

LAIRD V. TATUM AND ARTICLE III STANDING IN SURVEILLANCE CASES

*Jeffrey L. Vagle**

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INTRODUCTION

Plaintiffs seeking to challenge government surveillance programs have faced long odds in federal courts, due mainly to a line of Supreme Court cases that have set a very high bar to Article III standing in these cases.¹ The origins of this jurisprudence can be directly

* University of Pennsylvania Law School. Thanks to Ryan Calo, Danielle Citron, Woody Hartzog, Orin Kerr, Seth Kreimer, Brett Max Kaufman, Rita Siemon, and Ben Wizner for their comments on earlier drafts.

¹ The “case or controversy” requirement of Article III standing doctrine has developed to require that plaintiffs demonstrate “injury in fact” that is “certainly impending,” a difficult task for those seeking to challenge government programs whose secrecy often prohibits access to supporting evidence. *See, e.g.*, Alan Butler, *Standing Up to Clapper: How to Increase Transparency and Oversight of FISA Surveillance*, 48 NEW ENGL. L. REV. 55, 69–70 (2013); Donald L. Doernberg, “*We the People*”: *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 53 (1985); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 461 (2008); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988); Gene R. Nichol Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 102 (1984); Cass R. Sunstein, *What’s Standing after Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 168 (1992); Stephen I. Vladeck, *Standing and Secret Surveillance*, 10 J.L. & POL’Y FOR INFO SOC’Y 551, 552 (2014).

While it is beyond the scope of this Essay, it is worth noting here that standing doctrine has long been a favorite topic of argument within law review articles. For a list, see Nichol, *supra*, at 68 n.3. Black letter standing doctrine—to the extent there is such a thing—begins with the basic rule that a plaintiff may only have standing before a federal court if she has satisfied the “case or controversy” requirement of Article III, by showing

traced to *Laird v. Tatum*, a 1972 case where the Supreme Court considered the question of who could sue the government over a surveillance program, holding in a 5-4 decision that chilling effects arising “merely from the individual’s knowledge” of likely government surveillance did not constitute adequate injury to meet Article III standing requirements.² Federal courts have since relied—and built—upon *Laird* to deny standing to plaintiffs in surveillance cases, including the 2013 Supreme Court decision in *Clapper v. Amnesty International USA*.³ But the facts behind *Laird* illuminate a number of important reasons why it is a weak basis for surveillance standing doctrine. It is therefore a worthwhile endeavor, I think, to reexamine *Laird* in a post-Snowden context in order to gain a deeper understanding of the Court’s standing doctrine in surveillance cases.

I. ARMY SURVEILLANCE OF DOMESTIC POLITICS

The facts behind *Laird* originated with a January 1970 article in *The Washington Monthly*, titled *CONUS Intelligence: The Army Watches Civilian Politics*.⁴ The article was written by Christopher Pyle, a lawyer and former Army military intelligence officer, who revealed that

that she has suffered an “injury in fact,” that her injury has been caused by the conduct found in the complaint, and that her injury is redressable by the court. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (“Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy. . . . In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.” (citations omitted) (internal quotation marks omitted)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (“[T]he party bringing suit must show that the action injures him in a concrete and personal way. . . . [This requirement] preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual . . . stake in the outcome, and that ‘the legal questions . . . presented will be resolved. . . .’”); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (noting the difference between actual injury redressable by the court, which tends to be a legal question presented to the court, and standing, which “assures an actual factual setting in which the litigant asserts a claim of injury in fact”).

² *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

³ *See Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1143 (2013) (denying standing on the theory that injuries due to surveillance were “too speculative”); *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (denying standing in a taxpayer lawsuit); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974) (denying standing where the lawsuit was based on complaints held in common with all members of public). *But see United States v. United States Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 299, 323–34, 326 (1972) (Douglas, J., concurring) (acknowledging *Laird* yet concurring that judicial approval was required prior to the initiation of government domestic searches or surveillance, in accordance with applicable U.S. law).

⁴ Christopher H. Pyle, *CONUS Intelligence: The Army Watches Civilian Politics*, WASH. MONTHLY, Jan. 1970.

