

The Burger Court Opinion Writing Database

Laird v. Tatum

408 U.S. 1 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



1 (3)
Supreme Court of the United States
Washington, D. C. 20543

May 26 , 1972

CHAMBERS OF
THE CHIEF JUSTICE

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

MAY 11 2

Circulated: _____

Recirculated: _____

MEMORANDUM TO THE CONFERENCE:

No. 71-288 -- Laird v. Tatum

My records show a conference vote of 4 - 4 with one vote tentative in each 4. I reserved at the time and further study of the case led to a decision to reverse, with possible consideration of a remand if needed. It now seems to me that a remand is unnecessary.

* * * *

The petitioners here are the Secretary of Defense, the Secretary of the Army, the Chief of Staff of the Army, and the Commanding General of the Army Intelligence Command. They were named as defendants in a complaint filed in the District Court by respondents, who are four individuals and nine unincorporated membership associations. The respondents brought the action in behalf of themselves and "all other individuals and organizations who wish to exercise their right under the First Amendment . . . to engage in peaceful political protest . . . and other forms of constitutionally protected expression and assemblies without surveillance by [petitioners'] agents and without becoming the subject of dossiers, reports, and files"

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U.S. DEPARTMENT OF JUSTICE

6

Supreme Court of the United States
Washington, D. C. 20543

June 1, 1972

CHAMBERS OF
THE CHIEF JUSTICE

No. 71-288 -- Laird v. Tatum

MEMORANDUM TO THE CONFERENCE:

Enclosed is a second draft of my reactions on the above case, giving more pointed emphasis to the limited scope of the proposed disposition. As usual, your comments are invited.

Regards,

W.B.B.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

SECRET NO ADVANCE IN

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 1, 1972

SECOND TYPED DRAFT

Changes on pages:
2, 3-(3a), 4, 9-to end

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: _____

Recirculated: JUN 1 1972

MEMORANDUM TO THE CONFERENCE:

No. 71-288 -- Laird v. Tatum

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REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

SECTION OF ADVISORY

100
Mr. Justice Douglas
with dissent
35

Supreme Court of the United States
 Washington, D. C. 20543

June 8, 1972

CHAMBERS OF
 THE CHIEF JUSTICE

THIRD DRAFT

(Substantial changes throughout)

To: Mr. Justice Douglas
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall ✓
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: Mr. Justice Douglas

Circulated: _____

Recirculated: JUN 8 1972

No. 71-288 -- Laird v. Tatum

MEMORANDUM TO THE CONFERENCE:

Respondents brought this class action in the District Court seeking declaratory and injunctive relief on their claim that their rights were being invaded by the Army's alleged "surveillance of lawful civilian political activity." The petitioners in response describe the activity as "gathering by lawful means, . . . [and] maintaining and using in their intelligence activities, . . . information relating to potential or actual civil disturbances [or] street demonstrations." In connection with respondents' motion for a preliminary injunction and petitioners' motion to dismiss the complaint, both parties filed a number of affidavits with the District Court and presented their oral arguments at a hearing on the two motions. On the basis of the pleadings, the affidavits before the court, and the oral arguments advanced at the hearing, the District Court granted petitioners' motion to dismiss, holding that there was no justiciable claim for relief.

On appeal, a divided Court of Appeals reversed and ordered the case remanded for further proceedings. We granted certiorari to consider whether,

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For Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

10
You joined
dissent to
Wood v. 108
changes
1, 2, 2a, 2b, 4, 12

2nd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES:

No. 71-288

Recirculated: JUN 20 1972

Melvin R. Laird, Secretary
of Defense, et al.,
Petitioners,
v.
Arlo Tatum et al.

On Writ of Certiorari to the
United States Court of
Appeals for the District of
Columbia Circuit.

[June —, 1972]

MR. CHIEF JUSTICE BURGER delivered the opinion
of the Court.

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Court seeking declaratory and injunctive relief on their
claim that their rights were being invaded by the Army's
alleged "surveillance of lawful civilian political activity."
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and using in their intelligence activities, . . . informa-
tion relating to potential or actual civil disturbances
[or] street demonstrations." In connection with re-
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tioners' motion to dismiss the complaint, both parties
filed a number of affidavits with the District Court and
presented their oral arguments at a hearing on the two
motions. On the basis of the pleadings, the affidavits
before the court, and the oral arguments advanced at
the hearing, the District Court granted petitioners' mo-
tion to dismiss, holding that there was no justiciable
claim for relief.

