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In the

Supreme Court of the United States

MELVIN B. LAIRD, Secretary of Defense, et al.,

Petitioners,

vs.

ARLO TATUM, et al.,

Respondents.

No. 71-288

Washington, D. C.
March 27, 1972

Pages 1 thru 41

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v.	:	No. 71-288
ARLO TATUM, et al., Respondents.	:	

Washington, D. C.

Monday, March 27, 1972

The above-entitled matter came on for argument at 11:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ERWIN N. GRISWOLD, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, for the Petitioners.

FRANK ASKIN, ESQ., Rutgers Law School, 180 University Avenue, Newark, New Jersey 07102, for the Respondents.

SAM J. ERVIN, JR., ESQ., Box 69, Morganton, North Carolina, for Unitarian Universalist Association, et al., as amici curiae.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-288, Laird against Tatum and others.

Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GRISWOLD: May it please the Court:

This case is here on the government's petition for writ of certiorari to review a divided decision of the United States Court of Appeals for the District of Columbia Circuit. The question before that court was whether the District Court had rightly dismissed the complaint filed in that court on February 17, 1970, by the parties who are respondents here. The complaint was dismissed by the District Court without the production of any evidence. Thus the case arises here on the complaint in the District Court of the motion to dismiss and certain affidavits which were filed in connection with these matters.

In their brief, the respondents say that, and I quote, "The government has persistently attempted to convert this case into something other than the case brought by the plaintiffs." I'm afraid that's the way we feel about the respondents. We think that the case is in the appendix while they try to present it on the basis of two volumes of hearings before the Senate Subcommittee on Civil Rights.

I am reminded of Lord McNaughton's remark about the William and Shelley's case when he said that it is one thing to put the case in a nutshell and another thing to keep it there.

The complaint filed in the District Court was filed by four individuals and nine unincorporated associations. It is framed as a class action on behalf of all other individuals and organizations, and I read from page 8 of the appendix: "...all other individuals and organizations who wish to exercise their right under the First Amendment of the United States Constitution to engage in peaceful political protest, demonstrations, marches, rallies, church meetings and other forms of constitutionally protected expression and assemblies without surveillance by defendants' agents and without becoming the subject of dossiers, reports, and files, defendants' data bank and intelligence network."

The complaint then contains allegations that the Army had been conducting surveillance of lawful and peaceful civilian activity within the United States and that this information is stored in a computerized data bank. In Exhibit A attached to the complaint they give a sample of the sort of material which has been compiled. This appears on pages 13-21 of the appendix, and I would like to read a few examples, beginning on page 14.

Hartford, Connecticut, March 11, 1968:

"Approximately 20 persons picketed outside the U. S. Federal Building. The protestors carried placards denouncing the war in Vietnam and the payment of income tax. The demonstration was sponsored by the Voluntown, Conn., Chapter of the New England Committee for Non-Violent Action."

And on page 16: "San Jose, Calif.: An Anti-Dow Chemical Company demonstration was held in front of the Administration Building at San Jose State College. A crowd of about 400-500 persons were present, but approximately 90 percent of these were spectators or curious onlookers. At 1230 hours the demonstrators moved to the Morris Daily Auditorium where they were refused permission to hold a rally. San Jose State College officials, however, permitted the protestors to use the music building for an afternoon rally. The rally received very little support and attendance was light."

I am not going to read others of those items, but it's apparent that they are the kind of items that constantly appear in the newspapers, information of very little significance and not at all repressive in its nature.

There is also attached to the complaint as an exhibit a copy of an article by Captain Christopher H. Pyle, which appeared in the January, 1970 issue of a publication called The Washington Monthly. There can be no doubt that

the publication of this article was the immediate reason for the bringing of this suit. There are no allegations in the complaint that any specific harm or injury has been done to any of the plaintiffs, either individuals or the unincorporated association. It was alleged that this type of activity has a chilling effect on the plaintiffs and others seeking to exercise their First Amendment rights.

There is no allegation in the complaint that there was any surveillance of any wholly private activity; but it is charged that members of the military went to public meetings and rather elaborately recorded what they saw.

Before proceeding further, I should call attention to some background facts. There is no rigid dichotomy between the military and civilian in this country. Both the Constitution and the statutes provide for the use of the military in domestic, civilian contexts. The military is at all times subject to civilian control through the President as Commander-in-Chief and the Secretary of Defense and the secretaries and other civilian officers of the three branches of the armed forces.

A high proportion of adult American males, including many members of Congress and the courts has served in the military for a time. Many of them retain their civilian outlook as is shown clearly by one of the amicus briefs filed here. Over the past 20 years the military has

been called on many times to supplement civilian power; on some occasions, to enforce decisions of the courts, including this Court; and on many other occasions to help to restore and to maintain order in many of our cities. This was done in Detroit in July, 1967. It was done in April, 1968 here in Washington, and in Chicago and in Baltimore and in other cities.

