IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN R. LAIRD, Secretary of Defense, *et al.*,

Petitioners,

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ARLO TATUM, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

Question Presented

Whether the Court of Appeals was correct in holding that respondents' claim—that unauthorized and extensive surveillance by the United States Army of constitutionally protected civilian political activity is an unconstitutional burden on plaintiffs' exercise of their First Amendment rights—was justiciable under Article III.

Statement of the Case

The only issue before this Court is whether the complaint states a justiciable claim entitling plaintiffs[1] to a hearing. Because much of the government's Statement of the Case is based upon representations and documents which are not properly part of the record, and because the government ignores many of the material allegations made by plaintiffs, we set out in some detail the allegations of the complaint and the facts which underlie them.

On February 17, 1970, plaintiffs initiated this action on behalf of themselves and others similarly situated challenging the investigation of civilians engaged in lawful political activity by the United States Army (App. 1, 5-12). Plaintiffs complained that their constitutionally protected activities were being investigated "by military intelligence agents, . . . by anonymous informants, and through the use of photographic and electronic equipment" (App. 9), and that the information collected by the Army through such investigation was being "regularly, widely, and indiscriminately circulated . . . to numerous federal and state agencies" (App. 9, 11), published in a "Blacklist" (App. 9), and stored "in a computerized data bank" (App. 9) and "non-computerized records" (App. 10).

The complaint further alleged that the Army's domestic intelligence operations in the civilian community are unauthorized and overbroad, curtail political expression and debate among civilians, inhibit persons from associating with plaintiffs and thereby injure them and others similarly

[1] Respondents are referred to as plaintiffs throughout this brief.

situated by depriving them of their First Amendment rights of free speech and association and their right peaceably to assemble and to petition the government for redress of grievances (App. 11). Plaintiffs also alleged that the Army's surveillance activities abridge their right of privacy guaranteed by the Fourth, Fifth and Ninth Amendments to the Constitution (App. 8-11).

1. Proceedings in the courts below.

Having filed their complaint on February 17, 1970, plaintiffs filed a motion for a temporary restraining order and preliminary injunction on March 12, 1970, which would require the Army to cease investigating them and to deliver to the court *in camera* all blacklists, publications, records, reports, photographs, recordings, data computer tapes and cards, and other materials maintained by the Army, describing and interpreting their lawful political activities. The motion for a temporary restraining order was denied on March 13. On April 22, plaintiffs appeared before the District Court for an evidentiary hearing on their motion for a preliminary injunction. The court, however, denied their request to proceed with witnesses and documentary evidence (App. 123), denied their motion for a preliminary injunction, and granted the government's motion to dismiss the complaint for failure to state a claim upon which relief could be granted (App. 126, 128). Defendants never filed an answer.

Plaintiffs appealed the dismissal, and on April 27, 1971, the Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Wilkey in which he was joined fully by Judge Tamm and in part by Judge MacKinnon, reversed

the decision of the District Court on the grounds that the complaint sufficiently stated a cause of action and the controversy between the parties was justiciable (App. 129-48). In remanding the case for full evidentiary proceedings on the motion for a preliminary injunction, the Court of Appeals instructed the District Court to determine (1) the nature and extent of the Army domestic intelligence system, the methods of gathering information, its content and substance, the methods of retention and distribution, and the recipients of the information; (2) what part of the Army domestic intelligence system is unrelated to or not reasonably related to the performance of the Army's statutory and constitutional mission; (3) whether the existence of any overbroad aspects of the intelligence gathering system has or might have an inhibiting effect on the plaintiffs and others similarly situated; and (4) what relief is called for in accordance with the evidence (App. 147-48).

2. Plaintiffs' unchallenged allegations which must be broadly construed and accepted as true in face of the government's motion to dismiss.

A. *Allegations about the plaintiffs and the Army's investigation of their political activities.*

The plaintiffs are four individuals and nine unincorporated associations engaged in lawful political activity, including but not limited to union organizing, public speaking, peaceful assembly, petitioning the government, newspaper editorializing, and educating the public about political issues (App. 6-7). They include government

employees,[2] attorneys,[3] clergymen,[4] pacifists and pacifist organizations,[5] veterans of the armed forces,[6] and groups opposed to American involvement in the war in Southeast Asia[7] (App. (6-7). Members of the plaintiff associations also include current and prospective government employees, students, professionals, and others whose status, employment and livelihood are threatened by the Army's maintenance of files and dossiers on their political activities and associations (App. 10). All of the named plaintiffs have been subjects of political surveillance, and all are believed to be subjects of reports, files, or dossiers maintained by the Army (App. 9).

