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FEDERAL COURTS — STANDING — SIXTH CIRCUIT DENIES  
STANDING TO CHALLENGE TERRORIST SURVEILLANCE  
PROGRAM. — *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007).

The Terrorist Surveillance Program (TSP) offers a conundrum for the courts and would-be challengers. Many experts have argued that the program was illegal on the grounds that it ignored the warrant requirement Congress prescribed in the Foreign Intelligence Surveillance Act of 1978<sup>1</sup> (FISA) and that it might have violated the Fourth Amendment.<sup>2</sup> But the state secrets doctrine has prevented potential plaintiffs from obtaining proof that they were among the group surveilled under the TSP.<sup>3</sup> In a recent decision, *ACLU v. NSA*,<sup>4</sup> the Sixth Circuit accordingly held that a group of plaintiffs lacked standing to challenge the TSP because they could not show that they personally were injured by it. The judges relied on a strict construction of standing for Fourth Amendment injuries, one developed in cases where plaintiffs sought to challenge individual searches of other people. In the context of secret surveillance programs by the government, the reality is that no plaintiff will be in a position to establish injury with anything approaching certainty. Hence, a more appropriate approach would be to allow standing where plaintiffs can show even a low level of probability they have been or will be among the injured.

In the wake of the September 11 attacks, President Bush authorized the TSP, a classified program that permitted warrantless domestic eavesdropping when two conditions were met: first, one party to the intercepted communication had to be located overseas, and second, the National Security Agency (NSA) had to have a “reasonable basis” to believe that one party was connected to al Qaeda or a related organization.<sup>5</sup> The TSP’s existence was eventually leaked to the *New York Times*, and in December 2005 the paper published a story that described the program and suggested it might violate the law.<sup>6</sup>

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<sup>1</sup> 50 U.S.C. §§ 1801–1871 (2000 & Supp. IV 2004), amended by Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 522. FISA was most recently amended in August 2007 to exclude from its coverage certain types of surveillance that involved people inside the United States; the amendment is set to sunset in February 2008. Protect America Act of 2007, Pub. L. No. 110-55, 21 Stat. 552.

<sup>2</sup> See, e.g., Letter from Curtis A. Bradley, Richard and Marcy Horvitz Professor of Law, Duke University, et al., to Bill Frist, Majority Leader, United States Senate, et al. (Jan. 9, 2006), available at <http://www.fas.org/irp/agency/doj/fisa/doj-response.pdf>.

<sup>3</sup> The privilege mandates that courts deny discovery requests that could endanger national security. See *United States v. Reynolds*, 345 U.S. 1, 10–11 (1953).

<sup>4</sup> 493 F.3d 644 (6th Cir. 2007).

<sup>5</sup> *Id.* at 648 (citation omitted).

<sup>6</sup> James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

A month after the disclosure in the *Times*, the ACLU filed suit in federal district court on behalf of a group of attorneys, journalists, and academics who were in communication with foreigners they believed the NSA had linked to al Qaeda and thus had surveilled.<sup>7</sup> The plaintiffs alleged that the TSP violated the First and Fourth Amendments, the separation of powers doctrine, and three statutes, including FISA.<sup>8</sup> They claimed violations of their reasonable expectation of privacy under the Fourth Amendment and a chilling effect on their First Amendment rights that resulted when secret surveillance forced them to abrogate their professional duty to keep client communications confidential.<sup>9</sup> The district court granted summary judgment to the plaintiffs, holding the TSP unconstitutional and enjoining the government from conducting warrantless wiretaps under its auspices.<sup>10</sup>

A divided panel of the Sixth Circuit vacated the injunction and remanded for dismissal.<sup>11</sup> Delivering the judgment of the court, Judge Batchelder found that none of the plaintiffs' claims could meet all three requirements for constitutional standing: injury in fact, causation, and redressability.<sup>12</sup> The plaintiffs' Fourth Amendment claims failed for lack of injury: the state secrets privilege prevented them from proving actual interception and thus the ensuing privacy violation.<sup>13</sup> Citing *Rakas v. Illinois*,<sup>14</sup> the judge noted that Fourth Amendment rights "may not be asserted vicariously," and it would thus be "unprecedented . . . to find standing for plaintiffs to litigate a Fourth Amendment cause of action without any evidence that the plaintiffs themselves have been subjected to an illegal search or seizure."<sup>15</sup>

