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Constitutional Law - Civilians' Claim that Army's Datgathering System Works a Chilling Effect on Their First Amendment Rights Held Not Be a Justiciable Controversy Absent Showing of Objective Present Harm or Threat of Future Harm

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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW — CIVILIANS' CLAIM THAT ARMY'S DATA-GATHERING SYSTEM WORKS A CHILLING EFFECT ON THEIR FIRST AMENDMENT RIGHTS HELD NOT TO BE A JUSTICIABLE CONTROVERSY ABSENT SHOWING OF OBJECTIVE PRESENT HARM OR THREAT OF FUTURE HARM.

Laird v. Tatum (U.S. 1972)

The plaintiffs, a group of civilians forming the Central Committee for Conscientious Objectors, brought a class action[1] in the United States District Court for the District of Columbia,[2] seeking declaratory and injunctive relief on a claim that their first amendment right to freedom of expression was being infringed by the United States Army's surveillance of the group's activity. The Army, in response, characterized its activities as the lawful gathering and storing of information necessary for the intelligent deployment of military resources in the event of civil disturbances,[3] based on the constitutional[4] and statutory[5] authority and duty of the President to use the armed forces as he deems necessary to suppress any domestic insurrection or violence.

The district court granted the Army's motion to dismiss because there was no showing of inhibitory effect on the plaintiffs, holding that the case was not justiciable.[6] The court of appeals reversed and remanded, holding that the plaintiffs' complaint of a "chilling effect" on the exercise of their first amendment rights caused by the existence of the intelligence-gathering and distributing system, if unauthorized as alleged, created a "chilling effect" on the plaintiffs' exercise of first amendment rights.[7]

Upon appeal, the United States Supreme Court reversed, *holding* that the alleged "chilling effect" on the rights of the plaintiffs, due to the Army's surveillance alone, did not constitute a sufficient showing of

1. FED. R. CIV. P. 23. For an analysis of the class action and Rule 23, *see generally* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 375-400 (1967).
2. The district court's opinion is unreported.
3. Tatum v. Laird, 444 F.2d 947, 949 (D.C. Cir. 1971).
4. U.S. CONST. art. IV, § 4, provides:
The United States . . . shall protect each of [the individual States] . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.
5. 10 U.S.C. § 331 (1970), 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.
6. *See* Laird v. Tatum, 408 U.S. 1, 2 (1972).
7. Tatum v. Laird, 444 F.2d 947, 958 (D.C. Cir. 1971).

objective harm or threat of specific future harm to be justiciable. *Laird v. Tatum,* 408 U.S. 1 (1972).

The jurisdiction of the federal courts is limited by article III, section 2, of the United States Constitution to certain "cases" and "controversies."[8] Thus, to invoke federal jurisdiction, a litigant must present a case or controversy in order to show that his claim is "justiciable."[9] Courts have held that this requires the dispute to be concrete; that is, it must exist between parties whose interests are clearly adverse to one another, in order that distinct legal issues be presented for judicial analysis.[10] An ancillary purpose is to draw the boundaries between the judicial and the political branches of government.[11] This serves to prevent idle judicial speculation into areas within the other branches' responsibility.[12]

In testing cases for justiciability, the courts consider a "blend of constitutional requirements and policy considerations."[13] Basic considerations include: the impact on the litigants of a present denial of judicial relief,[14] the preference not to decide a constitutional question in advance of the necessity for deciding it,[15] and the avoidance of the creation of rules of constitutional law broader than are required by the precise facts in a given case.[16]

With regard to the degree of harm a plaintiff must show in order to challenge authority for governmental action,[17] a policy has developed that

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8. U.S. CONST. art. III, § 2, provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . . to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States . . . .

9. Flast v. Cohen, 392 U.S. 83, 94–97 (1967).

10. *See, e.g.,* United States v. Johnson, 319 U.S. 302 (1943); Muskrat v. United States, 219 U.S. 346 (1911); Chicago & G.T. Ry. v. Wellman, 143 U.S. 339 (1892).

