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Constitutional Law - Chilling Effect on First Amendment Rights - Army Surveillance of Civilian Political Activity

John S. Vento

trative hardship" argument of the appellee, Justice Eagen noted that any teacher suffering from a temporary disability presents similar problems. In concluding, he acknowledged the proposition advanced in *Stanley v. Illinois*, 405 U.S. 645 (1972), an equal protection case, that "efficiency is not the only value to be considered."

It seems that in *Cerra* the court came to grips with the basic constitutional arguments advanced on both sides of the case, even though there was no need to dispose of the litigation explicitly on constitutional grounds. The purpose of both the equal protection clause and the state civil rights statute is, after all, the prohibition of unreasonable discrimination.

R. W. P.

CONSTITUTIONAL LAW—CHILLING EFFECT ON FIRST AMENDMENT RIGHTS —ARMY SURVEILLANCE OF CIVILIAN POLITICAL ACTIVITY—The United States Supreme Court has held that allegations of a "subjective" chill of first amendment rights, due to the mere existence of the Army's intelligence and data gathering system, did not constitute a justiciable controversy since such allegations are not an adequate substitute for a claim of *specific* present objective harm or a threat of specific future harm necessary to invoke the judicial power to determine the validity of executive or legislative action.

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

A class action suit was brought by several citizens and organizations, who discovered that their political activities were the subject of surveillance by the Army,[1] seeking a declaratory judgment that the Army's surveillance of their "lawful civilian political activity"[2] was unconstitutional and an injunction forbidding such surveillance.

The United States District Court for the District of Columbia dismissed the suit, declaring that no evidence existed to support the complaint that the Army exceeded its constitutional authority.[3] Plaintiffs appealed to the United States Court of Appeals for the District of Columbia which reversed on the ground that the complaint alleging

1. *See* Pyle, *Conus Intelligence: The Army Watches Civilian Politics*, WASH. MONTHLY, Jan. 1970, at 88.
2. Complaint for Plaintiff at 2-6, Tatum v. Laird, 444 F.2d 947 (D.C.C. 1971).
3. Tatum v. Laird, 444 F.2d 947 (1971).

that the Army's intelligence work *was far beyond its mission requirements,* and thereby exercising a present inhibitory effect on appellants' first amendment rights to engage in lawful political activity, presented a justiciable controversy.[4]

The United States Supreme Court granted certiorari[5] to consider whether respondents presented a justiciable controversy in complaining of a chilling effect on the exercise of their first amendment rights where such effect is allegedly caused, not by any specific action of the Army against them, but only by the existence and operation of the surveillance system.[6]

The Supreme Court reversed[7] and held that absent actual present or immediately threatened injury resulting from unlawful governmental action, a controversy[8] did not exist, and that the judiciary had no authority to investigate the wisdom and soundness of executive action;[9] rather, such a role is one appropriate for Congress acting through its committees and the "power of the purse."[10] In dismissing respondents'

4. *Id.* The court felt that a valid controversy existed since the broad operation of the system by the Army was itself a breach of duty which presented a claim of such immediacy and adversary character as to require its adjudication. The case was then remanded to the district court with directions for ascertaining facts necessary to determine whether the Army infringed upon any rights of appellants and whether appellants were entitled to injunctive relief. They believed that the claim, although lacking in substance, did not lack merit and should therefore be reversed and remanded.

5. 404 U.S. 955 (1971).

6. 408 U.S. 1, 10 (1972). The respondents had considerable difficulty in establishing their claim. They first alleged that it was the mere existence of the system which caused the alleged chill. But later, during the oral argument, plaintiffs' counsel replied that what actually caused the specific chill was "the threat . . . that in some future civil disorder of some kind, the Army is going to come in with a list of troublemakers . . . and go rounding up people and putting them in military prisons somewhere." *Id.* at 9.

7. 408 U.S. at 10.

8. U.S. CONST. art. III, § 2. The controversy must be between parties having adverse legal interests of sufficient immediacy and reality to warrant declaratory or injunctive relief. *See* Golden v. Zwickler, 394 U.S. 103 (1969).

9. The executive action in this case is authorized by 10 U.S.C. § 331 (1959) which allows the President to make use of the armed forces to quell insurrection and other domestic violence under certain conditions. The data-gathering system involved here was developed as part of a general plan that would permit the Army to respond to such disorders with a minimum of violence since the force used would be intelligently directed by the data gathered under the system. For a detailed discussion of the constitutionality of such authority see Tatum v. Laird, 444 F.2d 947, 953 (D.C. Cir. 1971).