“[t]he U.S. Army has been closely watching civilian political activity within the United States. Nearly 1,000 plainclothes [Army] investigators . . . keep track of political protests of all kinds—from Klan rallies in North Carolina to anti-war speeches at Harvard.”⁵ Further, Pyle claimed that the Army kept “files on the membership, ideology, programs, and practices of virtually every activist political group in the country.”⁶ Army officials initially denied Pyle’s claims, but Congress, the press, and the public were becoming increasingly unimpressed with the integrity of military leadership at that time, especially after the November 1969 revelations of the My Lai Massacre and the subsequent attempted cover-up by U.S. officials.⁷ The article sparked inquiries from dozens of senators and congressmen, and the Army’s general counsel responded by asserting that he had ordered the Army Intelligence Command at Fort Holabird, Maryland to destroy its civilian surveillance databases.⁸ He failed to mention, however, that the Army continued to maintain volumes of “Counterintelligence” information on paper, microfilm, and regional databanks on “Organizations of Interest and Individuals of Interest,” which included details on thousands of organizations and individuals, from the John Birch Society, to the Urban League, to Martin Luther King, Jr.⁹

It is no surprise that these revelations elicited a strong response from Americans. Since the founding, U.S. citizens have been ambivalent when it comes to a standing military, with the Third Amendment being a tangible recognition of this philosophy.¹⁰ The nation’s

5 *Id.*

6 *Id.*; see also SUBCOMM. ON CONSTITUTIONAL RIGHTS, MILITARY SURVEILLANCE OF CIVILIAN POLITICS, S. REP. NO. 87-312, at 4–5 (1973) (discussing the history of military surveillance).

7 By the end of the 1960s, the U.S. government was losing what little support they once had among the American people for the interminable war in Vietnam. This growing anti-military and anti-government sentiment exploded when the news of the My Lai Massacre—and the Army’s initial attempts to cover it up—became publicly known. See generally JOSEPH GOLDSTEIN ET AL., THE MY LAI MASSACRE AND ITS COVER-UP: BEYOND THE REACH OF LAW? 29 (1976) (discussing the My Lai Massacre and the Army’s attempt to cover it up); WILLIAM R. PEERS, THE MY LAI INQUIRY 3, 5, 9 (1979) (same).

8 At the time of Pyle’s article, Congress was beginning to take an early interest in the issue of government computer databases, with inquiries into security clearances for scientific personnel as well as the growing number of Secret Service databases. Pyle’s article gave Senator Sam Ervin, then chairman of the Senate Constitutional Rights Subcommittee, the fodder to move forward with hearings. Christopher H. Pyle, *CONUS Revisited: The Army Covers Up*, THE WASH. MONTHLY, July 1970, at 49–58.

9 *Id.*; see also SUBCOMM. ON CONSTITUTIONAL RIGHTS, MILITARY SURVEILLANCE OF CIVILIAN POLITICS, S. REP. NO. 87-312, at 4–5 (1973); Clay Risen, *Spies Among Us*, 78 AM. SCHOLAR 49, 49–51, 60 (2008).

10 See JOAN M. JENSEN, ARMY SURVEILLANCE IN AMERICA, 1775–1980, at 72–75 (1991) (“The ambivalence of the War Department about its first officer spy hero before World War I re-

Founders were not naïve, however, and allowed for the provision, under Article I, Section 8 of the Constitution, of statutory procedures for the use of the military to restore public order.¹¹ These procedures, however, were constrained to three possible uses: (1) the President may use federal forces upon a request by a state legislature to restore civil order, (2) the President may deploy federal forces to combat a rebellion against the federal government, and (3) the President may use federal forces if a state denies constitutional rights to a part of that state's population.¹² There is no such provision for the use of federal troops to surveil U.S. citizens prior to any legal commitment by the President. Congress further strengthened this separation when it passed the Posse Comitatus Act of 1878, which forbade the use of military forces in law enforcement, except when expressly authorized by Congress.¹³ It should be noted, however, that, beginning with the Reagan Administration, the increasing use of federal military forces in the war on drugs has weakened this barrier.¹⁴

II. LAIRD V. TATUM AND THE QUESTION OF STANDING

North Carolina Senator Samuel Ervin, Jr., chairman of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, held extensive inquiries regarding Pyle's allegations in 1971, placing a large body of testimony and documentation regarding Army surveillance into the public record.¹⁵ A number of organi-

flected the ambivalence of the American government and people."); William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 393, 431 (1991).

11 See Robert Reinders, *Militia and Public Order in Nineteenth-Century America*, 11 J. AM. STUDIES 81, 83 (1977) (stating that Article I, Section 8, paragraphs 15–16 reflected a compromise among the Framers which allows for a national role in public security).

