

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

1-1-1973

Laird v. Tatum: The Supreme Court and a First Amendment Challenge to Military Surveillance of Lawful Civilian Political Activity

Ralph Michael Stein
Pace Law School

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Constitutional Law Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

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 (1973), <http://digitalcommons.pace.edu/lawfaculty/285/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

LAIRD V. TATUM: THE SUPREME COURT AND A FIRST AMENDMENT CHALLENGE TO MILITARY SURVEILLANCE OF LAWFUL CIVILIAN POLITICAL ACTIVITY*

The First Amendment was adopted to elevate and defend the central right of a free people: the right to peaceably dissent, to argue, to persuade, and to demonstrate. The United States Army was created to preserve and protect our society. *Laird v. Tatum*,¹ a class action challenge to military surveillance of civilian politics, demonstrates with frightening precision the degree to which the force of protection can and has imperiled the instrument of freedom.

There was no evidence in the record before the Supreme Court to show the extent to which lawful political activity was chilled and deterred by Army intelligence. The reasons are several. The action was initiated with a modicum of information; much that is known today was not known at the time of the District Court hearing. More important, individuals present in court who were prepared to relate their experiences monitoring civilian activity were not allowed to take the stand and, instead, took their story to the country through a press conference.

This Comment will explore the salient issues raised by *Laird v. Tatum* and will attempt to answer the following questions: Did the Supreme Court err in denying the political activists an opportunity to present witnesses at a District Court hearing and in deciding the issues on the original papers and appellate briefs? Was the Military Intelligence (hereinafter MI) program complained of an impermissible abridgment of First Amendment rights? Did Justice Rehnquist behave improperly by participating in the *Laird v. Tatum* decision? Last, to what extent has the Supreme Court's decision in this case affected future adjudication of First Amendment class action challenges to government programs of surveillance and data compilation related to lawful political activity?²

* The author gratefully acknowledges the support and advice of his friend and colleague, Christopher H. Pyle, Esq. The comments, criticisms and constant intellectual stimulation of Professor Burton C. Agata were invaluable.

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

2. The author served in the U.S. Army in Military Intelligence from October 1965 to October 1968. From July 1967 to October 1968, he was assigned to the Counterintelligence Analysis Branch, Office of the Assistant Chief of Staff for Intelligence, United States Army, Washington, D.C. In that capacity he was the desk, or action, officer responsible for Left Wing/Anti-War and Civil Disturbance Analysis. Inevitably the analysis and conclusions in this comment are to a certain degree based on his experiences and perceptions stemming from that tour of duty. For the author's account

In January 1970, *The Washington Monthly*, a social and political science magazine, published "CONUS Intelligence: The Army Watches Civilian Politics," by Christopher H. Pyle, a lawyer and former captain in MI. Pyle stated that "[t]he U.S. Army has been closely watching civilian political activity within the United States. Nearly 1,000 plainclothes investigators . . . keep track of political protests of all kinds—from Klan rallies in North Carolina to anti-war speeches at Harvard."³ In his article, Pyle reproduced a portion of an MI intelligence summary which described a number of political activities and named participants and organizations.⁴

The reaction to Pyle's article was immediate. While newspaper reporters investigated Pyle's allegations, senators and congressmen queried appropriate officials in the Department of Defense and the Department of the Army to determine whether the military, as Pyle claimed, actually maintained "files on the membership, ideology, programs, and practices of virtually every activist political group in the country"⁵ and conducted a program of surveillance.

A number of the persons and organizations mentioned in the MI summary reproduced in Pyle's article, together with other political activist individuals and groups, engaged the American Civil Liberties Union to initiate a class action challenge to the constitutionality of the Army's domestic intelligence program.

The action commenced by the activists, *Laird v. Tatum*, was dismissed by the Supreme Court after two and a half years of litigation on October 10, 1972.

The case raised a number of still unsettled and pressing constitutional issues, as well as questions concerning Mr. Justice Rehnquist's judicial propriety in participating in the *Laird v. Tatum* decision, the latter of a critical importance since the Associate Justice's vote decided the case against the plaintiffs.

I. HISTORY OF THE CASE

The *Laird v. Tatum* plaintiffs⁶ filed their complaint in the

of his experience in military intelligence see Stein, *The Expansion of Counter Intelligence*, in *UNCLE SAM IS WATCHING YOU* (1971). See also *WHISTLE BLOWING* 126-134 (R. Nader, P. Petkas, K. Blackwell, eds. 1972).

3. Pyle, *CONUS Intelligence; The Army Watches Civilian Politics*, 1 *THE WASHINGTON MONTHLY*, (Jan. 1970).

4. *Id.* at 5-6.

5. *Id.* at 5.

6. The individual plaintiffs were: Arlo Tatum, Executive Secretary of the Central Committee for Conscientious Objectors; Conrad Lynn, a private attorney; Benjamin N. Wyatt, Jr., also a private attorney; and the Reverend Albert B. Cleage, Jr., Minister of the Shrine of the Black Madonna in Detroit, Michigan. Organizational plaintiffs

United States District Court for the District of Columbia on February 17, 1970.⁷ They named as defendants in their suit for injunctive and declaratory relief Secretary of Defense Melvin R. Laird and several high-ranking Army officials.⁸

The complaint, based almost exclusively on the Pyle article,⁹ alleged that the MI program created an impermissible First Amendment chill, was *ultra vires* and exceeded the lawful needs of the United States Army in carrying out its constitutional and statutory role with regard to intervention in civil disorders.¹⁰ The litigants sought a declaration that the Army's activity was unconstitutional and prayed for a preliminary and permanent injunction restraining the Army from engaging in the surveillance and data-compilation activities disclosed by Pyle.¹¹ Also sought in the same motion were a permanent injunction forbidding the defendants from applying security classifications to reports of civilian political activity and a mandatory injunction directing the defendants to produce for the court, but explicitly not for public disclosure, all documents and files pertaining to military surveillance of civilian politics.¹² A separate motion for a temporary restraining order was denied.¹³

In a memorandum prior to oral argument before the District Court, the plaintiffs alleged that "the Army's domestic intelligence program also involves the conduct of undercover operations by military agents within the civilian community. . . ."¹⁴ This allegation, as

were: Women Strike for Peace; Chicago Area Women for Peace; the Vietnam Week Committee of the University of Pennsylvania; The Vietnam Education Group of Knoxville, Kentucky; Veterans for Peace in Vietnam; The American Federation of State, County and Municipal Employees; the Vietnam Moratorium Committee; Clergy and Laymen Concerned about Vietnam; and the War Resisters League.

7. *Tatum v. Laird*, Civil No. 459-70 (D.D.C., 1970).

8. The other defendants were: Secretary of the Army Stanley R. Resor; General William C. Westmoreland, Army Chief of Staff; and Brigadier General William H. Blakefield, Commanding General, United States Army Intelligence Command. None of them currently hold the above positions. The defendants were sued individually and in their official capacity.

9. From the date of publication of Pyle's article to the time of filing of the complaint in *Laird v. Tatum* no further information had come to the attention of plaintiffs' counsel. Shortly after the complaint was filed, several individuals with personal and extensive knowledge of the Army's activity came forward, including the author. Pyle, an instructor at the U.S. Army Intelligence School at Fort Holabird, Baltimore, Maryland, had never been personally involved in the activity complained of, but he had picked up enough information from friends and acquaintances to write the January 1970 article.

10. Complaint of *Tatum et al.*, *supra* note 7.

11. *Id.* at 2.

12. *Id.* at 10.

13. Plaintiffs' Motion for Temporary Restraining Order, *Tatum v. Laird*, Civil No. 459-70 (D.D.C., filed Mar. 12, 1970, denied Mar. 13, 1970).

14. Plaintiffs' Memorandum In Support of Their Motion for a Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss at 1.

will be discussed later, is of seminal significance in analyzing *Laird v. Tatum*.