11. *See* Flast v. Cohen, 392 U.S. 83, 93 (1967); Frothingham v. Mellon, 262 U.S. 447, 489 (1923). *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

12. Thus, federal courts will not issue advisory opinions, since the parties would lack the necessary adverseness, and the issues would not be concretely presented. *See, e.g.,* Muskrat v. United States, 219 U.S. 346 (1911); Comment, *The Advisory Opinion and the United States Supreme Court,* 5 FORD. L. REV. 94 (1936).

13. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 156 (1951) (Frankfurter, J., concurring). In Poe v. Ullman, 367 U.S. 497, 508–09 (1961), the Court stated:

> Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought.
>
> The much-argued question of which requirements are constitutionally compelled will not be explored here.

14. *See, e.g.,* Poe v. Ullman, 367 U.S. 497 (1961); Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967).

15. *See, e.g.,* Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945); Ashwander v. TVA, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring). *See generally* M. HART & M. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

16. *Id.*

17. Some showing of harm is necessary to assure sufficient interest of the plaintiff in the case so that the issues will be vigorously argued in an adversary context. *Cf.* text accompanying note 10 *supra.*

"the mere existence of a statute, regulation, or articulated policy is ordinarily not enough to sustain a judicial challenge, even by one who reasonably believes that the law applies to him and will be enforced against him according to its terms."[18] This policy has been applied under the doctrines of "ripeness" — whether the plaintiff's case is sufficiently developed to be heard by a federal court[19] — and "standing" — whether the plaintiff is sufficiently distinguishable from the general public to raise the particular claim.[20] Under either doctrine (for the purposes of this note referred to hereinafter as "ripeness"), the policy serves to prevent the courts from becoming entangled in abstract disagreements until the effects of the alleged harm are felt in some concrete manner.[21]

A leading case applying this principle was *United Public Workers v. Mitchell*,[22] in which several federal employees and a labor union sought to have declared unconstitutional a provision of the Hatch Act, prohibiting them from taking any active role in political campaigns. The Court described the justiciability question as a continuum, ranging from allegations of general threats by officials to enforce all laws they were charged with administering, to allegations of direct threats aimed at a particular person who had completed a specific act. Suits arising from those threats nearer the "general" end of the spectrum were not justiciable, while those nearer the "direct" end were.[23] The plaintiffs in *Mitchell* had alleged generally that they desired to engage in political campaigns, and had listed specific

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18. National Student Ass'n v. Hershey, 412 F.2d 1103, 1110 (D.C. Cir. 1969) (footnote omitted).

19. *See, e.g.*, International Longshoremen's & Warehousemen's Union v. Boyd, 347 U.S. 222 (1954); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

20. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962). Speaking for the majority, Justice Brennan stated:

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.

Id. at 204.

In the instant case, the Court briefly mentioned standing without discussing it fully or applying it to the decision. 408 U.S. at 13–14 n.7.

21. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 148–49 (1967), in which the Court stated:

> Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . until . . . [a] decision has been formalized and its effects are felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Id. With the addition of the factor of the hardship to the parties, the *Abbott Laboratories* test for "ripeness" would thus allow for some deficiencies in the fitness of the issues for judicial determination. *Cf.* L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTIONS 396 (1965), in which Professor Jaffee observed:

> Ripeness should not be determined by formula but by a reasoned balancing of certain typical and relevant factors for and against the assumption of jurisdiction.

For a similar discussion, *see* Davis, *Ripeness of Governmental Action for Judicial Review*, 68 HARV. L. REV. 1122, 1133 (1955), wherein the author concluded that "courts are free to define ripeness on a case-by-case basis, since 'cases' and 'controversies' of Article III are the only relevant words in the Constitution."

22. 330 U.S. 75 (1947).

23. *Id.* at 88.

acts, such as soliciting votes, acting as poll watchers, organizing political campaigns, and serving as party ward committeemen.[24] One of the plaintiffs also alleged that he had actually offered to help his party by being a watcher at the polls, but was deterred from doing so, by an office of the Civil Service Commission which had warned him that such activity would cost him his job.[25] Despite these allegations, the Court held there was no justiciable controversy, characterizing the Commission's threats as speculative.[26]