I remember coming to the calm of this courtroom on the Monday after the death of Martin Luther King with smoke in the air and a soldier on every street corner as I passed. The Court sat but a number of the persons whose admission I was to move that day did not get here.

We can recall too that the Warren Commission reported that advance intelligence had not been adequate for the protection of the President and recommended that greater steps be taken to compile data about persons who might be inclined to violence. A similar recommendation was made by the Kerner Commission in 1968.

Today we provide a guard not only for the President and the Vice President but also for every presidential candidate and, alas, with reason.

If the Army is to have the function of helping to preserve order in the civilian society, it must have some intelligence information. How much, of course, is an important question. But it must have some. As the court

below said, it cannot be expected that the Army should use its force blindly.

In the summer of 1968 the past was sad and the future was uncertain. This was when the Army began to expand its intelligence gathering activities. From my point of view, it went too far. Or perhaps to put it another way, there was an absence of adequate civilian control. One of the problems of an army is that you ordinarily have far more people than you have any use for because you have to have enough people at the right place when the need arises. Here the Army had a lot of people in intelligence. They spent more than 90 percent of their time in investigating people who needed clearances for military or civilian employment. But they had men remaining, and they received directives that they were to build up intelligence for use in case the military ever needed it in connection with civilian disturbances. So, they built up the material we see here. And they had a computer and they put all of this on the computer. And from the computer they built up a list of the names which appeared in the data, which the plaintiffs call a "black list."

From my point of view, it was poor judgment, an inappropriate use of military resources. As Secretary of the Army Froehlke has said, and I quote, "From the vantage point of hindsight, the guidance and direction to the military for

collection of civil disturbance information was too often general and oral rather than in written form."

Or in Senator Ervin's words: "Some people charged with responsibility in this, especially at the local level, got a little bit too zealous in their activity."

With this summary statement of the facts where the case arises on the complaint, the motion to dismiss, and the accompanying exhibits and affidavits as included in the appendix, I would like to summarize our legal position. First, the complaint does not allege a justiciable controversy. And, related to that, the plaintiffs do not have standing to maintain the case. There is a controversy all right, but it is not a Case or Controversy, with capital "C's", in the Constitutional sense.

Second, what was done, as alleged in the complaint, unwise as it may have been, did not violate the Constitution or any statute.

Third, if there was anything done that was legally wrong and the case is justiciable, it has been stopped.

And, fourth, in this situation, I do not claim this in the strict sense, but the case is not one now, if it ever was, in which there is equity jurisdiction, that is, in which it is appropriate for a court of equity to intervene by way of injunction.

Let me turn first to the question of justiciability.

As I have already said, no plaintiff alleges that anything has been done to injure him. The whole cause of action rests on chill. I know of no decision of this Court which has been based on chill alone. In every case in which chill has been a factor there has been a criminal prosecution either in process or immediately threatened, or there had been governmental attempts to compel disclosure of information as a prerequisite to entitlement to government employment or benefits.

There was an individual before the Court who said that he was injured in some immediate and concrete fashion. Here the complaint proceeds only on the broadest of generalities. It states on page 10 of the appendix, and I quote, that "The purpose and effect of the collection, maintenance and distribution of the information on civilian political activity described herein is to harass and intimidate plaintiffs and others similarly situated." Yet they do not allege a single instance or harassment or intimidation. They do allege generally an invasion of their privacy, damage to their reputations, and an adverse effect on their employment. But they cite no specific instance or example.

The dissenting judge in the court below called these indefinite claims of highly visionary apprehensions. They do not, we submit, have the concreteness and sufficiency

of focus to make the claims justiciable. There is no assertion here that the activity complained of has caused direct injury to these plaintiffs or to others similarly situated. Instead, they appear here, as they have said various times in their arguments below and in their briefs, on behalf of millions of people.

But when you appear on behalf of millions of people, the case is no longer concrete and specific. That is the sort of thing which is appropriate for consideration by the legislative branch or the executive but does not present a case for decision by a court. The case is much like the situation in United Public Workers against Mitchell, a case which they cite once but skip over very quickly, where the court refused to find a generalized claim as to the validity of the Hatch Act to be justiciable.

Justiciability is not a mere technicality. Elusive as it may be, it is an expression of one of the basic concepts on which our Constitution rests, the separation of power. The courts exercise judicial power under the Constitution. This is not the power to decide all the questions of law which arise in the course of the administration of the government. It is the power to act as a court to decide the concrete and specific issues which arise between men and men or between the citizen and his government, when someone says, "He did this to me and I'm hurt." This is not the power to

respond when the complainant says, "I don't like the way the government is acting. I am not hurt but I might be someday, and I want this stopped."

