

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



B
Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
THE CHIEF JUSTICE

May 26, 1972

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Clark

MAY 26 1972

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"

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

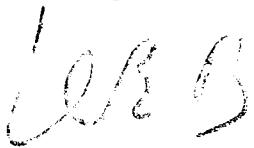
June 1, 1972

CHAMBERS OF
THE CHIEF JUSTICENo. 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,



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

June 8, 1972

CHAMBERS OF
THE CHIEF JUSTICERb
All your signed & w/ B's
W. D. & Dissent toTo: 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 Clerk's Office

Circulated:

Recirculated: JUN 8 1972No. 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,

5
My changes 1, 2, 2a, 2b, 4, 12

You pointed
dissents to 10
Corp. 10/28

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

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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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 foregoing paragraphs numbered five through thirteen [of the complaint] was published in the January 1970 issue of the magazine The Washington Monthly . . ."

B/

To: The Chief Justice
Mr. Justice Blackman
Mr. Justice Brandeis
Mr. Justice Chase
Mr. Justice Harlan
Mr. Justice Jackson
Mr. Justice McReynolds
Mr. Justice Stone

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Washington, D.C.

Circulated: S-30

No. 71-288

Recirculated: _____

Melvin R. Laird, Secretary
of Defense, et al.,
Petitioners, } On Writ of Certiorari to the
v. } United States Court of
Arlo Tatum et al. } 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.

81/9
To : Mr. Justice Justice
Mr. Justiceberman
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist

3rd 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.

[June —, 1972]

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7/2/3/4

Please give me

4th DRAFT

To: The Chairman, House
Mr. Chairman, Senate
Rep. Select Committee
Rep. Select Committee

From:

6/16/72

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.

[June —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

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Mr. Justice Black
Mr. Justice Blackmun
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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—
Chase *thru hand*

6th DRAFT

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: *Rehnquist, J.*

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.

[June —, 1972]

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

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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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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 recirculation 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

*Wm. S. Aull
6/19/72*

pp 9 and 19
Appendix II

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, 6-24

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.

Circulated: 6/11/72

SUPREME COURT OF THE UNITED STATES

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
"The following" "changed
"reportedly" "throughout"

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 (CADC 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

To: The Chief Justice
Mr. Justice

3rd DRAFT

From:

SUPREME COURT OF THE UNITED STATES

No. 71-288

Rec'd

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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3
p. 1

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

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

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.

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

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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

P
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 dissenting opinion in this case.

Sincerely yours,

P. S.

Mr. Justice Brennan

Copies to the Conference

B3
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

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 8, 1972

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

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

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

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

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,

WR

The Chief Justice

Copies to the Conference



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.