Judge Batchelder suggested that the inquiry for First Amendment claims was less strict,<sup>16</sup> but she noted that the plaintiffs had failed to show "probability or certainty" that "calls *might* be intercepted."<sup>17</sup> Based on her reading of *Laird v. Tatum*,<sup>18</sup> however, she suggested that even if the plaintiffs had proven their calls *were* intercepted, their First Amendment chilling effect injury would be too "attenuated" to permit standing, because the plaintiffs' fears about misuse arose merely from

<sup>7</sup> *ACLU v. NSA*, 493 F.3d at 648–49 (opinion of Batchelder, J.).

<sup>8</sup> *Id.* at 652–53. The plaintiffs also challenged a separate NSA data-mining program, but that challenge was dismissed at both the district and appellate levels. *Id.* at 697.

<sup>9</sup> *Id.* at 653–55.

<sup>10</sup> *ACLU v. NSA*, 438 F. Supp. 2d 754, 773–78 (E.D. Mich. 2006).

<sup>11</sup> *ACLU v. NSA*, 493 F.3d at 648 (opinion of Batchelder, J.).

<sup>12</sup> *See id.* at 659 (citation omitted).

<sup>13</sup> *Id.* at 673 & n.32.

<sup>14</sup> 439 U.S. 128 (1978).

<sup>15</sup> *ACLU v. NSA*, 493 F.3d at 673–74 (opinion of Batchelder, J.). She also noted repeatedly that this point was conceded by the plaintiffs at oral argument. *Id.* at 673, 655 n.11, 657 n.17.

<sup>16</sup> *Id.* at 657.

<sup>17</sup> *Id.* at 667 (emphasis added).

<sup>18</sup> 408 U.S. 1 (1972).

government retention of information rather than from “direct government regulation, prescription, or compulsion.”<sup>19</sup> Finally, she reasoned that even if any First Amendment injuries were cognizable, the TSP had not *caused* those injuries, as secret surveillance under FISA would still have chilled their communications.<sup>20</sup> Because she found the plaintiffs to lack standing,<sup>21</sup> Judge Batchelder did not reach the merits.

Judge Gibbons concurred in the judgment. She disagreed with Judge Batchelder about the implications of *Laird*, writing that it did not necessarily preclude chilled speech as an injury when the government was only conducting surveillance.<sup>22</sup> But Judge Gibbons found the plaintiffs had to show with certainty that they had been “personally subject” or “would be subject” to the TSP to allege injuries under the First or Fourth Amendment or any of the other causes of action.<sup>23</sup>

Judge Gilman dissented. He thought that sufficient First Amendment harm arose under *Laird* when the TSP forced plaintiffs to “decide between breaching their duty of confidentiality to their clients and breaching their duty to provide zealous representation,” regardless of whether they could prove interception.<sup>24</sup> He emphasized that FISA requires the government to minimize the extent to which confidential information is retained and disseminated.<sup>25</sup> Because evidence in the public record demonstrated the TSP did not have sufficiently similar procedures, FISA surveillance would have protected attorney-client communication, and plaintiffs could thus show both causation and redressability.<sup>26</sup> Turning to the merits, Judge Gilman found that the government’s public admissions demonstrated that the TSP violated FISA and that neither post-9/11 congressional authorizations nor inherent executive authority permitted it to do so.<sup>27</sup>

The Sixth Circuit’s three opinions are the latest in a confusing and unsatisfactory decades-long lower court struggle to determine when chilling effects are cognizable First Amendment injuries.<sup>28</sup> In a case

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<sup>19</sup> *ACLU v. NSA*, 493 F.3d at 663 (opinion of Batchelder, J.). She did not decide whether certain other claimed First Amendment injuries were cognizable; she merely noted that doing so was unnecessary because the plaintiffs could not show causation and redressability. *Id.* at 665–66.