Exhibit A to the complaint is a document entitled, "USAINTC WEEKLY INTELLIGENCE SUMMARY NUMBER 68-12," containing "items of intelligence interest for the period 0600 hrs., Monday, 11 March 68 to 0600 hrs., Monday 18 March 68" (App. 14). This document is a report on the constitutionally protected political activities of plaintiffs and others similarly situated and, upon information and belief, is representative of similar reports

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[2] The American Federation of State, County & Municipal Employees.

[3] Conrad Lynn and Benjamin N. Wyatt, Jr.

[4] Rev. Albert B. Cleage, Jr. and Clergy and Laymen Concerned about the War in Vietnam.

[5] War Resisters League; Arlo Tatum, the Executive Secretary of the Central Committee for Conscientious Objectors; and Women's Strike for Peace.

[6] Veterans for Peace in Vietnam.

[7] The Vietnam Moratorium Committee; the Vietnam Week Committee of the University of Pennsylvania; the Vietnam Education Group; and Chicago Area Women for Peace.

prepared weekly by military intelligence units. Such reports were widely and indiscriminately distributed to civilian and military officials within the Department of Defense, to civilian officials in federal, state and local governments, and to each military intelligence unit and troop command in the Continental United States as well as Army headquarters in Europe, Alaska, Hawaii and Panama,[8] and were stored in one or more data banks in the Department of the Army (App. 9, 26-27). Typical of the reports concerning the plaintiffs' activities are the following:

> FRIDAY, 15 MARCH 1968:
> PHILADELPHIA, PA.: A. *THE PHILADELPHIA CHAPTER OF THE WOMEN'S STRIKE FOR PEACE* SPONSORED AN ANTI-DRAFT MEETING AT THE FIRST UNITARIAN CHURCH WHICH ATTRACTED AN AUDIENCE OF ABOUT 200 PERSONS. *CONRAD LYNN,* AN AUTHOR OF DRAFT EVASION LITERATURE, REPLACED YALE CHAPLAIN WILLIAM SLOANE COFFIN AS THE PRINCIPAL SPEAKER AT THE MEET-

[8] Exhibit A is expressly directed to: "CG FIRST ARMY (THRU 109TH MI GP); CG, THIRD ARMY (THRU 111TH MI GP); CG FOURTH ARMY (THRU 112TH MI GP); CG, FIFTH ARMY (THRU 113TH MI GP); CG, SIXTH ARMY (THRU 115TH MI GP); CG, XVIII ABN CORPS; CG, III CORPS (THRU DCSI FOURTH ARMY); CG, MDW (THRU 116TH MI GP); CG, 1ST ARMD DIV (THRU DCSI FOURTH ARMY); CG, 2D ARMD DIV (THRU DCSI FOURTH ARMY); CG, 82D ABN DIV (THRU XVIII ABN CORPS); CG, 5TH INF DIV (THRU DCSI FIFTH ARMY); CG, USARHAW (THRU 710TH MI DET); CG, FT DEVENS (THRU 108TH MI CP); CO, 902D MI GP (THRU 116TH MI GP); CO 108TH MI GP; CO, 109TH MI GP; CO, 111TH MI GP; CO, 112TH MI CP; CO, 113TH MI GP; CO, 115TH MI GP; CO, 116TH MI GP; CO, 710 MI DET; DIRECTOR ANMCC (PASS TO DIA ELEMENT); USAINTC LNO, PENTAGON." Eleven other recipients are indicated by code (App. 13-14).

ING. FOLLOWING THE QUESTION AND ANSWER PERIOD ROBERT EDENBAUM OF THE *CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS* STATED THAT MANY PHILADELPHIA LAWYERS WERE ACCEPTING DRAFT EVASION CASES. THE MEETING ENDED WITHOUT INCIDENT.

