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# Reflections on the Senate Investigation of Army Surveillance

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## REFLECTIONS ON THE SENATE INVESTIGATION OF ARMY SURVEILLANCE

LAWRENCE M. BASKIR†

[S. 2318]'s indiscriminate lumping together of all kinds of innocent information or literature within the prohibited ambit of "maintaining and recording" information on beliefs, associations or political activities is a serious flaw and itself a possible infringement upon [the military's] first amendment rights.<sup>1</sup>

### INTRODUCTION

In public hearings on April 9 and 10, 1974, the Constitutional Rights Subcommittee of the Senate Judiciary Committee addressed once again, after an interlude of three years, the problem of military surveillance of domestic political activities of American citizens.<sup>2</sup> Despite general expectations, the 1974 hearings were not planned as yet another exposé of the military spying scandal. They were, instead, a sober and fairly technical examination of the merits of a bill<sup>3</sup> proposed by Senator Ervin. The bill's purpose is to amend existing prohibitions on military involvement in civilian political affairs by creating a criminal prohibition against the collection of information on political activities of American civilians not affiliated with the military.<sup>4</sup>

The story of this controversy has been told in numerous press and magazine articles and legislative reports, and will be the subject of at least two extensive books;<sup>5</sup> the legal aspects have been explored by a

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1. Testimony of David O. Cooke, Deputy Assistant Secretary of Defense (Administration); *Hearings on S. 2318 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 103, 107 (1974) [hereinafter cited as *1974 Hearings*].

2. *1974 Hearings*.

3. S. 2318, 93d Cong., 1st Sess. (1973).

4. A bill to enforce the first amendment and fourth amendment to the Constitution, and the constitutional right of privacy by prohibiting any civil or military officer of the U.S. or the militia of any State from using the Armed Forces of the United States or the militia of any State to exercise surveillance of civilians or to execute the civil laws, and for other purposes.

*1974 Hearings* at 8.

5. For a sample of contemporaneous news and other reports see *Hearings on Federal Data Banks, Computers and the Bill of Rights, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971) [here-

number of commentators.<sup>6</sup> The purpose of this article is to describe how the Constitutional Rights Subcommittee conducted its investigation, what role litigation played in the inquiry, and what the ultimate legislative response is likely to be. The investigation deserves to be examined for the insights it gives into the operation of the investigative role of Congress and for the knowledge it may give us of how the military establishment and, by extension, the entire executive branch, responds to legislative oversight. For those readers of law reviews who are accustomed to evaluating a legal issue from within the four walls of briefs and reported opinions, this discourse may also shed light on the role constitutional litigation plays in political controversies over public policy.

#### THE EARLY STAGE OF THE INVESTIGATION

To an American public not yet accustomed to the Watergate climate, and unaware of the military's long history of such activity, the publication of an article in January 1970, exposing a broad program of Army political surveillance within the United States,<sup>7</sup> came as a great shock. The article, written by former Captain Christopher Pyle, until recently an instructor at the Army Intelligence School, disclosed that the Army for some years had systematically collected reports on political events throughout the country and that these reports were computerized at Army Intelligence Headquarters at Fort Holabird, Maryland.<sup>8</sup> Pyle's revelations were based in large part on a few conversations he had had with members of Army intelligence and a brief tour of the Holabird facility. The immediate result of his article was a series of public denials by senior Army officials, along with a rash of letters of inquiry from Senators and Congressmen. Among those writing inquiries was Senator Sam J. Ervin, Jr., Chairman of the Constitutional Rights Subcommittee.<sup>9</sup>

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inafter cited as *1971 Hearings*]. Both Christopher Pyle and Lt. Col. William Mann, Jr., former Chief, Civil Disturbance Branch, OACSI, Department of Army, are presently preparing manuscripts for publication.

6. See, e.g., 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); Comment, *Laird v. Tatum: The Supreme Court and a First Amendment Challenge to Military Surveillance of Lawful Civilian Political Activity*, 1 HOFSTRA L. REV. 244 (1973); 11 DUQUESNE L. REV. 419 (1973); 41 GEO. WASH. L. REV. 385 (1972); 21 AM. U.L. REV. 262 (1971).

7. Pyle, *CONUS Intelligence: The Army Watches Civilian Politics*, WASHINGTON MONTHLY, Jan. 1970, at 4-16, in *1971 Hearings*, *supra* note 5, at 1683-99.

8. *Id.* at 4, *1971 Hearings*.

9. Great things often have curious beginnings; in this case the beginnings were curious indeed. One of the subcommittee staff members had his attention called to the article by an English neighbor then taking citizenship classes. Challenged to reconcile the precepts the Government was teaching prospective citizens with the implications of

The reply that Ervin received was the same as that received by the other legislators who had written.<sup>10</sup> In it, Army General Counsel Jordan described at great length the various programs and file systems maintained by the Army. His reply also described the civil disturbance responsibilities of the Army and its need for information. The letter was long, reassuring, and entirely plausible. Its purpose was to be responsive to the legislative complaints, but more important, to be disarming. In this respect, it was almost entirely successful. Most of the legislators who had written were mollified and soon retired from the controversy.

Ervin, however, did not, for two reasons. First, he was seeking precise facts for his general survey. Jordan's letter provided no details for any of the sixteen explicit questions raised in the January letter. The second reason was also crucial. Unlike most public muckrakers, Pyle was not satisfied with a single dramatic exposé. As a graduate of law school, a Ph. D. candidate in political science, and as an aspiring professor of American government, he wanted a full exploration of the program and some concrete legislative response. Further, he was almost as strong an admirer of the Army as he was of the Constitution. Army surveillance, he felt, was not only improper from a constitutional perspective, but was wrong and unnecessary, and dangerous for the Army. He took his article with him to Washington seeking a Congressman or Senator who would help him achieve his goals.

By the time Jordan's letter arrived, Pyle had discussed the issue with the subcommittee staff several times, had persuaded staff members of his bona fides, and had offered his expert knowledge. When Jordan's letter came, the staff was in an unusually good position to analyze it. As a consequence, Ervin was not persuaded by the reassuring words from the Army. His reply, dated only two days after Jordan's letter was received, beginning with the words, "Thank you for your *interim*

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the Pyle article, the staffer took the problem to Ervin. Ervin's first letter was couched in terms of a formal inquiry into Army practices and regulations regarding data banks and computers. Letter from Sam Ervin to Stanley R. Resor, Jan. 22, 1970, in *1971 Hearings*, *supra* note 5, at 1047.

The subcommittee had for a number of years been exploring this question with a variety of government departments. It had just previously been engaged in an extended inquiry with the Department of Health, Education, and Welfare about its program of political clearance for scientific and honorific advisory appointments and with the Secret Service over its program of collecting the names of "gate crashers" and expounders of "suspect" remarks for its own computer. Ervin had previously addressed this subject in a Senate speech. See 115 CONG. REC. 39114 (1969). Because of this background, Ervin's letter was grounded in a more substantial legislative interest than the majority of the other inquiries. See Pyle, *CONUS Revisited: The Army Covers Up*, WASHINGTON MONTHLY, July 1970, at 50, in *1971 Hearings* at 1693-94 [hereinafter cited as *CONUS Revisited*].

reply to the Subcommittee's inquiry,"<sup>11</sup> signaled as much to the services. While the other legislators used the Army response as public evidence that the Army had remedied the problem, Ervin persevered.<sup>12</sup>

The course of the investigation over the succeeding months can best be understood by a reading of the hearing materials and reports the subcommittee eventually published.<sup>13</sup> There were, however, a few high points between this date and the hearings of February and March, 1971, which deserve elaboration. One of the more important developments was the fact that a few newspapers were prepared to assign investigative reporters to cover the story and to support their reporters during long fallow periods when nothing newsworthy seemed to be happening.<sup>14</sup> These reporters were in a position to complement the subcommittee's inquiries with interviews of former agents and government officials, and with tracking down loose ends. They provided essential legwork without which the investigation could not have proceeded. They also gave public exposure to the additional evidence that Pyle was collecting through his contacts with former intelligence students.

The first watershed was reached in July 1970, when Pyle published a second article.<sup>15</sup> In it he accused the Army of making essentially cosmetic reforms, while still continuing most of its surveillance.<sup>16</sup> Pyle was especially devastating in his analysis of what he called "plausible denials"—apparently candid rebuttals which avoided direct responses and which were meant to mislead.<sup>17</sup> Pyle listed many activities by the Army that were in direct contradiction to official statements. Perhaps most damaging of all, he made it clear that the civilian officials in the

10. The letter from Robert E. Jordan III to Sam Ervin, Feb. 25, 1970, is reprinted in *1971 Hearings*, *supra* note 5, at 1048.

11. Letter from Sam Ervin to Stanley R. Resor, Feb. 27, 1970, in *1971 Hearings* at 1050 (emphasis added).

12. *CONUS Revisited*, *supra* note 9, at 52, *1971 Hearings* at 1695.

13. In addition to the *1971 Hearings*, two reports were eventually published by the subcommittee: STAFF OF CONSTITUTIONAL RIGHTS SUBCOMM., SENATE COMM. ON THE JUDICIARY, 92D CONG., 2D SESS., ARMY SURVEILLANCE OF CIVILIANS: A DOCUMENTARY ANALYSIS (Comm. Print 1972) [hereinafter cited as 1972 REPORT], and SUBCOMM. ON CONSTITUTIONAL RIGHTS, SENATE COMM. ON THE JUDICIARY, 93D CONG., 1ST SESS., MILITARY SURVEILLANCE OF CIVILIAN POLITICS (Comm. Print 1973) [hereinafter cited as 1973 REPORT].

14. These reporters included Jared Stout, *Newhouse News Service*; Morton Kondracke, *Chicago Sun-Times*; and Richard Halloran, *New York Times*.

15. *CONUS Revisited*, *supra* note 9, at 49.

16. *Id.*, *1971 Hearings* at 1693.