12 *Id.* at 83–84.

13 Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383, 384 (2003).

14 Enacted in 1981, the Military Cooperation with Law Enforcement Officials Act encouraged military agencies to supply intelligence, equipment, and training to civilian police departments. Pub. L. No. 97–86 § 905, 95 Stat. 1115 (codified as amended at 10 U.S.C. §§ 371–82 (2012)). In the 1980s and 1990s, Congress continued to expand the military's ability to work directly with civilian law enforcement, through such legislation as the National Defense Authorization Act, which authorized and funded direct National Guard participation in drug operations. See EVAN MUNSING & CHRISTOPHER J. LAMB, JOINT INTERAGENCY TASK FORCE—SOUTH: THE BEST KNOWN, LEAST UNDERSTOOD INTERAGENCY SUCCESS 10–11, INSTITUTE FOR NATIONAL STRATEGIC STUDIES (2011); Kealy, *supra* note 13, at 383.

15 *Federal Data Banks, Computers and the Bill of Rights: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 92nd Cong. 1 (1971) [hereinafter *Federal*

zations and people mentioned as surveillance targets in the Army documents initiated a suit challenging the constitutionality of these Army surveillance programs in February 1970.¹⁶ The plaintiffs, including Arlo Tatum, then Executive Secretary of the General Committee for Conscientious Objectors, sought injunctive and declaratory relief from Secretary of Defense Melvin Laird and several high-ranking Army officials.¹⁷ The defendants immediately filed motions to dismiss with the district court, refusing to discuss the specific Army intelligence activities, but assured the court of their legality, and claimed that the *Laird* plaintiffs had failed to state claims upon which relief could be granted.¹⁸

In their complaint, the *Laird* plaintiffs did not assert that the Army had made any attempts to directly control protest or speech. Instead, they argued that the Army's domestic surveillance programs created with them an inhibiting force on First Amendment liberties.¹⁹ Indeed, in his concurring opinion in *Lamont v. Postmaster General*, Justice William Brennan stated that the "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government."²⁰ This was exactly what the *Laird* plaintiffs sought to challenge: a nationwide domestic surveillance program, conducted by the Army, creates a "dragnet which may enmesh anyone."²¹

District of Columbia District Court Judge George Hart, Jr. heard oral argument on the motions in April 1970.²² The plaintiffs had brought with them a number of former Army military intelligence agents who were prepared to testify on their behalf on the nature and scope of the Army's civilian surveillance programs.²³ Judge Hart, however, refused to allow the plaintiffs to present any witnesses, and concluded on the papers that the surveillance activity in question was

Data Banks Hearings]; see also Lawrence M. Baskir, *Reflections on the Senate Investigation of Army Surveillance*, 49 IND. L.J. 618, 618–21 (1974) (discussing Senator Ervin's inquiries).

16 *Military Surveillance: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 93rd Cong. 1, 79–82 (1974) [hereinafter *Military Surveillance Hearings*] (statement of John H.F. Shattuck, National Staff Counsel, American Civil Liberties Union).

17 *Tatum v. Laird*, 444 F.2d 947, 948–49 (D.C. Cir. 1971), *rev'd*, 408 U.S. 1 (1972); *Military Surveillance Hearings*, *supra* note 16, at 79–82; Pyle, *supra* note 8, at 49, 54–55.

18 *Laird*, 444 F.2d at 948–49.

19 See Ralph Michael Stein, *Laird v. Tatum: The Supreme Court and a First Amendment Challenge to Military Surveillance of Lawful Civilian Political Activity*, 1 HOFSTRA L. REV. 244, 246 (1973).

20 *Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965).

21 *Herndon v. Lowry*, 301 U.S. 242, 263 (1937).

