case not about surveillance but the closely related issue of government investigations, a future Supreme Court justice followed Justice Marshall's lead in interpreting *Laird*. Writing for a First Circuit panel in *Ozonoff v. Berzak*,[105] which considered a job applicant's challenge to a government requirement that he undergo a "loyalty check" if he applied to work at the World Health Organization, then-Judge Breyer identified language from *Laird* that suggested an important limitation on its holding. According to *Laird*, the "jurisdiction of a federal court may [not] be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity. . . ."[106] But as Judge Breyer noted, "[t]he problem for the government with *Laird* . . . lies in the key words 'without more.'"[107] The government argued that the plaintiff in *Ozonoff* lacked standing because the FBI might decide not to investigate him, because the loyalty board would likely clear him, and because the plaintiff's job application might be unsuccessful for other reasons.[108] The First Circuit found that the government's arguments

> miss[ed] the point, for the issue is not whether Dr. Ozonoff will likely be denied the job, but whether the Order reasonably leads him to believe he must conform his conduct to its standards. Certainly one reading the Order would think it probable that WHO would not offer

102. *Id.* at 1319.
103. *Id.* at 1318.
104. *Id.* at 1318.
105. 744 F.2d 224 (1st Cir. 1984).
106. *Id.* at 229 (quoting Laird v. Tatum, 408 U.S. 1, 10 (1972)) (alteration by *Ozonoff*, internal quotation marks omitted).
107. *Id.*
108. *Id.*

> a job to a "disloyal" American. Thus, he would reasonably think it necessary to avoid acting in ways that may show "disloyalty" as described in the Order.[109]

In sum, although the effect of the loyalty check on the plaintiff's job application was speculative, the chilling effect it produced on the plaintiff's associations was not, and therefore the plaintiff had standing to sue.[110]

That same year, in *Clark v. Library of Congress*,[111] the D.C. Circuit interpreted *Laird* along the same lines as *Ozonoff*—a surprising result in light of that circuit's own restrictive standing decisions in *Halkin* and *United Presbyterian*, each decided within three years of *Clark*. The plaintiff Clark was a book reshelver at the Library of Congress, which asked the FBI to initiate an investigation into Clark's political beliefs and activities after the Library learned Clark had attended meetings of a group affiliated with the Socialist Workers' Party.[112] The court found Clark to have a justiciable First Amendment claim based on both the diminution of Clark's employment prospects at the Library and also on the chilling effect of the investigation on Clark's beliefs and associations.[113] Though it did not cite *Ozonoff*, the D.C. Circuit's rationale for distinguishing *Laird* was similar to *Ozonoff*'s and relied on some of the same language: *Laird* had only reached the "'narrow conclusion'" that no injury was demonstrated by "'a complainant who alleges that the exercise of his first amendment rights is being chilled by the *mere existence, without more*, of a governmental investigative and data-gathering activity.'"[114] By contrast, the FBI's investigation of Clark brought about "an *objective* chill of his first amendment rights, and not merely . . . a potential *subjective* chill as in *Laird*."[115] Thus, *Clark* made explicit what was merely implicit in future-Justice Breyer's *Ozonoff* opinion and in Justice Marshall's *Socialist Workers' Party*

109. *Id.* at 229–30.

110. *Id.* at 230. Echoing much of then-Judge Breyer's reasoning, a district court recently upheld a doctor's standing to seek injunctive relief against law enforcement investigations of his practice that chilled his constitutionally protected medical advice to his clients. *See* Denney v. DEA, 508 F. Supp. 2d 815, 832 (E.D. Cal. 2007).

111. 750 F.2d 89 (D.C. Cir. 1984).

112. *Id.* at 90–91.

113. *See id.* at 93. An earlier case had likewise distinguished *Laird* on the basis of harm to employment opportunities, even though that harm could not be identified with "mathematical certainty." *See* Paton v. La Prade, 524 F.2d 862, 868 (3d Cir. 1975) (finding justiciable controversy where an FBI file linking the plaintiff with "subversive material" might damage her future employment prospects).

114. *Clark*, 750 F.2d at 92–93 (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972), and *id.* at 10, respectively).

115. *Id.* at 93 (footnote omitted, first emphasis added); *see also id.* at 93 n.3 ("[T]he direct injury and objective chill incurred by Clark are more than sufficient to place this case outside the limitations imposed by *Laird*.").

opinion: Since *Laird* had rejected only the claim that a "subjective chill" could support standing, an "objective chill" could still confer standing to challenge government investigative activity.[116]

The Marshall-Breyer understanding of *Laird* as barring only injury claims based on subjective chilling effects was ultimately adopted by the Supreme Court (although in a case not involving surveillance) in *Meese v. Keene*.[117] There a politician challenged the government's labeling as "political propaganda" three foreign films he wanted to screen.[118] Although the Court concluded that the government had not violated the First Amendment in its labeling of the films,[119] the Court first held—without dissent on this point[120]—that the plaintiff raised a justiciable claim because "he ha[d] alleged and demonstrated more than a 'subjective chill.'"[121] Specifically, the government's classification of the films chilled the plaintiff's right to show them by threatening the plaintiff with damage to his reputation in the community and his prospects for reelection.[122] Having to choose between protecting his reputation (and therefore his political prospects) and exercising his right to speak by showing the films constituted a non-subjective injury that rendered the plaintiff's suit justiciable,[123] even though the government action in question—the labeling of films—was not "regulatory, proscriptive, or compulsory" in any way with regard to the plaintiff.[124]

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116. *See also* Fisher, *supra* note 24, at 655–57 (identifying the crux of the post-*Laird* standing analysis as the line between objective and subjective injury). Around the same time as *Clark* and *Ozonoff*, lower courts were also invoking the distinction between subjective and objective chilling effects in ruling on claims that government summonses were chilling the associational rights of summons targets. *See, e.g.*, O'Neal v. United States, 601 F. Supp. 874, 876, 879 (N.D. Ind. 1985) (rejecting First Amendment challenge to IRS summons where petitioners' claim that the summons would chill their membership in an anti-IRS group did not have sufficient factual support; the court explained that the "[t]he proof offered must be objective" and that "an allegation of apprehension, or subjective deterrence of membership or contribution, is not sufficient" (citation and internal quotation marks omitted)).