General questions arising with respect to the structure and the administration of the government are best resolved by the other coordinate branches established by the Constitution. The executive administers better than the courts are equipped to administer. And the Congress formulates general policies with more responsiveness to the democratic process than the courts can. The courts, with their independence, are better qualified to deal with concrete cases of alleged wrong which directly affect the complainant. But the courts should not undertake to decide all the questions which arise in government.

This case, I think, is a specific example. If the court is to grant relief, it may be of two forms. (A) It may say that the Army is enjoined from conducting any and all intelligence operations involving civilians under any circumstances. I think that would be wrong. Suppose there was a plot to blow up an arsenal or sink a troop ship, for example. Or suppose the Army was actually engaged in riot control operations in Washington or Detroit or Chicago. The Court could hardly deny the Army the resources to protect its personnel or to maintain its legally assigned mission. If that alternative won't do, that is, absolute forbidding

to do any civilian intelligence work, then the alternative is (B) to work out in detail what the Army may and may not do under varying circumstances and subject to change from time to time and from place to place. That is administration. And the courts are not equipped to carry on administration. We can hardly have a situation where a colonel or a captain confronted with an immediate problem in Seattle or in Syracuse would have to say, "Well, I can't act. I will have to apply to the United States District Court in the District of Columbia to get a modification of the injunction, in view of the circumstances which confront me."

Managing things in this way is not judicial action. Disputes which can lead only to such control of another branch of government are not justicial.

Q How about the Fourth Amendment problems? That puts judges in an administrative--

MR. GRISWOLD: There is no suggestion here that anything has been searched or seized, reasonable or unreasonable.

Q Does this involve electronic surveillance?

MR. GRISWOLD: There is no suggestion in this complaint that there was electronic surveillance.

Q Does the Army or Pentagon have data banks?

MR. GRISWOLD: Yes, Mr. Justice, it did have. But as I have pointed out, it has stopped them on these matters.

In addition to the executive to administer very importantly in this area there is the legislative branch of the government. Many of the problems here are very suited to the sort of general policy making which the Congress can do. If Congress can devise appropriate means to regulate the military in this area, it has the power to do so. The Senate already has had extensive hearings on this specific question, and a number of bills have been introduced. And I shall indicate below, the executive has also taken clear and specific action.

But, second, if the case is justiciable, if the plaintiffs have adequate standing, then we say that as a matter of law the complaint does not state a cause of action on the merits. However unwise the actions may have been--and in my judgment they want far beyond anything that was appropriate for the military to do, as the Department of Defense and the Army have recognized--they did not violate the Constitution or any provision of the law.

There is nothing to indicate that anything which was done was evil or malicious and no allegation that the materials were in fact misused. There is no allegation that anyone was deprived of his freedom of speech, which is what the First Amendment says.

Indeed, not much was generally known about the Army's activities until the publication of Captain Pyle's

article on the filing of this suit. Those were, in my opinion, useful acts, but they were also the immediate cause of whatever shivering there may be. They have led to uninhibited, robust, and wide-open debate which, I suppose, is one of the objectives of the First Amendment, as this Court has said. They have led to tighter civilian control, which is desirable. They have led to extensive consideration of the problem by the Congress, which is appropriate. But there is, I submit, no action taken by the Army alleged in this complaint which violates anything literally contained in the Constitution and nothing done which violates anything implied from the Constitution as far as this Court's decisions have gone.

Third, if there was anything done here which was illegal, it has been stopped. To show this, I have to go outside the appendix. But I believe that is justified under this Court's decisions, for everything to which I refer is a matter of official acts. For support on that I would refer to this Court's decision last term in the Ehler case. In this case the official actions were numerous and clear. Two of them are included in the appendix to our main brief. Numerous others are set out in volume two of the hearings before the Senate Committee on Constitutional Rights. It may seem odd that I refer to these hearings in connection with our case while saying that the hearings themselves

cannot be utilized to make this a different case from that which is presented in this record. But I believe the distinction is clear. The respondents want to use the hearings as a repository of evidence to establish facts which are not alleged in their complaint--that is, to make this a different case from what it is in the complaint. My reference to the hearings is simply as a convenient place in which the Court can find the text of official actions which show that the practices which the respondents here complain about have been stopped.

Q I see references in the report of the Senate Judiciary Committee to this case and the problems. Can we take judicial notice of that?

MR. GRISWOLD: Mr. Justice, I think you cannot take judicial notice of the evidence and testimony which was presented before that hearing. I think you can take judicial notice of the official actions which, among other places, are recorded in volume two of those hearings.

As I have said, the surveillance has been stopped, the computer banks and print-outs have been destroyed. The index list of names or black list have been destroyed. In each case, one copy has been retained for the purposes of this litigation. We did not want to destroy all for fear that someone would say that we had improperly interfered with the due administration of justice. But that one copy is in

good hands and will be destroyed as soon as this litigation is terminated or the courts give us authority to act.