17. *Id.* at 50, *1971 Hearings* at 1693. For example, the Army confirmed the existence of its nationwide intelligence apparatus, but said it collected information only in relation to Army civil disturbance responsibilities. Also, the Army acknowledged that it did publish an identification list of persons active in past civil disturbances, but failed to mention that the list also contained descriptions of persons never involved in civil disturbances.

Department were probably unaware of what their military subordinates were really doing.<sup>18</sup>

Ervin's inquiries began to bear fruit in the receipt of the legal and administrative paper that formed the foundation (or lack of foundation) for the surveillance program.<sup>19</sup> The continuing public pressure, together with the unseen efforts of the Army's civilian leadership, finally resulted in the so-called Lynch directive of June 9 outlining new and more stringent limitations on Army surveillance.<sup>20</sup> While the new directive was a decided improvement over earlier efforts to reassure the public, by this time Ervin and the subcommittee staff were not easily reassured. Ervin's response to the directive informed the Army of a planned set of hearings in the fall on the entire subject.<sup>21</sup> It included ten additional, specific inquiries seeking the Army's interpretation of the new directive. It also contained Ervin's summary rejection of the Army's claim that the directive was an adequate solution to the disclosures of the past six months:

I confess that the exceptions, qualifications, and lack of criteria in your policy letter could lead the average citizen—which I consider myself—to wonder just how much of a change it represents in government policy.<sup>22</sup>

By the time fall arrived, Ervin had scheduled three days of hearings to explore Army surveillance and other computer issues involving privacy.<sup>23</sup> While the staff lobbied hard for such hearings, there was a definite feeling that the Army surveillance issue had faded and that the hearings would not attract much public attention or develop a great deal of new information.

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18. By illustration, he described Jordan's surprising discovery during a field inspection of computers that he had been told, and had so told the Congress, did not exist. *Id.* at 50-51, *1971 Hearings* at 1694.

19. The various regulations and other materials pertaining to the authority for the programs are reprinted in *1971 Hearings*, pt. 2.

20. Adjutant General's letter directive of June 9, 1970, Dep't of the Army, Collection, Reporting, Processing, and Storage of Civil Disturbance Information, in *1971 Hearings* at 1099. Two subsequent Adjutant General directives were issued later that year: Adjutant General's letter directive of July 31, 1970, Dep't of the Army, Policy Limitations on Counterintelligence Coverage of Racial Matters, in *1971 Hearings* at 1117; and Adjutant General's letter directive of December 15, 1970, Dep't of the Army [Wickham Directive], Counterintelligence Activities Concerning Civilians Not Affiliated with the Department of Defense, in *1971 Hearings* at 1142. The Wickham Directive was altered in important respects by a classified modification issued at the same time.

21. Letter from Sam Ervin to Stanley R. Resor, July 27, 1970, in *1971 Hearings* at 1102.

22. *Id.*

23. *1971 Hearings* at 1661.

There was, nonetheless, a considerable let-down when Ervin informed the staff several days before the hearings were scheduled to open that his schedule on the Senate floor was too full to permit hearings. The cancellation, while a severe disappointment to the staff at the time, later proved a blessing. Despite nine months of hard work, the staff had in fact only scratched the surface. All throughout this period of the investigation the staff investigators had no real idea of the scope or dimensions of the program they were examining.

#### APPROACHING PUBLIC HEARINGS

Following the cancellation, events moved out of the control of both the subcommittee staff and the military. All during the prior period, the subcommittee had been in the position of guiding press investigations, giving out information, receiving leads and facts from former agents, formulating inquiries, and evaluating Army responses. During the fall, however, a number of television documentaries were in progress, and the investigations conducted in the course of preparing for them were kept secret by the networks. The most dramatic of these was an NBC documentary produced by Tom Pettit and aired December 1, 1970.<sup>24</sup> More than newspaper stories, Senate speeches, and magazine articles, this documentary had a widespread and dramatic impact. It conveyed to the public the story on Army surveillance in a way that made it immediate and hard-hitting.

The immediate result was a resurgence in public and press interest in the subcommittee's work—a needed tonic to a discouraged and played out investigation. More important, it persuaded a former Army intelligence sergeant named John O'Brien that there were important people in Washington who might listen to what he said. Having seen the program, O'Brien wrote a letter to NBC and to each of the Senators, Congressmen and other figures featured in the program.<sup>25</sup> In it, O'Brien described a far broader scope of Army surveillance than the subcommittee had previously known about. He said that it covered all civilian groups opposing the war in Vietnam or the Nixon administration's domestic policies. O'Brien also said the surveillance was directed at public figures, including elected officials at the state and federal level.<sup>26</sup>

O'Brien's letter was written December 7, 1970. Senator Ervin released that letter on December 16. The intervening week was a busy period for the subcommittee staff. O'Brien's charges clearly opened up

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24. *First Tuesday*, "The Man From Uncle (Sam)," NBC Television Network.

25. *1971 Hearings* at 1679.

26. *Id.*

new and potentially unlimited implications for the program. Up to that time, it had appeared that the surveillance was largely directed at public trouble-makers—those individuals and groups actively involved in violent civil disturbances. The letter suggested that the program covered the entire range of disagreement with administration policy. O'Brien said the surveillance was not aimed at "radicals" or "activists" but at established political figures and institutions, as well.

O'Brien's letter was potentially damaging but could not be ignored. The problem of how to deal with it was finally resolved by requesting Pyle and an investigative reporter who had also received a copy of the letter to go to Chicago and evaluate O'Brien's story. This they did in a manner which divorced the subcommittee from any direct involvement, yet which still persuaded O'Brien that his charges were being weighed by a Senate committee. When the two unofficial subcommittee investigators returned, they were convinced that O'Brien was a sound, reasonable, and truthful witness, and that he was familiar with his intelligence unit's operations. During the course of their 36-hour interview they got specific information on some of the targets of the program, including the names of Illinois local, state and federal officials who had been subject to the unit's surveillance. Based on this evaluation of O'Brien's credibility, Ervin agreed to disclose this information in a Senate speech.<sup>27</sup>

Ervin's speech, while carefully phrased to protect him as much as possible from the possibility that O'Brien's charges would collapse, still placed him squarely in a new and vulnerable position. After describing the background of the inquiry and the fairly narrow scope of the Army program as then known, Ervin related in summary what O'Brien had said:

It appears that Army intelligence, at least since 1968, but probably earlier as well, and up to June of this year at least, was actively covering the activities of individuals and groups against whom no charge of political extremism can possibly be made.

The individuals who were "targeted" for surveillance—spying, in common parlance—include a Member of this body,

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27. Ervin's statement to the Senate was delivered late in the day December 16, 1970. 116 CONG. REC. 41750 (1970).

Before giving the speech, Senator Ervin had the subcommittee check with each of the figures for permission to name them as subjects of the Army spying. Each of them was outraged, and only one had objections to a public identification, believing that identification as a subject of surveillance might engender in the public a belief that the attention was deserved. In the end, the official allowed his name to be used, and suffered no adverse political effects.



the junior Senator from Illinois, Mr. Stevenson; the former Governor of Illinois, now Judge Otto Kerner, a Member of the other body, Congressman Abner Mikva; State and local officials; plus well-known political contributors of both parties, newspaper reporters, religious figures, lawyers and local and national political figures. These are only a few of the reportedly 800 individuals who were targets of the military intelligence system in only one State, Illinois.<sup>28</sup>

The result of the speech and the accompanying press account was electric. President Nixon, through his press secretary, said he was "totally, completely, and unequivocally" opposed to such spying and that it "absolutely was not going on in any way at this time."<sup>29</sup> The story was carried nationally and displayed prominently on TV. Other agents came forward to give more examples, and Congress responded with a chorus of demands for investigators and answers.

The Army's denial, issued shortly thereafter by the Secretary of the Army, read in pertinent part as follows:

*A preliminary check has been completed. On the basis of information I have received, I can state that neither Senator Stevenson, Representative Mikva nor former Governor Kerner are or ever have been the subject of military intelligence activities or investigations related to political activities. Allegations to the contrary are without foundation in fact.*<sup>30</sup>

On the face of it, Secretary Resor's denial was straightforward, unequivocal, and complete. It was a direct contradiction of O'Brien's charges about Senator Stevenson, Congressman Mikva, and Governor Kerner. Strictly speaking, a successful repudiation of these points should not have detracted from the major substantive charge concerning

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28. *Id.* at 41751, 1971 Hearings, *supra* note 5, at 1678.

He also challenged the asserted basis for the surveillance as he had consistently heard it from the Army:

As reported to me, the reason for this surveillance was that the Army could determine the political proclivities of the individuals involved, and forecast their reactions to certain situations. The information was used to predict political behavior, voting patterns, political alliances, and political activities of men who are part of the normal, regular, constitutional, "established" political system of our country.

*Id.*

29. The President's remarks appear in 1971 Hearings at 1719. The 1970 Huston Plan on domestic surveillance was prepared with the reluctant cooperation of Army officers, but as approved by the President, it assigned the military no active role. Testimony of Col. John Downie, U.S. Army (ret.), 1974 Hearings, *supra* note 1, at 38, 71.

30. 1971 Hearings at 1299 (emphasis added).

the more extensive scope of the surveillance. Nor should it have affected the disclosures of the previous twelve months. But practically, it was very clear that O'Brien's statement about Stevenson and the other officials had become the precarious foundation upon which the subcommittee's entire work now rested.

Resor's statements in other respects were not so much denials as a "confession and avoidance." Naturally enough, the Army's reply was aimed at the most vulnerable and most dramatic, if not the most important, aspects of O'Brien's allegations. It was the word of the Secretary of the Army against that of a former sergeant. The best the subcommittee could do was to point out that the Army's unequivocal denial was based on a preliminary check and on the basis of information which the Secretary had received. The staff argued that the Army was only making good use of the old device of the carefully hedged, "unequivocal" denial.

The Army did not mention that its investigation was only three days long, nor did it mention whom it had questioned, or what it had learned. As it turned out, the Army had called in the commanding officer and the senior civilian from O'Brien's unit. They had flown in from Chicago and denied O'Brien's story. The Army had made no other independent inquiry at this time.