117. 481 U.S. 465 (1987).

118. *Id.* at 467–68.

119. *Id.* at 477–85.

120. Although Justice Stevens' majority opinion only spoke for five Justices, the three Justices who dissented did so on the merits only, and made clear that they agreed with the majority that the plaintiff had standing. *Id.* at 485 (Blackmun, J., joined by Brennan & Marshall, JJ., dissenting). Justice Scalia did not participate.

121. *Id.* at 473 (majority opinion).

122. *Id.* at 473–74. These claims of potential injury were supported in the record by an opinion poll and the views of an experienced political analyst. *See id.*

123. *Id.* at 475–76.

124. In *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), Judge Batchelder's lead opinion distinguished *Meese* by characterizing the statute at issue there as among the "regulatory, proscriptive or compulsory" measures whose chilling effects were distinguished in *Laird*: According to Judge Batchelder, "Mr. Keene was subject to a *regulatory* statute that directly and expressly *ordered* the labeling of the

Two years later, the Ninth Circuit closed the loop, bringing the First Circuit's and Supreme Court's interpretive work with *Laird* back to the context of government surveillance. Relying on *Meese*, the Ninth Circuit's decision in *Presbyterian Church v. United States*[125] (not to be confused with the similarly titled D.C. Circuit case discussed earlier) held that churches had standing to challenge the government's practice of recording church services because it had caused congregants to diminish their participation in church activities.[126] The court distinguished *Laird* as follows:

> The churches in this case are not claiming simply that the INS surveillance has "chilled" them from holding worship services. Rather, they claim that the INS surveillance has chilled *individual congregants* from attending worship services, and that this effect on the congregants has in turn interfered with the churches' ability to carry out their ministries. The alleged effect on the *churches* is not a mere subjective chill on their worship activities; it is a concrete, demonstrable decrease in attendance at those worship activities. The injury to the churches is distinct and palpable.[127]

The *Presbyterian Church* opinion brought together principles of Justice Marshall's opinion in *Socialist Workers' Party*, future-Justice Breyer's opinion in *Ozonoff*, the D.C. Circuit's decision in *Clark*, and the Supreme Court's decision in *Meese*. As in *Socialist Workers' Party*, the fact that the government's conduct

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films in the manner that would cause the harm." *Id.* at 664 (opinion of Batchelder, J.). This is a questionable interpretation both of *Laird* and of the statute at issue in *Meese*. Judge Batchelder seems to have taken *Laird*'s "regulatory, proscriptive or compulsory" language out of context: By its own terms, what *Laird* distinguished were cases in which "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, *and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging*." Laird v. Tatum, 408 U.S. 1, 11 (1972) (emphasis added). Judge Batchelder's failure to take account of the second half of this key sentence undermines her analysis of the statute at issue in *Meese*, a statute that was "regulatory" in nature but that did not actually regulate the plaintiff himself such that "the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *Id.* The statute at issue in *Meese* required agents of foreign governments to take certain action when disseminating material deemed "political propaganda" (namely, provide a copy of the material to the Attorney General, make certain disclosures to any recipient of the material, and label the material with certain information), *see Meese*, 481 U.S. at 470–71 & nn.5–6, but no mention is made of any duty imposed on an American exhibitor of the material. The Supreme Court found that the plaintiff had standing not because the statute at issue required him to do anything (it didn't), but because when the government itself saddled certain films with the politically charged label of "political propaganda," it deterred the plaintiff from screening the films. *See id.* at 473.

125. 870 F.2d 518 (9th Cir. 1989).

126. *Id.* at 520–23. The government's activities were part of its investigation of the Sanctuary Movement, a loose-knit group of clergy and lay people formed to aid Latin American refugees. *See id.* at 520. The reasons for the government's investigation of the movement are not discussed in the opinion.

127. *Id.* at 522 (internal quotation marks omitted).

was not "regulatory, proscriptive or compulsory" did not foreclose standing; as in *Ozonoff* and *Clark*, the derivative harm flowing from the government surveillance was not speculative or subjective because the plaintiffs could identify harms resulting from objectively reasonable responses to the surveillance (specifically, church members' avoidance of church activities); and, as in *Meese*, the chilling effect of government activities could confer standing when these activities affected the actions of third parties in such a way as to cause injury to the plaintiff.[128] The Ninth Circuit drew explicit support from *Meese*'s recognition of the concrete "professional" or "reputational" harms that result when government actions cause other individuals to be "influenced against" the plaintiff.[129]

The restrained view of *Laird* has continued to inform some courts' treatment of challenges to government surveillance or even potential surveillance. For example, in *Williams v. Price*,[130] a district court held that inmates had standing to challenge a prison's failure to provide a private area for attorney-client meetings.[131] The court distinguished *Laird*, holding that the prisoners' injury was much more concrete and less subjective than that at issue in *Laird*.[132] The court found that the "[p]laintiffs have shown that the ability of other persons to overhear their conversations with their attorneys prevents them from being able to discuss private matters with their attorneys and results in limiting their discussions with their attorneys."[133] Without further analysis, the court concluded that the plaintiffs' showing sufficed to demonstrate actual injury;[134] the reasonableness of the inmates' reaction to the lack of private meeting space was apparently too obvious for comment.

A more recent application of the restrained view of *Laird* in the surveillance context is *Muslim Community Association of Ann Arbor v. Ashcroft*.[135] There the court held that a group of cultural and religious associations had

128. To similar effect is *Jabara v. Kelley*, 476 F. Supp. 561, 568 (E.D. Mich. 1979), *vacated on other grounds sub nom.* Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982), in which the court found that a plaintiff whom the government had investigated via warrantless electronic surveillance, informants, and inspection of bank records, had standing to sue at least in part based on the plaintiff's allegation that "others have been detered [sic] from associating with him because of the FBI investigation." As in *Presbyterian Church*, the activities of third parties in response to chilling activities of the government converted what might otherwise have been a subjective chill into an objective one.