10. Chief Justice Berger's view of the role of the judiciary is supported in National Student Association v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969).

> Appellants proposition that every official chill is a justiciable controversy would do considerable violence to the long-accepted allocation of roles among the several branches of the federal government. In view of the range of statutes, regulations, and policies which arguably chill protected expression, it would convert the courts into de Facto Councils of Revision over a substantial body of legislative and executive rules, ensuring immediate judicial review without regard to the actual application of the rules in practice.

Id. at 1114. Ironically, it is this qualification of the test laid down in *National Student Association* that the majority in the appellate court in *Tatum v. Laird* ignored when

attempt to make subjective "chill" the legal basis for enjoining a governmental program, the Court said that a "chilling" effect on first amendment rights such as would present a real and substantial controversy and give the respondents the right to challenge the Army's system in the federal courts was not shown by their perception of the system as inappropriate to the Army's role and as inherently dangerous, or by speculative apprehension that the Army might misuse the information at some future date. The Court made it clear that it would not express an opinion with respect to the propriety or desirability, from a policy standpoint, of such challenged activities.[11] It explicitly stated that in order for the "case or controversy" requirement of justiciability to be met there must be before the court a claim of specific present objective harm or a threat of specific future harm.[12] The Court, in expressing its view that respondents' claim was not ripe for adjudication,[13] said that when presented with claims of *judicially cognizable injury* resulting from military intrusion into the civilian sector federal courts are fully empowered to consider claims asserting such injury, but that respondents here failed to establish such a claim.[14] By way of dicta, the Court touched upon the standing issue by saying that those asserting "chill" are in reality not "chilled" if bold enough to come before the Court, but the issue was never fully resolved.[15]

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they cited part of that test to support their argument that a justiciable controversy existed. 444 F.2d at 956.

11. "The federal courts established pursuant to Article III of the Constitution do not render advisory opinions." United Public Workers of America (CIO) v. Mitchell, 330 U.S. 75, 89 (1947). *See also* Muskrat v. United States, 219 U.S. 346 (1911) (the landmark decision which established the rule that the judicial power is limited to the right to determine actual controversies arising between adverse litigants).

12. "[It is] an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action . . . ." *Ex parte* Levitt, 302 U.S. 633, 634 (1937). In *Levitt*, an attorney moved to file a petition for an order requiring Mr. Justice Black to show cause why he should be permitted to serve as an Associate Justice of the Supreme Court. Levitt contended that the appointment of Black by the Chief Executive was void because no vacancy could be created under the Constitution. The Supreme Court dismissed his claim on the ground that a mere general interest common to a member of the public was not enough to present a justiciable controversy. The rule in *Levitt* was first expressed by the Court in Massachusetts v. Mellon, 262 U.S. 447 (1923), and Frothingham v. Mellon, 262 U.S. 447 (1923), where the Court refused to consider a question it thought was an abstract question of political power. *See also* Poe v. Ullman, 367 U.S. 497 (1961).

13. 408 U.S. at 15.

14. *Id.* at 16.

15. *Id.* at 14.

Not only have respondents left somewhat unclear the precise connection between the mere existence of the challenged system and their own alleged chill, but they have also cast some considerable doubt as to whether they themselves are in fact suffering from any chill . . . .

Id. at 13.

In the last two decades the Court has introduced significant new standards of interpretation into the area of first amendment questions.[16] Often, because of the inconsistency of some cases[17] lower courts have struggled to define the limits of those standards. Before the unique problem presented in *Laird v. Tatum*,[18] virtually all of the cases fell into one of three categories.[19] The first of these are cases in which some legal or criminal sanction was imposed or threatened to be imposed on persons who exercised their first amendment rights. One of the most recent of this type of case[20] is *National Student Association v. Hershey*[21] where plaintiffs[22] sought declaratory and injunctive relief against the controversial Hershey Directive of October, 1967,[23] which threatened war protesters with loss of their draft deferments and in some cases immediate induction into the armed forces for engaging in "illegal"[24] demonstrations against the Vietnam War. In granting the

16. As Professor Frank Askin, counsel for plaintiffs in *Tatum v. Laird*, has said: "Seldom have the governing concepts in a fundamental area of our jurisprudence undergone such sweeping revision in so short a time." Askin, *Police Dossiers and Emerging Principles for First Amendment Adjudication*, 22 STAN. L. REV. 196 (1971).