The other important consequence of the O'Brien disclosure was that, after leaving the Army with the controversy for an entire year, the Secretary of Defense, Melvin Laird, now decided it was a problem which required his personal attention. Suddenly, the subcommittee was no longer dealing with the Army General Counsel, Robert Jordan, or the Secretary, Stanley Resor. Now the man in charge was J. Fred Buzhardt, Department of Defense General Counsel and Laird's senior trouble shooter. One of the first signs of Secretary Laird's new role was the issuance of a directive to all DOD agencies and departments setting forth the Secretary's policy on surveillance.<sup>31</sup> The first paragraph expressed his concern that individual and constitutional rights be carefully observed in all intelligence activities of the Department.

The balance of the order made clear that the Secretary had more on his mind than the Ervin investigation. He proposed a reorganization and centralization of all intelligence and investigative efforts within the Secretary's office. Among unfinished business of the DOD reorganization of 1947 was the question of intelligence. It had been a sore spot of contention among the various services and the Joint Chiefs of Staff and succeed-

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31. *Id.* at 1299-1300.

ing Secretaries of Defense. Access to and control of military intelligence play a key role in policy disputes within the Defense Department between civilian and military leaders. These factors can be critical to the influence each of the parties has within the National Security Council and with the President and Congress. What Laird had done was to use the opportunity of this embarrassing but limited dispute over one facet of military intelligence to provide the Secretary with the opportunity to seek full administrative control over all military intelligence from the services.<sup>32</sup>

Following the O'Brien disclosures and the rapid sequence of events that they produced, the subcommittee began to prepare for hearings in early spring. One important aspect of these hearings was that the chairman did not want them to be exclusively concerned with the Army problem. Also of importance was the far less dramatic, but much more intractable, problem of focusing attention on the rapid proliferation of federal data banks and computers and on individual privacy in areas which did not involve politically sensitive activities. While the importance of the controversy over the Army's intelligence gathering is not to be underrated, it was a program that most people would consider to be clearly outside the legitimate governmental domain. As such, it could be cleared up, without undue difficulty. By contrast, the other kinds of government data collection had a much firmer justification in law and policy. The problem here was to persuade the public and the government to place restrictions and controls on otherwise legitimate programs in order to minimize invasions of personal privacy. While by 1974 this issue has received much public attention, in early 1971 the subcommittee was faced with introducing the problem largely for the first time.

#### THE ARMY SURVEILLANCE HEARINGS

The preparation for the hearings essentially took two parts. One staff member arranged for the non-Army portion, while most of the staff resources were devoted to the surveillance question. Despite the temptations and the pressure of the press, the first day of hearings did not focus on Army surveillance at all. The subcommittee instead invited a number of lawyers and professors to speak about the right to privacy in general, and the importance of the issue for individual rights. Despite the low-key start, the press and TV coverage was extensive. The hearings

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32. The final result was less than Laird had sought. While personal background investigations were centralized in the Defense Investigative Service, intelligence on "potentially hostile nations" remained the prerogative of the individual services. See *1971 Hearings* at 1300.

were held in the klieg lights and awesome grandeur of the Senate Caucus Room, a hearing site that is almost a precondition for making history. Despite the slow start, the opening day made headlines in the *New York Times*.<sup>33</sup>

The second day led off with John O'Brien,<sup>34</sup> who had obviously become the star witness. Fortunately, he had been persuaded not to respond to the importunings of the press in the two months that followed his disclosures and so had not been tempted to embellish his story beyond supportable limits. O'Brien was not coached by the staff, who indeed did not meet him until shortly before the hearing day. As in a trial, a garrulous witness in an investigative hearing can be trouble, but O'Brien did well. Despite close questioning by Senator Hruska (R-Neb.) and Senator Thurmond (R-S.C.), the latter a member of the Armed Services Committee and a Reserve Air Force General, and both formidable interrogators, O'Brien managed to avoid any inroads into his story. The impression he made was very favorable.<sup>35</sup>

Once past O'Brien, the subcommittee's principal case went smoothly. It consisted largely of a number of former intelligence agents who gave various examples of the surveillance they had conducted or of which they were aware. This was supplemented by testimony of a few subjects of the surveillance.<sup>36</sup> The individual experiences were put into context by an extended analysis and description of the results of the subcommittee's inquiries by Christopher Pyle.<sup>37</sup> Finally, a noted professor of military science gave his views on the dangers to society and to the military of this activity.<sup>38</sup>

The military witnesses were scheduled to appear on the second Tuesday of the hearings. Pursuant to the subcommittee's request, a draft statement was delivered to the staff the Friday before. Among the more significant aspects of the testimony was the admission that,

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33. The headline read: *Senators Hear Threat of a "Dossier Dictatorship,"* N.Y. Times, Feb. 24, 1971, at 1, col. 5.

34. *1971 Hearings* at 91, 100.

35. *Id.* at 106-10, 118-25.

36. Such targets included Curtis Graves, Texas State Representative, *see id.* at 336; Abner Mikva, then U.S. Congressman from Illinois, *see id.* at 130; John A. Sullivan and Stewart Meachem, American Friends Service Committee, and Pete Parra, college student, *see id.* at 351.

37. *Id.* at 147 (statement of Christopher H. Pyle).

Particularly telling was the testimony of one former serviceman who had been a clerk-typist with the military task force set up to investigate the charges first outlined by Pyle a year earlier. He testified to the efforts of the task force to conceal or mislead the civilian authorities within the Department of the Army who were themselves trying to find out what had happened. *Id.* at 277 (statement of Edward Sohler).

38. *Id.* at 344 (statement of Morris Janowitz, Professor of Sociology, University of Chicago).

after two months of denials, the Army had indeed finally discovered a file on Senator Stevenson.<sup>39</sup> With this concession, the political and psychological initiative shifted permanently to the subcommittee.

Appearing as chief witness for the Department was Assistant Secretary of Defense Froehlke, accompanied by DOD General Counsel Buzhardt and Army General Counsel Jordan. The military, chiefly by Buzhardt, had prepared a 50-page statement, plus an extensive appendix. Despite the staff's desire to have it summarized, and Froehlke's obvious hope that the chairman would so direct, it was apparent that Buzhardt intended to have the statement read in full. In a strained and not at all riveting style, the Assistant Secretary of Defense proceeded to use up the entire morning session. The tactic was not without purpose. Not only did it serve to occupy time otherwise useful for questions, but it served to deaden just about everyone at the hearings. By the time the afternoon session began, most of the press had left to file stories based on the Department's testimony; the cameras had shut down; the Senators were exhausted; and any important revelations that the interrogation might produce would largely escape public attention. One wonders whether more might have been produced if the filibuster had not been so effective.

#### DIFFICULTIES WITH THE DOD

With the testimony of the Department, the hearings passed to the more general subject of computers and privacy, and little of direct relevance to Army surveillance was developed, with one exception. When William Rehnquist, then Assistant Attorney General for the Office of Legal Counsel, testified, he disclosed that a number of documents prepared by the Army in the course of its surveillance program were now under his personal control for the purposes of litigation then being conducted. Senator Ervin asked for copies and Rehnquist readily agreed.<sup>40</sup> Surprisingly, they were delivered to the subcommittee with a total absence of difficulty or hindrance.<sup>41</sup>

In this case the materials were extremely extensive, consisting of computer printouts and other documents totaling hundreds of pages and

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39. *Id.* at 375, 389 (statement of Robert F. Froehlke, Assistant Secretary of Defense).

40. *Id.* at 597, 622 (statement of William H. Rehnquist, Assistant Attorney General).

41. This was a highly unusual occurrence, and undoubtedly was due to Rehnquist's personal efforts to aid the committee. It was in sharp contrast to the difficulties the subcommittee later had in getting other information directly from the Defense Department. Rarely, if ever before, had raw political intelligence files of the government been given to a critical congressional committee.

standing over four feet high. The materials were analyzed by the staff and described at length in a 97-page staff report.<sup>42</sup> They proved invaluable in giving the subcommittee a first-hand knowledge of how the Army and, by extension, other federal agencies collect political intelligence on Americans.

While relations between the Army and the subcommittee were never particularly warm nor overly cooperative during the first twelve months of the subcommittee's investigation, they were always proper and formal. The subcommittee was not confronted with any unusual obstruction beyond what all executive departments display when dealing with what they consider to be overly curious legislative committees. This relationship deteriorated noticeably after December 16 when responsibility shifted from Jordan to Buzhardt. Thereafter, the subcommittee was subjected to extensive delays, evasions and obstacles in its quest for information.

The problem became evident very quickly when Senator Ervin requested the attendance of certain officials at the hearings. In particular, he sought the testimony of a number of uniformed intelligence officers who could give first-hand information on the origins, purposes, and military value of the intelligence program. Informal requests that the generals be made available proved fruitless, and so the chairman then made a formal request.<sup>43</sup> Buzhardt's reply was polite, but negative. He suggested that the generals might be material witnesses in possible future administrative or criminal proceedings, and that their appearance might affect the due process rights of persons involved in these proceedings. Furthermore, he said that two of the generals were then overseas.

Ervin then wrote directly to Secretary Laird, by-passing Buzhardt.<sup>44</sup> In the letter Ervin asked for the particulars on the legal action to which Buzhardt had referred. He also pointed out the critical gaps that remained in the record. Those were, first, the absence of any underlying documents and evidence to support and elucidate the vague and conclusory statements which formed most of Secretary Froehlke's testimony, and second, the failure to provide professional military assessments of the surveillance program.

As the record then stood, there was no way the subcommittee or the public could assess for itself the picture put forth by the Department.

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42. 1972 REPORT, *supra* note 13.