129. *Presbyterian Church*, 870 F.2d at 522–23.

130. 25 F. Supp. 2d 623 (W.D. Pa. 1998).

131. *Id.* at 624, 629–30.

132. *See id.* at 630.

133. *Id.*

134. *Id.*

135. 459 F. Supp. 2d 592 (E.D. Mich. 2006).

standing to challenge Section 215 of the Patriot Act, which permitted the FBI, without probable cause, to obtain an order from the Foreign Intelligence Surveillance Court requiring the plaintiffs to produce tangible things including books, papers, and records.[136] The organizations alleged sufficient injury, the court ruled, because "they and their individual members may be or are currently subject to a Section 215 order" and, as a result, the organizations' members were afraid to attend religious services, practice their religion, express opinions regarding particular issues, or obtain other services from plaintiff organizations.[137] The court's allowance that the plaintiffs "may be" (and therefore may not be) subject to government investigation indicates that, contrary to the decisions in *Halkin* and *ACLU v. NSA*, demonstrating that the government is in fact spying on the individual plaintiff is not a sine qua non of standing to challenge government surveillance. Rather, as in *Ozonoff*, *Presbyterian Church*, and *Williams*, the court in *Muslim Community Association* recognized that derivative injuries resulting from government surveillance—including the chilling of associational or other First Amendment activities—suffice to confer standing under *Laird* as long as such chilling effects are more than merely "subjective."[138]

III. RECONCILING *LAIRD* WITH PROBABILISTIC INJURY JURISPRUDENCE

As discussed in Part II.A, the few courts to consider the standing of plaintiffs who claim they are likely to be wiretapped have concluded that *Laird v. Tatum* bars such claims. Although there is no dispute that actually being wiretapped constitutes an injury-in-fact, the mere probability of being wiretapped is insufficiently concrete to support standing under *Halkin v. Helms* and its progeny. What these few cases have required, instead, is proof of *actual* wiretapping—proof that is generally unavailable because of the state secrets privilege.[139]

Though the views of the few judges to consider this question are in accord, there is good cause to question whether they are correct. As an interpretation of *Laird* in isolation, the requirement that plaintiffs prove actual, as opposed to potential, wiretapping is at least defensible. But this view is difficult to reconcile with general principles of standing law, under which standing to seek injunctive relief extends not only to those plaintiffs

136. *See id.* at 594–95, 597, 601.
137. *Id.* at 601.
138. *See id.* at 597–98.
139. *See supra* notes 31–33 and accompanying text.

who are guaranteed to suffer injury at the hands of the defendants, but also to those for whom prospective injury is reasonably likely. Standing doctrine is about realistic, not certain, injury. Viewed in the larger context of standing jurisprudence as a whole, the restrictive rule of *Halkin* imposes a special, heightened burden on surveillance plaintiffs that is more onerous than, and therefore out of line with, the Supreme Court's general approach to prospective injury. This heightened standing burden is not a necessary implication of *Laird*, in which the Court rejected a surveillance challenge by plaintiffs who did not even allege they were potential targets of government surveillance at all.[140] Courts should bring the justiciability of surveillance claims into line with the justiciability of other claims, and hold that plaintiffs have standing when they are reasonably likely surveillance targets and not merely when they can prove to a certainty that they are being targeted.[141]

A. Standing Law on Prospective Injuries Outside the Surveillance Context

The modern rule on standing and prospective injury is exemplified by the Supreme Court's decision in *City of Los Angeles v. Lyons*.[142] In *Lyons*, the Supreme Court held that a man whom the Los Angeles Police Department had subjected to an allegedly unconstitutional chokehold lacked standing to sue to enjoin the chokehold practice because there was "no showing of any real or immediate threat that the plaintiff will be wronged again" in this way.[143] The Court found that Lyons' risk of being choked again was too speculative to support standing to seek equitable relief. The Court reasoned that, in order for him to be choked a second time, Lyons would have to be arrested again and the police would have to apply another chokehold. The Court found neither of these possibilities sufficiently likely, chiefly since there was no showing that the chokehold practice was applied to all suspects.[144]

Importantly, the basis for the Supreme Court's holding in *Lyons* was not the plaintiff's failure to show with certainty that he would be subjected to another illegal chokehold. Rather, the Supreme Court's discussion made clear

140. *See supra* notes 42–44 and accompanying text.

141. Given the widespread use of the state secrets privilege, even developing evidence that someone is a probable target of surveillance can be difficult. But it is not impossible. For example, after the Bush Administration's warrantless wiretapping was reported by the *New York Times*, administration officials spoke on the record about some of the details of the program. *See supra* text accompanying notes 3–4. Under a probabilistic injury jurisprudence that is in line with general standing doctrine, plaintiffs could establish standing by making reasonable inferences about who is likely being surveilled, based on whatever details are publicly available about the surveillance regime.

142. 461 U.S. 95 (1983).

143. *Id.* at 111.

144. *See id.* at 105–09.

that Lyons lacked standing because he could not plausibly assert a reasonable *likelihood* the police would choke him again. "Lyons' standing to seek the injunction requested," the Court explained, "depended on whether he was *likely* to suffer future injury from the use of the chokeholds by police officers."[145] The Court faulted Lyons' complaint for injunctive relief because "it did not indicate why Lyons might be *realistically threatened* by police officers who acted within the strictures of the City's policy."[146] Although the Court did at one point restate Lyons' burden in terms that suggested a requirement of certainty,[147] this language is not representative of the Court's analysis as a whole. Rather, the court focused on the probabilistic nature of the alleged injury, as demonstrated by the Court's repetition of the "realistic threat" formulation of the inquiry and its concluding emphasis on "sufficient likelihood" rather than certainty.[148]