In *Adler v. Board of Education*,[27] a state statute prohibited the employment in public school of any person who advocated the overthrow of the government by force, or who belonged to an organization that had such aims, or who uttered any treasonable or seditious words. The plaintiffs, who asked for a declaratory judgment invalidating the statute, were taxpayers, parents of attending school children, and teachers. In contrast to the *Mitchell* case, the Court reached the merits without any discussion of "ripeness," even though the teachers did not allege that they had engaged in the proscribed conduct or that they had any intention of doing so in the future.[28] As these two cases suggest, the factors which are applied in determining ripeness are many and are weighted differently, depending upon the particular factual situation. And, as Professor Bickel has observed, the estimation of ripeness in a given case often depends upon the judge's determination of the substantive issues.[29]

The requirement of a direct and imminent harm to the plaintiff has been relaxed somewhat where there is a "chilling effect" on first amendment rights.[30] The Court's use of the "chilling effect" doctrine has been described as follows:

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24. *Id.* at 82–83 n.11.

25. *Id.* at 87–88 n.18.

26. *Id.* at 89–90. Speaking for the Court, Justice Reed noted:

> We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other.

Id. at 90 (footnote omitted).

27. 342 U.S. 485 (1952).

28. *Id.* at 504 (Frankfurter, J., dissenting). It is submitted that these two cases may be distinguished on the basis of the Court's willingness to decide the issue at a given time. *Adler* involved a situation with which the Court was more familiar. *Cf., e.g.,* Garner v. Board of Pub. Works, 341 U.S. 716 (1951). *See* note 29 *infra.*

29. A. BICKEL, *supra* note 11, at 169–70. Professor Bickel noted:

> It [ripeness] constitutes an extension of the requirement of concreteness which, at its minimum of pure standing, is justly erected into a constitutional principle. Yet, though quite significant, the concept of ripeness of the case does not operate independently, and is not alone decisive. As I have shown, it is in substantial part a function of a judge's estimate of the merits of the constitutional issue. A case may be ripe for one judge but not for another, depending not on their understanding of the fixed concept of ripeness but on the contours of the ultimate constitutional principle each would evolve and apply.

Id.

30. *See* National Student Ass'n v. Hershey, 412 F.2d 1103, 1111–13 (D.C. Cir. 1969). Other well-established principles of judicial discretion have been similarly affected, including the federal abstention doctrine, Dombrowski v. Pfister, 380 U.S. 479 (1965) (civil rights organization sought to restrain legislative committee from

> To give these freedoms the necessary "breathing space to survive," . . . the Court has modified traditional rules of standing and prematurity. We have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our over-riding duty to insulate all individuals from the "chilling effect" upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise.[31]

Thus, the concept of "chilling effect" comes into play when governmental action inhibits — not necessarily prohibits — the exercise of first amendment rights.[32] The peculiar feature of such suits is that "immediate and real injury is done to the plaintiff if he *does not* speak or act as he says he wants to."[33] Thus the alleged harm seems to be not the threatened reprisal, however imminent or remote, but the inability to speak one's mind because of the threat.[34]

As the court of appeals noted in the instant case, virtually all of the cases dealing with the "chilling effect" doctrine may be classified in three categories:

(1) Cases where a legal or criminal sanction was imposed or threatened to be imposed on persons exercising their first amendment rights.

(2) Cases invoking some element of governmental compulsion, either to testify regarding one's political beliefs or to identify oneself in order to exercise first amendment rights.

(3) Cases in which the Government threatened to publicize the names of allegedly politically controversial persons for the purpose of inhibiting the exercise of their First Amendment rights.[35]

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prosecuting or threatening to prosecute them under vague criminal statutes), the exhaustion of remedies doctrine, Wolff v. Selective Serv. Bd. No. 16, 372 F.2d 817 (2d Cir. 1967) (selective service registrants sought reclassification after their student deferments had been revoked due to their participation in anti-war demonstrations), and the doctrine as to standing to raising the rights of third parties. United States v. Raines, 362 U.S. 17, 21–22 (1960) (United States brought action to enjoin state officials from discriminating against Blacks who desired to register to vote in state elections); NAACP v. Button, 371 U.S. 415, 428 (1963) (civil rights organization sought to enjoin enforcement of state statute concerning solicitation of legal business); Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940) (individual appealed conviction under vague anti-picketing statute). *But see* Younger v. Harris, 401 U.S. 37 (1971).