Responding to the plaintiff's assertions in the several pre-hearing motion papers, the defendants stated that the Army's preparation for its civil disturbance mission necessitated that information be collected before a crisis, and that such collection was reasonable and implied by statutes which authorize the Army's civil disturbance function.¹⁵ The defendants would not discuss the specific activities of the MI branch, but urged that the Army's conduct was constitutional and claimed that the *Laird v. Tatum* activists had failed to state grounds upon which relief could be granted. An affidavit filed by Under Secretary of the Army Thaddeus R. Beal did admit, however, that "As a result of a review of the intelligence activities of the U.S. Army it has been determined that certain records maintained by the Army were not useful and were not necessary in view of the Army's mission."¹⁶ The Beal affidavit did not elaborate on the nature or scope of MI holdings concerning civilians.

On April 22, 1970, oral argument on the motion papers was heard in the District Court by Judge George L. Hart, Jr. Present in the courtroom were a number of former MI agents who were prepared to testify on behalf of the plaintiffs as to the extent and nature of MI operations;¹⁷ three of these former agents were willing to discuss covert and clandestine infiltration operations conducted by MI personnel.¹⁸

Judge Hart refused to allow plaintiffs' counsel, Professor Frank Askin of Rutgers University School of Law, and Melvin L. Wulf, National Legal Director of the American Civil Liberties Union, to present any witnesses. He insisted instead that oral argument was sufficient. Ignoring the claim of Professor Askin that the witnesses present in court were able to testify as to the existence of covert operations, Judge Hart concluded that MI activity seemed to be limited to the clipping of news media reports. Such activity, he maintained, whether engaged in by the Army or by the press, is

15. Defendant's Memorandum In Opposition to Plaintiffs' Motion for a Preliminary Injunction at 3-7.

16. Affidavit of Thaddeus R. Beal.

17. The author and two former agents were present in the courtroom and prepared to testify. Unfortunately, counsel for plaintiffs had not secured affidavits from the persons prepared to testify. As a result, Judge Hart, after refusing to hear witnesses, had no means of learning that serious charges of clandestine operations by the Army were being advanced by the litigants.

18. Much of the material which the former agents were prepared to discuss during testimony was publicly revealed for the first time in a press conference immediately after the District Court hearing. See *NEWSWEEK*, May 4, 1970, at 35-36.

equally constitutional. Hart, in dismissing the action,¹⁹ found that no unconstitutional action by the Army was shown and that the complainants had not alleged any unlawful conduct.²⁰ On April 23, 1970 an appeal was filed. On April 27, 1971, the Court of Appeals for the District of Columbia remanded the case to the District Court for an evidentiary hearing.²¹ Judge Wilkey, for the majority, found,²²

Because 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.

He acknowledged that the military has a legitimate need for certain information in order to effectively intervene in civil disorders. He noted also that "The questions are what type of information the military needs, how they should go about obtaining it, when they need it, and whether what the Army has done here has infringed any of appellants' rights."²³

Whatever the Army had "done here" was limited, in the view of the court majority after examining the District Court record, to what "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."²⁴ Since the testimony of witnesses was absent, the court concluded that "[t]here is no evidence of illegal or unlawful surveillance activities. We are not cited to any clandestine intrusion by a military agent."²⁵

The court recognized, however, that "[t]he compilation of data by a civilian investigative 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. . . ."²⁶ The court ordered the case re-heard by the District Court to determine four principal issues:²⁷

1. The nature of the Army domestic intelligence system made the subject of appellants' complaint, specifically the extent of

19. Oral dismissal on April 22, 1970.

20. Order of Dismissal, April 29, 1970.

21. 444 F.2d 947, 958 (D.C. Cir. 1971).

22. *Id.* at 955-6.

23. *Id.* at 953.

24. *Id.*

25. *Id.*

26. *Id.* at 957.

27. *Id.* at 959.

the system, the methods of gathering the information, its content and substance, the methods of retention and distribution, and the recipients of the information.

2. What part, if any, of the Army domestic intelligence gathering system is unrelated to or not reasonably necessary to the performance of the mission as defined by the Constitution, statutes, military regulations, and as interpreted by actions under those written definitions of the mission.

3. Whether the existence of any overbroad aspects of the intelligence gathering system, as determined above, has or might have an inhibiting effect on appellants or others similarly situated.

4. Such relief as called for in accordance with the above established law and facts.

Judge MacKinnon dissented, finding that "the chill to this amorphous group . . . is grounded in the unrealistic and speculative fear that the Government will improperly use the information against them."²⁸ He asserted that the appellants lacked standing based on the admission of counsel during oral argument before Judge Hart that the plaintiffs were not cowed or chilled, but rather wished to represent those Americans who were supposedly so affected by the Army program.²⁹

The Supreme Court granted defendants' petition for certiorari on the issues of justiciability and standing.³⁰ The government, in their briefs and before the Court, argued that the case lacked concreteness and evidence of a real injury to the rights of the plaintiffs.³¹ The defendants also asserted that the issue was moot.³² Sufficient public disclosure of clandestine MI activities by a large number of former military personnel had forced some admissions of inappropriate activity by Army officials followed by assurances that such activity had been halted. The defendants offered the Army's assurances

28. *Id.*

29. *Id.*

30. Petitioner's Brief for Certiorari at 2, *Laird v. Tatum*, 408 U.S. 1 (1972). The Court's jurisdiction was invoked under 28 U.S.C. § 1254(1).

31. *Id.* at 2, 13-14, 32-33.

32. *Id. passim*. In briefs and on oral argument before the Supreme Court, the government argued that such activities as had been determined by the Army to be unnecessary had been stopped and that there was no further cause for complaint. The defendants were hampered to a certain degree by a continuing series of revelations by former Army personnel, some of which were in direct conflict with the assurances and statements of Army officials. While these developments were not, of course, before the Court, they were a matter of considerable public, legislative and news media interest.

to show that the issue was moot; they also alleged that the responsibility for insuring the lawful functioning of MI operations resided in the Executive and Legislative branches.³³

The plaintiffs urged the Supreme Court to affirm the Court of Appeals order for an evidentiary hearing.³⁴ Arguing that the record was insufficient for a valid determination of the constitutional issues,³⁵ the plaintiffs alleged that many of the defendants' assertions of fact about First Amendment injury were, in reality, contested and could not be decided absent an opportunity to present witnesses and documentary evidence.³⁶

Prior to oral argument, an unusual brief *amici curiae* was submitted to the Court. The *amici*, twenty-nine former MI officers and enlisted personnel, urged the Court to allow the plaintiffs an opportunity to present witnesses and evidence in the trial court.³⁷ They informed the Court that far from limiting its activities to clipping newspapers, MI, among other things, infiltrated agents into Resurrection City,³⁸ had agents pose as newsmen with bogus identification cards to obtain information from unsuspecting civilians during protests,³⁹ had infiltrated the headquarters of the National Mobilization

33. Petitioner's Brief, *supra* note 30, at 33. The government had raised the separation of powers question at the District Court and the Court of Appeals level. The government urged the Court to accept the viewpoint that where a party seeking to represent a class similarly situated failed to allege a specific personal injury the case lacked the clarity and focus required to maintain a case or controversy and was, in reality, a political question which the Legislative and Executive Branches were especially designated, under the Constitution, to decide.

34. Respondents' Brief in Opposition, at 30, *Laird v. Tatum*, 408 U.S. 1 (1972).

35. *Id.* at 15.

36. *Id.* at 9.

37. For *Tatum, et al., as Amici Curiae, Laird v. Tatum*, 408 U.S. 1 (1972). Christopher H. Pyle and the author participated in the writing of the Brief. Counsel for the *amici* were Professor Burke Marshall, Deputy Dean of the Yale Law School, and Professor Arthur R. Miller, Harvard Law School. It is the author's belief that this Brief is unique in that, for the first time, individuals with a common background but no organizational link with one another were brought together for the sole purpose of submitting an *amici* brief to the Supreme Court. The expenses incurred in this undertaking were shared by most of the *amici*.

38. *Id.* at 17. Resurrection City was the Washington, D.C. tent encampment of the Southern Christian Leadership Conference's Poor Peoples' Campaign. It was located between the Washington Monument and the Lincoln Memorial. The author, on duty in the Pentagon, received daily reports from, among others, an Army major, a black officer who infiltrated Resurrection City after assuming a false identity and with specific orders to attempt to influence Southern Christian Leadership Conference policy. A large number of other agents, who reported regularly, roamed the area in casual clothing with orders to glean as much information as possible from participants in the Poor People's Campaign.