<sup>20</sup> *Id.* at 667–69. Similarly, the First Amendment claims were not redressable, for an injunction would just lead to the addition of warrants, not the cessation of wiretapping. *Id.* at 671–73.

<sup>21</sup> Judge Batchelder also separately found that the plaintiffs lacked standing to bring suit on the separation of powers issue and under the three statutory claims. *Id.* at 674–85.

<sup>22</sup> *Id.* at 692 n.3 (Gibbons, J., concurring).

<sup>23</sup> *Id.* at 688.

<sup>24</sup> *Id.* at 697 (Gilman, J., dissenting).

<sup>25</sup> *Id.* at 696.

<sup>26</sup> *Id.* at 696, 703–04.

<sup>27</sup> *Id.* at 713–15, 718–19.

<sup>28</sup> Application of the doctrine has been particularly inconsistent with respect to standing. *See, e.g.,* Jonathan R. Siegel, Note, *Chilling Injuries as a Basis for Standing*, 98 YALE L.J. 905, 907 (1989) (noting divergent lower court opinions); Posting of Daniel J. Solove to Concurring Opin-

like *ACLU v. NSA*, the First Amendment harm is particularly difficult to conceptualize because, as the lead opinion noted,<sup>29</sup> the plaintiffs' core injury is really a Fourth Amendment one: that TSP surveillance was unreasonable because it did not follow a constitutionally or congressionally mandated process.<sup>30</sup> The plaintiffs recharacterized their injury to focus primarily on the First Amendment because Fourth Amendment standing rules seemingly require direct proof of surveillance. But the certainty normally demanded in the Fourth Amendment context should not apply here. The certainty requirement was developed in the context of challenges, generally by those seeking to suppress evidence, to a specific, individual search whose existence is unchallenged and whose target is known.<sup>31</sup> In those circumstances, it may make sense to require that the immediate victim mount the challenge. Where, as here, the challenge is not to an individual search but to a secret program of surveillance that is alleged always to operate in violation of the Constitution or statutory law, the certainty requirement is inappropriate.<sup>32</sup> In circumstances where the precise identity of a victim cannot be known, a better approach to Fourth Amendment standing would be to drop the requirement that plaintiffs prove the program was or will be applied against them, and instead embrace the type of probability standard that courts have applied to some non-Fourth Amendment injuries.

The Supreme Court has not been consistent about standing requirements for plaintiffs who seek to challenge government policies that might cause them future injury,<sup>33</sup> but it is clearly sometimes will-

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ions, <http://www.concurringopinions.com> (July 7, 2007, 18:34 EST) ("[T]he chilling effect doctrine is a mess.").

<sup>29</sup> See *ACLU v. NSA*, 493 F.3d at 657 (opinion of Batchelder, J.) ("To call a spade a spade, the plaintiffs have only one claim, namely, breach of privacy, based on a purported violation of the Fourth Amendment or FISA . . . . On a straightforward reading, this claim does not implicate the First Amendment.").

<sup>30</sup> After all, it is hard to imagine that a successful First Amendment claim could be mounted where the government has obtained a warrant to conduct surveillance. Surveillance certainly can more directly implicate the First Amendment, particularly because of its potential to be abused to chill political dissent, as the Supreme Court recognized in *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297 (1972). But the plaintiffs here did not allege they were targeted for this reason; their case instead relied on the chilling effects of government retention of information.

<sup>31</sup> The Sixth Circuit, for example, cited a traditional evidence suppression case as the basis for the requirement. See *ACLU v. NSA*, 493 F.3d at 673 (opinion of Batchelder, J.) (citing *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978)).

<sup>32</sup> The Supreme Court has not applied such a requirement to a challenge to a generalized, secret surveillance program. In *Laird v. Tatum*, the plaintiffs had no Fourth Amendment claim because the government surveillance program primarily relied on public information, like newspaper articles. 408 U.S. 1, 6 (1972). In *Keith*, the government admitted to wiretapping the plaintiffs. 407 U.S. at 300. But the D.C. Circuit has applied a strict Fourth Amendment standing standard in similar contexts. See, e.g., *Halkin v. Helms*, 690 F.2d 977, 999-1001 (D.C. Cir. 1982).