17. *Compare* American Communication Ass'n v. Douds, 339 U.S. 382 (1950), *with* United States v. Robel, 389 U.S. 258 (1967). In *Douds* the Court upheld a federal statute which required labor union officials, as a condition to the use of NLRB facilities, to file an affidavit disclaiming membership in the Communist Party. Yet in *Robel*, the Court struck down a provision of the Subversive Activities Control Act, 50 U.S.C. § 784(a)(1)(D) (1970), which made it unlawful for members of the Communist Party to hold employment in a defense facility. The rationale of *Robel* was that such a statute established guilt by association alone, applying both to those who supported that Party's unlawful aims as well as those who opposed them. Apparently, the earlier decision never considered this problem or chose not to make such a distinction.

18. 408 U.S. 1 (1972). *Laird* is the first case to come before the Court where a non-compulsory governmental program was challenged on grounds that its mere existence, rather than its visible application, indirectly affected first amendment freedoms.

19. Only two of the categories will be explored in this note. The third includes situations where the government threatens to publicize the names of allegedly politically controversial persons for the purpose of inhibiting the exercise of their first amendment rights. *See* Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. 1970). Since no threat of publication exists in *Laird*, a discussion of this area has been omitted from the note.

20. *See also* United States v. Robel, 389 U.S. 258 (1967) (criminal prosecution); Dombrowski v. Pfister, 380 U.S. 479 (1965) (criminal prosecution); NAACP v. Button, 371 U.S. 415 (1963). For a good analysis of these types of cases see Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

21. 412 F.2d 1103 (D.C. Cir. 1969).

22. Plaintiffs in this case were fifteen college student-body presidents, the president of the University Christian Movement, and three national student organizations, including the Students for a Democratic Society, all of whom were openly critical of the draft and the Vietnam conflict.

23. The directive was a letter from the then Selective Service Director, General Lewis B. Hershey, addressed to all members of the Selective Service System. The text of the letter appears in N.Y. Times, Nov. 9, 1967, at 27, cols. 2-5.

24. The directive neither said nor meant that war protesters were to be reclassified only after a conviction for violation of a statute. Hence, its effect was to deter not merely validly proscribed conduct, but any protest activity which a registrant could reasonably expect his draft board to think illegal.

declaratory judgment[25] the court said that the directive was more than a "general threat to enforce the law,"[26] and that a justiciable controversy existed by virtue of adverse legal interests of "immediacy, reality, and specificity."[27] The court held that the "severity and scope of the chilling effect on First Amendment freedoms" sprang from the lack of authority for and the unconstitutionality on its face[28] of a simple and specific policy.[29] The court determined that what actually caused the "chill" of first amendment rights was the effect of the directive which gave discretionary authority to draft boards to make a "judicial" determination as to what protest activity was illegal, and based on this illicit subjective determination to reclassify those engaged in legally protected conduct.[30] Thus, *National Student Association* did not depart from the rule[31] that concrete legal issues of sufficient immediacy

25. 412 F.2d at 1123. The court denied the request for an injunction on the grounds that the practical enforcement of an injunction against every local and appellate draft board was beyond the power of the court.

26. 412 F.2d 1103, 1118 (D.C. Cir. 1969).

27. 412 F.2d 1103 (D.C. Cir. 1969), *citing* Golden v. Zwickler, 394 U.S. 103 (1969). The court in *National Student Association* determined that the deferment policy expressly singled out from an infinite range of illegal conduct specific kinds of "illegal" acts—namely those commonly performed by war protestors—for special treatment. The result of this was to impart an element of specificity to the threat of enforcement and to accentuate its potential chilling effect on protected expression.

28. Since prosecution of illegal and unprotected conduct under the criminal laws, subject to traditional procedural safeguards and to judicial scrutiny of the laws themselves, is a narrower alternative means to the ends served by the Hershey policy, that policy appears to be constitutionally unsound.
412 F.2d at 1121.

29. *Id.* at 1119. What then distinguishes the case from *Laird* is that neither of the two issues presented to the court turned on the way in which the policy was applied, which is partially what plaintiffs complaint was in *Laird*. *See* note 6 *supra*. It is also important to note that both of the lower courts in *Laird* determined that the policy was not unconstitutional on its face and was validly authorized under the power granted to the Chief Executive. *See* note 9 *supra*.