31. Walker v. City of Birmingham, 388 U.S. 307, 344–45 (1967) (Brennan, J., dissenting).

32. Laird v. Tatum, 408 U.S. 1, 25–26 (1972) (Douglas, J., dissenting), *citing* Lamont v. Postmaster Gen., 381 U.S. 301, 309 (1965).

33. National Student Ass'n v. Hershey, 412 F.2d 1103, 1111 (D.C. Cir. 1969).

34. The *Tatum* Court appears to have noted this special solicitude but said it was not separate from the requirement for direct injury. *Cf.* 408 U.S. at 8–9 n.5.

35. 444 F.2d at 953–54. For examples of cases falling within category (1), *see* Dombrowski v. Pfister, 380 U.S. 479 (1965) (criminal prosecution); NAACP v. Button, 371 U.S. 415 (1963) (criminal prosecution and disbarment); National Student Ass'n v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969) (draft reclassification).

For cases falling within category (2), *see* Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (compelling addressee to request delivery of mail regarded by the Post Office to be communist propaganda); NAACP v. Alabama, 357 U.S. 449 (1958) (requiring filing of association's membership lists).

For a case falling within category (3), *see* Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. 1970).

Significantly, *Laird v. Tatum*[36] does not fall within any of these categories, inasmuch as the plaintiffs based their complaint on the mere present existence of the Army's surveillance apparatus and not on any prospective actions which the Army might take. The plaintiffs seemed to be challenging the invidiousness per se of such amassed information on civilians in the hands of the military, without any showing of actual threat of misuse of such information.[37] The case thus illustrated a threat different from those presented by previous cases and required a closer scrutiny of the balance between the need for prompt vindication of first amendment rights and traditional policies underlying the case-or-controversy requirement.[38]

In two cases before the Court of Appeals for the District of Columbia Circuit, which also heard the instant case, the court had considered the various factors relevant to the justiciability of a "chilling effect" claim. In *National Student Association v. Hershey*,[39] the court concluded that the justiciability of actions alleging "chilling effects" should be determined on a case-by-case basis[40] and proposed several factors worthy of consideration:

> (1) the severity and scope of the alleged chilling effect on First Amendment freedoms, (2) the likelihood of other opportunities to vindicate such First Amendment rights as may be infringed with reasonable promptness, and (3) the nature of the issues which a full adjudication on the merits must resolve, and the need for factual referents in order to define and narrow the issues.[41]

The plaintiffs had brought an action challenging a Selective Service directive which threatened war protestors with loss of their draft deferral status and, in some cases, with immediate induction as delinquents.[42] They also challenged the delinquency regulations, promulgated under a federal statute,[43] which provided that whenever a registrant failed to perform any duty required under the selective service law, the local board was empowered to declare him to be delinquent. Applying the aforementioned factors, the court held the portion of the complaint regarding the delinquency regulations not justiciable, since it neither demonstrated a grave chill nor focused on a narrowly defined legal issue.[44] The portion of the complaint relating to the directive was held justiciable, since it alleged a serious chill; a delay would not provide a better case; the legal issues were narrow and well-defined; and the complaint alleged a specific threat against specific activity, namely, revoking draft deferments of those who engaged in common forms of war protests.[45]

36. 408 U.S. 1 (1972).
37. *See id.* at 8–9 n.5.
38. *See* note 71 and accompanying text *infra*.
39. 412 F.2d 1103 (D.C. Cir. 1969).
40. *Id.* at 1115.
41. *Id.*
42. *Id.* at 1105.
43. The relevant statute was 50 U.S.C. App. §§ 451–67, 471a (Supp. I, 1971).
44. 412 F.2d at 1116–17.
45. *Id.* at 1119.