39. *Id.* Agents with phony press cards and portable videotape units were ordered to conduct interviews with civilians during protests in the hope that those interviewed would divulge future plans.

Committee to End the War in Vietnam,⁴⁰ had penetrated the Colorado Springs Young Adults Project,⁴¹ and had assigned agents to stake-out Martin Luther King's grave to determine who came to the graveside.⁴²

On June 26, 1972, Chief Justice Burger delivered the majority opinion in a 5 to 4 reversal of the Court of Appeals decision, thereby affirming the dismissal of the action.⁴³ The Court acknowledged the "traditional and strong resistance of Americans to any military intrusion into civilian affairs,"⁴⁴ but found that there had been no actual or threatened injury by reason of unlawful activities by the Military.

The Court noted,⁴⁵

The [Army's] information itself was collected by a variety of means, but it is significant that the principal sources of information were the news media and publications in general circulation.

The Court majority, agreeing with the government's position, contended,⁴⁶

The system put into operation as a result of the Army's 1967 experience consisted essentially of the collection of information about public activities that were thought to have at least some potential for civil disorder. . . .

Of far greater import, however, was the Court's acceptance of the defendants' claim that *Laird v. Tatum* was nonjusticiable because the parties bringing the action had failed to show injury and thus lacked standing to sue. In the absence of injury, the issues raised required action by the Executive and Legislative branches if they perceived a need to respond to the allegations raised by the plaintiffs. The Court majority stated,⁴⁷

[T]hey [plaintiffs] disagree with the judgments made by the Executive Branch with respect to the type and amount of

40. *Id.*

41. *Id.* at 17-18.

42. *Id.* at 17.

43. 408 U.S. 1 (1972). Joining the Chief Justice were Associate Justices White, Blackmun, Powell and Rehnquist.

44. *Id.* at 15.

45. *Id.* at 6.

46. *Id.*

47. *Id.* at 13.

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.

The political activists, in the opinion of the Court, sought a wide, self-conducted investigation of Army intelligence operations, utilizing the Federal judiciary as its agency of inquisition.⁴⁸

Carried to its logical end, this 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 of the judiciary, *absent actual present or immediately threatened injury resulting from unlawful governmental action*.⁴⁹ [emphasis added]

The Court therefore concluded that the respondents lacked standing to bring the action. Mr. Justice Douglas, in a dissent in which Mr. Justice Marshall concurred, began by asserting that "Our tradition reflects a desire for civilian supremacy and subordination of military power."⁵⁰ Reviewing the role of the military, the Justice stated,⁵¹

[T]he Armed Services . . . are not regulatory agencies or bureaus that may be created as Congress desires and granted such powers that seem necessary and proper. The authority to provide rules "governing" the Armed Services means the grant of authority to the Armed Services to govern themselves, not the authority to govern civilians.

He continued, "The action in turning the 'armies' loose on surveillance of civilians was a gross repudiation of our traditions."⁵²

Justice Douglas found that the majority's conclusion that the plaintiffs lacked standing to sue was "too transparent for serious argument."⁵³ Noting that the Army allegedly maintains files on all groups engaged in activist politics,⁵⁴ "uses undercover agents to infiltrate these civilian groups . . ."⁵⁵ and "moves as a secret group among

48. *Id.* at 14.

49. *Id.* at 15.

50. *Id.* at 19.

51. *Id.* at 18.

52. *Id.* at 23.

53. *Id.* at 24.

54. *Id.*

55. *Id.* at 25.

civilian audiences, using cameras and an electronic ear for surveillance,"⁵⁶ he concluded that, "One 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 deterrent effect."⁵⁷

Mr. Justice Brennan, in a separate dissent concurred in by Associate Justices Stewart and Marshall, decried the denial to the plaintiffs of an opportunity to present evidence at the trial court level. Justice Brennan stated,⁵⁸

Respondents 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.

Following the Supreme Court's June decision, the plaintiffs filed a petition for re-hearing. They also filed a motion for withdrawal of the Court's opinion, so that Mr. Justice Rehnquist could consider a separate motion addressed to him requesting recusal because of his prior involvement in the case. The petition and motions were denied on October 10, 1972.⁵⁹

II. THE HISTORICAL BACKGROUND

The issues raised by *Laird v. Tatum* cannot be meaningfully examined solely in their legal context. Two other areas must be explored in some detail before an attempt can be made to analyze *Laird*: use of federal troops in civil disorders; and the Army's domestic intelligence program.

A. *The Use of Federal Troops in Civil Disorders*

The defendants in *Laird* relied on statutory authorization by implication for their data-collection on civilian activities. They also viewed the MI program as a necessary preparation for the commitment of Federal troops in civil disorders. It is useful to review the history of Federal troop commitment to see if the statutory provisions cited allow this expansive interpretation.

Americans have always been wary of military forces. The third amendment is as much a recognition of the coercive nature of mili-

56. *Id.*

57. *Id.* at 26.

58. *Id.* at 40.

59. 93 S. Ct. 7 (1972).

tary force in a civil setting as it is a declaration of property rights. The debate over when and how to employ Federal forces to suppress civil disorder dates back to the founding days of the nation.⁶⁰ As early as 1792, fears were voiced that the use of federal troops would dampen civil liberties. "Congressman John Francis Mercer of Virginia rose in the new House of Representatives to denounce a bill to permit use of federal troops to control civil disorders, 'In no free country,' he said, 'can the [military] be called forth nor martial law proclaimed but under great restrictions.'"⁶¹

Two years after Congressman Mercer expressed his concern, President George Washington was faced with the Whiskey Rebellion, a Pennsylvania protest against the imposition of an excise tax many considered to be little different from the hated British Stamp Act.⁶² Washington dispatched troops after writing,⁶³

Not only the Constitution and Laws must strictly govern; but the employing of the regular troops avoided if it be possible to effect order without their aid . . . Yet, if no other means will effectually answer, and the Constitution and Laws will authorise these they must be used as the Dernier resort.

Washington was quick to warn, however, that the necessary deployment of troops because of the inability of local government to keep order did not mean that the military authorities were to govern. "The dispensation of . . . justice belongs to the civil Magistrate and let it ever be our pride and our glory to leave the sacred deposit there unviolated."⁶⁴

Although there were occasional departures from Washington's standard, the concept that the employment of Federal forces must occur only when such commitment is the "Dernier resort" was accepted by most presidents.⁶⁵

60. See generally, A. YARMOLINSKY, *THE MILITARY ESTABLISHMENT* (1971). This excellent study, especially chapter 11, is recommended for those desiring a more complete account of the role of the military in American society.

61. *Id.* at 153 (Footnote Omitted).

62. S. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* §40 (1965).

63. 32 *THE WRITINGS OF GEORGE WASHINGTON* 153 (J. Fitzpatrick, ed. 1931).

64. 34 *THE WRITINGS OF GEORGE WASHINGTON* 6 (J. Fitzpatrick, ed. 1931).

65. The reluctance to commit troops is perhaps best illustrated by President Theodore Roosevelt's terse telegram to an Army commander during a bitter 1907 Nevada miners' riot: "Do not act at all until President issues proclamation . . . Better twenty-four hours of riot, damage, and disorder than illegal use of the troops." B. RICH, *THE PRESIDENTS AND CIVIL DISORDERS* 129 (1941).

Not all Presidents have been as concerned with maintaining control over Federal forces. President Wilson's directive that National Guard commanders should respond to all state requests for aid—at the time the Guard was federalized—has been severely criticized as an abdication of Federal power. *Id.* (1941).

As Washington correctly foresaw, occasions arise when the only means left to restore public order is the use of the Federal military might. Article I, Section 8 of the Constitution provides the authority for such use and three statutory provisions define the procedures for the President to follow in dispatching the Army.⁶⁶ The President may direct the commitment of federal forces upon a request by a state legislature, or a state governor if the legislature cannot be convened, to suppress civil disorder. Troops may be deployed by the President to combat a rebellion against the national government. Last, the Chief Executive may commit troops if state or national law is interfered with so as to result in a denial of constitutional rights to a part or a class of the state's population.⁶⁷

Nowhere in these statutory provisions nor in any other legislation is there reference to or authority for pre-commitment activities on the part of the military.