22 See Stein, *supra* note 19, at 247.

23 *Id.*

no more intrusive than collecting clippings of news media reports, which was constitutional.²⁴ Judge Hart granted the Army's motion to dismiss, finding that the plaintiffs had not alleged any unconstitutional conduct on the part of defendants.²⁵

The *Laird* plaintiffs appealed this ruling, and the D.C. Court of Appeals remanded the case back to the District Court for an evidentiary hearing, finding that "[b]ecause the evil alleged in the Army intelligence system is that of overbreadth . . . and because there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action, the issue can be considered justiciable at this time."²⁶ The court further stated that "[t]he compilation of data by a civilian investigation agency is thus not the threat to civil liberties or the deterrent on the exercise of the constitutional right of free speech that such action by the military is," and ordered the District Court to re-hear the case.²⁷

The defendants appealed the order of the Court of Appeals to the Supreme Court, which granted certiorari on the issues of justiciability and standing.²⁸ The plaintiffs asked the Court to affirm the Court of Appeals order for an evidentiary hearing, arguing that the record as it existed was not sufficient for a determination of the constitutional issues before the District Court. In addition to the parties' briefs, a group of twenty-nine former military intelligence officers and agents filed an amicus brief with the Court.²⁹ In their brief, the amici informed the Court that the Army's domestic surveillance programs went far beyond mere newspaper article clippings, and included such activities as widespread agent infiltration into civilian groups, agents posing as journalists with falsified identification, and assigning agents to stake out Martin Luther King, Jr.'s gravesite and keep records of visitors.³⁰

In June 1972, Chief Justice Warren Burger issued the majority (5-4) opinion of the Court, reversing the Court of Appeals order, and thus affirming the District Court's dismissal of the plaintiffs' action.³¹ The Court agreed with the defendants' claim that their surveillance programs were put into place in the anticipation of civil disorder,

24 *Id.* at 247-48.

25 *Laird*, 444 F.2d at 948-49, 962-63; Stein, *supra* note 19, at 248.

26 *Laird*, 444 F.2d at 955-56.

27 *Id.* at 957.

28 *Laird v. Tatum*, 408 U.S. 1, 3 (1972).

29 See Stein, *supra* note 19, at 250 (discussing the amicus brief).

30 *Id.* at 250-51.

31 *Laird*, 408 U.S. at 2-3.

with no actual or threatened injury by these programs. More relevant to this Essay, however, the Court held that the plaintiffs did not have standing to sue, stating that

[The plaintiffs'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role for the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action.³²

This opinion was a dramatic departure from First Amendment precedent, where courts had created a standard of justiciability in First Amendment cases that was less restrictive than in cases where constitutional rights were not at stake. For example, in *Reed Enterprises v. Corcoran*, the court held that “[w]here the plaintiff complains of chills and threats in the protected First Amendment area, a court is more disposed to find that he is presenting a real and not an abstract controversy.”³³ In *Dombrowski v. Pfister*, the Supreme Court held that First Amendment rights were “of transcendent value to all society, and not merely to those exercising their rights,” noting that “[b]ecause of the sensitive nature of constitutionally protected expression, we have not required that all those subject to overbroad regulations risk prosecution to test their rights.”³⁴ It is also noteworthy that, prior to *Laird*, the Supreme Court had flatly rejected a “balancing test” between constitutionally protected expression and national security:

Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual’s exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. . . . [W]e have in no way “balanced” those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict.³⁵

In his dissent in *Laird*, Justice William Douglas observed that the majority’s conclusory opinion was “too transparent for serious argument,” and stated “[o]ne need not wait to sue until he loses his job or until his reputation is defamed. To withhold standing to sue until that time arrives would in practical effect immunize from judicial scrutiny all surveillance activities, regardless of their misuse and their

³² *Id.* at 15.

³³ *Reed Enters. v. Corcoran*, 354 F.2d 519, 523 (D.C. Cir. 1965).

³⁴ *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

³⁵ *United States v. Robel*, 389 U.S. 258, 268 n.20 (1967).

deterrent effect.”³⁶ In a separate dissent, Justice Brennan, joined by Justices Potter Stewart and John Marshall, strongly disagreed with the majority’s denial of standing, stating “[r]espondents may or may not be able to prove the case they allege. But I agree with the Court of Appeals that they are entitled to try.”³⁷

III. JUSTICE REHNQUIST AND RECUSAL

In addition to the flawed reasoning by the majority in *Laird* regarding standing and justiciability in First Amendment cases, a serious impartiality question was raised by then-Justice William Rehnquist’s participation in the majority opinion. Prior to his 1972 appointment to the Supreme Court, Rehnquist was an Assistant Attorney General in the Department of Justice’s Office of Legal Counsel (“OLC”).³⁸ While he was with the OLC, Rehnquist appeared before Senator Ervin’s 1971 hearings on the very subject matter raised in *Laird*.³⁹ During these hearings, Rehnquist testified as to the legality of the military domestic surveillance programs, and directly opined on the *Laird* case, then before the D.C. Court of Appeals:

My only point of disagreement with [Senator Ervin] is to say whether as in the case of *Tatum v. Laird* that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government.⁴⁰

The opinion given by then-Assistant Attorney General Rehnquist bears a striking similarity to the conclusion later reached by the *Laird* Court: chilling effects alone do not warrant standing.