Subsequent Supreme Court cases reinforce the probabilistic nature of the standing inquiry in the context of prospective relief. For example, *Honig v. Doe*[149] held that a student with an emotional disability could, consistent with *Lyons*, seek injunctive relief against his school's response to his potential disruptive behavior in the future: "[T]he nature of his disability"—which consisted of his history of uncontrolled verbal and physical outbursts—combined with the school's "insistence that all local school districts retain residual authority to exclude disabled children for dangerous conduct," gave the Court "little difficulty [in] concluding that there is a reasonable expectation[ ] that [the student] would once again be subjected to" the school actions he challenged.[150] The Court spelled out that the justiciability rested on the likelihood of the confluence of two separate occurrences—the student's future misbehavior and the school's repetition of the same actions it had taken in response to the student's earlier outbursts.[151] Thus *Honig* indicates that the *Lyons* reasonable-likelihood standard can be satisfied even when the circumstances necessary

145. *Id.* at 105 (emphasis added).
146. *Id.* at 106 (emphasis added).
147. *See id.* at 107 n.7 (referring to "the necessity that Lyons demonstrate that he, himself, will not only again be stopped by the police but will also be choked without any provocation or legal excuse").
148. *See id.* ("Lyons would have to credibly allege that he faced a realistic threat from the future application of the City's policy."); *id.* at 109 ("If Lyons has made no showing that he is realistically threatened by a repetition of his experience of October 1976, then he has not met the requirements for seeking an injunction in a federal court . . . ."); *id.* at 111 ("Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles . . . .").
149. 484 U.S. 305 (1988).
150. *Id.* at 319–20 (citation and internal quotation marks omitted).
151. *See id.* at 320–21.

for the constitutional violation to recur are doubly contingent—as long as each contingency is likely. Certainty is simply not required.

The Supreme Court has even found standing when a set of circumstances that appeared likely at the onset of the lawsuit did not ultimately materialize. In *Davis v. FEC*,[152] a candidate challenged the asymmetric nature of a campaign finance regulation that imposed greater restrictions on contributions to candidates who spent more than $350,000 of their own money than on contributions made to those candidates' opponents.[153] The Supreme Court upheld a candidate's standing to challenge the law, even though the plaintiff's opponent had not yet qualified for the asymmetrical limits at the time the suit was filed, and the opponent ultimately chose not to take advantage of those limits.[154] The constitutional standing requirements were satisfied, the Court held, because when the lawsuit was filed the plaintiff had declared his intention to pass the spending threshold that would trigger the asymmetrical limits, and as for the plaintiff's opponent, the Court simply generalized that "most candidates who had the opportunity to receive expanded contributions had done so."[155] *Davis* demonstrates that stated intentions and general trends suffice to demonstrate the likelihood of injury necessary to maintain a suit; as in *Lyons* and *Honig*, certainty was not a requirement.[156]

Following the Supreme Court's lead, the federal courts of appeals have recognized the distinction between probabilistic and certain injury, and require only the former to establish standing. For example, in *Roe v. Operation Rescue*,[157]

152. 128 S. Ct. 2759 (2008).

153. *See id.* at 2766.

154. *Id.* at 2769.

155. *Id.*

156. In a recent decision, Justice Scalia, speaking for a bare majority of the Court, attempted to recast the "realistic threat" language of *Lyons* and its progeny as mere dicta, and suggested the test might in fact be something stricter. *See* Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149–53 (2009) (holding that members of an environmental group lacked standing to sue over U.S. Forest Service regulations governing salvage sales of timber, because the parties had reached a settlement with respect to the particular sale plaintiffs challenged, and plaintiffs lacked standing to mount a facial challenge to the regulations absent a concrete allegation they would affect plaintiffs in the future). Ironically, Justice Scalia's digression on this point was itself dicta, since in his own analysis the plaintiffs' proffered evidence of standing "no more meet[s] [the realistic threat] requirement than [it] meet[s]" the "imminent harm" standard that Justice Scalia characterized as the "usual formulation." *Id.* at 1152–53 (internal quotation marks omitted). Given the canonical status of *Lyons* and the Supreme Court's repeated reliance on its standard, not only in dicta but also in holdings such as those of *Honig* and *Davis* (the latter speaking for a unanimous Court, including all five members of the *Summers* majority, on the standing question), it seems unlikely that one paragraph's worth of dicta in *Summers* portends a sea change in probabilistic injury jurisprudence. Of course, should the Supreme Court strike out in a new direction based on the *Summers* dicta, the analysis in this section would have to be revised accordingly.

157. 919 F.2d 857 (3d Cir. 1990).

the Third Circuit considered whether abortion providers had standing to obtain an injunction to prevent abortion protestors from demonstrating in front of, and disrupting the activities at, various women's health facilities.[158] The district court had issued an injunction covering only those clinics that had previously been blockaded during Operation Rescue's Independence Day campaign; the Third Circuit held that other clinics were sufficiently at risk to have standing as well.[159] According to the Third Circuit, the nonblockaded clinics faced an equal risk that they would be blockaded in the future for two reasons: first, Operation Rescue had previously stated its plan, widely reported in the media, to launch "rescue missions," and second, the defendants' secretive modus operandi precluded identification of target clinics in advance.[160] In light of these circumstances, some "clinics' inability to prove that Operation Rescue has specifically targeted them does not mean that they are not threatened by the defendants' harassment."[161] The Third Circuit therefore reversed the dismissal of those clinics not included in the original injunction, including two that were blockaded subsequent to July 4 and one that (as far as the opinion discloses) was never blockaded at all.[162] Probability of harm, therefore, can exist even in the face of defendants' secrecy, and standing does not depend on certainty. As the Eleventh Circuit has recently explained in summarizing the state of the law: "Unpacking the Court's basis for denying standing in *Lyons* reveals that there is no per se rule denying standing to prevent probabilistic injuries. Indeed, since *Lyons* we have repeatedly upheld plaintiffs' standing when the alleged injury was prospective and probabilistic in nature."[163]

B. The Case for Uniformity

In light of the general justiciability principle that a probabilistic injury suffices to confer standing so long as the injury is "likely" or "realistic," the *Halkin* requirement that a surveillance plaintiff prove to a certainty that she will be wiretapped is an aberration. Does any consideration of precedent or policy justify this special, heightened standing requirement in the surveillance context?