B. *The Army's Domestic Intelligence Program*

Until former Army Captain Pyle's January 1970 article appeared, virtually no information had ever become public suggesting that the

66. The statutes apply to the military in general, not just to the Army. In practice, however, the Army has been almost exclusively the branch of the Armed Forces which the President has called out for riot duty.

67. 10 U.S.C. § 331 provides:

Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

10 U.S.C. § 332 provides:

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

10 U.S.C. § 333 provides:

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

Army maintained a program of surveillance and data-compilation on civilians.⁶⁸

In February 1970, Pyle and the author initiated a nationwide investigation of MI activities.⁶⁹ Although the Army assured critics that it had re-evaluated its intelligence needs with regard to civil disturbance preparation, Pyle, in a second article in July 1970, several months after the District Court hearings in *Laird*, charged,⁷⁰

Despite over 50 Congressional inquiries, the threat of House and Senate hearings, and a lawsuit by the American Civil Liberties Union, more than 1,000 plainclothes soldier-agents continue to monitor the political activities of law-abiding citizens.

He asserted that the Army, finding that "the rising tide of criticism could not be ignored,"⁷¹ had issued a series of partial admissions. "In the jargon of the spy trade, such admissions are known as 'plausible denials,' because they are invested with just enough truth to mask an essential falsehood."⁷²

Although a number of senators and congressmen threatened to hold hearings on the Army's intelligence program, only one, Senator Sam J. Ervin, Jr. (Democrat-North Carolina), actually held hearings. In February and March 1971, the Subcommittee on Constitutional

68. See generally J. JENSEN, *THE PRICE OF VIGILANCE* (1968). This is a fascinating study of military surveillance of civilian politics during World War I and is one of the only works to delve into this facet of military operations. Jensen examines the Army's fear of dissenters during the First World War and traces the steps taken by the fledgling MI Branch—then known as the Corps of Intelligence Police—to monitor and control dissent. The Army entered into an extensive liaison relationship with the American Protective League, a vigilante group which sought to identify and neutralize German sympathizers and pacifists. One of the most chilling examples of MI activity in the sensitive area of First Amendment rights occurred in Butte, Montana, in 1917, when a military intelligence party raided a union printing plant with the aid of civilian vigilantes and arrested labor leaders and seized pamphlets. Among the Army raiders was then Major Omar N. Bradley. Apparently the only factor to prevent the enlargement of the Army's largely clandestine domestic police role during World War I was the termination of hostilities and the resultant cutback in appropriations for the MI Branch. *THE PRICE OF VIGILANCE* is must reading for those interested in fully understanding the constitutional implications of the issues raised in *Laird v. Tatum*.

69. The author and Mr. Pyle began their investigation, which is still in progress, in February 1970. In connection with this study, the author has travelled throughout the United States, Canada, and the Virgin Islands to interview scores of former Army agents, as well as civilians affected by the Army's program. Some sources came voluntarily forward while other were developed by Pyle and the author. Many have insisted on total anonymity in exchange for their cooperation.

70. Pyle, *CONUS Revisited: The Army Covers Up*, 2 *THE WASHINGTON MONTHLY*, July 1970, at 49.

71. *Id.* at 50.

72. *Id.*

Rights, chaired by Senator Ervin, heard witnesses on eleven hearing days.⁷³ Although the Subcommittee concerned itself with several issues, most of the hearing days were devoted to MI activities. The 2,164 pages of testimony, documentary evidence, and related materials published by the Subcommittee on Constitutional Rights are, at present, the only reference source on Army domestic spying.⁷⁴ No attempt to outline the extensive material contained in the two volumes published will be made here, but a summary of the hearings is a prerequisite to understanding the analysis of *Laird v. Tatum* which follows this section.

Hearings witnesses testified that an Army agent, in civilian clothes, had attended black studies classes at New York University to monitor one professor and his course material.⁷⁵ Agents had infiltrated racial,⁷⁶ campus,⁷⁷ and religious groups⁷⁸ and had gathered data on virtually every activist group in the United States.⁷⁹ Military intelligence agents attended both national political conventions in 1968, according to witnesses.⁸⁰ At the Chicago Democratic Convention, undercover men with bogus news credentials wandered about with a videotape camera and conducted phony news interviews with protest leaders to determine their future plans.⁸¹ At the Miami Republican Convention, agents drifted aimlessly among the delegates on the convention floor after having been given vague and ill-defined orders to monitor political activity.⁸² One witness related that he penetrated a church-sponsored youth group in Colorado because "one of the founders of the organization had been active in antiwar activities in Colorado Springs. . . ."⁸³ This same agent had orders to spy on local anti-poverty agencies.⁸⁴

73. *Hearings on Federal Data Banks, Computers, and the Bill of Rights Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pts. 1 and 2 (1971) [hereinafter I *Hearings* and II *Hearings* respectively].

74. See STAFF OF SENATE COMM. ON THE JUDICIARY, SUBCOMM. ON CONSTITUTIONAL RIGHTS, ARMY SURVEILLANCE OF CIVILIANS: A DOCUMENTARY ANALYSIS, 92nd Cong., 2nd Sess. (1972). This report analyzes the Army's use of computers in connection with its MI program and is an essential appendix to the two Hearings volumes.

75. I *Hearings* at 290.

76. See statement and testimony of Christopher H. Pyle, I *Hearings* at 147. See also the author's statement and testimony, I *Hearings* at 244.

77. Note 76 *supra*.

78. I *Hearings* at 305 and at 285.

79. I *Hearings passim*. Virtually all of the former MI personnel who testified reported massive data-gathering.

80. I *Hearings* at 185, at 198, and at 274.

81. See Pyle testimony in I *Hearings* at 147.

82. I *Hearings* at 274.

83. *Id.* at 306.

84. *Id.* at 308.

A black agent recounted his assignments to cover anti-war meetings in churches and to cruise the black areas of Washington D.C. in a radio-equipped car, reporting on community activities.⁸⁵ On one occasion this former first lieutenant had to attend a children's Halloween party because refreshment ingredients for the party had been obtained from local stores by a known black militant.⁸⁶ According to this witness, Army intelligence interest extended to the topic of birth control.

Agents from our unit were detailed to attend a conference of dissenting priests from throughout the Washington Archdiocese who were protesting the position that Archbishop O'Boyle had taken in reference to the birth control pill.⁸⁷

To store the information collected by the special agents and provided by other agencies, the Army maintained several computer data banks as well as local intelligence files at approximately 300 Army intelligence field and resident offices throughout the U.S. These data banks contained information on hundreds of thousands of American citizens, much of it obtained from informers and undercover agents. Many of those under surveillance were either young men and women or black Americans, a fact that will be shown to have special relevance in establishing a theory of First Amendment chill caused by the MI program.⁸⁸ To date, the Army has presented no evidence to show that its data banks and local field office files concerning civilians have been destroyed.

Many of the witnesses before the Ervin Subcommittee stated that the Army received much of its information through liaison with other agencies, particularly the Federal Bureau of Investigation. The author, while serving in MI in Washington, received hundreds of F.B.I. reports weekly on individuals and organizations involved in lawful dissent.⁸⁹

The Department of the Army's principal spokesman before the Ervin Subcommittee was Robert F. Froehlke, then Assistant Secre-

85. *Id.* at 288.

86. *Id.* at 289.

87. *Id.*

88. See REPORT ON ARMY SURVEILLANCE, *supra* note 74; author's testimony, I *Hearings* at 264-265 for a representative but very incomplete listing of the organizations monitored by MI.