The *Laird* plaintiffs sought the recusal of Justice Rehnquist based on the clear appearance of bias, citing the Code of Judicial Conduct, which states, in part, that “[a] judge should perform the duties of his office impartially and diligently,” and “should disqualify himself in a proceeding in which his impartiality might reasonably be questioned,

³⁶ *Laird*, 408 U.S. at 24, 26 (Douglas, J., dissenting).

³⁷ *Id.* at 40 (Brennan, J., dissenting).

³⁸ See Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 592 (1987) (describing Justice Rehnquist’s role as head of the Justice Department’s Office of Legal Counsel to the White House).

³⁹ See *id.* (discussing Justice Rehnquist’s testimony before the Senate Committee); *Military Surveillance Hearings*, *supra* note 16, at 90 n.3 (explaining that Justice Rehnquist’s decision in *Laird* was controversial due to his testimony before the Senate Committee); *Federal Data Banks Hearings*, *supra* note 15, at 597 (providing Justice Rehnquist’s testimony before the Senate committee).

⁴⁰ *Federal Data Banks Hearings*, *supra* note 15, at 864–65.

including but not limited to instances where . . . he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.”⁴¹ In October 1972, Justice Rehnquist issued an unprecedented sixteen-page memorandum where he denied the motion for recusal, acknowledging that “fair minded judges might disagree” about this matter.⁴² Justice Rehnquist further noted that his recusal could result in “the principle of law presented by the case [remaining] unsettled.”⁴³ This last point was clearly erroneous, however, as a divided Court in *Laird* would only ensure an evidentiary hearing at the District Court level, which would make a record for later review, possibly by the Supreme Court.

CONCLUSION: LAIRD’S LEGACY

Our courts have long operated under the assumption that the Constitution requires that conflicts between legislative power and individual rights can only be accommodated by legislation that is drawn more narrowly so as to avoid that conflict—it is government that must adjust to the Constitution, not the other way around. As Chief Justice John Marshall observed in *McCulloch v. Maryland*, “[I]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”⁴⁴ The *Laird* Court failed to live up to this standard when it refused to grant Article III standing to citizens who sought to show that the Army’s domestic surveillance programs did not conform with the Constitution. This seriously flawed opinion has become the basis for similar denials of standing for those seeking to challenge government surveillance programs. As Justice Douglas observed in his *Laird* dissent, “[t]his case involves a cancer in our body politic.”⁴⁵

It didn’t take long for courts to embrace *Laird* as a useful tool to dismiss cases where plaintiffs sought to challenge government surveillance programs, especially where the complaints rested on a First Amendment chill from political profiling by law enforcement. Some judges took exception to a broad interpretation of *Laird*, but objec-

41 CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES CANON 3, 3(C)(1) (1972).

42 See Note, *Justice Rehnquist’s Decision to Participate in Laird v. Tatum*, 73 COLUM. L. REV. 106, 121 (1973) (quoting Justice Rehnquist’s justification for denying the motion).

43 *Id.* at 123 (quoting Justice Rehnquist).

44 *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

45 *Laird v. Tatum*, 408 U.S. 1, 28 (1972) (Douglas, J., dissenting).

tions largely showed up in dissenting opinions. For the most part, early interpretations of *Laird* sympathized with the government's view of surveillance claims.