43. Letter from Sam Ervin to Robert F. Froehlke, Feb. 18, 1971, in *1971 Hearings*, *supra* note 5, at 1216.

44. Letters from Sam Ervin to Melvin Laird, Mar. 4, 1971, and Mar. 12, 1971, in *1971 Hearings* at 1217, 1218.

It was critical to have a professional evaluation of the surveillance program to substantiate the subcommittee's belief that it had no value from an intelligence or military perspective. Absent that support, there was the danger that the intelligence arm would not be reconciled to the program's cessation. If the feeling developed that the program was halted solely for political reasons, there would be no assurance that it would not be resumed in some future crisis.<sup>45</sup> Buzhardt responded to Ervin's letter with a discourse on the information already provided and its sufficiency for the subcommittee's investigation. In his view, there was no need for any more information, nor, of course, for the generals.<sup>46</sup>

The pattern of the next year was set by this post-hearing exchange. The subcommittee continued to seek more and more detail. It was met with answers which provided as little as possible, while asserting that the subcommittee had all it needed. Ervin's letters got stronger and more insistent as time went on. The Defense responses became more impatient. A high point—or low point—came when Laird himself responded on April 19 with a long review of the cooperation the Department had given. In the course of the letter he pointedly said that, as for the generals, "I do not believe it appropriate" for them to appear. The desired testimony should be (and, of course, had been) furnished by "my designated representative, Mr. Robert Froehlke."<sup>47</sup>

This offended Ervin to an exceptional degree. It was quite normal for the Department to want to end an embarrassing inquiry as quickly as possible and to take the position that the hearings were the conclusion, not the middle, of the investigation. Executive agencies take this position as a matter of course, and they use every argument they can think of to blunt or wear down a congressional investigation. Usually this is successful. Because of the pressure of business, legislators generally seek to hit only the high point of an issue. They have neither the time, nor the resources, nor the inclination to conduct long, detailed and possibly fruitless inquiries. The agencies know this and act accordingly. Part of their approach is to deny and delay without explicitly refusing. But there is a fine line between this and overt obstructionism. Usually, the last thing an agency wants is to anger a Senator

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45. The subcommittee staff was also aware of comments of senior officers in Army Intelligence to the effect that the investigation was a transitory political "flap" and that once the controversy receded, they could resume the surveillance.

46. Letter from Fred Buzhardt to Sam Ervin, Mar. 9, 1971, in *1971 Hearings, supra* note 5, at 1217.

47. Letter from Melvin Laird to Sam Ervin, Apr. 19, 1971, in *1971 Hearings* at 1225, 1226. The written correspondence was supplemented by many personal exchanges between Buzhardt and the subcommittee staff.

or to allow things to deteriorate to a final refusal and confrontation. Laird's statement that he, rather than the subcommittee chairman, would determine what was appropriate, exhausted Ervin's patience and convinced him that strong measures would probably be necessary.<sup>48</sup>

While the issue was first joined on the question of the generals' appearance, by spring other events had served to make their appearance less important as a means of securing the needed testimony. First, it became clear that new hearings so soon after the last were not advisable. Second, the subcommittee had received a mass of documentary evidence through the Justice Department and Rehnquist's intercession. This evidence had been analyzed by the staff in a documentary report which, far more than anything else thus far, showed the nature, extent—and worthlessness—of the surveillance. Finally, the subcommittee had come upon a "secret agent in place"—a member of the intelligence branch still in uniform and working within the Pentagon office directly concerned with the subcommittee investigation.<sup>49</sup> This man had managed to provide the subcommittee with a wealth of information which vastly increased its knowledge of the entire program. As a result, Ervin was by this time more interested in getting the staff report declassified and getting the subcommittee's new information confirmed officially by the Department.

A copy of the proposed report was sent to Buzhardt for declassification in May 1971, and the Department replied on June 9.<sup>50</sup> Buzhardt listed six reasons why it could not be declassified. Most of the reasons went to substance: it was incorrect, outdated, incomplete, and so forth. Only three reasons were advanced which had any relevance to the declassification issue. First, there was pending civil litigation; second, the report mentioned the names of individuals whose privacy would thereby be impaired; and third, the Department had given the documents with a reservation on their public use.

Senator Ervin felt the first was irrelevant to the right of a legislative committee to publish a report. The second problem was mooted by the fact that these individuals and groups had already been publicly identified as subjects of surveillance. In any case, that was not a valid

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48. Ervin directed the staff in April 1971 to prepare subpoenas for the missing witnesses, but decided there was insufficient political support for their issuance.

49. Dubbed "Yellow-pants," this serviceman kept the staff fully informed of developments in the Army during the first half of 1971. His alias was not well-chosen since he had a habit of wearing yellow slacks while off-duty and so might have been identified by his military associates.

50. Letter from Lawrence Baskir to Fred Buzhardt, May 3, 1971, and reply of June 9, 1971, in *1971 Hearings*, *supra* note 5, at 1227, 1228.



reason for a national security classification. In fact, there was more than a little irony in the Defense Department defending the privacy of the people upon whom it had spied. The third reason was, of course, the reason why Ervin had written for consent in the first place.

Ervin continued to pressure the Department for cooperation. By mid-summer, his concern with executive secrecy had expanded beyond this one example relating to the subcommittee investigation. There had been growing discontent in Congress with the Executive's increasing refusals to deal with Congress. Ervin decided the issue needed exploration in a broader context. In part at the insistence of Senator Fulbright, whose Foreign Relations Committee had been frustrated in its efforts to get Presidential Advisor Henry Kissinger to appear at hearings, Ervin decided to use his other Judiciary Subcommittee, Separation of Powers, to hold general hearings on a variety of executive secrecy issues.<sup>51</sup> These hearings gave Ervin an opportunity to apply additional political pressure for Defense Department cooperation. Among the witnesses was Buzhardt, who was subjected to a severe public examination about his failures to provide Ervin with what he wanted.<sup>52</sup>

A second witness was Senator John Tunney, a junior member of the Constitutional Rights Subcommittee. In cooperation with the Constitutional Rights staff, Tunney presented a comprehensive review of the Subcommittee's difficulties with the Defense Department.<sup>53</sup> Although there was a certain unreality in having Tunney tell Ervin at one hearing what Ervin had been doing in another subcommittee, it was no different from a staged colloquy on the Senate floor. The hearing served its purpose in giving Ervin a public forum to pursue his case, to bring additional public exposure to the Department's obstinacy and to provide a foundation for any further steps that might prove necessary.

The Department, however, remained firm. By the fall of 1971, Ervin, frustrated by the persistent failure to deliver the requested documents, or to have the materials in his possession declassified, or to get clearance for the staff report, decided to issue his first ultimatum. In a letter to Secretary Laird he reviewed the course of the unsuccessful efforts thus far and pointedly rejected each of the excuses or justi-

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51. Kissinger had become the senior official in charge of foreign policy, displacing the then Secretary of State. The President claimed executive privilege to prevent Kissinger's appearance before the Foreign Relations Committee, chaired by Fulbright. Fulbright introduced a bill to force an appearance. *Hearings on S. 1125 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. (1971)*.

52. *Id.* at 443.

53. *Id.* at 381.

fications that he had received. The Department's excuses were summarized in the letter:

[W]e are precluded by consistent Executive branch policy from releasing to the public. (J. Fred Buzhardt, General Counsel, Department of Defense.)

Inappropriate to authorize the release of these documents. (Melvin Laird, Secretary of Defense.)

This information is solely for your use in conducting your inquiry. (R. Kenly Webster, Acting General Counsel, Department of Army.)

The records . . . cannot be obtained without an inordinate expenditure of time and effort. (R. Kenly Webster, Acting General Counsel, Department of Army.)

No useful purpose would be served by a public report on the materials. . . (J. Fred Buzhardt, General Counsel, Department of Defense.)

I do not believe it appropriate that the general officers in question appear before your Subcommittee, but that any 'desired testimony' . . . should be furnished by my designated representative. (Melvin Laird, Secretary of Defense.)<sup>54</sup>

To which Ervin replied:

If I were a suspicious person, I would draw the inference that the Subcommittee has been given the 'runaround.' I refrain, however, from so asserting.

I am constrained to say that if the Subcommittee postpones further action until the Department of Defense and the Department of the Army manifests [*sic*] a willingness to comply with the Subcommittee's request, the Subcommittee will await such action in vain until the last lingering echo of Gabriel's horn trembles into ultimate silence.<sup>55</sup>

Ervin then said that if the documents and other responses were not forthcoming, he would have to introduce a resolution in the Senate on these matters, which would condemn the surveillance program from

54. 1971 *Hearings* at 1265.

At one point, Buzhardt "resolved" months of dispute about access to an Army investigative report by inviting the staff to review the material in his office. Once there, the staff was treated to a three-hour monologue of charm and anecdote. By the end of the performance, the reports, sitting on an adjacent table, had not been cracked. They were never made available again.

55. *Id.*

a constitutional perspective and authorize the chairman to seek subpoenas. Ervin thoughtfully enclosed a copy of the draft resolution.<sup>56</sup>

In the Watergate era, we are now accustomed to have subpoenas flow from Congress to executive branch. But in those more innocent days, the issuance of a congressional subpoena for information from an executive officer was highly unusual. The subcommittee's quick search had not disclosed a recent precedent for one in these circumstances. While the subpoena weapon has always existed, and is very effective, in recent times Congress had just not seen fit to exercise it.

To understand this, it is necessary to recall that the issue of executive privilege and withholding of information from Congress has only recently come to a head. In the false sense of comity that had served to rationalize Congress' unwillingness and inability to assert itself against executive secrecy, the subpoenaing of documents from the executive branch was just "not done." That Ervin, after a year or more of frustration, was finally driven to threaten the subpoena shows not only how far he had been pushed, but what it took to provoke a legislator finally to flex his muscles. The experience with the Army, or more precisely with Buzhardt and the Defense Department, was perhaps the first serious skirmish in a conflict that later spread throughout Congress.

Ervin's letter did not specify a time limit. As ultimatums go, and certainly as recent events show, it was a relatively mild threat. But it did have some results. After more communications with the Department in January, Buzhardt finally delivered a set of documents comprising a portion, though by no means a great proportion, of the missing materials.<sup>57</sup> This delivery served as the grounds for a tacit resolution of part of the controversy.