In *Davis v. Ichord,*[46] the court listed additional considerations which tended to focus on the expected impact of the threat: (1) the source of the chill; (2) the degree of focus on the plaintiffs' activities; and (3) the probability that it would influence that conduct.[47] In *Davis,* the plaintiffs, the much-publicized "Chicago 7," asserted that their exercise of first amendment freedoms was being deterred by personal information in the possession of the House Committee on Internal Security, which information had been compiled by the defunct Committee on Un-American Activities and made available not only to all levels of government, but also to private groups.[48] The court held that the complaint failed to meet the justiciability criteria, since there was no focus on the plaintiffs, since the Committee threatened no immediate use of the information against the plaintiffs, and since influence on plaintiffs' conduct was unlikely — any fears of future actions against them were purely speculative.[49] Regarding the source of the chill, the majority noted that the primary responsibility for the management of the files in question rested with the House of Representatives, and that in order for the plaintiffs to invoke judicial review of these activities, they had to demonstrate more clearly that their constitutional rights were in immediate danger.[50] Judge Leventhal, concurring, emphasized the significance of the fact that the source of the chill was a legislative body. He noted the strong policy consideration whereby legislators should not have to defend their investigative activities, which are undertaken to give rise to future legislation in the public interest, unless there is a specific showing of direct impact on the plaintiffs' liberties.[51]

In the instant case, the court of appeals[52] reasoned that, assuming the plaintiffs' allegation that the Army's surveillance exceeded its statutory authority was true, there was a controversy, since such activity worked a "present inhibiting effect" on their first amendment rights.[53] Applying the *Hershey* standards, the court noted this effect and observed that it could not foresee a better opportunity in the future to ascertain the constitutionality of the Army's action, nor was any additional time necessary to clarify the legal issue — the Army's statutory authority.[54]

46. 442 F.2d 1207 (D.C. Cir. 1970).

47. *Id.* at 1214.

48. *Id.* at 1210.

49. *Id.* at 1215.

50. *Id.* at 1216.

51. *Id.* at 1220 (Leventhal, J., concurring). Judge Leventhal further stated: There is judicial wisdom and sound discretion in avoiding "needless friction" with the coordinate legislative branch of the Federal Government, at least to the point of deferring decisions until the controversy is so sharpened by a specific factual context as to permit a sure-footed judicial appraisal of the pertinent factors. *Id.*

52. It may be noted that actions to challenge governmental activity tend to be pursued in the District of Columbia Circuit so that many of the principal cases in this area are treated initially by this court.

53. Tatum v. Laird, 444 F.2d 947, 954 (D.C. Cir. 1971).

54. *Id.* at 955–56.

The circuit court also considered the factors treated in *Davis:*[55] the source of the chill — similar to the source in *Hershey*[56] — contrasted with the source in *Davis*. The court noted that the investigations were being conducted by a military, executive arm of government, while in *Davis* the investigations were conducted by a regular investigative agency of a civilian, legislative arm of government. The *Tatum* court seems to have assumed that civilian investigative agencies are without the power or inclination to directly affect the liberty of civilians without resort to the courts, while the military is not so restricted. It suggested, as an alternative course of action, that the necessary information could be supplied to the military by the President and his Cabinet officers from files compiled by existing civilian investigative agencies.[57] Though not explicitly discussed, the focus of the threat, under a *Davis* rationale, could be found in the fact that some of the plaintiffs' activities were surveyed. The finding of a "present inhibitory effect" met the *Davis* requirement that the threat have a probable influence on plaintiffs' conduct.

In reversing the decision of the court of appeals, the Supreme Court rejected much of its reasoning. It summarily denied the relevance of the source of the chill to the question of justiciability.[58] Moreover, it did not utilize any of the analytical tools presented in *Davis* or *Hershey*. Instead, the Court relied upon a number of its recent "chilling effect" cases in which the challenged governmental activity was "regulatory, proscriptive, or compulsory in nature,"[59] and in which the plaintiff was either presently or prospectively subject to those regulations, proscriptions, or compulsions.[60] These cases were deemed to be conclusive, the Court having failed to recognize the new situation presented in *Tatum*.

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55. *Id.* at 957–58.

56. In *Hershey,* the source of the chill was the selective service system, while in *Tatum* the Army was the source.

57. 444 F.2d at 958. The court stated:

> The 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, because a civil investigative agency has no inherent power to act against an individual, that power always being subject to the well-defined restrictions of law and the approval of the courts. The military have no such restrictions; they have their own force (of incomparable power), they have their own commanders trained as soldiers not lawyers, the military's vast size may make civilian control of individual or small unit actions more theoretical than actual, and the military is not accustomed to operating within the restrictions of law and the processes of courts.