B. *REV. ALBERT CLEAGE, JR.* THE FOUNDER OF THE BLACK CHRISTIAN NATIONALIST MOVEMENT IN DETROIT, SPOKE TO AN ESTIMATED 100 PERSONS AT THE EMMANUEL METHODIST CHURCH. CLEAGE SPOKE ON THE TOPIC OF BLACK UNITY AND THE PROBLEMS OF THE GHETTO. THE MEETING WAS PEACEFUL AND POLICE REPORTED NO INCIDENTS (App. 17).*

B. *Allegations of injury to the plaintiffs.*

Paragraph 15 of the complaint alleges that "[t]he purpose and effect of the collection, maintenance and distribution of the information on civilian political activity described herein is to harass and intimidate plaintiffs and others similarly situated and to deter them from exercising their rights of political expression, protest and dissent from government policies which are protected by the First Amendment by *invading their privacy, damaging their*

* The peaceful political activities of members of the plaintiffs' class are also reported in the Weekly Intelligence Summary, *e.g.*:

WEDNESDAY, 13 MARCH 1968

BROOKLYN, N.Y.: ABOUT 35 PERSONS PARTICIPATED IN A DEMONSTRATION AT THE MAIN GATE OF FORT HAMILTON TO PROTEST THE SCHEDULED INDUCTION OF PETER BEHR. MANY OF THE PROTESTORS DISTRIBUTED LEAFLETS AND FLOWERS TO PERSONS ENTERING THE FORT. THE DEMONSTRATION LASTED APPROXIMATELY ONE AND ONE HALF HOURS AND ENDED WITHOUT INCIDENT (App. 15).

reputations, adversely affecting their employment and their opportunities for employment, and in other ways" (App. 10) (emphasis added). The specific deterrent induced by the Army's surveillance activities is the plaintiffs' "fear [that] they will be made *subjects of reports* in the Army's intelligence network, that *permanent reports of their activities will be maintained* in the Army's data bank, that *their 'profiles' will appear in the so-called 'Blacklist'* and that all of this information will be *released to numerous federal and state agencies* upon request" (App. 11) (emphasis added).

The government's Statement of the Case ignores these allegations of injury, and attempts through the introduction of highly questionable allegations of fact which have not been subjected to cross-examination in court, to convey the impression that Army surveillance is justified.[10] But in appellate review of a successful motion to dismiss, the plaintiffs' allegations of injury must be broadly con-

[10] Rule 12(b)(6) of the Federal Rules of Civil Procedure states, in part: "If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . ." However, having clearly stated that it was treating the government's motion as one made pursuant to Rule 12(b)(6) (App. 128), the District Court was bound to exclude matters outside the pleadings in determining the sufficiency of the complaint. Wright & Miller, *Federal Practice and Procedure,* § 1356 (1969). To do otherwise would have required the court to give plaintiffs ". . . reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12(b)(6). Having failed, therefore, to give plaintiffs such opportunity to be heard, having excluded their witnesses, and having characterized the government's motion as one brought pursuant to Rule 12(b)(6), the District Court could not have admitted the government's affidavits in considering the motion to dismiss. It should be noted that the government filed four affidavits on April 20, 1970, only two days prior to the District Court hearing. Those affidavits are frequently cited in the government's brief.

strued and taken as true[11] unless they are stated as conclusions of law or are inconsistent or unwarranted deductions of fact.

Specific constitutional injuries to the plaintiffs are legion on the face of the pleadings. Adverse effect on the government employment of members of the plaintiff American Federation of State, County and Municipal Employees stems from their inclusion in Army files and dossiers on civilians "who might be involved in civil disturbance situations"—files which are disseminated by the Army to federal and state agencies (App. 11, 26, 54). Damage to the

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[11] In reviewing the sufficiency of a complaint on a motion to dismiss, this Court has consistently held that "the material allegations of the complaint are taken as admitted." *Jenkins* v. *McKeithen*, 395 U.S. 411, 421 (1969). See also, *California Motor Transport* v. *Trucking Unlimited*, 40 U.S.L.W. 4153, 4155 (January 13, 1972); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 126 (1951).