It's true that the respondents say that we cannot certify that every single copy has been destroyed. The copies were not numbered. But it is clear that there has been a bona fide effort to recall and destroy every copy and orders have been given against the utilization of any copy. I do not think that more can be done even under the orders of a court.

In this circumstance, we do not say that the case is necessarily moot. In some situations past action is sufficient to obviate mootness, even though the action has been stopped. We do say, however, that the actions taken by the Army are sufficient to destroy equity jurisdiction in the District Court. We sometimes forget that equity has a jurisprudence of its own, and one of the principles of equity is that it does not utilize the mighty remedy of injunction when the conduct complained of has been stopped in the absence of extraordinary circumstances such as a substantial risk that the conduct will be resumed if this Court does not intervene. This is essentially the basis of this Court's recent decision in the Medical Committee on Human Rights case. Here there is no such risk.

I feel sure that the Court will find that the actions of the Secretary of Defense, of the Secretary of

the Army, and of other defense officials are clear, vigorous, and in good faith. It is said that these officials cannot control the Army, that the Army will go ahead and watch civilians anyway. If they can't succeed, I am inclined to doubt that a District Court would be more successful.

I think that the situations are different today from what they have been sometimes in the past, that the officials of the Army are alert and determined. It is much better, I submit, to leave the resolution of the details of carrying out their directives to the civilian army authorities than to have the intervention of the courts.

Thus if the case is justiciable, if the actions of the army in conducting surveillance of civilians did violate the Constitution and the laws, I submit that the decision of the District Court should nevertheless be affirmed, since the actions of the Army have now been terminated and though the District Court did have jurisdiction of the case, if the requisite jurisdictional amount was present, it is not as of now a case within the principles of equity jurisdiction. Where the wrong no longer continues courts do not ordinarily issue an injunction. There should be no injunction here. The decision below should be reversed and the judgment of the District Court should be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General. Mr. Askin.

ORAL ARGUMENT OF FRANK ASKIN, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. ASKIN: Mr. Chief Justice, and may it please the Court:

Senator Ervin will take the final ten minutes of this argument and will deal mainly with the ultra vires nature of the military conduct.

I agree with the Solicitor General that the only materials before this Court are the plaintiffs' allegations. But with all due respect, I believe the Solicitor has again misstated and misrepresented those allegations in the circumstances of this case. And it is the plaintiffs' allegations which are here, not the allegations as the defendants would like to rewrite them and not some state of facts as they might appear in the light of hearsay assertions offered by defense counsel nor the Solicitor's efforts to justify the Army's conduct with respect to smoke in the air and soldiers on street corners.

The sole question for this Court to decide is whether the plaintiffs were entitled to a judicial hearing, whether their uncontested allegations of unauthorized and unconstitutional conduct by the Army earned them to right to their day in court. It was defendants who moved to dismiss this complaint, who said, in effect, construe plaintiffs' allegations most favorably, give them all the

benefits of the doubt and all the inferences; they said there is still no set of facts which might be proved which would entitle plaintiffs even to a hearing on the merits. The trial judge acted on defendants' advice; he decided that taking everything into consideration plaintiffs alleged, they had no right to be in court. The District Court was in error about that and Judges Wilkey and Tamm in the Court of Appeals were correct, as I believe a review of the plaintiffs' allegations will demonstrate.

I don't want to go over in great detail the factual setting in this case. We are dealing, it's true, with a public issue that has been discussed and reported upon very widely in the two years since plaintiffs filed their complaint. But I do want to point up the facts which make these allegations justiciable.

Plaintiffs set forth a pervasive system of military spying and data keeping on the political activities of the plaintiffs and other law-abiding Americans. Over a thousand Army agents around the country helping to keep track of the political assemblages and speeches of citizens unassociated with the armed forces, citizens like plaintiffs and members of plaintiff organizations who had done no wrong, people unassociated with the spectre of civil disturbance which the Army belatedly invoked to justify its lawless behavior. Other information being gathered by (Nurik and Gestin?)

and undercover methods of operation. And I must point out that the Solicitor General is wrong. He has not read plaintiff's complaint. There are allegations of electronic surveillance in plaintiffs' complaint. Paragraph Eight says very specifically that much of the information which is being gathered by the Army was gathered both through anonymous informants and through the use of photographic and electronic equipment. So, this was not wholly public activity we were talking about. There were uncontested allegations that clandestine, undercover operations were taking place in gathering this information on the political activities of the plaintiffs and others acting similarly.

Q The allegation as I have it before me is a little ambiguous. Electronic equipment, of course, could include a tape recorder at a public meeting. In its context here with the use of photographic electronic equipment, that would almost seem to be the meaning ascribed to it, wouldn't it?