89. Some reports concerned criminal activity which had no bearing on or relationship to the Army. A small percentage of reports, no more than five percent in the author's estimation, contained information relevant and necessary for the accomplishment of the Army's mission.

tary of Defense (Administration).⁹⁰ Froehlke acknowledged, "Clearly there is no precedent for the scope and intensity of information collection and analysis related to the civilian communities which occurred in the period in question."⁹¹ He described in detail the civil disturbance picture during the period 1967-1970 and explained Army preparations for suppressing civil disturbances.⁹² Dealing directly with the Army's involvement in monitoring civilian affairs, Froehlke depicted most of the Army's effort as directly related to tactical deployment of troops.⁹³ He acknowledged that covert operations had taken place with official approval, in four instances.⁹⁴

Froehlke admitted that "a civil disturbance related covert collection was authorized for an agent to enroll at New York University to monitor a special course entitled 'New Black Revolt,' in early 1968."⁹⁵

Froehlke conceded that as the pressure to obtain information by agent observation increased, "*In some cases, the rather obscure demarcation between direct agent observation and covert collection was probably transgressed.*"⁹⁶ [emphasis added]

Undersecretary Froehlke concluded his testimony by emphasizing the steps then being undertaken by the Department of the Army to limit Army intelligence collection to the minimal amount required for mission preparedness.⁹⁷

In the context of this background, the legal issues can now be examined and weighed.

III. THE LEGAL ISSUES—THE SUPREME COURT AND LAIRD V. TATUM

The plaintiffs in *Laird v. Tatum* sought judicial relief for alleged infringements of their First Amendment rights, and on behalf of other individuals and organizations claiming the same right to engage in lawful political activity without being surveilled by Army agents.

90. Mr. Froehlke is now Secretary of the Army.

91. I *Hearings* at 376.

92. *Id.* at 382-4.

93. *Id.* at 382-6.

94. *Id.* at 387. The four acknowledged operations took place at the following events: the Democratic National Convention in Chicago in August 1968; the March on the Pentagon in October 1967; the June 1968 Washington Spring Project (better known as the Poor People's Campaign); and the presidential inauguration in January 1969. During these operations, agents were admittedly used to infiltrate groups in order to obtain information on personalities and activities associated with the event.

95. *Id.*

96. *Id.* at 388.

97. *Id.* at 392 *et seq.*

In affirming the dismissal below, the Supreme Court has raised many issues which will affect future First Amendment adjudication.

A. *The Chilling Effect*

The rights protected by the First Amendment were recognized in *Dombrowski v. Pfister* to be a public interest "of transcendent value to all society, and not merely to those exercising their rights. . . ."⁹⁸ Any government policies or the acts of government officials which restrain, limit, deter or control individuals in the exercise of First Amendment rights directly conflict with the Supreme Court's finding in *New York Times Co. v. Sullivan* that the First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open. . . ."⁹⁹

The scope of public issues for debate is vast. Some topics are of limited impact and interest, others are far-reaching and charged with controversy and dissension. Throughout history, governments have attempted by various means to suppress dissent by citizens. The First Amendment was designed not only to allow dissent, but to protect and encourage this fundamental right.

In *Laird v. Tatum*, the plaintiffs did not assert that the Army attempted to directly prohibit protest, dissent, or speech. Rather, they maintained that the Army's system of surveillance and data-compilation exerted an unhealthy and inhibiting effect on the exercise of First Amendment rights which deterred Americans from enjoying those constitutional provisions. The absence of a direct intent to prevent speech or lawful dissent does not obviate First Amendment challenges, for as Justice Brennan stated in *Lamont v. Postmaster General*, "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government."¹⁰⁰

The question arising from Justice Brennan's statement is what government activity constitutes the impermissible inhibiting of First Amendment rights? In *Watkins v. United States*, the Court found that where people are identified with views that are "unorthodox, unpopular or even hateful to the general public," there is an injury covered by the First Amendment.¹⁰¹

Perhaps the greatest fear of the *Laird* plaintiffs was the possibility

98. 380 U.S. 479, 486 (1965).

99. 376 U.S. 254, 270 (1964).

100. 381 U.S. 301, 309 (1965) (Brennan, J., concurring opinion).

101. 354 U.S. 178, 197 (1957).

that they or their followers might be the subject of governmental sanctions as a result of their political activity. As the Court noted in *NAACP v. Button*, "The threat of sanctions may deter almost as potently as the actual application of sanctions."¹⁰²

Sanctions for the exercise of First Amendment rights have been attempted. In *Dombroski v. Pfister*, the threat of prosecution under an overbroad state statute was found to chill First Amendment rights. Justice Brennan noted that "Because 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."¹⁰³

Other forms of governmental sanctions besides prosecution may also be employed. Security clearances may be denied, promotions may not come, positions may not be offered, employment may be terminated. To determine whether a First Amendment chill exists, we must look beyond the possibility or probability of prosecution and examine the complained of conduct with reference to the claimed necessity for such activity by government and the impact of the conduct on the complainants.

In *Lamont*, the Supreme Court invalidated a government scheme which required individuals desiring to receive certain types of mail from communist countries to affirmatively indicate such desire before receiving the mail. The case established the proposition that government cannot demand that people act affirmatively in response to government requests for information as a pre-condition for the enjoyment of First Amendment rights. As the lower court noted in *Heilberg v. Fixa*, a companion case decided by the Supreme Court with *Lamont*, the unwillingness of the individual to be identified in the eyes—and files—of government as one interested in unorthodox concepts, groups or individuals is part of a deterrent to the free expression of ideas.¹⁰⁴ Engagement in lawful protest under the eyes and camera lenses of government agents can be seen as an affirmative act of the type struck down in *Lamont*.

Recognizing that identification with a lawful, albeit controversial cause can deter freedom of expression, the court granted an injunction forbidding state law enforcement officers from attending and monitoring union meetings in *Local 309 v. Gates*.¹⁰⁵ Similarly, the Court recognized in *NAACP v. Alabama* that the compelled dis-

102. 371 U.S. 415, 433 (1963).

103. 380 U.S. at 486.

104. 236 F. Supp. 405, 409 (N.D. Cal. 1964).

105. 75 F. Supp. 620 (N.D. Ind. 1948).

closure to government officials of membership lists can result in significant fears on the part of the organization's members that sanctions may follow and that these fears, admittedly not always rational, can act as a chilling deterrent on the members.¹⁰⁶

The *Laird* plaintiffs asserted that the Army's nationwide program created a chilling effect and was so extensive in operation that it could be seen as a "dragnet which may enmesh anyone."¹⁰⁷

Responding to the charges that MI surveillance created an impermissible chill on First Amendment rights, the government advanced a narrow interpretation of *Dombrowski*, arguing that no legal or criminal sanctions threatened any of the plaintiffs.¹⁰⁸ The Army's activity, according to the government, did not require disclosure of membership lists nor did MI operations entail the assumption of affirmative acts by the plaintiffs in order to exercise their rights. The government, noting that the plaintiffs acknowledged that the Army had a lawful civil disturbance mission, urged the Court to apply a balancing test to the situation at bar.¹⁰⁹

The lack of an evidentiary record precludes discussion of the actual Army practices which led to the *Laird* plaintiffs' chilling effect claims in this part of the comment (see Conclusion). The government's contention that a balancing test should be employed raises the fundamental question whether First Amendment rights may be balanced against activities adopted in the pursuit of lawful governmental policies and practices.

The circumscription of First Amendment rights as a corollary to executing a valid governmental function has been found constitutionally repugnant "less under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer."¹¹⁰ The standard to be applied cannot simply be an inquiry into the nature and extent of the lawful state police power "but whether the means chosen to achieve a legitimate end are so sweeping that fundamental personal liberties are stifled."¹¹¹ The balancing test was clearly rejected by the Court in *United States v. Robel* where the Court declared,¹¹²

106. 357 U.S. 449 (1958).

107. *Herndon v. Lowry*, 301 U.S. 242, 263 (1937); Appellants' Brief at 16, *Tatum v. Laird*, 444 F.2d 947 (D.C. Cir. 1971).

108. Petitioners' Brief, *supra* note 30, at 24.

109. *Id.* at 2 *et seq.*

110. *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966).

111. *Davis v. Francois*, 395 F.2d 730, 734 (5th Cir. 1968).

112. 389 U.S. 258, 268, n.20 (1967).

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.