158. *Id.* at 860.
159. *Id.* at 864–65.
160. *Id.* at 864.
161. *Id.*
162. *Id.* at 865.
163. Fla. State Conf. of NAACP v. Browning, 522 F.3d 1153, 1162 (11th Cir. 2008).

Courts' willingness to apply the same standard of likelihood across a variety of contexts—in challenges to government regulations,[164] police practices,[165] and private protests[166]—establishes a strong baseline presumption in favor of a uniform rule that applies in the surveillance context as well as in others. *Laird* itself does not contain any reason to impose a stricter standard in the surveillance context; in fact, in that case the Court had no occasion at all to differentiate between probability and certainty of injury because in the Court's view the plaintiffs wholly lacked any "claim of specific present objective harm or a threat of specific future harm" whatsoever.[167]

To the extent the subsequent D.C. Circuit opinions in *United Presbyterian* and *Halkin* provide any reasoned basis for departing from the usual rule on standing and probabilistic injuries, that basis appears to be national security. In the words of the *Halkin* court, for example: "As in the other cases in which the need to protect sensitive information affecting the national security clashes with fundamental constitutional rights of individuals, we believe that '[t]he responsibility must be where the power is.'"[168] But the Supreme Court has repeatedly made clear that national security claims are not of talismanic effect: From the Court's rejection of a blanket national-security exception to the warrant requirement over thirty-five years ago,[169] to Justice O'Connor's recent admonition that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens,"[170] the Court has been unwilling to abandon constitutional principle in the face of claimed threats to national security.[171] The Court's strong stand against special deference to

164. *See* Davis v. FEC, 128 S. Ct. 2759, 2769 (2008).

165. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983).

166. *See Operation Rescue*, 919 F.2d at 864–65.

167. Laird v. Tatum, 408 U.S. 1, 14 (1972).

168. Halkin v. Helms, 690 F.2d 977, 1001 (D.C. Cir. 1982) (quoting N.Y. Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring)).

169. *See* United States v. U.S. Dist. Ct. *(Keith)*, 407 U.S. 297, 314–21 (1972).

170. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion).

171. *See also* Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008) ("Security subsists . . . in fidelity to freedom's first principles. . . . The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law."); United States v. Robel, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425–26 (1934) ("Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. . . . [E]ven the war power does not remove constitutional limitations safeguarding essential liberties."); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in

executive power in times of emergency is particularly significant because of the context in which the Court has articulated and repeated it—adjudications of constitutional claims on the merits. If national security cannot alter constitutional standards for deciding cases on the merits, then it would be anomalous for it to change constitutional standards for reaching the merits in the first place, particularly in light of the powerful state secrets privilege that protects (and perhaps overprotects[172]) against the disclosure of classified information. Moreover, using national security concerns in a field on which they have no obvious constitutional bearing—Article III's case and controversy requirement—to avoid accounting for their application in a field of decision in which national security could be a relevant consideration—the Fourth Amendment's reasonableness requirement, for instance—undermines transparency in judicial decisionmaking by permitting courts to use procedural grounds to cloak what are in fact substantive decisions.[173] Avoiding such a practice of decisional sleight of hand is a strong argument for bringing the probabilistic-injury jurisprudence of surveillance law in line with the rest of standing doctrine.

In sum, neither *Laird* nor the handful of cases claiming *Laird* requires certainty of injury in order to support standing to challenge surveillance programs provide a good reason that the standard for alleging probabilistic injuries should be more stringent in the surveillance context. In order to reconcile *Laird* with *Lyons* and the volumes of cases applying it, courts should reject the *Halkin* certainty requirement and require surveillance plaintiffs to demonstrate no more and no less than other plaintiffs must show: a reasonable likelihood of injury.

IV. CHILLING EFFECTS AFTER *LAIRD*: THE BETTER VIEW

There is also a clear way forward regarding the other major unresolved question *Laird v. Tatum* has spawned—the viability of chilling-effect claims

war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.").

172. *See, e.g.*, Frost, *supra* note 32, at 1932–34.

173. This is not a novel observation; on the contrary, "the idea that rulings on standing often represent concealed judgments on the merits has acquired the status of folk wisdom." Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 634–35 (2006); *see, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3.1 (4th ed. 2003); Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 59 (1982); Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 650–51 (1985); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1743 (1999).

as a basis for standing to challenge government surveillance. Courts should hold that *Laird* bars standing only when plaintiffs rely solely on *subjective* chilling-effect claims, not when plaintiffs show objectively reasonable chilling effects that flow from government surveillance programs.

Lower courts for more than three decades have split over what types of chilling effects can qualify as cognizable injuries. As between the two positions on the question identified and discussed in Part II.B (what I have termed the "broad view" and the "restrained view"), one side clearly has the better of the debate. The restrained reading of *Laird* is a better reading of that case on its own terms, is more congruent with general principles of standing, and is more desirable from a normative standpoint.

A. Congruence with *Laird* and its Progeny in the Supreme Court

The restrained view is, first of all, a more plausible reading of *Laird* itself. As both then-Judge Breyer and also the D.C. Circuit would later observe, the narrowness of *Laird*'s holding is apparent from the majority's presentation of the issue as "whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, *without more*, of a governmental investigative and data-gathering activity" that is overly broad.[174] In so limiting the question, the Court necessarily restricted the scope of its answer. For the Court majority, *Laird* was about the "mere existence, without more" of a government surveillance activity; no mention was made of any concrete effects on the plaintiffs.

The opinion's subsequent characterization of the plaintiffs' claim is equally telling:

> Their claim, simply stated, is that they disagree with the judgments made by the Executive Branch with respect to the type and amount of information the Army needs and that the very existence of the Army's data-gathering system produces a constitutionally impermissible chilling effect upon the exercise of their First Amendment rights.[175]

Again, the Court emphasized that it was addressing a claim of injury based on the "very existence" of the program. Thus, the Court's characterization of the plaintiffs' challenge as essentially a policy-based objection to the army's surveillance reduced the claim to a generalized grievance not supported by any injury at all. With its carefully circumscribed understanding of what

174. Laird v. Tatum, 408 U.S. 1, 10 (1972) (emphasis added); *see also* Ozonoff v. Berzak, 744 F.2d 224, 229 (1st Cir. 1984) (taking particular note of the emphasized phrase); Clark v. Library of Cong., 750 F.2d 89, 92 (D.C. Cir. 1984) (same).