<sup>33</sup> See Note, *And Justiciability for All?: Future Injury Plaintiffs and the Separation of Powers*, 109 HARV. L. REV. 1066, 1072-75 (1996).

ing to accept probability-based tests. *Pennell v. City of San Jose*,<sup>34</sup> for example, held that the “likelihood of enforcement” of a government ordinance against a landlord permitted standing where the landlord had shown he was “subject to the terms” of the ordinance, even though he had not shown the ordinance would be enforced against him.<sup>35</sup> In other cases, however, the Court has been unwilling to accept a probability standard for future injuries: the plaintiff in *City of Los Angeles v. Lyons*<sup>36</sup> had no standing to prospectively challenge a police chokehold policy because he could not show that “all police officers in Los Angeles always choke any citizen” they encounter, and that he would have such an encounter.<sup>37</sup> Commentators have concluded that the degree to which the Court accepts probabilities of injury often hinges on the substantive nature of the claimed injury.<sup>38</sup>

Courts have also accepted probability-based standing in cases where the existence of any injury at all is indeterminate. In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,<sup>39</sup> the Supreme Court found the emission of radiation into the environment where plaintiffs lived to be a “direct and present injury” even though the “health and genetic consequences” of those emissions were “uncertain[]” and whether the individual plaintiffs would be affected by those consequences was also uncertain.<sup>40</sup> Similarly, lower courts have found “injury in fact” in cases where plaintiffs had been exposed to Agent Orange<sup>41</sup> and asbestos<sup>42</sup> but had not yet developed an injury nor shown with any certainty that they would.

In *Duke Power* and the toxic tort cases, the population subject to the potential injury is known, but whether there will be any injury is uncertain. The *ACLU v. NSA* plaintiffs have the opposite problem: the

<sup>34</sup> 485 U.S. 1 (1988).

<sup>35</sup> *Id.* at 7–8 (citation omitted) (internal quotation marks omitted).

<sup>36</sup> 461 U.S. 95 (1983).

<sup>37</sup> *Id.* at 105–06. One reason the Court may have chosen a strict standard — and why *Lyons* is a weaker candidate for probability-based standing than the TSP — is that the Court thought the chokehold policy was not inherently illegal but rather just might be illegally applied. *See id.* at 108–10.

<sup>38</sup> *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-16, at 409–13 (3d ed. 2000).

<sup>39</sup> 438 U.S. 59 (1978).

<sup>40</sup> *Id.* at 74. *Duke Power* has been described as a somewhat aberrational case, one in which the Court manipulated standing doctrine because it wanted to reach the merits, but it has not been overruled. *See* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 106–08 (1985).

<sup>41</sup> *In re “Agent Orange” Prod. Liab. Litig.*, 996 F.2d 1425, 1434 (2d Cir. 1993) (*overruled in part on other grounds by* Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28 (2002)).

<sup>42</sup> *See* Jeremy Gaston, Note, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 TEX. L. REV. 215, 217–18 (1998) (noting that several lower courts have recognized standing for future injuries in asbestos cases). The Supreme Court declined to resolve whether exposure-only asbestos plaintiffs met the injury requirement in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612–13 (1997).

injury is certain, but the identity of the injured population is unknown. From a probability or expected-value perspective, it is unclear why only the former combination should be cognizable. The Court has characterized the “injury in fact” test as requiring that “the party seeking review be himself among the injured,”<sup>43</sup> but there is not an inherently greater likelihood that the party-injury nexus will be complete where the identity is known but the injury is uncertain than where the injury is known but the identity is uncertain.