Id. at 957–58 (footnote omitted).

See Christie, *Government Surveillance and Individual Freedom: A Proposed Statutory Response to* Laird v. Tatum *and the Broader Problem of Government Surveillance of the Individual,* 47 N.Y.U.L. REV. 871 (1972). Professor Christie proposes that there be no military surveillance of civilians until the President has ordered the military to maintain order. Further, such surveillance should be confined to military installations, unless the focus is on a civilian employee of the armed forces. *Id.* at 883–84, 898–99.

58. 408 U.S. at 10–11 n.6.

59. *Id.* at 11.

60. The Court referred to the following cases: Baird v. State Bar of Arizona, 401 U.S. 1 (1971) (attorney denied admission to bar for refusal to answer a question regarding the organizations with which she had been associated in the past); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (teachers had been discharged or threatened

The Court directly considered only the severity and the scope of the inhibitory effect — which is, it is submitted, the chief divergence from the rationale advanced by the court of appeals. Apparently to show the unlikelihood of the surveillance having any inhibitory effect on the plaintiffs, the Court described the Army's data-gathering system; it emphasized the system's relative insignificance[61] and that the principal sources of its information were publications of general circulation,[62] noting also that the Army had announced a cutback in its surveillance activities.[63] The Court was careful to point out, at the same time, that this description implied no opinion with respect to the merits — whether the Army had exceeded its statutory authority. The Court merely characterized the plaintiffs' chill as purely "subjective," and thus an inadequate substitute for a claim of specific present harm or a threat of future specific harm.[64]

In contrast, Justice Douglas, dissenting,[65] considered the merits of the case, because he saw a clear question as to whether the Army had the constitutional authority to maintain *any* type of surveillance over civilian activity.[66] He noted that article I, section 8, of the Constitution provides that Congress may make "Rules for the Government and Regulation of

with discharge due to their political associations); Lamont v. Postsmaster Gen., 381 U.S. 301 (1965) (plaintiff compelled to make special written request for delivery of certain political literature deemed to be communist propaganda by the Post Office); Baggett v. Bullitt, 377 U.S. 360 (1964) (plaintiff required to take oath of vague and uncertain meaning as a prerequisite for government employment).

61. The Court stated:

> The material filed by the Government in the District Court reveals that Army Intelligence has field offices in various parts of the country; these offices are staffed in the aggregate with approximately 1,000 agents, 94% of whose time is devoted to the organizations principal mission, which is unrelated to the domestic surveillance system here involved.

408 U.S. at 6–7 (footnotes omitted).

62. *Id.* at 6.

63. *Id.* at 7. The Army's policies after this cutback were characterized as follows:

> [R]eports concerning civil disturbances will be limited to matters of immediate concern to the Army — that is, reports concerning outbreaks of violence or incidents with a high potential for violence beyond the capability of state and local police and the National Guard to control. . . . They will not be placed in a computer . . . . These reports are destroyed 60 days after publication or 60 days after the end of the disturbance. This limited reporting system will ensure that the Army is prepared to respond to whatever directions the President may issue in civil disturbance situations and without watching lawful activities of civilians.

Id. at 7–8, *quoting* Letter from Under Secretary of the Army to Senator Sam J. Ervin.

Justice Douglas, however, was reluctant to believe that such a cutback had been effectuated without a prior hearing by the district court in that regard. *Id.* at 27 (Douglas, J., dissenting).

64. *Id.* at 13–14.

65. *Tatum* was a 5–4 decision, with Justice Marshall joining in both Justice Douglas' dissent and the dissent of Justice Brennan, the latter of which Justice Stewart also joined. Justice Brennan agreed with the appeals court that the case was justiciable because, if the Army had indeed exceeded its authority, the plaintiffs' freedom of expression was presently inhibited. *Id.* at 38–40 (Brennan, J., dissenting).

See Note, *Justice Rehnquist's Decision to Participate in* Laird v. Tatum, 73 COLUM. L. REV. 106 (1973), wherein the author considers whether Justice Rehnquist should have participated in *Tatum* due to his prior activities with regard to surveillance while serving in the Justice Department. Had he not participated, the precedential value of the resulting 4–4 decision by the Supreme Court would be marginal.