The subcommittee had by now a great deal of information from many sources. A full year had just about passed since its hearings, and almost two years since the investigation began. It was long since time for the subcommittee to produce some concrete results. While the missing information was still important, the passing of time had become more important. Despite staff importunings, Ervin decided that he could not and would not press the Department for further information.

This left only one issue outstanding—declassifying the staff report and the materials it had drawn upon. This effort continued during the early part of the spring of 1972. By this time, the report had been sub-

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56. *Id.*

57. The delivery to Ervin was made by Buzhardt personally.

stantially revised. Still, no reply had been forthcoming to the request for clearance. Faced again with this frustrating lack of response, Ervin wrote once more to Laird.<sup>58</sup> This time he enclosed a copy of his revised resolution which now stated that all materials pertaining to the discredited and halted Army surveillance program were, in the Senate's judgment, no longer, if ever, properly classified for national security purposes. It declared them unclassified and permitted anyone in possession to make them available to the Senate or the public.

The resolution would have proved a serious political embarrassment to the Department and the Administration since it accused them of still covering up even after two years of public statements disavowing the spying. But it was also an unprecedented effort to establish a process of declassification by legislative proclamation. Such a step would have been a major blow to the consistent executive tradition that it alone has the power to adjudge what is necessary for national security and what must be classified on those grounds.

Irrespective of the legal issue raised by Senator Ervin's proposed resolution, there was little doubt in his mind or in the Department's that it would have passed quickly and possibly unanimously. Once asserted, such a legislative power might have untold consequences in the future. This time he set a time limit of a bare week. Before the week was out, the Department sent up a legal officer who read both the staff report and the draft committee report. It took him an hour and a quarter. When he emerged, he pronounced them no danger to national security and, accordingly, free from classification. That ended fifteen months of effort. With the publication of the two reports in the following months, the investigation of Army surveillance ended. By this time, preliminary efforts were underway towards establishing another Ervin committee to examine Watergate and a vastly greater range of government surveillance.

The long investigation conducted by the subcommittee shows how chance and circumstance can affect the oversight function. It also underlines the importance of establishing firm public and political support as an aid in pursuing an inquiry. Without public pressure, and the assistance of the press which stimulates it, reluctant government agencies can resist more easily the demands of legislators for information.

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58. Ervin's letter was written by him personally and was not placed in the subcommittee files although its substance was reported to the subcommittee staff. Correspondence subsequent to January 1972 was not published in the hearings. With the exception of the above mentioned letter all other letters remain in the subcommittee files.

The importance of psychology in such an inquiry also is evident. Quite clearly, Buzhardt's function was to terminate the investigation as quickly as possible and with the minimum of political embarrassment to the Department and the Administration. In fulfilling this task, he sought to wear down the patience of his adversaries without giving them a tangible provocation. Letters were ignored, promises were made and forgotten, arguments were provoked, irrelevancies were debated. Such tactics tend to be overshadowed by the popular legal debate over executive privilege. Despite the recent increase in the use of this technique, it arises in only a very small portion of the disputes over legislative access to executive information. Far more often, less formal claims of secrecy, unavailability, lack of need, or other arguments are asserted. Since most legislative investigations depend upon correspondence, they are long and often tedious affairs. This enables the executive agency to exhaust all but the most persistent inquisitors.

#### LITIGATING MILITARY SURVEILLANCE

The American system of public jurisprudence is unique in the world in at least one respect: Americans have a tendency to transform issues of public policy into questions of law and to present them for decision by judges. If this is a tendency which has grown in extraordinary degree in recent decades, it is by no means a new phenomenon. *Marbury v. Madison*<sup>59</sup> itself was a politically inspired test of the Jeffersonians' effort to block the loading of the federal courts by John Adams (and Marshall) in their famous "midnight appointments."

Fully consistent with this time-honored American tradition, within days of the publication of the original Pyle article, the ACLU put together some plaintiffs, drafted a complaint and filed suit in the District of Columbia District Court.<sup>60</sup> While the ACLU was primarily interested in an adjudication of the constitutional issue of Army surveillance, there was another aspect of their case which was of direct interest to the subcommittee. *Tatum v. Laird* sought substantial discovery from the Army about its surveillance activities. A full public exposure of Army activities was essential to the creation of a firm public condemnation of political surveillance and would also be of tremendous help to the subcommittee's own investigatory efforts.

The lawsuit met with a rapid rebuff when the trial judge denied the request for a preliminary injunction, denied permission to proceed

59. 5 U.S. (1 Cranch) 137 (1803).

60. *Tatum v. Laird*, Civil No. 459-70 (D.D.C., Apr. 29, 1970), *rev'd*, 444 F.2d 947 (D.C. Cir. 1971), *rev'd*, 408 U.S. 1 (1972).

with discovery, and granted a government motion to dismiss the complaint for failure to state a cause of action. He did so in little more than the time it takes to report these facts.<sup>61</sup>

There may have been many reasons why Judge Hart was not impressed with the seriousness of the plaintiffs' case. One reason certainly was the paucity of data the plaintiffs could advance on the scope and nature of the Army program. When the case was filed, there was no knowledge of the kinds of data the Army had been collecting, nor their sources. All that was known, essentially, was that the Army had been collecting data from public sources. The plaintiffs had available witnesses to support their allegations, but the judge declined even to hear them. To Judge Hart, as to many others, the program involved no more than a group of Keystone Cops engaged in a constitutionally harmless waste of taxpayer money.<sup>62</sup>

The case was duly appealed to the District of Columbia Court of Appeals.<sup>63</sup> By the time the court decision was rendered on April 27, 1971, one weakness in the case, at least, had been remedied: a considerable amount of additional evidence had gone into the public, if not the formal court, record. The subcommittee had held its hearings, and the country had been subjected for over a year to press stories and public exposés. The appellate court's reversal of Judge Hart's dismissal came as a welcome surprise to the plaintiffs and their supporters. The District of Columbia bench, while generally considered among the most liberal in the federal system, has its conservative members as well, and the luck of the draw had not produced three who would automatically sympathize with the plaintiffs. Indeed, two of them, Judges Wilkey and MacKinnon, were considered in the conservative column. Despite this, the plaintiffs were fully supported by two judges, and even the dissent was only partial.

Judge Wilkey addressed directly the question of legal injury, which was the main jurisdictional hurdle in the case. The plaintiffs had alleged

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61. *Tatum v. Laird*, Civil No. 459-70 (D.D.C., Apr. 29, 1970). The transcript of the district court hearings occupies less than five pages in the Joint Appendix to Briefs of Petitioner and Respondent, at 122-26, *Laird v. Tatum*, 408 U.S. 1 (1972).

62. A related case, brought a year later in Chicago in the wake of the O'Brien disclosures was dismissed by the presiding judge after an evidentiary hearing with the following commentary:

The chief beneficiary of military intelligence has been newspaper circulation.

The chief menace has been the increase in air pollution from burning newspapers from which has been extracted, for dossiers, valuable secretive bits of common knowledge available to all who can read.

*ACLU v. Laird*, Civil No. 71-1159 (N.D. Ill., Jan. 5, 1971) (per Austin, J.).

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

no concrete harm from the surveillance of which they were the victims: no loss of job, no threat of legal sanction, no loss of benefit for exercising constitutional rights, no compulsion to provide constitutionally-protected information, and, of course, no threatened public embarrassment by government publication of personal information. Nonetheless, Judge Wilkey agreed that the existence of a system of improper surveillance was itself a sufficient claim of present harm to first amendment rights to warrant trial and a decision on the merits. Buttressing this was the fact that here was no likelihood that the issue would ever be more ripe for testing.<sup>64</sup> Judge Wilkey held that a government action, not otherwise justified, which impaired first amendment rights was justiciable and that the plaintiffs need not show additional consequential harm. In common constitutional parlance, a government action which "chilled" first amendment rights was justiciable.<sup>65</sup>

An important element of Judge Wilkey's opinion was the ultra vires nature of the Army's program. Political surveillance was a function which the government should conduct, if at all, through duly authorized civil agencies. At the core of the judge's view was the belief, held by conservatives no less than liberals, that the military should be kept out of domestic political affairs.<sup>66</sup>

Reversals of dismissals for failure to state a cause of action usually go no further than the court of appeals. For one thing, economy of litigation dictates that the Supreme Court should not have to bother with an appeal from a denial of a motion to dismiss which, if upheld, may still not result in success by the plaintiffs at trial. And if the plaintiffs are successful, the issue would still be available for review on appeal. Thus, it was quite unusual for the Court to accept the petition for certiorari presented by the government.

What was more curious was the fact that the ACLU did not vigorously challenge the government's petition on these procedural grounds. In their brief in opposition to the government's writ, the ACLU argued primarily that the lower court's decision was proper on the merits, and so did not require Supreme Court review.<sup>67</sup> While the

64. *Id.* at 947, 953-56.

65. *Id.* at 956.

66. [T]o permit the military to exercise a totally unrestricted investigative function in regard to civilians, divorced from the normal restrictions of legal process and the courts, and necessarily coupling sensitive information with military power, could create a dangerous situation in the Republic.

*Id.* at 958.

67. *Id.*, cert. granted, 404 U.S. 955 (1971).

There was also some perplexity about why the government chose to risk an adverse constitutional ruling in preference to a long procedural battle in discovery proceedings

ACLU was not enthusiastic about Supreme Court review, it apparently viewed the prospect with mixed emotions. The appeal to the Supreme Court short-circuited what would otherwise have been a long and chancy road to an adjudication of the constitutional issue. While a decision in the plaintiffs' favor might not have been a conclusive ruling on the constitutional issues, still it would have satisfied the question of whether a program of this type was a proper subject of constitutional challenge.