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

was at stake in *Laird*, the Court's opinion is easily distinguishable from the more recent lawsuits, discussed in detail in Part II.B, that have alleged tangible chilling-effect injuries such as specific and documented impediments to plaintiffs' job performance or organizational mission.

Viewed in light of the Court's framing of the *Laird* plaintiffs' claims, the key conclusion that "[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"[176] is best understood as differentiating among types of chilling effects and as holding only the "subjective" type to be insufficient for standing purposes. Indeed, the Court elsewhere in its opinion noted types of chilling effects (those arising from "regulatory, proscriptive, or compulsory" government actions) that do support standing, and the Court never suggested that these categories were exhaustive.[177]

Finally, the Court described its own holding as "a narrow one, namely, that on this record the [plaintiffs] have not presented a case for resolution by the courts."[178] It is difficult to see how this careful description of a holding could be viewed (as some lower court decisions have viewed it) as sweeping away all chilling-effect claims against government surveillance.

Indeed, the Supreme Court itself has not treated it that way. Instead, both Justice Marshall's opinion in *Socialist Workers Party v. Attorney General*[179] and the full Court's holding in *Meese v. Keene*[180] distinguished *Laird* and found justiciable controversies based on chilling effects arising from government action that did not in any way regulate plaintiffs or proscribe or compel any of their activities.[181] In particular, *Meese v. Keene* held (albeit outside of the surveillance context) that a plaintiff had established standing, notwithstanding *Laird*, because "he ha[d] alleged and demonstrated more than a 'subjective chill.'"[182] Thus, not only does the language of *Laird* suggest a narrower holding than the D.C. Circuit surveillance cases and *ACLU v. NSA* would read into it, but the Supreme Court itself has read *Laird* narrowly as well.

176. *Id.* at 13–14.
177. *Id.* at 11–13 (distinguishing *Laird* from various chilling-effect cases, but observing that "governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights").
178. *Id.* at 15.
179. 419 U.S. 1314 (1974) (Marshall, Circuit Justice).
180. 481 U.S. 465 (1987).
181. *See supra* Part II.B.2.
182. 481 U.S. at 473.

B. Congruence with General Standing Principles

Standing jurisprudence from beyond the line of cases associated with *Laird* itself also supports the restrained reading of that case. Indeed, the broad reading is actually inconsistent with both Supreme Court and lower court treatment of injuries that are conditional or derivative of other injuries (as all chilling-effect injuries are).

Chiefly, in *Friends of the Earth v. Laidlaw Environmental Services, Inc.*,[183] a 7–2 majority of the Supreme Court held that environmental groups had standing to sue a polluter under the Clean Water Act because the environmental damage caused by the defendant had deterred members of plaintiff organizations from using and enjoying certain lands and rivers.[184] That the plaintiffs' members were free to choose to avoid the injury of exposing themselves to pollution did not render their derivative injury—being deterred from using the lands and rivers—any less concrete: On the contrary, the Supreme Court specifically rejected the proposition that the "conditional" nature of the plaintiffs' statements as to what they would do absent the pollution rendered their claim of injury speculative.[185] Rather, like the justices' opinions in *Socialist Workers' Party* and *Meese*, and like lower court holdings in *Ozonoff v. Berzak*,[186] *Clark v. Library of Congress*,[187] *Presbyterian Church v. United States*,[188] *Williams v. Price*,[189] and *Muslim Community Association of Ann Arbor v. Ashcroft*,[190] *Friends of the Earth* held that plaintiffs who curtail their activities as a reasonable response to challenged conduct can allege an injury sufficient to support standing. To read *Laird* as barring all chilling-effect claims would fly in the face of *Friends of the Earth* by effectively shutting down the very type of derivative-injury claim that the Supreme Court in *Friends of the Earth* found justiciable.[191]

183. 528 U.S. 167 (2000).
184. *Id.* at 181–83.
185. *Id.* at 184.
186. 744 F.2d 224 (1st Cir. 1984).
187. 750 F.2d 89 (D.C. Cir. 1984).
188. 870 F.2d 518 (9th Cir. 1989).
189. 25 F. Supp. 2d 623 (W.D. Pa. 1998).
190. 459 F. Supp. 2d 592 (E.D. Mich. 2006); *see supra* Part II.B.2 (discussing in detail these cases reading *Laird* narrowly).
191. One recent commentary suggests that it is necessary to modify the current standing rules in order to permit claims against government surveillance to proceed under the principles applied in *Friends of the Earth*. *See* Miller, *supra* note 20, at 1069–70. But as *Presbyterian Church*, *Williams*, and *Muslim Community Association* demonstrate, these principles are already sometimes operable in the surveillance context: What is needed is not a modification of an established rule, but a judicial consensus about which of two competing rules is the correct one.

Lower court decisions reflecting general principles of standing outside the context of surveillance likewise undercut key premises underlying the broad reading of *Laird* espoused in *Halkin v. Helms*,[192] *United Presbyterian Church in the U.S.A. v. Reagan*,[193] and *ACLU v. NSA*.[194] For example, cases from a variety of contexts support the theory reflected in *Ozonoff*, *Williams*, and *Muslim Community Association*—and, indeed, in *Friends of the Earth*—that a plaintiff can be injured by a government program even when the program has not resulted in action directly against the plaintiff: Rather, a plaintiff's altered behavior in the face of threatened action is sufficient injury for standing.[195] Another group of non-surveillance cases supports the proposition, exemplified by the Supreme Court's decision in *Meese* and the lower court decisions in *Clark* and *Presbyterian Church*, that a chilling-effect injury claim can be a viable basis for standing even when the government action that produces the chill is not (as the broad view of *Laird* insists) "regulatory, proscriptive, or compulsory" in nature.[196]

192. 690 F.2d 977 (D.C. Cir. 1982).