MR. ASKIN: I don't think so, Mr. Justice. Again I think we have to construe this complaint broadly. We were making allegations that they were using a variety of means, both photographing people at demonstrations, and I would say that the allegation includes both taping meetings and use of other kinds of electronic--

Q There is no allegation of any specific or

explicit allegation, wiring tapping or what has become known as bugging or anything of that nature that I have been able to find.

MR. ASKIN: No, there is not, Mr. Justice. We did have witnesses at the hearing in the District Court, former Army agents, who were prepared to testify about some of the undercover activities they had engaged in. They were not permitted to go on the stand.

Q In short, I am right, am I not, in understanding this complaint as not relying on the Fourth Amendment but rather on the First Amendment?

MR. ASKIN: Essentially this is a First Amendment complaint, that's correct, except insofar as the allegations of the invasion of a right of privacy include, of course, both the First Amendment and the Fourth Amendment and whatever other constitutional provisions have been invoked in its behalf.

Q The Ninth and Tenth and a few others. It's basically a First Amendment complaint, right?

MR. ASKIN: Essentially the complaint is that the Army was invading First Amendment rights of the plaintiffs.

Q Not the Fourth Amendment rights as such. That's not the gravamina of the complaint.

MR. ASKIN: That would not be the essential gravamen of the complaint, no.

Q There was no answer here; only a motion to dismiss?

MR. ASKIN: That's correct, Mr. Justice Douglas. Only the motion to dismiss. And plaintiffs' complaint, its exhibits, its affidavits, in support of its motion for preliminary injunction which went on at the same time as the motion to dismiss was heard.

The complaint states that the Army was using a teletype system similar to the onesmaintained by news services, reporting the information it was gathering to a central intelligence command at Fort Holabird and out again to military intelligence units all over the country. Data banks, large and small, at various military installations themselves storing and often computerizing the data on plaintiffs and others for their own use, further dissemination of the data to both military and civilian federal and state governmental units all over the country.

In short, we put forth a chilling system having nothing to do with a military function. Indeed, until it was revealed to be part of the operations of the United States Army, this was a kind of system which Americans associated with someplace else, not with the United States of America.

And the plaintiffs who brought this class suit challenging the authority of the Army to engage in such a

program were, of course, among the very people most immediately and directly affected by it. They were the targets of surveillance. Every one of the plaintiff organizations and individuals had come into focus of the Army's surveillance operations. All had been the subject of the Army's intelligence reports. The government's assertion that the plaintiffs do not allege the Army spied on selected individuals or groups, it's double-talk. Plaintiffs' allegations are as clear as can be, that information about them was collected, was transmitted over the Army's teletype network, was fed into its data bank, was then disseminated further around the country, indeed to military installations around the world.

Plaintiffs allege that this program invaded, not only invaded their privacy, threatened their reputations in employment, but also caused immediate and irremedial injury to their First Amendment rights, both because they themselves were forced to become more circumspect about their speech and association and, more importantly, because others were deterred from associating with them in pursuit of political objectives and frightened away from membership in their associations and organizations.

The nation has since discovered in fact that plaintiff's complaint described only the very tip of an iceberg. It was revealed in hearings before the Senate of

the United States and we refer to them really to illuminate our complaint because this case is here on a justiciable--

Q The Solicitor General said the tip is the only thing we have.

MR. ASKIN: Well, Mr. Justice Marshall, our allegations we believe are complete and state clearly a justiciable claim. We do believe that in construing our complaint and liberally construing it, as this Court many times has said must be done, indeed is useful to examine other information which subsequently was revealed about this system as illuminating what in fact this complaint was talking about. The complaint, in accordance with the federal rules, was a short and plain statement. It did not give evidence or detail of the allegations.

Indeed, what we're talking about is the evidence which would later be used to demonstrate in fact that the plaintiffs could prove their complaint. We do not believe that that information is essential to the question of justiciability except insofar as it does illuminate what the plaintiffs were complaining about.

Q I thought you were going to say you might put evidence on along the same line.

MR. ASKIN: We could put witnesses on the--I'm saying if we go back to a hearing, we will have the witnesses to prove the allegations in our complaint, and some of those

witnesses, indeed those who did testify before Senator Ervin's committee. This is the way in which our complaint will in fact be proven. Indeed we had some of those witnesses in court with us that morning.

Q You could have given affidavits of them.

MR. ASKIN: Mr. Justice Marshall, it was our understanding that we were going to have an evidentiary hearing that morning. Indeed we had brought witnesses in from all over the country and they were prepared to go on the stand. They were not permitted to testify. It had been our understanding that they would be permitted to testify. We did not believe that with our motion for a preliminary injunction before the court that it was possible for the court to really consider issuing a preliminary injunction against the United States Army based on affidavits, and we were under the impression that our witnesses would be allowed to go on that morning.