In attempting to create a concept of balancing interests in *Laird v. Tatum*, the defendants sought to rely not on statutory enactments which clearly contain neither reference to nor mandate for the MI domestic program, but on directives of Department of Defense and Department of the Army officials interpreting their scope of authority under the statutes.¹¹³

In *Laird*, we do not find a clear conflict between statutes and First Amendment rights. There is, however, a sharp and clear conflict between Department of the Army directives, the claimed authority for which is statutory, and the individual's First Amendment rights.

B. *Justiciability, Separation of Powers and the Standing Question*

The value of the First Amendment to the American concept of society and government has resulted in the creation of a standard for justiciability in First Amendment cases which is less restricted

113. 10 U.S.C. §§331-333 (1970). See I *Hearings* 375 *et seq.*, testimony of Under Secretary of Defense Froehke. II *Hearings* contains numerous Department of the Army directives concerning the collection of information about civilian organizations and personalities by MI. It is interesting to note that the Army civil disturbance plans cite no authority in law. The author, based on his experience, believes that the challenged Army program arose largely because military officers, inadequately and insufficiently supervised by civilian superiors, consistently and disastrously misinterpreted the source and nature of urban strife and rioting. It appeared to the author that many of these high-ranking officers were convinced that urban rioting was initiated because of conspiratorial activity on the part of a number of protest groups and their leaders. Insulated from frequent and meaningful contact with civilian communities, many of the Army's top-ranking generals were unable to grasp and comprehend the complex political, socio-economical and historical background which contributed to the outbreak of tragic violence in American cities. The legal arguments advanced by the government at various stages of *Laird* as authority for the MI program were, in the opinion of the author, afterthoughts brought on by the need to litigate the questions raised. In 16 months of Pentagon duty, the author never heard any high-ranking officer or civilian superior enunciate, much less question, the existence of a legal authority for the Army's program of surveillance and data-compilation.

than one employed in cases not involving basic rights.¹¹⁴ In *Reed Enterprises v. Corcoran*,¹¹⁵ the Court found,¹¹⁶

Where 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.

With reference to the relationship between sanctions and justiciability, the Court in *Wolff v. Selective Service Local Board No. 16* noted:¹¹⁷

It has been held repeatedly that the mere threat of the imposition of unconstitutional sanctions will cause immediate and irreparable injury to the free exercise of rights as fragile and sensitive to suppression as the freedoms of speech and assembly. . . . Since it is the mere threat of unconstitutional sanctions which precipitates the injury, the courts must intervene at once to vindicate the threatened liberties.

The Army's activity in itself may be a sanction against the exercise of First Amendment rights. The acknowledgement in *Heilberg v. Fixa*, that identification with unorthodox views by government can act as a deterrent to lawful political participation makes obvious the concept that sanctions are not limited, as they were in *Dombrowski*, to possible or probable formal prosecutions. The very surveillance itself, especially at private meetings, is a form of forced disclosure of membership. It identifies persons at meetings whether or not they hold the unorthodox viewpoint espoused by a particular faction. Even if they do agree with the views of the speaker or organization there is clearly no right to compel such identification.

A determination of justiciability cannot await a finding that the challenged program is actually succeeding through design or chance in deterring lawful activity. Referring to the situation challenged in *Dombrowski*, the Court stated, "The chilling effect upon the exercise of First Amendment rights may derive from the fact of its prosecution, unaffected by the prospects of its success or failure."¹¹⁸ If the view is accepted that a program of surveillance can, in some circumstances, be interpreted as a prosecution of a non-judicial

114. *National Students Association v. Hershey*, 412 F.2d 1103 (D.C. Cir. 1969).

115. 354 F.2d 519 (D.C. Cir. 1965).

116. *Id.* at 523.

117. 372 F.2d 817, 824 (2nd Cir. 1967).

118. 380 U.S. at 487.

nature, justiciability exists without a statement that the challenged activity has achieved its chilling effect.

Chief Justice Burger, writing for the *Laird* majority, found that "it is not the role of the judiciary, absent actual present or immediate threatened injury resulting from unlawful governmental action" to investigate an activity initiated and directed by the Executive Branch.¹¹⁹ Departing from precedent in First Amendment cases, he denied justiciability, stating that:¹²⁰

[W]hen presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

The court improperly denied the plaintiffs the opportunity to prove their case because the majority refused to acknowledge that the plaintiffs, in their original complaint, had alleged actual First Amendment injury to themselves and, further, had alleged that the Army had conducted covert operations; they had been unable to substantiate these charges without witnesses. That no evidence existed in the trial court record to indicate covert infiltration of private events is attributable solely to the refusal of Judge Hart to permit witnesses to be heard in the District Court.

Plaintiffs maintained, in their brief before the Supreme Court, as did the *amici* in their brief, that evidence could and would be introduced at a trial court hearing to show both the nature of the chilling effect upon the plaintiffs and the extent of MI clandestine operations. The majority, while making no reference to these allegations, took note of material filed by the Solicitor General which included Army and Defense Department directives relating to MI activities and commented,¹²¹

[T]hese directives indicate that the Army's review of the needs of its domestic intelligence activities has indeed been a continuing one and that those activities have since been significantly reduced.

119. 408 U.S. at 15.

120. *Id.*

121. *Id.* at 8.

In fact, the degree of MI reduction in surveillance and data-compilation was highly contested by the plaintiffs in their brief and by the knowledgeable *amici*. The Court's reliance on the government directives did not, in any event, adjudicate the legality of the challenged program. Even if the practices of MI had been curtailed or halted,¹²²

[T]he voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing. For if the case were dismissed as moot appellants would be "free to return to . . . [their] old ways."

The Army practices, while largely expanded in the 1967-70 period, began in 1917. The author personally had access to a vast number of reports on civilians from the 1940s and 1950s. The activity was deeply rooted; only the subjects which interested MI seemed to change, *i.e.*, left wing organizations in the 1950s, new left, black and youth groups in the 1960s.

The Court found that the plaintiffs lacked standing. To do this, the majority seized on a statement by plaintiffs' counsel during oral argument before Judge Hart.¹²³ Counsel had stated that the plaintiffs were not cowed or chilled, but rather represented those Americans who would not and could not put themselves under public scrutiny and feared MI surveillance. Obviously, the *Laird* plaintiffs were not so immobilized as to be unable to initiate a suit. In view of their pre-hearing assertion that they had been affected and inhibited by the Army's program, it is difficult to understand the Court majority's interpretation of and reliance on one statement. The Court used one oral statement to negate all of plaintiffs' claims of First Amendment injury, ignoring all of plaintiffs' other assertions.

Even assuming, *arguendo*, that the *Laird* plaintiffs, or other activists bringing a future suit based on a chilling effect claim related to government activities, are actually not themselves chilled, the Court's decision may significantly narrow the protection of First Amendment freedoms as a practical reality.

If activists cannot raise the question of the chilling effect unless they are personally cowed—and leaders are sometimes less vulnerable than average citizens—and such actions can be brought only by the personally chilled, can we expect many challenges to First Amendment inhibiting practices? As the brief *amici* pointed out to the

122. *Gray v. Sanders*, 372 U.S. 368, 376 (1963).

123. *See Tatum v. Laird*, 444 F.2d 947, at 959 (D.C. Cir. 1971), where a portion of the transcript from the District Court hearing is reproduced.

Court, by requiring that litigants be either intimidated or demonstrate having been harmed in addition to intimidation, "the Government would place all dissenters in the classic 'Catch 22' dilemma: they can invoke their rights if they are immobilized by fear, but if they really were immobilized by fear, they would not invoke their rights."¹²⁴

The reality, of course, is that political activism cannot exist without followers as well as leaders, and if average Americans are deterred from exercising their First Amendment rights, those rights cease to be a public interest "of transcendent value to all society."¹²⁵ As Mr. Justice Brennan noted in *Lamont*, "It would be a barren marketplace of ideas that had only sellers and no buyers."¹²⁶ The Supreme Court's ruling in *Laird* may lay the foundation stone for that marketplace.