193. 738 F.2d 1375 (D.C. Cir. 1984).

194. 493 F.3d 644 (6th Cir. 2007); *see supra* Part II.B.1 (discussing these cases in detail).

195. *See, e.g.*, Smith v. Meese, 821 F.2d 1484, 1494 (11th Cir. 1987) (finding that in a challenge to allegedly discriminatory pattern of voter-fraud investigations, even black voters who had not themselves been targeted by the investigation had standing to sue, because "[i]f individuals fail to vote because of intimidation by government officials, whether or not specifically targeted at the individuals, the individuals have been injured" and the government policy has "had the demonstrable objective effect of limiting, or chilling, the exercise of protected constitutional rights"); Finley v. Nat'l Endowment for the Arts, 795 F. Supp. 1457, 1469–70 (C.D. Cal. 1992) (holding that artists receiving government grants had standing to challenge "decency" condition because it chilled their expression and confronted them with the choice of tailoring their speech to the requirements of "decency" or losing their funding), *aff'd*, 100 F.3d 671 (9th Cir. 1996), *rev'd on other grounds*, 524 U.S. 569 (1998); Planned Parenthood Fed'n v. Sullivan, CIV. A. No. 88-5565, 1989 WL 149755, at *3 (E.D. Pa. Dec. 9, 1989) (holding that an organization had standing to challenge regulation under which recipients of federal grants were subject to special reporting requirements and possible loss of funding if they advocated for abortion rights; "specific and direct" injury arose from chilling effect produced by fear of loss of funding); *see also* Olagues v. Russoniello, 797 F.2d 1511, 1519 (9th Cir. 1986) (en banc) (finding that organizations promoting voting rights for Chinese- and Hispanic-Americans had standing to challenge voter-fraud investigation that targeted foreign-born voters, because of demonstrated injury to organization's mission; "whether the investigation actually involved any unwarranted intrusions into their associational activities affects the merits of their claim, not their standing"), *vacated as moot*, 484 U.S. 806 (1987).

196. *See, e.g.*, Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1096 (10th Cir. 2006) (en banc) (holding that plaintiffs who intended to promote wildlife-protection initiatives had standing to challenge state constitutional provision requiring supermajority for passing wildlife-related initiatives; "in some cases, First Amendment plaintiffs can assert standing based on a chilling effect on speech even where the plaintiff is not subject to criminal prosecution, civil liability, regulatory requirements, or other direct effects" (internal quotation marks omitted)); Colo. Taxpayers Union, Inc. v. Romer, 750 F. Supp. 1041, 1042 (D. Colo. 1990) (holding that citizens who sponsored initiative had standing to pursue claim that the governor had violated their First Amendment rights by "use of state resources and the power and prestige of his office to advocate [the] defeat" of the measure); Common Cause v.

Not only is the restrained view of *Laird* a better reading of both *Laird* itself and the Supreme Court's own interpretation of that decision, but the key premises of the restrained view are also more consistent with the larger body of generally applicable standing case law. Thus, with respect to chilling-effect injuries, as with loss-of-privacy injuries, following the broad view of *Laird* makes standing harder to establish in the surveillance context than in other areas of law, and harder than *Laird* itself requires.

C. Normative Considerations

Doctrinal consistency is not the only reason courts should be wary of taking so narrow a view of chilling-effect injuries that surveillance challenges become effectively foreclosed. The threat that unconstitutional surveillance poses to individual freedoms in the form of invasions of privacy and the chilling of speech and association is both large and multidimensional.[197] Chilling effects, though derivative in nature, are real harms that affect peoples' personal associations, reputations, and ability to do their jobs.[198] Moreover, chilling effects may arise from government activities that raise serious questions about separation of powers and the rule of law, such as the executive's unilaterally implemented program of wiretapping outside of the regulatory structure established by Congress and outside of any other judicial review. Although the possibility that a governmental action will be completely insulated from judicial review cannot obviate the constitutional case or controversy requirement,[199] this possibility should inform judicial interpretations of that requirement. In developing the modern rules of standing during the 1970s and 1980s, the Supreme Court was concerned that too lax a rule of standing would open the courts to lawsuits insufficiently concrete for meaningful adjudication.[200] But following the broader interpretation of *Laird* applied in *ACLU v. NSA* acutely raises the problem associated with the opposite extreme: If standing is too elusive, then important and concrete controversies will be shut out of court.[201]

Bolger, 512 F. Supp. 26, 29–32 (D.D.C. 1980) (finding that candidates, voters, and campaign contributors had standing to challenge the congressional "mail-franking" privilege, which plaintiffs argued harmed them by depriving them of a fair electoral process).

197. *See supra* text accompanying notes 24–29 and 89–92; *see also* Recent Case, ACLU v. NSA, *493 F.3d 644 (6th Cir. 2007)*, 121 HARV. L. REV. 922, 928–29 & n.53 (2008).

198. *See* text accompanying notes 24–29 and 89–92.

199. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974).

200. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472–73 (1982) (summarizing and explaining these decisions).

201. To be fair, not all matters relating to government surveillance would be nonjusticiable. Targets of government surveillance orders may occasionally have their claims heard in court in the rare instance in which the intermediary through whom the government seeks to obtain private information

This concern cannot rise to a higher level of importance than when one branch of government may be engaging in widespread illegal and unconstitutional activities, yet no court can intervene because no one has standing to bring a case. The revelation of the Bush Administration's warrantless wiretapping program prompted widespread outcry and sharp questions about its legality by the Congressional Research Service and prominent legal scholars[202] and by elected officials across the political spectrum—ranging from liberal Democratic Senator Russ Feingold and former Clinton Justice Department official Philip Heymann to Republican members of the Senate Judiciary Committee including conservative South Carolinian Lindsey Graham.[203] The Republican chairwoman of the House Intelligence Subcommittee on Technical and Tactical Intelligence called for a congressional inquiry into the program.[204] Fourteen legal scholars and former government officials, including a former U.S. solicitor general, a former U.S. deputy attorney general, a former director of the FBI, the dean of Yale Law School, the former dean of Stanford Law School, and leading constitutional scholar Laurence Tribe, wrote a letter to congressional leaders expressing doubt about the legality of the program.[205] Constitutional questions of this magnitude simply should not be left to fester.