I will not pursue the factual detail. I believe the information has been stated in great detail in our brief as well as in the two amicus--

Q Mr. Askin--

MR. ASKIN: Yes, Mr. Justice Powell.

Q --before you leave the facts, I understood you to say the Solicitor General had misstated the facts. You made reference to electronic equipment. Did he misstate in

any other way?

MR. ASKIN: Yes, Mr. Justice, I believe he says that we are complaining about a generalized system which does not focus concretely on these plaintiffs. Indeed, this system did focus concretely on the plaintiffs. The plaintiffs were watched by military agents. You might take the situation of one of our plaintiffs, Mr. Conrad Lynn. A military agent apparently went to a meeting at a Unitarian church in Philadelphia at which Mr. Lynn spoke. He filed a report over the Army teletype system to Fort Holabird which, among other things, identified Mr. Lynn as the author of draft evasion literature. We allege that that information goes into the Army's data bank at Holabird.

That information is then picked up, sent out over the Army's teletype system on their weekly summary, which is what is attached as an exhibit to the complaint, to other military installations all over the country. And it's then taken and put in their mini-banks at these various other military installations. So, this is something other than plaintiffs merely complaining about some generalized system. This is a system which, in fact, very intimately affected them and focused upon them. That's why I believe the Solicitor General has in fact misrepresented our allegations as indeed with the other allegations we said clandestine operations.

In our exhibits to the complaint, for example, it is said that among other things the military went to the registrar at a university to gather confidential information about students, that this was one of the ways in which they were gathering information.

But indeed we were limited in our knowledge. Of course, we didn't know the details of the system. We saw, as has been said before, only the very tip of the iceberg. We did not have the full details as they ultimately emerged, of course, in Senator Ervin's committee. We could only put forth in our complaint as much of the detail as we in fact knew at that time in addition to the broad outlines of the system as it was functioning.

Q Mr. Askin, suppose that if instead of sending agents the military for whatever reason relied upon newspaper clipping services and just identified certain people and certain organizations and had a clipping service and fed them into their data banks. Would you feel that that had violated some constitutional rights of the persons affected?

MR. ASKIN: Of course, Mr. Chief Justice, that's not our case. On the merits it would be a different case.

Q These were all public meetings, were they not?

MR. ASKIN: Well, the meetings we're talking about in the exhibit to the complaint were public meetings. We

have made allegations that they were also gathering information by other kinds of clandestine methods. If they were only doing the kinds of clipping you were saying--but still if they were maintaining data banks and were still disseminating information on individuals and still compiling what we referred to as a blacklist, what they've called an index list, I would believe that still would be a justiciable controversy. The ultimate result on the merits might turn out different, but I would say that there would still be a justiciable controversy if in fact this system did focus on these particular plaintiffs. They would have a right claim which would be justiciable and then would have to go back for a hearing on the merits as to whether or not the Army indeed could do it.

Based on the claims that we have put forth, our uncontested allegations, we insist that there is really no question that plaintiffs are entitled to a hearing, that the answer to the justiciability question must be the same one given by this Court in a series of celebrated cases over the past dozen years, in each of which government defendants argue that this Court should close its eyes and close its ears to serious violations of constitutional rights. We refer to Baker v. Carr, Zwickler v. Koota, Powell v. McCormack, Flast v. Cohen. In each of those cases this Court reaffirmed its commitment to the principle of judicial

review. And in this case even more than any of those we suggest, judicial review is absolutely essential because this case involves the most serious of all threats to democratic government, military intrusion into civilian political affairs.

Of course, the Army piously denies and would block all judicial review of such surveillance operations, since its only argument is that this case is not reviewable. There is no other forum in which this military surveillance operation may be judicially reviewed. It is now or never. It is unlikely we'll ever be more right, that anyone else will ever have better standing than these plaintiffs to mitigate this claim. So, despite the Army's denials, it is asserting that the military surveillance operation is in fact unreviewable. And such a result would make constitutional rights a nullity.

And, Mr. Chief Justice, as you yourself reminded us in your dissent in Bivvins last year, without some effective sanction constitutional protections against unlawful conduct by government officials would constitute little more than rhetoric. And if these plaintiffs do not assert a judiciable claim there is no sanction whatsoever against the Army's engaging in this kind of lawless conduct. They would then be able--that would mean that the Army could snoop at will into people's lives, prepare computerized

dossiers on every man, woman, and child in this country free of any judicial oversight.

Q I understood the government's argument in this phase of the case, at least in terms of standing--certainly there would be judicial review if, as or when any individual plaintiff could show that he had been actually injured, just as a matter of standing, or perhaps justiciable controversy. We all agree these concepts run into each other and overlap a good deal.

MR. ASKIN: Well, Mr. Justice Stewart, on the question of--first of all, it is unlikely that any particularly plaintiff, any particular individual, is ever going to find out exactly what happened to him.