C. *The Role of Mr. Justice Rehnquist*

Before appointment to the Supreme Court, Mr. Justice Rehnquist was an Assistant Attorney General in the Department of Justice's Office of Legal Counsel.¹²⁷ In that capacity, he appeared on March 9, 1971 and March 17, 1971 at the Ervin Hearings to explain the Justice Department's role in MI surveillance of lawful political activity.¹²⁸ During the hearings, he testified at length about the legality of military intelligence operations and directly presented his viewpoint on *Laird v. Tatum*. At one point, in response to a question from Senator Ervin, he stated:¹²⁹

My only point of disagreement with you 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

124. Brief for Tatum, *et al.*, as *Amici Curiae*, *supra* note 37, at 11. The "Catch 22" reference is to Joseph Heller's novel of the same name. In Heller's novel, an Army Air Force bombardier during World War II requested relief from combat duty because he thought everyone was planning to kill him. The only way out of flying for the bombardier was Catch 22

which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind . . . All he had to do was ask; (to be relieved from flying) and as soon as he did, he would no longer be crazy and would have to fly more missions.

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

126. 381 U.S. at 308.

127. Respondents' Motion to Recuse Mr. Justice Rehnquist *Nunc Pro Tunc* at 4, *Laird v. Tatum*, 408 U.S. 1 (1972).

128. *See I Hearings* at 597-654 and at 849-914.

129. *Id.* at 864.

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.

Rehnquist's statement then is similar to the conclusion later reached by the Court majority in *Laird* and is based on the same theory of standing and chilling effect doctrine.¹³⁰

The plaintiffs, in their motion to recuse Mr. Justice Rehnquist, cited Canons 2 and 3 of the Final Draft of the Code of Judicial Conduct.¹³¹ They relied also on lower federal court decisions recusing other judges "under circumstances similar to those of Mr. Justice Rehnquist in the case at bar."¹³²

Had Justice Rehnquist abstained from voting, the Court of Appeals decision would have been affirmed by the vote of an equally divided court. By casting the decisive vote, Mr. Justice Rehnquist prevented the activists from obtaining the evidentiary hearing they sought and upheld his seemingly preconceived position regarding the merits of the case.

Justice Rehnquist, on October 10, 1972, in an unprecedented action, issued a 16 page memorandum in which he denied the motion for recusal and explained his position.¹³³ Acknowledging that he had appeared as an expert witness during the Hearings,¹³⁴ he denied having any involvement in the *Laird* litigation while serving in the Department of Justice.¹³⁵ The Associate Justice maintained that he

130. 408 U.S. at 1-16.

131. Canon 2. A judge should avoid impropriety and the appearance of impropriety in all his activities.

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3. A judge should perform the duties of his office impartially and diligently.

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.

132. Respondents' Motion for Recusal, *supra* note 127, at 10.

133. Memorandum of Mr. Justice Rehnquist (October 10, 1972), *Laird v. Tatum*, 93 S. Ct. 7 (1972).

134. *Id.* at 8-9.

135. *Id.* at 10.

had been informed of the case as background preparation for his testimony as a Department of Justice representative at the Hearings.¹³⁶

In his memorandum, Mr. Justice Rehnquist admitted supervising the preparation of a memorandum of law on *Laird v. Tatum* in response to a request from Senator Hruska, a member of the Subcommittee on Constitutional Rights.¹³⁷ Although no copy of the memorandum for Hruska is apparently available, Justice Rehnquist admitted that he "would expect such a memorandum to have commented on the decision of the Court of Appeals in *Laird v. Tatum*" ¹³⁸

He stated, however, that he would never participate, as an Associate Justice, in a case in which he had signed a pleading or brief or actively participated prior to being appointed to the Supreme Court.¹³⁹ Thus he found no grounds for mandatory recusal.

Mr. Justice Rehnquist proceeded to examine the question of discretionary recusal.¹⁴⁰ Discretionary recusal is indicated where a judge had a previous relationship with a party to a litigation to such a degree that impropriety would be suggested by the judge's failure to recuse himself.¹⁴¹ He found, however, that he had

no hesitation in concluding that my *total* lack of connection while in the Department of Justice with the *defense* of the case of *Laird v. Tatum* does not suggest discretionary disqualification here because of my previous relationship with the Justice Department.¹⁴² [emphasis added]

The Associate Justice also stated that "none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench."¹⁴³

Justice Rehnquist acknowledged that "fair minded judges might disagree about the matter,"¹⁴⁴ which he admitted was a "fairly debatable one."¹⁴⁵ The Justice urged as a countervailing argument

136. *Id.* at 9-10.

137. *Id.* at 10.

138. *Id.*

139. *Id.*

140. *Id.* at 11.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 14.

145. *Id.*

that, when not disqualified, judges have a duty to sit which is equally strong to the duty to recuse when indicated.¹⁴⁶

Mr. Justice Rehnquist's final argument for participating is intriguing.¹⁴⁷

The prospect of affirmance by an equally divided Court, unsatisfactory enough in a single case, presents even more serious problems where *companion cases reaching opposite results are heard together here*. [emphasis added]

The Associate Justice noted that "the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided court."¹⁴⁸ He then found that "the consequence attending such a result is, of course, that the principle of law presented by the case is unsettled."¹⁴⁹

The Associate Justice failed to realize that affirmance by an equally divided Court in *Laird v. Tatum* would merely insure that the plaintiffs obtained an opportunity to present evidence and make a record upon which the Supreme Court could, at a later date, concretely base a substantive review. Further, there were no companion cases to *Laird v. Tatum* before the Court. Mr. Justice Rehnquist must have been aware of the enormous quantity of material unearthed during the Hearings, at which he himself testified, which strongly indicated that the *Laird* litigants could present evidence dealing with the issues raised by both the Supreme Court majority and the Court of Appeals dissent. Rather than settle a point of law, Mr. Justice Rehnquist's participation insured the continuance of a state of confusion.

It is also difficult to accept the analogies constructed by Mr. Justice Rehnquist to liken his participation to that by previous Justices. Justice Rehnquist was correct in stating in his memorandum that Chief Justice Hughes and Mr. Justice Frankfurter had both been involved in writing books, encouraging the enactment of legislation, and commenting on matters of legal controversy before coming to the Supreme Court.¹⁵⁰ Neither, however, had participated in a case as politically charged as *Laird v. Tatum*, and on behalf of the Executive Branch so soon before being appointed to the Court, as Justice Rehnquist did.

146. *Id.* at 15.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 12.

Such problems as may follow an affirmance by an equally divided Court are of little import compared with the serious ethical dilemma Mr. Justice Rehnquist's participation in *Laird v. Tatum* has posed for himself, the Court and the Constitution.

IV. CONCLUSION

An examination of the Ervin Hearings provides ample data upon which an analysis of the Army's activities can be made. The record reveals not an attempt by the Army to ignore or supplant civil and constitutional authority, but rather a program that can be characterized as at once coordinated and out of control, supervised and running free, benevolent and malign.

In July 1967, racial violence broke out in Detroit, Michigan, with such intensity that federal military assistance was urgently required to restore order with a minimum of bloodshed. Simultaneous outbreaks occurred, with varying degrees of intensity, in a number of cities. The Army was not prepared; it had little or no relevant tactical intelligence. So little information was available that the author, on duty in the Pentagon's Army Operations Center, received a frantic call for information from an Army staff officer in Detroit who stated that Lieutenant General Throckmorton, the Army commander on the scene, was positioning his airborne troops with the aid of an oil company road map.

Faced with the possibility of further outbreaks of violence at a time when troop strength in the United States was low because of the Vietnam war, the civilian and top military officers ordered MI to prepare for future civil disturbances and, if possible, predict further outbreaks. Very little guidance was given the General Staff MI analysts or the special agents in the field as to what preparation was necessary or what information was relevant and desired.¹⁵¹

In the two-and-one-half years between the Detroit riots and the first Pyle article, MI engaged increasingly in a widespread system of domestic surveillance and data-accumulation, largely without the knowledge and approval of civilian superiors.¹⁵²

The United States Army Intelligence Command, the component

151. The author, for example, was ordered by a superior officer to assume his duties with the simple command, "From now on, you're Mr. New Left in the Pentagon. Start a desk."