Since Rule 8(a)(2) of the Federal Rules of Civil Procedure only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," the courts have generally looked with disfavor on Rule 12(b)(6) motions. This is especially true when a "unique" legal theory is propounded (App. 139). See *Shull* v. *Pilot Life Ins. Co.*, 313 F.2d 445, 447 (5th Cir. 1963). In assessing the sufficiency of a complaint, this Court has consistently adhered to the rule enunciated in *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957):

> "In appraising the sufficiency of a complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Therefore, recognizing ". . . that the Federal Rules of Civil Procedure, do not require a claimant to set out in detail the facts upon which he bases his claim," *Conley* v. *Gibson*, *supra*, at 47, the test is whether the material allegations of the complaint, liberally construed, with all ambiguities resolved in favor of the plaintiff, are sufficient to support a claim upon which relief can be granted. See Wright & Miller, *supra*, § 1357, fns. 75-77; Barron & Holtzoff, 1A *Federal Practice and Procedure* § 356, fn. 93 (1960).

plaintiffs' reputations is illustrated in the case of Conrad Lynn, a New York attorney experienced in litigation under the Military and Selective Service Act, who is characterized in an Army intelligence file as "an author of draft evasion literature" (App. 17). A similar characterization is made in an Army file with regard to a member of the Central Committee for Conscientious Objectors (App. 17). The characterization of persons, including plaintiffs and members of their class, whose names appear on an Army "identification list" of civilians (App. 9-11, 25, 27), as individuals "who might be involved in civil disturbance situations" (App. 54) constitutes an immediate threat to their employment and damage to their reputations within the precise terms of the complaint (App. 10). Finally, the injuries and threatened injuries to the privacy, employment and reputations of the plaintiffs are visited upon them solely because they have exercised their First Amendment rights, and they are thus deterred from further vigorous exercise of those rights (App. 10-11), in addition to being deprived of their freedom of association with those citizens who are deterred from "free and open discussion of issues of public importance" (App. 11) for fear of becoming a target of defendants' surveillance network (App. 10-11).

C. *Allegations about the scope of the Army's domestic intelligence system.*

Plaintiffs allege and the government does not deny that the Army has stationed intelligence agents in more than three hundred domestic intelligence units throughout the United States (App. 23, 52); that these agents have intruded themselves into civilian politics by monitoring, re-

porting and interpreting the political and often private activities and associations of civilians (App. 8-10, 23-27); that the Army Intelligence Command maintains an undetermined number of computerized and non-computerized data banks on political protests occurring any place in the United States (App. 9-10, 23); that the information on civilian political protests collected by the Army Intelligence Command has been widely and indiscriminately disseminated to military and civilian agencies of government (App. 9, 27); that the Army Intelligence Command has compiled an identification Blacklist including photographs of civilians "who might cause trouble for the Army" (App. 9, 25); and that Army intelligence agents have infiltrated civilian political organizations[12] and used improper methods to acquire confidential information about private persons[13] (App. 9, 23-24).

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[12] Although the plaintiffs were denied an evidentiary hearing in the District Court, they were prepared to introduce evidence, through the testimony of witnesses who were in the courtroom that Army intelligence agents had infiltrated private social, political and religious groups exercising their freedom of association and their right of privacy. Plaintiffs' counsel made an offer of proof that one such witness, Oliver Allen Peirce, who had served in the Fifth Division, Military Intelligence Detachment at Fort Carson, Colorado, from May 1, 1969 to December 19, 1969, would testify "that he was instructed to infiltrate a group known as the Young Adults Project, an organization composed of a number of church groups in the Colorado Springs area which also included the participation of the Young Democratic organization in the Colorado Springs area; [and] that he was instructed to become a member of this group and to make regular reports on what was going on . . ." (Transcript of Proceedings in the District Court, April 22, 1970, at pp. 29-30).

[13] It is alleged in Appendix B to the complaint, for example, that agents of the 108th Military Intelligence Group in New York City have acquired confidential academic records of students at Columbia University without the knowledge or consent of the students or the University (App. 23-24).