On appeal, a divided Court of Appeals reversed and
ordered the case remanded for further proceedings. We
granted certiorari to consider whether, as the Court of
Appeals held, respondents presented a justiciable con-

*/
— The complaint filed in the District Court candidly
asserted that its factual allegations were based on a
magazine article: "The information contained in the fore-
going paragraphs numbered five through thirteen [of the com-
plaint] was published in the January 1970 issue of the magazine
The Washington Monthly"

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REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

SEP 20 1972

To: The Chief Justice
Mr. Justice Blackman
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Burger
Mr. Justice Stewart
Mr. Justice Souter

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.
Circulated: 5-30
Recirculated:

No. 71-288

Melvin R. Laird, Secretary
of Defense, et al.,
Petitioners,
v.
Arlo Tatum et al.

On Writ of Certiorari to the
United States Court of
Appeals for the District of
Columbia Circuit.

[June —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

I

If Congress had passed a law authorizing the armed services to establish surveillance over the civilian population, a most serious constitutional problem would be presented. There is, however, no such law under which in this case the Pentagon undertook surveillance over civilians. The question is whether such authority may be implied. One can search the Constitution in vain for any such authority.

The start of the problem is the constitutional distinction between the "militia" and the Armed Forces. By Art. I, § 7, of the Constitution the militia is specifically confined to precise duties: "to execute the laws of the union, suppress insurrections and repel invasions."

This obviously means that the "militia" cannot be sent overseas to fight wars. They are purely a domestic arm of the governors of the several States,¹ save as they may be called under Art. I, § 8, of the Constitution into the federal service. Whether the "militia" could be given powers comparable to those granted the FBI is a question not now raised. For we deal here not with the

¹ I have expressed my doubts whether the "militia" loses its constitutional role by an Act of Congress which incorporates it in the armed services. *Drifka v. Brainard*, 89 Sup. Ct. Rep. 434.

819

To : Mr. Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-288

5/31/72

Melvin R. Laird, Secretary
of Defense, et al.,
Petitioners,
v.
Arlo Tatum et al.

On Writ of Certiorari to the
United States Court of
Appeals for the District of
Columbia Circuit.

[June —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

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AN ILLUSTRATION OF CONCRETE

Please join me
for

From:

No. 71-288

6/8/22

MR. JUSTICE DOUGLAS, dissenting.

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712, 13, 14

8
P1

Mr. Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

5th DRAFT

From: Douglas; J.

SUPREME COURT OF THE UNITED STATES

Circulate:

No. 71-288

Recirculated:

6/9/72

Melvin R. Laird, Secretary
of Defense, et al.,
Petitioners,

v.

Arlo Tatum et al.

On Writ of Certiorari to the
United States Court of
Appeals for the District of
Columbia Circuit.

[June —, 1972]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

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Change through

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
From: Douglas, J.

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-288

Melvin R. Laird, Secretary
of Defense, et al.,
Petitioners,
v.
Arlo Tatum et al.

On Writ of Certiorari to the
United States Court of
Appeals for the District of
Columbia Circuit.

6/14/72

[June —, 1972]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

I

If Congress had passed a law authorizing the armed services to establish surveillance over the civilian population, a most serious constitutional problem would be presented. There is, however, no law authorizing surveillance over civilians, which in this case the Pentagon concededly had undertaken. The question is whether such authority may be implied. One can search the Constitution in vain for any such authority.

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U.S. DEPARTMENT OF JUSTICE

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 19, 1972

Dear Mr. Chief Justice:

In talking to Justice Douglas on the phone this afternoon, he said he had written a rider to his opinion in No. 71-288 - Laird v. Tatum, which hopefully will be received here by Wednesday.

If it is received in time for a re-circulation then the opinion can come down on Thursday as planned. But if for some reason it is not received by then or if the Print Shop cannot make the necessary changes in time, then the opinion will, of necessity, have to go over to next Monday.


Fay Aull
Secretary

The Chief Justice

Circulated to the Conference - 6/19/72

W. J. ...
on 11/...

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

No. 71-288

Recirculated: 6-24

Melvin R. Laird, Secretary
of Defense, et al.,
Petitioners,
v.
Arlo Tatum et al.

On Writ of Certiorari to the
United States Court of
Appeals for the District of
Columbia Circuit.

[June 26, 1972]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

I

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 6/1/72

No. 71-288

Recirculated: _____

| | | |
|--|---|--|
| Melvin R. Laird, Secretary of Defense, et al., Petitioners, v. Arlo Tatum et al. | } | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. |
|--|---|--|

[June —, 1972]

MR. JUSTICE BRENNAN, dissenting.

The Court of Appeals held that a justiciable controversy exists and that petitioners state a claim upon which relief could be granted. 444 F. 2d 947, 958. I agree with Judge Wilkey, writing for the Court of Appeals, that this conclusion is compelled for the following reasons stated by him:

"... [A]ppellants content that the *present existence of this system* of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitutes an impermissible burden on [petitioners] and other persons similarly situated which exercises a *present inhibiting effect* on their full expression and utilization of their First Amendment rights of free speech, etc. The baleful effect, if there is one, is thus a present inhibition of lawful behavior and of First Amendment rights.