In this case, at least, the ACLU attorneys seemed more familiar with constitutional law than with the fine points of litigation strategy or procedural law. They were much more at home in the Supreme Court arguing the constitutional aspects of the case than they would have been back in district court conducting long and complicated discovery and a trial of the factual issues. The ACLU briefs and arguments reflected this predilection.<sup>68</sup>

From the perspective of the subcommittee staff, the priorities were clearly on the side of further discovery. What the subcommittee wanted was assistance in developing its legislative case. The hearings had produced a nearly unanimous condemnation of the practice from all points on the political spectrum. A formal constitutional decision was not nearly as important to the subcommittee as was the creation of a firm political tradition that such surveillance was against the public understanding of the constitutional role of the military.

However, once the Supreme Court accepted certiorari, discussions ensued between the plaintiffs' lawyers and Senator Ervin's staff about the role Ervin might play in the case. Senator Ervin was approached by a number of religious organizations, each of which had been engaged in social or political action on issues which had been the subject of Army surveillance. They asked Ervin to represent them as amici in the case.<sup>69</sup> Because of the importance he saw in this surveillance issue, he decided to participate in the case. In the distant past, it was a common practice for legislators to argue before the Supreme Court, but this

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which, even if successful, would have largely duplicated what was by then already on the public record. In fact, it appeared that the Department of Justice was more interested in appealing than the Army. One possible explanation is that the Department of Justice feared pretrial discovery might uncover other government intelligence programs, such as the Huston Plan, which have subsequently come to light.

68. For example, on the merits, the plaintiffs noted only that in deciding a Fed. R. Civ. P. 12(b) (6) motion the defendants' affidavits should be disregarded, that the plaintiffs' allegations must be taken as fact, and that the complaint must be broadly construed in the plaintiffs' favor. They did not argue the inappropriateness of granting the writ. Brief for Respondents at 9 n.11, 11 n.12, Laird v. Tatum, 408 U.S. 1 (1972).

69. Ervin appeared as counsel for the Unitarian-Universalist Association, the Council for Christian Social Action of the United Church of Christ, the American Friends Service Committee, and the National Council of Churches of Christ.



practice has fallen into disuse in recent decades. In part, this may be a reflection of the change in the composition of the Senate from the days when great orators and lawyers continued to have an active private practice even after they became legislators. In any case, in recent years, only Senator Ervin has argued in the Supreme Court while a member of Congress.<sup>70</sup>

Ervin's brief stressed the constitutional issues, arguing that the surveillance program had a direct impact on first amendment rights and that there was no countervailing government interest which would justify the program. From a narrow point of view, this approach was inappropriate. The question at issue was one of standing and justiciability, not the constitutional merits. But if the Court could be persuaded that Army surveillance was a constitutional violation, it would be far more ready to reach a favorable conclusion on the jurisdictional issues. Ervin, representing amici, had more leeway to slide over this theoretical distinction.

There were two other advantages to Ervin's brief. First, the ACLU was intent on establishing the principle of the "chilling effect" as a viable constitutional doctrine; accordingly, its brief contained an extended appendix of 40 pages of social science data seeking to show that intrusive government action discourages the exercise of first amendment rights. Ervin, as well as many other constitutional authorities, thought the "chilling effect" doctrine had little support in Court precedent, and was not a winning strategy. Second, Ervin's participation provided an opportunity to enlarge the record before the Court. Because the case had been filed a few short weeks after Army surveillance was first uncovered, the record did not have the benefit of all the discoveries and developments of the succeeding two years, including the hearings. Ervin could draw on this history to flush out the factual case since he personified the legislative investigations of the subcommittee. To make doubly certain that the Court was aware of this record, Ervin submitted as an appendix the full printed record of the hearings.<sup>71</sup>

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70. Ervin had previously appeared as counsel for amicus arguing the justiciability of challenges to federal aid to religious education, *Flast v. Cohen*, 392 U.S. 83 (1968); as counsel for the Senate in *Gravel v. United States*, 408 U.S. 606 (1972); and as counsel for certain stockholders in *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

71. The plaintiffs and their allies were not the only ones to expand the official record in their presentation to the Court. The Government in its brief drew heavily on statements issued by the DOD in the period following the filing of the suit. See generally Brief for Petitioners, *Laird v. Tatum*, 408 U.S. 1 (1972). Plaintiffs took issue with many of the government's factual assertions, especially those to the effect that the program had halted. Brief for Respondents at 88-91, *Laird v. Tatum*, 408 U.S. 1 (1972).

The government stressed "uncontroverted evidence" of the following: the limited scope of the surveillance, its legitimacy, and the cessation of the program. The government used these latter claims to argue mootness. All these assertions of fact were controverted by the plaintiffs' allegations. Neither side's view of the factual case was subjected to the judicial tests of an evidentiary trial.

To those who are bemused by this transformation of a challenge to the legal sufficiency of a complaint into a test of constitutionality and a trial on the merits, one can only reply that Supreme Court litigation, at least in this case, is not quite the same in real life as it might appear from reading the *Federal Rules of Civil Procedure*. Consider that the Court, in holding against the plaintiffs, relied heavily on the government's allegations of facts that the plaintiffs vigorously disputed.<sup>72</sup>

The decision of the Court was rendered on June 26, 1972; Chief Justice Burger, speaking for a five-man majority, reversed the court of appeals.<sup>73</sup> The Burger opinion went to the heart of the question of whether the existence of surveillance alone was reason enough to enable a subject of the program to challenge it. The Chief Justice said no, holding that the plaintiffs had to show some other concrete harm—presumably something such as threat of sanction or loss of employment—before suing.<sup>74</sup>

The decision is a fundamental statement on the ability of citizens to challenge unconstitutional government action. An alleged constitutional violation is itself not necessarily sufficient injury to obtain legal redress, even when government's conduct is directed at specific plaintiffs. There must be more, perhaps a pecuniary loss or some other consequential, tangible hurt.<sup>75</sup> This reduces constitutional liberties to a scale far below loss of money or property. One would think that the infringement of a citizen's constitutionally guaranteed right would itself be cause enough to afford him standing, and that some other, more prosaic harm would not be needed.

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72. In a petition for rehearing the plaintiffs challenged five assertions of fact that the Supreme Court relied upon: (1) that most of the intelligence was "essentially" about civil disturbance events; (2) that the "principal sources of information" were the media; (3) that the program "hardly merits description as 'massive;'" (4) that the blacklist and data bank records had been destroyed; and (5) that Army domestic intelligence activities had been "significantly reduced." Petition for Rehearing at 4-11, *Laird v. Tatum*, 408 U.S. 1, *reh. denied*, 409 U.S. 901 (1972).

73. *Laird v. Tatum*, 408 U.S. 1 (1972), *rev'g* 444 F.2d 947 (D.C. Cir. 1971).

74. *Id.* at 13-14.

75. In another case, government-required record keeping by banks of depositors' transactions was challenged as a violation of the right to privacy, but the argument was rejected by the Court as premature in the absence of improper use by the government. *California Bankers Ass'n v. Shultz*, 94 S. Ct. 1494 (1974).

Although the issue is not clearly elaborated in the Court's opinion, there is a suggestion that the plaintiffs' claim of constitutional injury was not sufficiently corroborated to give them personal standing. Thus, the opinion argues in a footnote that the plaintiffs had conceded they were not actually "chilled."<sup>76</sup> Accordingly, they did not, in fact, suffer the harm they alleged and so were not proper parties to bring the challenge. To the extent that this concession determined the Court's decision of the case, it presents a "Catch 22" dilemma. Those who are truly chilled will not sue, since obviously they do not wish to compound any reluctance they feel about being targets of a surveillance program. Those who do sue, contrariwise, must be conceding that they are not chilled. Except for the possibility of a John Doe, it is hard to imagine a proper plaintiff for the *Tatum* case.

Surveillance and intelligence activities by their very nature are secret, do not rely upon legal compulsion for gathering information, and do not have as their objective the imposition of any legal or other kind of sanction. Because the nature of surveillance programs is such that the more direct, tangible kinds of injury the Court requires are never going to be present, in effect the Burger opinion gives legal immunity, if not sanction, to all such programs. In light of the increasing concern with government intelligence programs, the *Tatum* decision is a serious impediment to judicial control and oversight of program operations and possible excesses.

In addition to the legal controversies spurred by the case, the decision created even more dispute on another count. Casting the deciding vote was the Court's newest member, William Rehnquist. Without his vote, a 4-4 decision would have reaffirmed the court of appeals decision and kept the litigation alive. Justice Rehnquist's participation came as a surprise to the plaintiffs and their associates. His nomination had been bitterly contested in the Senate by liberals who objected to his political outlook and his consistent defense of administration and Justice Department policies. Ervin, however, had resisted pleas to join this opposition. While he disagreed with Rehnquist's views, he thought them honestly held and was not about to oppose a nominee solely because of differences with his legal position. Ervin was also attracted to the nominee because Rehnquist, unique within the Justice Department, had

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76. 408 U.S. at 13 n.7.

77. Mr. Rehnquist reversed the Department's opposition to an Ervin bill on speedy trial, and testified in support of the need for such legislation. *Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 94 (1971). With his departure, the Department reverted to its former stand.

been unusually candid and forthcoming in his dealings with the Senator. On a number of issues, he had shown himself ready to consider Ervin's views and positions on their merits and did not disregard or reject them out-of-hand as did other officials in the Department. This direct dealing resulted in Rehnquist's persuading the Department to take a more affirmative approach to some of Ervin's legislative proposals.<sup>77</sup>

In no matter was this more true than in the subcommittee's investigation of Army surveillance. Rehnquist was the principal witness for the Justice Department at those hearings and was the spokesman for the executive branch on its legal position.<sup>78</sup> He defended the constitutionality and authority of the government's surveillance function in general, with particular reference to military surveillance.<sup>79</sup> In effect, Rehnquist was the Justice Department and executive branch legal spokesman in the public and legislative debates surrounding these issues. In addition to his precise legal defense in congressional hearings, he also made many public addresses defending the constitutionality and propriety of the Administration's conduct. The Government, of course, argues its legal cases in many forums besides the courts. Except for the latter, Rehnquist was the government's chief defense attorney for this controversy.<sup>80</sup>

His role, however, was even more extensive than that of legal counsel for military surveillance in the court of public opinion. Because of the *Tatum* case and similar litigation in the federal court in Chicago,<sup>81</sup> the Justice Department had to coordinate both its legislative and litigation efforts. Evidentiary material related to Army surveillance was given to the Justice Department. As the officer in charge, the Assistant Attorney General became the person to deal with when the subcommittee wished additional information. It was through his authority that the subcommittee staff was permitted to examine some of the voluminous printouts and other documentary material which the Justice Department had received from the DOD. The staff examination was arranged and conducted according to ground rules determined by him. When the subcommittee requested custody of these materials, it was done through Rehnquist, and it was by his decision that the materials were delivered.<sup>82</sup>

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78. 1971 Hearings, *supra* note 5, at 597, 849.