Nevertheless, it is true that plaintiffs in TSP litigation will be unable to show a high probability of a Fourth Amendment violation or any other injury. Like the plaintiff in *Pennell*, the plaintiffs here can probably show they fall within the specific terms of the TSP. Yet the total number of Americans who also fall within its terms is unknown, as is (most centrally) how many of those people the program was or will be used against in the future. The Supreme Court’s standing jurisprudence, however, has not always required plaintiffs seeking prospective relief to show a large probability of injury — for the purposes of mootness analysis, for example, it does not even require plaintiffs to show injury to be “more probable than not.”<sup>44</sup>

Given this sometime flexibility, the question becomes whether a Fourth Amendment claim arising from the TSP is a good candidate for a probability-based approach, and particularly one that permits a low level of probability. Several reasons suggest that it is.

First, although the ultimate probability is indeterminate, plaintiffs *can* show they are more likely than most Americans to be among the unidentified victims of the TSP, since most Americans are not in contact with al Qaeda affiliates.<sup>45</sup> Thus the plaintiffs are not asserting a “generalized grievance” that is “common to all members of the public” — one main type of grievance the Court has sought to restrict.<sup>46</sup>

Second, explicitly underlying the Court’s reasoning in many cases denying standing for injunctive relief is the understanding that if an injury does occur, the victims can seek redress, and illegal conduct will be deterred. The Court made this point when it denied standing in *Lyons*<sup>47</sup> and when it limited Fourth Amendment standing in

<sup>43</sup> *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972).

<sup>44</sup> See *TRIBE*, *supra* note 38, § 3-11, at 349 (noting that with respect to mootness questions, the Court has allowed standing “where it seemed clear that the probability that the challenged conduct would recur was far less than 50 percent”).

<sup>45</sup> The plaintiff in *Lyons* could not make this showing. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (“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 . . .”).

<sup>46</sup> *United States v. Richardson*, 418 U.S. 166, 176–77 (1974) (citation omitted).

<sup>47</sup> Any future choke victims in *Lyons* would know it and could sue. See *Lyons*, 461 U.S. at 112–13 (“[W]ithholding injunctive relief does not mean that the ‘federal law will exercise no deterrent effect in these circumstances.’”) (citation omitted).

*Rakas*.<sup>48</sup> And the Court's prudential standing jurisprudence, which sometimes permits exceptions to third-party standing and mootness requirements, reflects a similar concern about the dangers of allowing external pragmatic problems — in this case, the discovery limits imposed by the state secrets doctrine — to preclude review where real injury has occurred.<sup>49</sup> Secret surveillance combined with the state secrets doctrine creates a unique situation where injuries definitely exist but no plaintiffs can ever come forward. The special circumstances of this case, then, mean that potentially illegal government conduct can *only* be deterred or stopped if a low-level probability standard is adopted.<sup>50</sup>

Third, the magnitude of the potential harm is great. In *Massachusetts v. EPA*,<sup>51</sup> the Court quoted lower court language suggesting the applicability of a sliding scale to the question of standing injuries: "The more drastic the injury that government action makes more likely, the lesser the increment in probability necessary to establish standing."<sup>52</sup> While surveillance-related privacy violations are somewhat nebulous harms, both the Supreme Court and Congress have characterized the potential injury as huge.<sup>53</sup> Furthermore, Congress

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<sup>48</sup> See *Rakas v. Illinois*, 439 U.S. 128, 134 (1978) ("There is no reason to think that a party whose rights have been infringed will not, if evidence is used against him, have ample motivation to move to suppress it. Even if such a person is not a defendant in the action, he may be able to recover damages for the violation of his Fourth Amendment rights or seek redress . . . for invasion of privacy or trespass.") (internal citations omitted).

<sup>49</sup> See *TRIBE*, *supra* note 38, § 319, at 436 (noting that the Court has "frequently relaxed" the rules by allowing third-party standing "in cases '[w]here practical obstacles prevent a party from asserting rights on behalf of itself'" and where the third party would be an effective substitute) (alternation in original) (citation omitted); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 301–02 (1988) (noting that the Court's "capable of repetition, yet evading review" exception to mootness doctrine may also reflect concerns about pragmatic problems preventing redress of future injury).