"Under this view of [petitioner's] allegations, under justiciability standards it is the operation of the system itself which is the breach of the Army's duty toward [petitioners] and other civilians. The case is therefore ripe for adjudication. Because the evil alleged in the Army intelligence system is that of overbreadth, *i. e.*, the collection

B
"petitioners" changed
to "respondents" pursuant

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Brennan, J.

Circulated: _____

No. 71-288

Recirculated: 6/2/72

Melvin R. Laird, Secretary
of Defense, et al.,
Petitioners,

v.

Arlo Tatum et al.

On Writ of Certiorari to the
United States Court of
Appeals for the District of
Columbia Circuit.

[June —, 1972]

MR. JUSTICE BRENNAN, dissenting.

The Court of Appeals held that a justiciable controversy exists and that respondents have stated a claim upon which relief could be granted. 444 F. 2d 947, 958 (CA DC 1971). I agree with Judge Wilkey, writing for the Court of Appeals, that this conclusion is compelled for the following reasons stated by him:

"[Respondents] contend that the *present existence of this system* of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitutes an impermissible burden on [respondents] and other persons similarly situated which exercises a *present inhibiting effect* on their full expression and utilization of their First Amendment rights of free speech, etc. The baleful effect, if there is one, is thus a present inhibition of lawful behavior and of First Amendment rights.

"Under this view of [respondents'] allegations, under justiciability standards it is the operation of the system itself which is the breach of the Army's duty toward [respondents] and other civilians. The case is therefore ripe for adjudication. Because the evil alleged in the Army intelligence system is that of overbreadth, *i. e.*, the collection

30
M —

Page 1

Please join me
M

To: The Chief Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice

3rd DRAFT

From:

SUPREME COURT OF THE UNITED STATES

Circuit

No. 71-288

Recd

6-2-72

Melvin R. Laird, Secretary
of Defense, et al.,
Petitioners,
v.
Arlo Tatum et al.

On Writ of Certiorari to the
United States Court of
Appeals for the District of
Columbia Circuit.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART joins, dissenting.

~~MR. JUSTICE BRENNAN, dissenting.~~

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U.S. DEPARTMENT OF JUSTICE

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
~~Mr. Justice Marshall~~
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Brennan, J.

No. 71-288

Circulated: _____

Recirculated: 6/9/72

Melvin R. Laird, Secretary
of Defense, et al.,

Petitioners,

v.

Arlo Tatum et al.

On Writ of Certiorari to the
United States Court of
Appeals for the District of
Columbia Circuit.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

The Court of Appeals held that a justiciable controversy exists and that respondents have stated a claim upon which relief could be granted. 444 F. 2d 947, 958 (CA DC 1971). I agree with Judge Wilkey, writing for the Court of Appeals, that this conclusion is compelled for the following reasons stated by him:

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"Under this view of [respondents'] allegations, under justiciability standards it is the operation of the system itself which is the breach of the Army's duty toward [respondents] and other civilians. The case is therefore ripe for adjudication. Because the evil alleged in the Army intelligence system is that of overbreadth, *i. e.*, the collection of information not reasonably relevant to the Army's

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 1, 1972

71-288 - Laird v. Tatum

Dear Bill,

Please add my name to your dissent-
ing opinion in this case.

Sincerely yours,

P.S.
/

Mr. Justice Brennan

Copies to the Conference

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U.S. DEPARTMENT OF JUSTICE
LIBRARY OF CONGRESS

3

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 9, 1972

Re: No. 71-288 - Laird v. Tatum

Dear Chief:

Please join me.

Sincerely,

Byron

The Chief Justice

Copies to Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT RECORDS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 8, 1972

Re: No. 71-288 - Laird v. Tatum

Dear Bill:

Please join me in your dissent.

Sincerely,


T.M.

Mr. Justice Brennan

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 8, 1972

Re: No. 71-288 - Laird v. Tatum

Dear Bill:

Please join me in your dissent.

Sincerely,


T.M.

Mr. Justice Douglas

cc: Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

SECRET

3
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 12, 1972

Re: No. 71-288 - Laird v. Tatum

Dear Chief:

Please join me in your third draft recirculation of June 8.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

OFFICE OF THE CLERK OF THE SUPREME COURT

6
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 21, 1972

Re: No. 71-288 Laird v. Tatum

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

U.S. LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 12, 1972

Re: No. 71-288 - Laird v. Tatum

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

U.S. DEPARTMENT OF JUSTICE



July 28, 1972

Re: No. 71-288 - Laird v. Tatum

Dear Chief:

I would appreciate any comment you have with respect to either the substance of this draft or whether any opinion at all should issue in connection with the denial.

Sincerely,

WHR

The Chief Justice

Att.