30. The resultant uncertainty concerning the legality of various forms of dissent imposes some chill on protected protest even without the Hershey directive. But by entrusting to draft boards effective power to decide hard legal and constitutional questions for themselves, the directive seriously compounds this chilling effect on protected conduct. The directive's deferment policy thus adds to the deterrents to legal protest by raising the price of a wrong guess as to the legality of particular protest activity or of failure to foresee the course an initially legal demonstration may take. Participation in most lawful demonstrations unavoidably involves at least some risk that the protest will in fact get out of hand . . . innocent parties may then be penalized along with the rest. The directive adds a new and—at least in the eyes of many protesters—a more severe penalty for such unintentional illegality. Draft eligible males who are willing to run the risk of prosecution for a misdemeanor in order to make a protest might still be intimidated by the threat of a I-A classification. Accordingly, we think the deferment policy works a pronounced effect on legal or protected conduct.
412 F.2d at 1118-19.

31. *See* Golden v. Zwickler, 394 U.S. 103 (1969) (real and immediate controversy); International Longshoreman's Union v. Boyd, 347 U.S. 222 (1954) (actual controversy a requirement for declaratory relief); Rescue Army v. Municipal Court, 331 U.S. 549 (1947)

and reality to warrant issuance of a declaratory judgment were "necessary requirements for establishing a justiciable controversy."[32]

The second category of cases attempting to use "chill" to establish justiciability requirements involves some element of government compulsion, either to testify regarding one's political ideas or beliefs, or to identify oneself in order to exercise first amendment rights. The most recent of these cases[33] were cited and distinguished by the Supreme Court in *Laird.* One of the earlier decisions mentioned was *Baggett v. Bullitt,*[34] which struck down a loyalty oath of vague and uncertain meaning,[35] which was required to be taken as a condition of employment by a governmental agency. The Court held that a state cannot require an employee to take an unduly vague oath containing a promise of future conduct at the risk of prosecution for perjury or loss of employment, particularly where the exercise of first amendment freedoms may thereby be deterred.[36] Later, in *Lamont v. Postmaster General,*[37] which dealt with a governmental regulation requiring private individuals to make a special written request to the Post Office for delivery of each piece of political literature which was sent to them from a Communist country, the Court held that such an affirmative obligation was wrongfully imposed and would have a deterrent effect on first amendment rights.[38] The Court made it clear, however, that a concrete legal issue was necessary to meet justiciability requirements.[39]

(adversary interest, direct injury); Aetna Life v. Haworth, 300 U.S. 227 (1937) (real and substantial controversy).

32. 412 F.2d at 1110. This requirement was ignored by the appellate court in *Laird* when it cited this case to support its finding that a justiciable controversy existed absent an objectively defined "chill."

33. *See also* Tulley v. California, 362 U.S. 60 (1960) (requiring identity on political handbill); NAACP v. Alabama, 357 U.S. 449 (1958) (requiring filing of membership lists); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (compelling testimony before a subversive activities committee); Watkins v. United States, 354 U.S. 178 (1957) (compelling testimony before the House Un-American Activities Committee).

34. 377 U.S. 360 (1964).

35. *Id.* at 371. *See also* Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).

36. Those with a conscientious regard for what they solemnly swear or affirm, sensitive to perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.
377 U.S. at 372.

37. 381 U.S. 301 (1965).

38. This requirement [the written request] is almost certain to have a deterrent effect, especially as respects those who have sensitive positions.
Id. at 307.
[I]nhibition as well as prohibition against the exercise of precious First Amendment rights in a power denied to government.
Id. at 309 (Brennen, J., concurring).

39. . . . any legally significant harm to Lamont as a result of being listed [on a roster of people receiving Communist propaganda in the mail] was merely a *speculative possibility,* and so on this score the controversy was not ripe for adjudication.

Laws and regulations relating to teacher loyalty were held constitutionally unsound in *Keyishian v. Board of Regents*,[40] where the Court said that the state's "complicated and intricate scheme" of laws and regulations inhibited first amendment expression by forcing a teacher to "guess what conduct or utterance" might be in violation of that complex regulatory scheme and might thereby "lose him his position."[41] The Court restated the proposition that "the threat of sanctions may deter . . . almost as potently as the actual application of those sanctions."[42] The Court applied similar principles in cases dealing with membership disclosure requirements imposed as a condition to obtaining admission to the bar. Thus in *Baird v. State Bar of Arizona*,[43] where petitioner had been denied admission to the bar solely because of her refusal to answer a question regarding the organizations with which she had been associated in the past,[44] the Court held that a state cannot force an applicant to disclose her "mere membership or mere beliefs" as the price for admission to the bar.[45]