79. *Id.* at 801, *passim*. Mr. Rehnquist offered the view that plaintiffs as in the *Tatum* case had suffered no harm or violation of first amendments rights, and so had no legal challenge. *Id.* at 864-65.

80. Mr. Rehnquist's speeches included at least three. They are cited in the Plaintiffs' Motion to Withdraw Opinion of the Court at 7, nn.6-8, *Laird v. Tatum*, 408 U.S. 1, *motion denied*, 409 U.S. 824 (1972).

81. See note 62 *supra*.

82. Letter from William Rehnquist to Sam Ervin, Mar. 18, 1971, in 1971 Hearings, *supra* note 5, at 1370.

At the same time, it was Rehnquist who was charged with the responsibility of developing the government's legal rationale and defense. He personally prepared the formal testimony he delivered, debated with the subcommittee chairman and other members on points of law on his own authority; and later, in response to a request by the ranking Republican, prepared and delivered a legal memorandum on the government's constitutional authority to conduct surveillance.<sup>83</sup>

Rehnquist's responsibilities in the legal defense of Army surveillance was, of course, well known to the other parties to the public controversy when the *Tatum* case was appealed to the Supreme Court. The question naturally arose as to what role he would now play as a Justice. The general conclusion was that he would obviously not participate. On this basis, suggestions that the parties raise the issue in advance of argument were not seriously considered. By the same token, a question arose as to the propriety of including in Ervin's brief a favorable quotation from Rehnquist's testimony before the subcommittee.<sup>84</sup> Ervin did not think it would be regarded as a personal appeal to one of the deciding Justices, since it was "obvious" he would not participate.

After the case was argued, the ACLU proposed submitting a motion challenging Rehnquist's right to sit. Ervin, however, refused to join. He recalled an earlier case in which a Justice sat to hear argument and even interrogated counsel, but then did not participate in the Court's deliberations. Despite the arguments of his staff and the other counsel, Ervin could not believe that the Justice would act differently than his predecessor. It was natural, he felt, that Rehnquist should want to hear the argument on an issue he had been so closely concerned with while at the Justice Department.

It came as a total surprise to Ervin when the opinion came down with Justice Rehnquist casting the deciding vote supporting the government's position on constitutionality. Ervin was so outraged that he agreed to a public statement severely criticizing the Justice for deciding a case in which he, as an attorney for the government, had been so personally and professionally interested. Having authorized the statement, Ervin soon changed his mind. He was not only an attorney in the case but a Senator. Making a personal attack on another public official, no matter how provoked he might be, violated his consistent rule of avoiding

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83. See memorandum on the first amendment and government information collection activities, in *1971 Hearings* at 1407.

84. While there is obviously no justification for surveillance of any kind that does not relate to a legitimate investigative purpose, the vice is not surveillance per se, but surveillance of activities which are none of the Government's business. *1971 Hearings* at 601.

personal attacks. Then, too, the ACLU had decided to file a recusal motion against Justice Rehnquist together with a petition for rehearing. It was, by the plaintiffs' research, only the second time a formal motion for recusal of a Supreme Court Justice had been presented by a party to a case.<sup>86</sup> Once again, Ervin believed that the Justice would withdraw voluntarily in the face of the motion. Once again, he was wrong.

The pattern was repeated when Justice Rehnquist rejected the recusal motion and issued a long memorandum justifying his view that no conflict of interest was involved.<sup>86</sup> Ervin was angered by what he viewed as the strained, opaque, an mechanistic interpretations of the conflict of interest canons and statute, and the principles they sought to express even more than by the original participation. Having read the memorandum, Ervin dictated a strong public statement. This time he was dissuaded by his staff, which used the same arguments that Ervin himself had made a few weeks before. While Ervin formally remained silent, his view of Rehnquist changed dramatically. He subsequently expressed, on a number of occasions, his belief that he had made a tragic mistake in supporting the nomination.

There are still some aspects of Rehnquist's role which have subsequently come to light but which have not yet been fully explored. There are indications that his involvement predates the legislative hearings of March 1971, and even the litigation that began in early 1970. To provide the context, it is necessary to refer to some of the internal disputes over Army surveillance that raged long before the issue came to public attention. Late in 1968, the General Counsel's office of the Department of the Army awoke to some of the controversial details of the Army's civil disturbance activities when it received a request from the Justice Department for video tapes of TV interviews conducted by Mid-West News, the Army's undercover TV unit for surveillance.<sup>87</sup> The Department of Justice wanted the tapes, which contained interviews with some leaders of the 1968 demonstrations at the Chicago Democratic Convention, for its conspiracy case against the Chicago Seven.

Upon learning of this request, the Army Secretariat realized, for the first time, that the Army's intelligence activities were far more extensive than they had been led to believe. These civilian officials then at-

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85. The plaintiffs' petition for rehearing did not raise the question of Justice Rehnquist's participation. The question was presented in the plaintiffs' Motion to Withdraw Opinion of the Court at 9 n.14, *Laird v. Tatum*, 408 U.S. 1 (1972), *motion denied*, 409 U.S. 824 (1972).

86. *Laird v. Tatum*, 409 U.S. 824 (1972) (Memorandum of Rehnquist, J.).

87. This history appears more fully in the 1972 REPORT, *supra* note 13, at 84.

tempted to halt all military surveillance.<sup>88</sup> The effort extended into the new year and the new administration. At the same time the Nixon administration was especially concerned about inadequacies in the government's response to civil disturbances. The President charged the Justice Department with improving planning and intelligence, and with coordinating the different government departments. This effort took the form of an Interdepartmental Action Plan for Civil Disturbances, which was eventually approved by the President in April 1969.<sup>89</sup>

The Army civilians welcomed this development as a means of getting their department out of civilian intelligence. Their draft plan expressly stated that intelligence was a responsibility of the civilian agencies. It said that the military should not perform the function because of traditional rules which bar military interference in civilian political life. The language of the original Army draft sent to the Justice Department deserves to be quoted:

We believe that the Federal Bureau of Investigation should be formally assigned primary responsibility for collecting, and furnishing on a timely basis to other concerned agencies, raw intelligence. Although the Army Intelligence Command could perform this function, the salutary tradition of avoiding military intelligence collection activities in predominantly civilian matters reinforces our view that this responsibility belongs with the FBI.<sup>90</sup>

The contrast between this draft and the final language is instructive. As finally approved, the Plan makes no reference to the allocation of the intelligence responsibility. The corresponding phrase reads in full:

Under the supervision of the Attorney General, raw intelligence data pertaining to civil disturbances will be required from such sources of the Government as may be available.<sup>91</sup>

Thus, the record shows clearly that although the Nixon administration only inherited the surveillance program, it had more than a passive and unsuspecting role in approving and continuing the program. The responsible Justice Department officials were squarely faced with

88. *1971 Hearings* at 392-95 (statement of Robert F. Froehlke, Assistant Secretary of Defense).

89. *1974 Hearings, supra* note 1, at 346-53.

90. *Id.* at 332-33. An earlier internal Army draft never sent to the Justice Department refers to the "inadvisability" of extensive military intelligence activities in the civilian community (strike) sphere." *Id.* at 324.

91. *Id.* at 348.

the constitutional issue presented by the Army language. Just as firmly, they rejected the efforts of the military officials to halt Army involvement, and, in so doing, they rejected the constitutional issue which the Army raised to support its effort to withdraw.

Rehnquist's involvement in this decision is less clear. His Office of Legal Counsel was charged with the work of preparing the Action Plan. It was also the Justice Department office to which the Deputy Attorney General had delegated responsibility for coordinating work with other agencies. Quite clearly a dispute arose between the departments of Justice and Defense concerning the allocation of intelligence responsibilities. The Defense representatives were unable to prevail with their view and settled for the ambiguous language that resulted. In a memorandum of recollection, the Army General Counsel stated that intelligence was one of the two items in which he was unable to get concurrence from the Department of Justice.<sup>92</sup> In any case, Rehnquist signed and approved the final draft which omitted the Army's desired disclaimer. The extent to which Rehnquist personally participated in the discussions concerning the military's proper role in civil disturbance intelligence and surveillance and the extent to which he personally knew and approved of the ultimate decision cannot be ascertained from the cold print of the documents. To what extent he must take official responsibility for the 1969 decision determining, in effect, that there are no constitutional impediments to Army surveillance is open for debate. So, too, is the question of whether this knowledge and this responsibility were pertinent to Justice Rehnquist's decision to cast the deciding vote in the *Tatum* case. Unfortunately, these points were not addressed in his memorandum justifying that decision.

#### DRAFTING THE LEGISLATION

Although the opponents of Army surveillance lost the constitutional battle in the courts, in a very real sense they have won the war. The tradition of keeping the military out of civilian politics is only rarely expressed in statutory and case law. It is, however, firmly rooted in our unwritten constitutional law. The general public and political condemnation of Army surveillance served to reinforce this tradition, and the Defense Department's issuance of prohibitory regulations has codified this result.