Q He'd find out if he lost his job or if he were denied clearance to some--

MR. ASKIN: He would never know, Mr. Justice.

Q ---confidential information in a place where he worked or in a variety of other ways which are reflected in many of the decisions of this Court. If he were denied a job in a defense facility or something of that kind, he could show that he was hurt.

MR. ASKIN: But indeed it's very unlikely that such a person would ever know why it was that he lost that job. This system operates in such a way that they don't come to him and say, "You're now losing your job because the military gathered information on your political activities."

Somebody would say, "You're not hired or you've lost your job," and that would be the end of it. He would never know the reason why.

Indeed, we think it's very clear that our plaintiffs have suffered the worst kind of injury; they have indeed suffered present injury to their First Amendment rights, and we believe this Court has constantly recognized that this is the most serious kind of constitutional injury which gives standing.

MR. CHIEF JUSTICE BURGER: You're time is consumed. You are now entering into Senator Ervin's time.

MR. ASKIN: All right, let me very briefly try to conclude, Mr. Chief Justice.

We concede that this is a significant case which will ultimately raise complex and difficult questions of constitutional interpretation. The ultimate question is whether the Army may do what they have been doing to the plaintiffs. We insist they cannot. We insist we have a justiciable controversy here that is right for adjudication. But that question of whether the Army may do it is not before the Court at this time. This case has reached this Court prematurely. The questions presented by the government on this petition have long been settled. Of course, plaintiffs' claims are justiciable. I would say this issue was settled if not in Marbury then in Ex Parte Milligan.

And indeed to hold otherwise, to grant the Army the unbridled discretion it here seeks, to interfere with civilian political action, would in the words of one recent Law Review commentary on this case result in the uncorking of the genie of military command. And the ultimate result of such a course we can only dimly imagine by viewing the tragic history of other nations which failed to sharply draw the line between military power and civilian politics.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Askin.

Senator Ervin, we allowed you ten minutes on request, and we'll keep our bargain. You'll have five of it before lunch and five after the recess, if that's agreeable.

MR. ERVIN: That will be fine.

ORAL ARGUMENT OF SAM J. ERVIN, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. ERVIN: There are laws on the statute books which make the use of the Army for the purposes for which it is used in this case illegal. Article I, Section 8, of the Constitution empowers Congress to make rules for the government and regulation of land and naval forces and to provide for calling out the militia to enforce the laws of the Union, suppress insurrection, and repel invasion. Article IV, Section 4, of the Constitution provides that the United States shall protect each state against domestic

violence if it is requested to do so by the legislature or by the governor in case the legislature is not in session. Congress has exercised this power to lay down rules for the government of the armed forces in the posse comitatus act which was enacted in 1878 as a result of the use of the Army in 70 communities in South Carolina to enforce laws and as a result of the practice of United States Marshals to call on the Army for contingents to assist in the enforcement of laws.

This statute says this: Whoever, except in cases and under circumstances expressly authorized by the Constitution or an act of Congress, willfully uses the Army--and it has now been amended, the Air Force, any part of the Army or Air Force--as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 and imprisoned not more than two years or both.

Now, manifestly that statute forbids the use of the Army for police purposes and police purposes including detective work. So, it forbids the use of the Army for detective work. There are three statutes which Congress has passed. Sections 331, 332, and 333 of Title 18 of the United States Code which allowed the President to use the armed forces to suppress rebellion, insurrection, and domestic violence of a higher magnitude. The first of these statutes is in harmy with Article IV, Section 4, of the

Constitution and provides the President can use the armed forces to suppress an insurrection against the state if it's requested by state authorities so to do. The second provides that the President can use the armed forces to suppress a rebellion against federal authority which impedes the enforcement of the federal laws by the normal force of action in the judicial proceedings. And the third provides that the President can use the armed forces where there is such domestic violence within the borders of a state that it impedes the execution of federal and state laws to such an extent that a class of citizens is deprived of a right named in the Constitution and secured by law and the state refuses or fails or is unable to suppress the insurrection or the domestic violence.

These statutes are subject to limitation which is ample here. It says before the President can invoke any one of these three statutes to use the armed forces, that the President must issue a proclamation calling upon the insurgents, it calls them, to disburse and to return to their places of abode within a reasonable time. That's the conditions under which the Army can be used, and these conditions didn't exist with reference to these plaintiffs.

Manifestly, if the President can't use armed forces to the issues of public proclamation, the Army cannot be used as a detective force as it was used in this case,

and it was used in order that the Army might be engaged in the role of a prophet and predict when and where there might be an insurrection or domestic violence and where the President in the future call them out. That's what this is.

MR. CHIEF JUSTICE BURGER: We'll pick up at that point after lunch, Senator.

MR. ERVIN: Thank you, sir.

[After the luncheon recess, the proceedings continued as follows.]