66. *Id.* at 16–17 (Douglas, J., dissenting).

the land and naval Forces," and concluded that this granted the armed services authority to govern themselves but not civilians.[67] On the issue of justiciability, he agreed with the court of appeals that the "present inhibiting effect" on the plaintiffs' first amendment rights due to the mere existence of the surveillance system constituted a case or controversy.[68]

The dissent and the circuit court differed with the majority essentially as to the assumption each made in regard to the Army's activity in relation to its impact upon the plaintiffs' freedom of expression. The former reasoned that if the Army had indeed overreached its statutory authority, as the plaintiffs alleged, present harm was inflicted upon their first amendment rights of speech and association in an objective sense, because a reasonable man might fear such information amassed in the military sector.[69] The latter, on the other hand, was unwilling to make such an assumption. Rather than focusing on the possible present inhibiting effects on freedom of expression which the Army's surveillance practices might have, the majority preferred to assume that the Army would only use such information in a lawful manner so that, even if its gathering were unlawful, there was no objective threat of harm to the plaintiffs from it. The majority, therefore, considered the issue concluded by the line of argument pursued by plaintiffs' counsel, *i.e.,* their emphasis on general unknown actions which the Army might take in some future disorders.[70]

Generally, in order to determine whether or not governmental activity abridges freedom of expression, a balancing test has been applied by the courts, in which the probable effects of governmental activity on the exercise of free speech and association are weighed against the interests of society which the activity seeks to protect.[71] Thus, in order to make a

67. *Id.* at 18–19.

68. *Id.* at 25.

69. 444 F.2d at 954 n.16. Even if the Army were acting within its authority, it would violate the Constitution if it created more than an incidental burden on first amendment rights. *See, e.g.,* Reid v. Covert, 354 U.S. 1 (1957).

70. 408 U.S. at 8–9 n.5. The oral argument was self-defeating in another respect. Counsel admitted that his clients were not inhibited by the Army's activities, but that they represented other citizens who were less forthright. The Court noted that, even if they held the case to be ripe for decision, the plaintiffs would lack the personal stake in the outcome necessary for standing, another component of justiciability. *Id.* at 13–14 n.7. For further discussion of standing, *see, e.g.,* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166 (1972); Baker v. Carr, 369 U.S. 186, 204 (1962); Rescue Army v. Municipal Court, 331 U.S. 549, 569 (1947).

71. *See* Konigsberg v. State Bar, 366 U.S. 36 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); American Communications Ass'n v. Douds, 339 U.S. 382 (1952).

In *Konigsberg,* Justice Harlan, speaking for the Court, formulated the following test:

> [G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

366 U.S. at 50–51. However, in Shelton v. Tucker, 364 U.S. 479 (1960), a different test was applied to a case involving the freedom of association. In striking down a statute which required all public school teachers to disclose the names of every

valid determination on the question of "ripeness," it is submitted that the Court should have examined more closely the extent of the Army's surveillance system,[72] in order to ascertain whether the plaintiffs' first amendment rights had been infringed. Professor Scharpf[73] made a similar observation in regard to Justice Frankfurter's dissent in *Adler v. Board of Education*,[74] wherein several teachers challenged a state statute prohibiting the employment in a public school of anyone who advocated a forceful overthrow of the government. He noted:

> Frankfurter alone advocated avoidance [on ripeness grounds] because he alone defined the substantive issues in terms of a close balance between the equally legitimate interests of society in its self-preservation and of the teachers in their freedom of thought, inquiry and expression. In order to strike this balance in the particular case, Frankfurter would have had to know much more about the actual practices of enforcement and the degree of surveillance to which the teachers would be subjected than the bare text of an unenforced statute permitted him to know.[75]

In disregarding the possible present inhibiting effects which the Army's surveillance practices may have had, and in concentrating solely on the lack of allegations concerning future actions the Army might take, the Court failed to recognize the special considerations which this case presented and to modify the "chilling effect" doctrine accordingly. The philosophical undercurrent of *Tatum* — our society's traditional resistance to military involvement in civilian affairs[76] — coupled with the potential danger of unbridled surveillance by an organization as large and potentially unmanageable as the Army,[77] arguably created a new situation requiring

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organization of which they had been members during the preceding five years, the *Shelton* Court stated:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved.