For example, about a month after the Supreme Court handed down its decision denying Article III standing to the plaintiffs in *Laird*, the United States Court of Appeals for the Fourth Circuit cited the decision in a case involving the open surveillance of demonstrations and meetings by the Richmond, Virginia police, which included the photographing of participants for the purposes of establishing and maintaining police files, which were then shared with other law enforcement agencies.⁴⁶ The plaintiffs in *Donohoe* objected to the police surveillance, arguing that the presence of police officers and use of police photographers violated their First Amendment rights by inhibiting their ability to freely speak and associate.⁴⁷ The Richmond police argued that they had a duty to "know who the leaders (of the demonstrations) are" in order to determine whether any demonstrators were "dangerous."⁴⁸ The police further pointed out that they only attended meetings held on public streets and spaces, and did not attend a series of protest meetings held at a local church (although they did park a police car outside the church to take photographs of everyone entering and leaving the meeting).⁴⁹

The *Donohoe* plaintiffs asserted that, despite (and because of) the fact that the Richmond police were conducting their surveillance in the open, participation in these demonstrations and meetings was chilled.⁵⁰ The court, however, disagreed, observing that the plaintiffs made no claims that could provide a basis for standing, and stated that just because the police presence and photography made the participants "nervous" or "felt uncomfortable" was not enough to establish any First Amendment harms under *Laird*.⁵¹ The court also dismissed the testimony of a meeting attendee who stated that the FBI told his employer that he had participated in a demonstration, stating that "[i]t is common knowledge . . . that the FBI maintains its own surveillance of demonstration groups" and there was "no evidence that the FBI had actually secured this information from the Richmond police department."⁵² The *Donohoe* court cited *Laird*, holding

46 See generally *Donohoe v. Duling*, 465 F.2d 196 (4th Cir. 1972).

47 *Id.* at 197.

48 *Id.* at 198.

49 *Id.* at 198–99.

50 *Id.* at 199.

51 *Id.* at 199–200.

52 *Id.* at 200.

that standing cannot 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 individual.’”⁵³ To put it plainly, “allegations of a subjective ‘chill’” from the presence of government agents photographing meeting participants for inclusion in police files “will not suffice.”⁵⁴

Not every judge agreed with this interpretation. In *Fifth Avenue Peace Parade Committee v. Gray*, Judge James Oakes dissented from the majority opinion following *Laird*, observing in rather understated tones that “[t]here has been detected a tendency in recent times to justify invasion of constitutional rights on the basis of national security.”⁵⁵ These rights, which include the “right . . . peaceably to assemble, and to petition the Government for a redress of grievances . . . necessarily implied a right to freedom in political associations.”⁵⁶ Judge Oakes articulated the premise that

a group, even a huge group, of people who want to go to the seat of government to protest a war and who do so peaceably have the right not to have their name (and hence their views against the administration or the Congress or the courts or the policies of any in relation to the war) listed in some dossier or table or catalog of protesters and disseminated throughout all the major branches of the ‘security system’ of the United States.⁵⁷

Judge Oakes distinguished *Laird* on the basis that the Supreme Court’s decision should be “‘narrow[ly]’ limited to general surveillance without specific misuse of data.”⁵⁸

That is to say, the *Laird* majority, in Judge Oakes’s words, “seriously underestimated the size and scope of [government] intelligence activities which included gathering public and private information on hundreds of thousands of ‘politically suspect’ persons,” and might have decided differently had they the benefit of Senator Ervin’s hearings and “Watergate-allied events” at the time of their decision.⁵⁹ One could make an argument that the Burger Court would not have decided differently in *Laird*, even if the caustic repercussions of

53 *Id.* at 201 (emphasis omitted) (quoting *Laird*, 408 U.S. at 11).

54 *Id.* at 202.

55 480 F.2d 326, 333 (1973) (Oakes, J., dissenting) (citations omitted).

56 *Id.* at 334.

57 *Id.*

58 *Id.* at 336.

59 *Id.* at 336–37.

COINTELPRO,⁶⁰ Watergate, and the many post-Cold War government intelligence abuses were made public at the time. But perhaps, in a post-Snowden world where issues of government surveillance are perhaps even more pressing than in the days of *Laird*, we should be asking these same questions of the Roberts Court.

60 COINTELPRO was the FBI's acronym for their large-scale, secret Counterintelligence Program, which used techniques originally approved for use against foreign enemies and applied them against domestic political groups. The program was started by FBI Director J. Edgar Hoover in 1956 and originally targeted the Communist Party, with the intent to "disrupt" or "neutralize" organizations and individuals. COINTELPRO quickly expanded to include any individual or group Hoover considered to be "subversive," leading the Church Committee to later observe that the program "demonstrates the dangers inherent in the overbroad collection of domestic intelligence." SETH ROSENFELD, *SUBVERSIVES: THE FBI'S WAR ON STUDENT RADICALS, AND REAGAN'S RISE TO POWER* 16, 213–14 (2012).