During the two months between the filing of the complaint on February 17, 1970 and oral argument on plaintiffs' motion for a preliminary injunction and on the government's motion to dismiss on April 22, 1970, additional aspects of the Army's surveillance system were revealed through statements made by Army spokesmen under pressure of Congressional inquiry, this lawsuit, and adverse publicity. In letters dated February 25 and 26, 1970 and addressed to plaintiffs' counsel and more than thirty members of Congress (App. 51-55), Robert E. Jordan III, then Army General Counsel, acknowledged that "there have been some activities which have been undertaken in the civil disturbance field which, after review, have been determined to be beyond the Army's mission requirements" (App. 54). Mr. Jordan admitted that the Army Intelligence Command maintained a computerized data bank at Fort Holabird, Maryland concerning civilian political activity throughout the nation (App. 52, 55), and distributed an "identification list which included the names and descriptions of individuals who might be involved in civil disturbance situations" (App. 54).[14]

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[14] Although Mr. Jordan asserted that the Fort Holabird computerized data bank would be "discontinued." he made no reference to duplicate and additional information located at other Army record centers (App. 51-55). He also stated that "[n]o computer data bank of civil disturbance information is being maintained" (App. 55), which the plaintiffs contend was inaccurate. Because of the vagueness of Mr. Jordan's letter, Senator Sam J. Ervin, Chairman of the Constitutional Rights Subcommittee of the Senate Committee on the Judiciary, wrote to the the Secretary of the Army on February 27, 1970 to request further information about the scope of the Army's domestic surveillance system (App. 61-62). Senators Abraham Ribicoff and William Fulbright and Congressman Cornelius Gallagher similarly pressed the Secretary for information (App. 63-65, 74-75).

To answer mounting Congressional criticism, Under Secretary of the Army Thaddeus Beal wrote to Congressman Gallagher and Senator Ervin on March 20, 1970 (App. 76-86). He disclosed the existence of a second "identification list . . . on individuals and organizations" prepared by the Counterintelligence Analysis Division (App. 81). Mr. Beal also acknowledged the maintenance by the Army of microfilm data banks on civilian political activity, and stated that such data banks would continue to be compiled and maintained (App. 81). Apart from these admissions, however, the Under Secretary denied the existence of any other intelligence files. Eight days earlier, however, in their motion papers for a temporary restraining order and preliminary injunction, plaintiffs had specifically charged that the defendants were concealing the existence of:

(1) a second computerized national domestic intelligence data bank, much larger than the one at Fort Holabird, maintained by the Continental Army Command at Fort Monroe, Virginia (App. 48);

(2) regional domestic intelligence data banks including files and dossiers on the political activities of individual citizens and organizations maintained by the First, Third, Fourth, Fifth, and Sixth Armies, and the Military District of Washington, D.C.; and by the 108th, 109th, 111th, 112th, 113th, 115th, 116th, and 902nd Military Intelligence Groups, and the 710th Military Intelligence Detachment, at Fort Devens, Massachusetts; Fort Meade, Maryland; Fort MacPherson, Georgia; Fort Sam Houston, Texas; Fort Sheridan, Illinois; San Francisco, California; and Honolulu, Hawaii, respectively (App. 48);

(3) cards and documents stored at the Headquarters of the Army Intelligence Command from which the Fort Hola-

bird domestic intelligence data bank was organized and made operable (App. 48);

(4) a second blacklist, larger than the first, known as the "Compendium" and published by the Counterintelligence Analysis Division of the Army in two volumes entitled, *Counterintelligence Research Project: Organizations and Cities of Interest and Individuals of Interest,* describing politically active individuals and organizations unassociated with the armed forces or with civil disturbances, but believed by the Army to be sources of "dissidence" (App. 48).

3. Events subsequent to the proceedings in the District Court of which the Court should take notice for the sole purpose of determining the justiciability of plaintiffs' claims.

The government's brief discusses events subsequent to the filing of this lawsuit and facts outside the scope of the proceedings in the District Court for the purpose of bolstering that court's decision. Thus, it claims that the Army's investigative activities have been discontinued and that the files and dossiers resulting therefrom have been destroyed (Gov't. Brief, pp. 9-11, 34). It also argues that the allegations of injury to the plaintiffs are unsubstantiated by facts in the record (*Id.,* p. 20). Whether these contentions spring from the government's desire to broaden the issues before this Court or its unwillingness to have the Court test the sufficiency of the pleadings on their face, the plaintiffs are entitled to present a rebuttal. In doing so they request the Court to take notice of two events subsequent to the District Court proceedings in order to complete the record in this case: (1) the transcript of a hearing on a motion for a preliminary injunction made by mem-

bers of the plaintiffs' class in a case involving the same subject matter as the case at bar, *ACLU* v. *Westmoreland,* 70 Civ. 3191 (N.D. Ill. 1970), appeal argued *sub nom. ACLU* v. *Laird,* 71-1159 (7th Cir. 1972), and (2) Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92nd Cong., 1st Sess., February 23-25 and March 2-4, 9-11, 15, and 17, 1971 [hereinafter "the Ervin Hearings."][15]