In the first two years of the inquiry, there was much uncertainty within the subcommittee staff as to the advisability of trying to codify a

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92. *Id.* at 326.



prohibition by statute. Much had been accomplished politically, and the risks of defeat on a bill threatened to cloud the political gains. Indeed, not only defeat, but anything short of success might be enough to encourage some future effort to reinstitute military surveillance. Nevertheless, for symbolic purposes, if nothing more, Senator Ervin drafted and introduced such a bill in 1972.<sup>93</sup> Doubts about its fate were immediately confirmed when the bill was referred to the Armed Services Committee, which had never been particularly exercised by the revelations of the recent past. There the bill quietly died with the 92d Congress.

Eight months later, with the growing public concern over governmental invasions of privacy, the expanding Watergate controversy, and the increasing evidence of political surveillance by the executive branch, Senator Ervin decided to push again for Army surveillance legislation. He directed the staff to redraft the bill for Judiciary Committee jurisdiction. By careful drafting of a bill's short title, by use of introductory findings and purpose, and by an introductory speech, a bill's author has great influence over its referral.

These techniques were used for S. 2318, which Ervin introduced on August 1, 1973.<sup>94</sup> The bill was indeed referred to the Judiciary Committee, and to the Constitutional Rights Subcommittee. Illustrative of the support the issue had gained by then is the cosponsorship it attracted. About one-third of the 37 cosponsoring Senators were Republicans. So great was the support for the bill that for a long time Senator Ervin considered reporting his bill to full committee without hearings. This unusual approach is fraught with peril since opponents can use arguments of procedural irregularity to stall the bill without taking a stand against the merits.

Eventually, however, Ervin decided that a short hearing would not only obviate this problem but have at least one other important advantage. The 1971 hearings, as discussed earlier, did not hear from those in positions of responsibility for the Army's civil disturbance activity. Their testimony would have shed light on the usefulness and need for the information that was collected. In 1971 these witnesses were still in service and subject to Departmental control. By 1974 many had left or retired and were therefore much more accessible. Senator Ervin decided

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93. S. 3750, 92d Cong., 2d Sess. (1972).

94. 93d Cong., 1st Sess. (1974). The short title describes S. 2318 as a bill to enforce the first and fourth amendments and the constitutional rights of privacy. See note 4 *supra*. The bill amends title 18, the federal criminal code, and title 28 relating to civil actions in the courts. Both titles are clearly within the Judiciary Committee's jurisdiction. S. 3750, 92d Cong., 2d Sess. (1972), was "free-floating" legislation prohibiting surveillance and could have been referred to either committee.

that he would seek their testimony. In the end, Ervin's plan for a single morning session barely could be accommodated in two days. The subcommittee received testimony from Robert Jordan, Army General Counsel during the surveillance period, David McGiffert, Army Undersecretary at the time, and Cyrus Vance, former Deputy Secretary of Defense. In addition, the subcommittee was fortunate in arranging for the appearance of Colonel John Downie,<sup>95</sup> who had been the senior professional intelligence officer in charge of the surveillance program. He had wanted very much to present the military's professional opinion back in 1971 but had been silenced by his civilian superiors. Each of these witnesses condemned the political surveillance as wrong, without value, and a waste of time.<sup>96</sup> Although they had suggestions and criticisms respecting certain details of the bill, they supported its purpose in full. As experts on the military's role in suppressing violence, they testified to the last remaining point that stood in the bill. The DOD had no grounds left to argue upon.

A word needs to be said about the Department's position. The military had, of course, suffered greatly in public esteem from the revelations of the 1970-71 investigation. "Army spying" entered the public consciousness as a symbol of oppressive government invasions of the first amendment. Despite the creation of a special agency in the Secretary of Defense's office as a watchdog to prevent further surveillance, despite the issuance of a fairly effective regulation, and despite the almost total absence of any evidence of a recurrence of the surveillance, the public continued to be skeptical. The subcommittee regularly received inquiries asking "whether the Army had stopped spying." Even though the subcommittee had no evidence to disprove the official position, no one was reassured. Both in public and private comments, officials of the Department expressed hurt and indignation over this persistent refusal of the public to take them at their word.

The subcommittee staff had high hopes that the Department officials would support the idea of legislation, if not necessarily the specifics of the bill. The goal of the legislation was, after all, no different from the intent of their own regulations. They professed no defense of past practices, and did not indicate any desire to see the military surveillance

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95. Former Director of Army Counterintelligence and Security.

96. See 1974 Hearings, *supra* note 1, at 14 (statement of Robert Jordan), 32 (statement of David McGiffert), 124 (statement of Cyrus Vance), and 38 (statement of Col. John Downie). Hearings can be arranged to give an inaccurate picture of the support for a bill. In this case, no witnesses wished to testify in opposition except for representatives of the Department of Defense.

programs resumed in the future. In light of the widespread suspicion, the subcommittee staff felt that the military could regain a great deal of public respect if Defense Department officials supported a bill which did little more than codify their own position. The staff had long talks with officials of the Department, but to no avail. All offers to frame a final bill in cooperation with the Department proved fruitless. The Department's representatives could give no convincing argument why they opposed the bill, but they remained unmoved.<sup>97</sup>

Unfortunately, this is a fairly common reaction of government agencies. There is an inherent resistance to having Congress put in legislative form policies already accepted within an executive agency. The explanation can only lie in a deep-seated aversion to conceding any congressional interference with the administrative discretion and authority that agencies wish to exercise. It is an instinctive reaction, grounded in the desire by agency officials to preserve their independence from congressional oversight and the desire to keep exclusive control over their own decisionmaking processes. This reaction can only be countered by senior political leaders, who presumably recognize that higher self-interest may sometimes be served by a public expression of cooperation. In this instance, only the Secretary of Defense or the Defense General Counsel could have made the decision. The Secretary may not have been concerned with this relatively narrow issue, but his subordinates were not in a position to assume the risk of making a "high political" decision.

The failure of the Department to accept the inevitable was a disappointment, but not a serious setback to the legislation. The bill was quickly polished in light of the technical points raised in the hearings, and was circulated for approval to the other subcommittee members.<sup>98</sup> It remained, in substance, as it was originally designed in June 1972. It provides for criminal penalties for any use of the military to conduct political surveillance on American citizens; it contains savings clauses to reconcile the prohibition with certain of the military's legitimate investigative responsibilities which might otherwise be regarded as affected by the prohibition; and it provides for private civil enforcement by legislatively correcting the standing defect found by the Supreme Court in the *Tatum* case.

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97. The Department argued that the bill was unnecessary, that it would interfere with authorized functions and that it presented insuperable drafting difficulties. See testimony of Deputy Assistant Secretary of Defense Cooke, *1974 Hearings, supra* note 1, at 103, 104, 107; see also note 1 *supra*.

98. Memorandum from Sam Ervin to Members of the Subcomm. on Constitutional Rights of Senate Comm. on the Judiciary, May 6, 1974.

Barring developments in the remaining months of this Congress which might interfere with the further progress of the bill, it seems fairly well assured that it will be speedily adopted by the Senate. Its fate in the House is more uncertain. However, there is a good chance that the subcommittee's investigation which began in 1970 will be capped by the enactment of the legislation.<sup>99</sup> If so, it will represent the first small step towards imposing legislative controls on the political intelligence activities of the government.

#### CONCLUSION

All legislative investigations are in some respects *sui generis*. This one was unique in many ways, not the least of which was the fact that it proved overwhelmingly successful. The subcommittee, so far as can be determined in retrospect, made no major errors of fact or assumption. Essentially all the allegations proved to be true. Informal conversations with knowledgeable Pentagon officials have subsequently satisfied the subcommittee staff that the investigation proved better (or luckier) than anyone could have hoped when it started in 1970.

One reason was that the Defense Department at no time attempted to defend the program on the merits or to make it a partisan issue. Had it done so, the investigation might well have been stalled in endless political disputes and would never have produced much factual information. The danger of this was evident since almost one-third of the subcommittee members are conservatives who might have been tempted to defend the Army and its program. This was avoided, first, because Senator Ervin was uniquely capable of avoiding an ideological cast to the investigation. Second, the issue was one which crossed party lines, the program having been initiated during a Democratic administration and continued under a Republican one. Finally, the civilian leaders of the Department and some of the senior military intelligence officers disapproved strongly of the program and wished, themselves, to have it halted.

Another factor in the success of the investigation was the ability of the subcommittee to conduct its inquiry independent of the information being supplied officially by the military. Except for those relatively few legislative committees that have their own investigative staff, most

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99. Since this article was written, it has become apparent that this prognosis was overly optimistic. As of mid-October, the bill was still held up in the Judiciary Committee by Senators acting on behalf of the Defense Department. Its fate now seems to hinge on whether the Committee will hold more meetings before the fast approaching end of the term.

oversight work in Congress must rely heavily on the information which the government agency can be required to produce. This leaves legislative oversight dependent, in large part, on the cooperation of the agency being investigated, and it goes without saying that the agency under examination will rarely be an enthusiastic partner. The Constitutional Rights Subcommittee has no field investigators of its own. Its inquiry was aided immeasurably by the many enlisted men and junior officers who, recognizing that their loyalty to the Constitution was greater than some notion of institutional loyalty, provided the subcommittee with facts, documents, leads and criticisms of official presentations. The "leak" may have a bad reputation in official government circles, but it is the single most important weapon available in any effort to disclose activity that the government wishes to keep to itself. Without "leaks," the Congress, the press, and the public would remain ignorant of those very facts which are critical to the successful operation of any public policy.

The Army surveillance investigation represented the first concerted legislative examination of domestic intelligence activities in recent years. It presaged an increasing public and official recognition that domestic intelligence is perhaps the single most important, unexamined aspect of public policy in our country. The subcommittee's investigation played an important role in bringing this issue to the surface, and subsequent events have reinforced the necessity for a thorough public exploration of these problems. Perhaps no other activity of government poses such a threat to individual liberties as the use of the military for domestic intelligence programs. But the country also can no longer afford to permit any governmental agency to conduct domestic intelligence in a secret and uncontrolled fashion.