Id. at 488. *But see* United States v. Robel, 389 U.S. 258 (1967). In *Robel*, a statute prohibiting members of the Communist Party from being employed in defense facilities was challenged. The Court, through Chief Justice Warren, expressly rejected the application of a balancing test and purported simply to measure the statute's provisions against the first amendment. *Id.* at 268 n.20. *See also* Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962) (critical of the balancing test).

72. The majority and Justice Douglas disagree markedly on the size and scope of the Army's data-gathering system. The former emphasized the relative smallness of the system and the fact that the bulk of the information was gathered from publications of general circulation. *See* notes 61–63 and accompanying text *supra*. The latter, however, characterized the system as "massive and comprehensive," noting that the Army utilized cameras and electronic equipment. 408 U.S. at 25–26. Thus it appears that the Justices had come to no agreement as to the underlying facts before considering whether such facts could have a "chilling effect."

73. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

74. 342 U.S. 485 (1952).

75. Scharpf, *supra* note 73, at 532.

76. *See* 408 U.S. at 19 (Douglas, J., dissenting). *See also* Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181 (1962).

77. *See* notes 55–57 and accompanying text *supra*.

a more flexible approach to the justiciability question.[78] The Court apparently relied on the fact that the plaintiffs were not threatened by a particular sanction about to be applied to them, as had been the plaintiffs in the cases cited by the Court.[79] Yet none of those cases concerned government activity in the nature of a surveillance system. It is submitted that the variety of potential sanctions which could have been applied to the instant litigants worked a "chilling effect" on their freedoms to at least the same degree as specific sanctions in the more conventional cases.[80]

While the decision may not undercut past "chilling effect" cases, it leaves grave doubt as to the effectiveness of the doctrine in this new context. Practically, the case leaves the Army's surveillance system effectively insulated from judicial inquiry.[81] For example, if someone strongly suspected that he had been denied employment as a result of information conveyed to the employer by the Army, he would have a difficult task proving it, since most employers would not divulge the existence of such information.

Similarly, *Tatum* may not be considered as merely an Army surveillance case. A recent Fourth Circuit decision, *Donohoe v. Duling,*[82] is another apt example of the potential ramifications. There, several citizens challenged the surveillance practices of the police department of Richmond, Virginia. Their principal complaint concerned the presence of police photographers at demonstrations and other public events — including, *inter alia,* at the showing of a film concerning the "Black Panthers" at a college campus — and the retention in the police files of any photoghaphs taken at these events. Relying on *Tatum,* the Fourth Circuit held that the plaintiffs had not alleged any present objective harm or threat of future harm.[83] These examples[84] suggest that many injustices, such as arrests or harassment resulting from aggregated information held by the military or police, may occur without the victim being able to link the governmental activity with the threatened or actual injury.

Thus, it would appear that although faced with a relatively new factual situation in the instant case, the Court rejected further liberalization of the justiciability standards which the lower court proposed. Though

78. Perhaps the closest analogy to the situation in the instant case from the non-military area is that in which a debtor might challenge the practice of a credit union in divulging information to other businesses and agencies. Though the danger of such divulgence does not reflect upon his first amendment freedoms, the existence of aggregated personal information capable of being used to his detriment is similar.

79. *See* note 60 and accompanying text *supra.*

80. The Court recognized this argument concerning the unknown nature of potential actions against the plaintiffs, but turned it against them. 408 U.S. at 8–9 n.5. The Court reasoned that if the threat was an unknown one, it failed to meet the traditional justiciability requirement of particularity of injury. *Id.* Judge MacKinnon reached the same conclusion when the case was before the circuit court. 444 F.2d at 961 (MacKinnon, J., concurring in part and dissenting in part).

81. *Cf.* note 54 and accompanying text *supra.*

82. 465 F.2d 196 (4th Cir. 1972).

83. *Id.* at 202.

84. For another example, *see* Anderson v. Sills, 56 N.J. 210, 265 A.2d 678 (1970). *See generally* Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication,* 22 STAN. L. REV. 196 (1970).