<sup>50</sup> Commentators have also suggested that the Court's claimed commitment to deterrence is incompatible even with its normal Fourth Amendment standing jurisprudence. See, e.g., Meltzer, *supra* note 49, at 267–69, 274–78. The case here seems significantly stronger, since the question is not whether limiting standing provides the "optimal" amount of deterrence, see *id.* at 275, but rather whether doing so could provide any deterrence at all.

<sup>51</sup> 127 S. Ct. 1438 (2007).

<sup>52</sup> *Id.* at 1458 n.23 (quoting *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234 (D.C. Cir. 1996)) (internal quotation marks omitted); see also *Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003) ("[T]he probability of harm which a plaintiff must demonstrate in order to allege a cognizable injury-in-fact logically varies with the severity of the probable harm.").

<sup>53</sup> See *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 320 (1972) (noting that "the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent" combine to make warrantless security-related surveillance particularly dangerous); S. REP. NO. 95-604, pt. 1, at 7–8 (1977) (justifying FISA on the grounds that warrantless wiretapping "seriously infringed" Fourth Amendment rights and created a "formidable" and "incalculable" chill on the "exercise of political freedom" by all Americans, and on the grounds that the executive branch

has authorized a five-year prison sentence for even a single instance of intentional surveillance outside of FISA.<sup>54</sup> This is an important indication of the serious and highly injurious nature of a program of surveillance that always evades FISA, even given some plausible countervailing considerations like the program's potential prevention of threats to the country overall.

Finally, the influence of the state secrets privilege is operating as an *artificial* bar to standing in *ACLU v. NSA*. That is, there is no real question that there is an Article III "case or controversy" here, or that some people have an injury that is "actual or imminent, not 'conjectural' or 'hypothetical'"<sup>55</sup> and that was caused by government action. Thus there are good reasons for courts to err on the side of limiting the distorting effect of the state secrets privilege on the judicial system when it is possible to do so without endangering national security. Recognizing standing for TSP plaintiffs with a low level of probability of injury is one opportunity to do so.<sup>56</sup>

All this is not to say that finding standing for the plaintiffs will necessarily result in an injunction against the government. Courts may find that the President has inherent authority to conduct warrantless surveillance in the foreign intelligence sphere,<sup>57</sup> or that there is not enough information available about the program to find that it violated FISA or the Fourth Amendment, or that the controversy is moot because the President has suggested that TSP is no longer in operation,<sup>58</sup> or that this type of dispute is best left to the political branches<sup>59</sup> or to the electorate. There may, in short, be good reasons to ultimately deny TSP plaintiffs relief. But it is inappropriate to do so through the rote application of traditionally restrictive Fourth Amendment injury standards.

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had a history of "seriously abus[ing]" its warrantless surveillance power to obtain "vast amounts of [personal] information" that were "unrelated to any legitimate government interest" and that involved people who "posed no genuine threat to national security") (citation omitted).

<sup>54</sup> 50 U.S.C. § 1809(a)–(c) (2000).

<sup>55</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted).

<sup>56</sup> Judicial reluctance to delve into highly classified matters whose exposure might endanger national security should not play a role in this analysis, because the relevant information about the contours of the TSP is already in the public domain. A major piece of information that is not in the public domain — who the government was or is targeting — would of course not be compromised if standing were granted on the basis of probability.

<sup>57</sup> The Court reserved this question in *Keith*. See 407 U.S. at 297.

<sup>58</sup> He has, however, asserted the authority to re-authorize it at will. See *ACLU v. NSA*, 493 F.3d at 712 (Gilman, J., dissenting).

<sup>59</sup> However, it is unclear that the political branches could really resolve a case where the President claims the inherent constitutional authority to disregard Congress. See Petition for Writ of Certiorari at 18–19, *ACLU v. NSA*, Nos. 06-2140 & 06-2095 (U.S. filed Oct. 3, 2007) ("[R]estrictions on government surveillance — whether statutory or constitutional — will be meaningless if, as the Sixth Circuit has effectively held, courts are left with no meaningful role in construing FISA and determining whether the executive branch is complying with the statute.").