In *Laird v. Tatum*, the Supreme Court said that it recognized fully that government action may be subject to court challenge even though it has only an indirect effect on the exercise of first amendment rights. But, it distinguished the line of decisions presented in the last category by saying that in those decisions the chilling effect arose from an abuse of governmental power that either illegally proscribed lawful conduct, regulated in an inhibitory fashion free expression, or threatened criminal or other penalties for activities protected by the first amendment. The *Laird* Court said that nowhere in those decisions did the Court intend to express an attitude that fear alone of a governmental policy which allegedly caused chill, or knowledge of a governmental activity

Id. at 304 (emphasis added). *Laird* seems to have lacked such a concrete identifiable issue since there was no showing that the Army exceeded its specific constitutional limitations. *See* note 9 *supra*.

40. 385 U.S. 589 (1967); *cf.* Whitehill v. Elkins, 389 U.S. 54 (1968).

41. 385 U.S. at 604.

42. *Id.* at 604, *citing* NAACP v. Button, 371 U.S. 415 (1961).

43. 401 U.S. 1 (1971). *But see* Law Students Research Council v. Wadmond, 401 U.S. 154 (1971) (valid to require applicants for admission to bar to take an oath to support the federal and state constitution).

44. 401 U.S. at 4. Petitioner refused to answer a question as to whether or not she had ever been a member of a Communist organization, the inquiry not being limited to a "knowing membership."

45. *Id.* at 409. The rationale seems to be that mere membership or beliefs can never alone be sufficient grounds for criminal penalties or civil disabilities, and that no legitimate state interest can require such a disclosure since no rational "nexus" exists between the question, if answered, and fitness to practice law. *Accord, In Re* Stolar, 401 U.S. 23 (1971) (denying admission to applicant who refused to list all the organizations to which he belonged since age 16, or since he became a law student).

which was believed by those before the Court to be outside the scope of constitutionally authorized power, could provide the basis for meeting justiciability requirements necessary to invoke the jurisdiction of the court to grant declaratory or injunctive relief.[46] Even the appellate court admitted that the respondents' claim in *Laird* involved "no concrete, identifiable sanctions, no compelled self-identification, . . . and no threat of publication."[47]

The language of the *Laird* decision reflects not only the changing attitude[48] as to the role of the judiciary in the area of first amendment adjudication, but also marks the expected retreat from some of the broader decisions of the Warren Court era.[49] It is important to note that the decision does not say that the Warren Court was on unsound ground when in past cases it assumed chill as a result of certain governmental programs which had the possibility of encroaching on protected freedoms; nor does it go so far as to hold that chill is an abstract or visionary notion—that *every* claim alleging chill lies beyond judicial cognizance—but it does clearly express its views as to when the oppor-

46. In none of the cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or selectivity in gathering information by the Army which would reasonably justify ties, the agency might in the future take some other and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to regulation, proscriptions, or compulsions that he was challenging.
408 U.S. at 10-11.

47. 444 F.2d at 953. The dissenting judge summed up the problem when he said:
Any present inhibition which they [respondents] suffer must be based wholly on fear, specific or general, of future consequences stemming from use of the Army's information. At the same time they have alleged no present use, preparation for use, or selectivity in gathering information by the Army which would reasonably justify such fears . . . . Any inhibition which appellants in the case suffer is attributable, not to what the Army is presently doing, but to their own imagination as to what it might do at some unknown time in the future. Therefore, it is inaccurate to contend that the Army's present surveillance is the source of the inhibitions which appellants allege.
Id. at 960.

48. For a discussion of the change in the attitude of the Supreme Court from Chief Justice Warren to Chief Justice Berger in another important area of the law see Note, *I Used to Love You But It's All Over Now: Abstention and the Federal Courts Retreat from Their Role as Primary Guardians of First Amendment Freedoms*, 45 S. CAL. L. REV. 847 (1972).

49. *Cf.* Flast v. Cohen, 392 U.S. 83, 100-01 (1968), which announced a standing rule as broad as the Constitution could permit. Golden v. Zwickler, 394 U.S. 103 (1969), marks a retreat from that rule and the *Laird* case is a logical extension of the thinking expressed in that decision. At present it can be said that chilling, which provided a logical nexus between the plaintiff and the claim sought to be adjudicated, and thus gave him standing to sue, is ultimately limited by the standing rule implicit in the case or controversy requirement of article III. However, when dealing with the substantive aspects of chill the court will continue to employ a balancing test such as the one used in the case most similar to *Laird*. *See* National Student Ass'n v. Hershey, 412 F.2d 1103, 1121 (D.D.C. 1969).