152. The failure of the appointed civilian superiors in the Department of Defense and the Department of the Army to discover that the Army, and MI in particular, was running a nationwide surveillance operation has, of course, serious constitutional implications in itself with which this comment cannot deal.

responsible for most of the MI agents in the country,¹⁵³ issued increasingly ambitious and far-flung collection requirements.¹⁵⁴ Before the end of 1967, an initial concern with racial violence had led to requirements that special agents monitor virtually every form of dissent in the United States.

As direct agent coverage increased, other agencies, especially the Federal Bureau of Investigation, responded to Army requests for information by sending extensive classified reports reflecting information collected from covert and other sources on the politics of dissent.

To maintain this data, several computerized data banks were established. The largest and the most complete was at the United States Army Investigative Records Repository at Fort Holabird, Maryland.

A phenomenon known as bureaucratic accretion and the application of military institutional paradigms, a not surprising development, assured that the data banks would grow immensely. The majority of participants in the MI program saw their activities as being in the best interests of the American people, rather than as creating a threat to liberty. Of particular relevance is the warning by Mr. Justice Brandeis, dissenting in *Olmstead v. United States*:¹⁵⁵

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasions of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding.

Such men largely directed and carried out the Army's program. In a disquieting minority of instances, individuals of relatively low rank undertook operations which, when made public, astounded and embarrassed their superiors.¹⁵⁶

153. A small number of agents assigned to combat units came under the command of the Continental Army Command, Fort Monroe, Virginia. Most MI special agents were assigned to the U.S. Army Intelligence Command, Fort Holabird, Maryland. These agents, working out of field and resident offices throughout the country, were primarily involved in conducting routine background checks—known as Personnel Security Investigations—on individuals entering the Armed Forces and the Army in particular. This activity was not challenged by the plaintiffs in *Laird v. Tatum*.

154. See II *Hearings passim* for a sampling of these mission requirements. See also testimony of former special agents and other Army personnel in I *Hearings*.

155. 277 U.S. 438, 479 (1928).

156. See the testimony of former Army Staff Sergeant John M. O'Brien in I *Hearings* at 100 *et seq.* O'Brien's revelation that he had been directed to monitor the activities of elected officials in the Chicago area, including U.S. Senator Adlai E. Stevenson III, shocked the entire nation and led to a court challenge to MI practices in the Chicago

A large part of the MI effort involved monitoring youth and campus groups. Information from a number of agencies was regularly transmitted to the Army with reference to youth involvement in antiwar and campus activities. The Army is predominantly composed of young men and women. It is naive to deny the very considerable chilling effect which this Army activity exerts on a wide range of America's young men and women who might one day serve in the Army. Anonymity is a vital component of the right to protest for many.¹⁵⁷ Stripped of this anonymity by an intelligence system which recorded, but never deleted, many Americans would undoubtedly consider themselves to be identified with unorthodox viewpoints by government. Participation would diminish from the resultant chill of First Amendment rights. Had an evidentiary hearing been granted in *Laird v. Tatum*, the plaintiffs' allegations of chilling effect might well have been substantiated using this vast group alone.

The Army's activities exerted a chill on other groups too. One of the most informative experiences ever encountered by the author occurred in 1970, in Detroit, during the taping of an interview show. The host was a leading black militant, the audience represented diverse segments of black Detroit and the topic was MI surveillance. When questions were solicited from the audience, the first question, to the author's temporary confusion, was "Does the Army have a King Alfred plan?" The audience became visibly uneasy and distressed. The host explained that the "King Alfred plan" was the creation of black novelist John Williams in his work, *The Man Who Cried I Am*. The fictional plan was a government operation for the

area. The action, *ACLU v. Laird*, 463 F.2d 499 (7th Cir. 1972) was brought by a number of political activists allegedly under surveillance by MI personnel in Illinois. The action was dismissed by the District Court after an evidentiary hearing in which much material was brought to public attention. The seriousness of the hearing was tempered somewhat when a career MI civilian intelligence officer, responding to O'Brien's charge that MI had harassed civilians by dispatching unordered pizza pie to the homes of political activists, firmly asserted that he and the members of his unit had ordered fried chicken instead for the activists. The dismissal was affirmed by the Court of Appeals for the Seventh Circuit with *Laird v. Tatum* being cited as controlling. The Supreme Court denied certiorari, 41 U.S.L.W. 3376 (U.S. Jan. 19, 1973).

157. See Address by Senator Sam J. Ervin, Jr., March 2, 1970, in Appendix to Appellants' Brief at 68-69, *Tatum v. Laird*, 444 F.2d 947. See A. WESTIN, *PRIVACY AND FREEDOM* (1967), the seminal work on the role of and need for privacy and individual autonomy in our society. See also A. MILLER, *THE ASSAULT ON PRIVACY* (1971), an excellent study of the threat to privacy posed by technological advances. Police surveillance is an increasing problem as police departments expand their capacity for intelligence operations of a type formerly conducted only by federal agencies in internal security matters. A study of the First Amendment problems inherent in such activities is well covered in F. Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication*, 22 STAN. L. REV. 196 (1970).

annihilation of black Americans in a manner reminiscent of Hitler's genocidal schemes. Despite assurances by the author that no such plan existed, the audience's fear, irrational yet profoundly disturbing, demonstrated the effect a government program of surveillance can have on a minority group. Without an evidentiary hearing, the Supreme Court, of course, had no inkling that such a response to MI activities may be felt by a wide range of Americans.

It cannot be gainsaid, however, that the Army must have some pre-commitment information to avoid repetitions of the oil company road map fiasco in Detroit. According to Senator Ervin,¹⁵⁸

The business of the Army . . . is to know about the condition of highways, bridges, and facilities. It is not to predict trends and reactions by keeping track of the thoughts and actions of Americans exercising First Amendment freedoms Regardless of the imagined military objective, the chief casualty of this overkill is the Constitution of the United States, which every military officer and every appointed official has taken an oath to defend.

In *Powell v. McCormack*, the Court affirmed that in our country living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government . . . have been exercised in conformity of the Constitution.¹⁵⁹

The Supreme Court failed to live up to that standard in *Laird v. Tatum* by refusing to allow American citizens the opportunity to prove that the Army was not exercising its powers in conformity with the Constitution. There may not be a second chance to try this issue. All the former Army personnel who revealed information about the MI program were citizen-soldiers serving one tour of duty in wartime. Career professionals did not step forward as is understandable. With the end of the Vietnam war and the transition to a volunteer Army, it is likely that a future MI surveillance program could operate to the possible detriment of millions of Americans with little information, especially of a probative nature, reaching the American public.

Already, other actions are being dismissed based on the Supreme

158. Appellants' Brief, *supra* note 59, at 68-69.

159. 395 U.S. 486, at 506 (1969).

Court's decision in *Laird v. Tatum*.¹⁶⁰ Mr. Justice Douglas, whose opinions ring true with a love for First Amendment freedoms, said in his dissent in *Laird v. Tatum*:¹⁶¹

This case is a cancer in our body politic. It is a measure of the disease which afflicts us. Army surveillance, like Army regimentation, is at war with the principles of the First Amendment. Those who already walk submissively will say there is no cause for alarm. But submissiveness is not our heritage. . . . The Bill of Rights was designed to keep agents of government and official eavesdroppers away from assemblies of people. . . . There can be no influence more paralyzing of that objective than Army surveillance. When an intelligence officer looks over every nonconformist's shoulder in the library or walks invisibly by his side in a picket line or infiltrates his club, the America once extolled as the voice of liberty around the world no longer is cast in the image which Jefferson and Madison designed. . . .

160. See e.g., *Donohoe v. Duling*, 465 F.2d 196 (4th Cir. 1972), a challenge to police coverage of protest meetings, which was dismissed on August 1, 1972. In *Donohoe*, 42 individual plaintiffs sought to represent those made timorous by the presence of police observers who photographed individual participants. The court majority, citing *Laird v. Tatum*, found that the plaintiffs had failed to show a chilling effect injury to themselves as a result of defendant's activities, and therefore they would not be permitted to represent those who were allegedly so affected.

161. 408 U.S. at 28.