The implications of an overly restrictive standing doctrine in this context extend beyond the issue of whether any given surveillance program is lawful,

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initiates a challenge. *See, e.g.*, John Doe, Inc. v. Mukasey, 549 F.3d 861 (2d Cir. 2008) (reviewing constitutionality of certain provisions governing National Security Letter (NSL) served on particular internet service provider); *In re* Directives Pursuant to Section 105B of FISA, 551 F.3d 1004 (Foreign Intelligence Surveillance Ct. of Review 2008) (reviewing particular directives issued to a communications service provider). But these isolated instances cannot ensure full and robust judicial review of government surveillance programs because the scope of review in these cases is limited by the circumstances in which such cases arise, *see, e.g.*, *John Doe*, 549 F.3d at 864 (noting that scope of challenge was limited to constitutionality of statutory gag order on NSL recipient and limits on judicial review of such an order, as opposed to facial constitutionality of underlying NSL regime), or the statutes governing them, *see, e.g.*, *In re Directives*, 551 F.3d at 1009–10 (petitioner could challenge only specific directives issued to it, not surveillance statute as a whole). In such instances, a facial attack on the constitutionality of a wiretapping regime is impossible to mount. *See id.* And even if these cases were able to raise the full range of issues about their respective surveillance regimes, the actual targets of the surveillance would still be completely dependent on their communications service providers to assert their rights, because the targets themselves rarely know who they are and are thus in no position to bring a challenge themselves.

202. *See* BAZAN & ELSEA, *supra* note 5; *see also supra* note 6 and sources cited therein.

203. *See* Jess Bravin, *Senator Plans to Seek Hearings on Bush's Surveillance Program*, WALL ST. J., Dec. 19, 2005, at A4; Eric Lichtblau, *Republican Who Oversees N.S.A. Calls for Wiretap Inquiry*, N.Y. TIMES, Feb. 8, 2006, at A12 (noting that "4 of the 10 Republicans on the Senate Judiciary Committee voiced concerns about the program at a hearing" and citing Senator Graham's characterization of the administration's legal justifications for the program as "dangerous"); *see also* Maclin, *supra* note 6, at 1293 n.176 (collecting additional sources of criticism).

204. *See* Lichtblau, *supra* note 203.

205. *See* Letter from Curtis A. Bradley, et al. to Hon. Bill Frist, et al., *supra* note 6.

to the more fundamental question of whether any court has jurisdiction to decide. Even when a court upholds a challenged program, it maintains the system of constitutional checks and balances, although some may disagree about whether the balance has shifted too far in one direction. But when courts are foreclosed entirely from deciding whether a program is unconstitutional, it is not a question of whether the right check has been applied or balance struck, but instead whether there remain any checks or balances at all. As the Supreme Court has admonished:

> Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.[206]

Of course, the unspoken corollary of the foundational principle that "the political branches of the Government" must adhere to and respect the judiciary's performance of its basic duty "to say what the law is" is that the judiciary must have an opportunity to perform that duty. The absence of judicial recourse against a program of executive surveillance leaves to the executive a sphere of activity—and intrusive activity at that—in which it is not only wholly free to act, but wholly free from even the possibility of limits on its action.

Although the merits of any surveillance challenge are analytically distinct from its justiciability, the same separation of powers concerns may arise in both. As the Supreme Court has warned in considering national security wiretaps specifically: "The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech."[207] The Court has thus held unanimously that courts must play a role in reviewing individual instances of surveillance by the executive (at least in the domestic intelligence context), even when the claimed justification for the surveillance implicates national security.[208] For the same reasons that our constitutional framework insists on judicial

206. City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

207. United States v. U.S. Dist. Ct. (*Keith*), 407 U.S. 297, 317 (1972).

208. *See id.* at 299, 321–22.

intervention in executive surveillance at the level of individual wiretaps, that framework requires judicial intervention at the programmatic level—even if only to pronounce the executive's action lawful—if we are to remain bound to the rule of law and not the unfettered power of the executive.

Perhaps most apt is the admonition of Justice Jackson, concurring in the Supreme Court's rejection of President Truman's unilateral authority to seize the nation's steel mills: "Presidential claim to a power at once so conclusive and preclusive [of the involvement of other branches of government] must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[209] In short, overreading *Laird* as effectively foreclosing challenges to government surveillance renders certain types of unconstitutional executive action unreviewable—a circumstance that in turn opens the door to the abuse of power.

CONCLUSION: WHO CAN SUE?

The law of surveillance and standing is currently in a state of confusion. It need not be.

Courts can bring needed coherence to the law, first, by recognizing standing to bring probabilistic injury claims in the surveillance context under the same standard that applies to other types of claims, and second, by consistently adopting the restrained view of *Laird* that recognizes chilling effects as valid injuries so long as they are objectively reasonable and not merely subjective and self-invented.

Applying these principles, courts should find that putative plaintiffs have standing to challenge government surveillance when they can allege that they themselves are reasonably likely to be surveilled under the challenged program or practice, or that the operation of the challenged program or practice has chilled their expression or association in ways that would harm a reasonable person in the plaintiffs' situation or occupation. The likely appeal of the recent standing decision in the FISA Amendments Act case[210] should provide the Second Circuit with an excellent opportunity to implement these principles and harmonize the law of standing and surveillance.

By bringing the treatment of probabilistic injuries in the surveillance context into line with the rest of standing law, and by recognizing objectively reasonable chilling-effect injuries, courts can create a body of standing juris-

209. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

210. Amnesty Int'l USA v. McConnell, No. 08 Civ. 6259, 2009 WL 2569138 (S.D.N.Y. Aug. 20, 2009).

prudence that maintains the integrity of justiciability doctrine while enabling courts to decide some of our generation's most pressing questions about civil liberties, the separation of powers, and the rule of law.