tunity to prove chill will be entertained by the Court. In holding that allegations of a chilling effect wholly subjective in nature could not be elevated to a justiciable claim the *Laird* Court intimated that in future cases the use of chill will be limited to its substantive aspects, and the exercise of declaratory judgment jurisdiction will be more restrictively applied.[50] The dicta of the decision implies that in cases involving standing issues, the use of chill for door-opening purposes will be denied.[51]

The underlying aspect of the case is that it resurrects the controversy concerning the powers and functions of the judiciary. From its creation the judiciary has struggled to define its role with respect to the other branches of government. It imposed upon itself limits as to when it would exercise its jurisdiction. Justice Frankfurter commented upon these self-imposed restraints when he said that under our Constitution there is not a judicial remedy for every political mischief.[52] His words were echoed by the *Laird* majority which refused to enlarge the procedural powers of the courts to conduct an "independent" investigation of facts and issues to determine if the Army was overstepping its constitutional boundaries.[53] Had the Court reached the opposite conclusion in *Laird* and held that every official chill is a justiciable controversy the decision could not have stopped short of ensuring immediate judicial review of all governmental statutes, regulations, or policies which arguably chill protected expression, without regard for the actual application of those rules in practice. The use of so speculative a standard based on the possible abuse of power could open the courts to a nightmare of spurious litigation aimed not to redress actual wrongs, but to harass and intimidate the processes of government. Therefore, whether or not one agrees politically that the Army should be allowed to conduct surveillance of civilian activities, it cannot be denied that the decision is a judicially prudent one. Had the Court expanded the boundaries of its declaratory judgment jurisdiction, it would have increased the possibility of loss of confidence in the Su-

50. It is sure to be felt in suits pending against the FBI's national security operations and suits against state and local police agencies seeking to enjoin a variety of operations which are alleged to cause a chilling effect. *See generally* Askin, *Surveillance: The Social Science Perspective*, 4 COLUM. HUMAN RIGHTS L. REV. 59 (1972).

51. For a detailed discussion of the opinions that mark the difference between the substantive and door-opening aspects of chilling see Note, *The Chilling Effect on Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

52. Baker v. Carr, 369 U.S. 186, 270 (1961) (Frankfurter, J., dissenting).

53. 408 U.S. at 14.

preme Court and ultimately in the judiciary system itself, and greatly eroded the "moral suasion" of the Court.

John S. Vento

LANDLORD-TENANT—EVICTION PROCEEDINGS—APPEAL BOND—The Supreme Court of the United States has held that a state statute requiring a tenant to post a double-bond before appealing an adverse eviction decision violates the equal protection clause.

Lindsey v. Normet, 405 U.S. 56 (1972).

Portland Bureau of Buildings officials declared appellee-landlord's building to be unfit for human habitation[1] where-upon appellant-tenants refused to pay their rent until the substandard conditions were remedied. The landlord threatened eviction under the Oregon Forcible Entry and Wrongful Detainer Statute[2] and appellants filed a class action requesting injunctive relief and seeking a declaratory judgment that the statute was unconstitutional on its face. A three-judge district court upheld the statute which provided that in eviction proceedings because of nonpayment of rent: (1) trial must be held no later than six days after service of the complaint on the tenant unless the tenant posts security for payment of any rent that may accrue during the continuance; (2) the issues litigable during the trial are restricted to those involving tenant's default and consideration of defenses based on the landlord's breach of any duty to maintain the premises are precluded; (3) a tenant who wishes to appeal from an adverse decision is required to post, in addition to the usual civil appeal bond,[3] sureties for twice the amount of rent expected to accrue pending appellate review, and to forfeit this double bond to the landlord, if the lower court decision is affirmed.[4]

1. Lindsey v. Normet, 405 U.S. 56, 58 n.2 (1972):
It was stipulated that city inspectors found rusted gutters, broken windows, broken plaster, missing rear steps, and improper sanitation, all in violation of the Portland Housing Code, and that the inspectors posted a notice that the dwelling was required to be vacated within 30 days unless the owner could show cause why the building should not be declared unfit for occupancy.
2. ORE. REV. STAT. §§ 105.105-.160 (1971) [hereinafter referred to as FED].
3. ORE. REV. STAT. § 19.040 (1971) provides:
Form of Undertaking on Appeal . . . (1) The undertaking of the appellant shall be given with one or more sureties, to the effect that the appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal . . . .
4. Civ. No. 70-8 (D. Ore., Sept. 10, 1970).