MR. CHIEF JUSTICE BURGER: Senator, you may proceed.

MR. ERVIN: The government's argument and brief takes a leaf out of the notebook of the old lawyers who used to file speak and demurrers. They ask this Court to determine the sufficience of the complaint not on the allegations of the complaint but on the allegations of some affidavits which were originally relevant to opposition to the motion of the plaintiffs in the District Court for a preliminary injunction. They are not relevant to the question presented to this Court. When the complaint in this case is interpreted in the light most favorable to the plaintiffs and all doubts are resolved in their favor, as the rule applicable to a challenge to the sufficience of a complaint requires, this complaint makes these allegations. First, that the plaintiffs and other similarly situated are

civilians having no connection with the Army who dissent from policies of government in respect to the draft, the war in Southeast Asia, and certain racial matters. Second, that the plaintiffs and others similarly situated are exercising in a peaceful fashion their First Amendment rights to freedom of speech, association, assembly, and petition, to expres their dissent, convert others to their views, and persuade government to alter the policies to which they dissent. Third, that although the plaintiffs and others similarly situated are exercising their First Amendment rights peaceably, the Army has required 1,000 military intelligence agents operating out of 300 stations throughout the nation and additional intelligence units where all the substantial forces of the Army are stationed to exercise surveillance both overt and covert over the plaintiffs and that these military intelligence agents and personnel are overtly and covertly collecting the information concerning the personal thoughts, political activities, and views of the plaintiffs and others similarly situated and storing it in dossiers and computers and exchanging it for similar information concerning them gathered by federal investigative agencies such as the FBI and the Secret Service and state and local law enforcement agencies and are making all such information available to all American military units throughout the United States and Europe and to all

federal departments and agencies engaged in hiring federal employees and to state and local law enforcement agencies. Fourth, that the Army is engaging in these activities to deter the plaintiffs and other similarly situated from exercising their First Amendment rights to dissent from the governmental policies stated, and to influence, enjoin, or petition the government to abandon or alter such policies and the Army as accomplice in such policies and is actually deterring the plaintiffs and others similarly situated from exercising their First Amendment rights for the purposes stated, and it's damaging their reputations and imperiling their opportunities as citizens to obtain employment at the hands of the federal government or others. Fifth, that the activities of the Army exceed any legitimate needs of the Army and are not authorized by law. Sixth, that plaintiffs have no adequate remedy at law, and unless and until the Court grants declatory and injunctive relief to halt the activities described in the complaint, irreparable injury will continue to be done to plaintiffs and all others similarly situated as well as the national interest.

I am going to make one observation with respect to the allegations of the complaint which cover, with the exhibits, about 44 pages. If these allegations do not state a cause of action in which judicial relief can be granted, within the purview of the case or controversy clause of the

Third Article of the Constitution, the Star Banqled Banner lies when it says that our country is the land of the free. I believe our country is the land of the free, and I believe this Court believes that our country is the land of the free. And, for that reason, I feel that I'm justified in asking this Court to affirm the ruling of the Court of Appeals which judges the complaint to be sufficient and remands the case to the District Court to be tried on the merits with a statement that they will determine after trial on the merits, establishes the fact whether injunctive and declaratory relief should be granted.

MR. CHIEF JUSTICE BURGER: Thank you, Senator Ervin.

You have about two minutes, Mr. Solicitor General.

REBUTTAL BY MR. GRISWOLD

MR. GRISWOLD: Mr. Chief Justice, and may it please the Court:

With one exception, I do not think that I have misrepresented the complaint here. Certainly I have not intended to do so. That one exception was in my answer to the question from Mr. Justice Douglas when I said there was no allegation about electronic surveillance. It is true that there is a reference to "through the use of photographic and electronic equipment" on page 9.

In my response, what I had in mind was wiretapping

and bugging. There is no specific allegation with respect to that. In all the hearings there is no evidence that any such action was taken. There is some evidence that there was videotape which, I suppose, is electronic but is more closely analogous to photographic than to what we usually have in mind when we say electronic.

With respect to the other items on the meaning of the complaint and the complaint itself is only seven pages long and of course the Court will decide it on the basis of what it finds in the complaint, but I would call attention to the opinion of the majority of the court below on page 137 of the record. Appellants freely admit that they complain of no specific action of the Army against them, only the existence and operation of the intelligence gathering and distributing system which is confined to the army and related civilian investigative agencies. There is no evidence of illegal or unlawful surveillance activities. We are not cited to any clandestine intrusion by a military agent.

And then the dissenting Judge, Judge MacKinnon below, in footnote 2 at the bottom of page 149 of his opinion, "There are no allegations that the Army has conducted surveillance of wholly private activity, and at all argument appellants indicated in effect that they did not have any witnesses who would testify that the Army had engaged in such

activity.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General. Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:07 o'clock p.m. the case was submitted.]

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