A. *The partial reforms cited by the government do not prove that the Army's investigation of civilian politics has been discontinued and that the files and dossiers resulting therefrom have been destroyed.*

The government's Statement of the Case attempts to convey the impression that the controversy before the Court is moot.[16] Under these circumstances the plaintiffs are entitled to go outside the record to demonstrate that the case is not moot.[17]

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[15] Even for the purpose of deciding issues on the merits, this Court has taken notice of legislative committee reports, *Carolene Products Co.* v. *United States,* 323 U.S. 18, 28 (1944); cf. *Elliott* v. *Home Loan Bank Board,* 233 F. Supp. 578 (N.D. Cal.) rev'd on other gds., 386 F.2d 42 (9th Cir. 1964), cert. denied 390 U.S. 1011 (1965), and may of course take notice of the record in other proceedings within the federal judicial system, *Brown* v. *Board of Education,* 347 U.S. 483 (1954); see also *Paul* v. *Dade County,* 419 F.2d 10 (5th Cir. 1969), *cert. denied,* 397 U.S. 1065 (1970).

[16] The government having injected the issue of mootness into this case, the plaintiffs would be entitled on remand to offer evidence addressed to that issue. The government, therefore, cannot be heard to object to any proof by the plaintiffs that the Army continues to compile and maintain files and dossiers on civilian political activity, Army regulations to the contrary notwithstanding. Cf. *SEC* v. *Rapp,* 304 F.2d 786 (2d Cir. 1962); *Kirk* v. *United States,* 232 F.2d 763 (9th Cir. 1956).

[17] *See* discussion of mootness at pp. 88-91, *infra.*

The vagueness of the Army directives initiating domestic surveillance, and the equivocal directives purporting to reduce it are exhaustively documented in the Ervin Hearings.[18] Contrary to the assertion by the government that Army surveillance focused on "selected public gatherings . . . that were thought to have a potential for civil disorder" (Gov't. Brief, p. 5), surveillance was neither selective, nor restricted to public gatherings, nor limited to even the broadest definition of potential civil disorders.[19] The directives setting up the Army surveillance program were extremely broad, unlike the narrower "family of contingency plans" referred to by the government in its brief (*Id.*), which related only to the logistics of troop movements.[20]

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[18] *See* Ervin Hearings, Part I, pp. 160, 175, 246-47, 258-59, 280-81, 297, 315, 323, 327, 330, 385, 418, 430; Transcript of Proceedings in the District Court, *ACLU* v. *Westmoreland, supra* [hereinafter "*Westmoreland* Transcript"], p. 629. See also the following colloquy, at p. 418, between Senator Ervin and Secretary Froehlke concerning the latter's prepared statement about the scope of Army surveillance:

> Senator ERVIN: This statement states in effect that it was a very unfortunate thing that many of the things which the military did were not spelled out in any kind of written guideline, and many of them were the result of oral orders and many of them were the result of conversations between the military and civilian law enforcement officers. Is that a fair statement?
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> Mr. FROEHLKE: That is a fair statement.

[19] Ervin Hearings, Part I, pp. 111-12, 176, 247, 263, 265, 267, 299, 317-18, 337, 376; *Westmoreland* Transcript, pp. 249, 257, 619, 758-59, 818, 847-48.

[20] Ervin Hearings, Part I, pp. 111-12, 261, 280-81, 297, 299, 421, 872; *Westmoreland* Transcript, pp. 201-03, 260, 330, 345, 374, 1066. Secretary Froehlke testified, at p. 421 of the Ervin Hearings, that ". . . both the collection plans of February 1, and May 2, [1968] could be interpreted in such a way that would permit surveillance of almost anybody who is active in a community where there was a civil disturbance. Both plans were very broad." Indeed, as former

While the scope of the Army's investigation of civilians was never defined by civilian authorities prior to the initiation of this lawsuit,[21] subsequent attempts by the Army to destroy the fruits of its investigation have been substantially ineffective. The government maintains, for example, that "spot reports"—the raw data of surveillance—are "destroyed 60 days after publication" (*Id.*, p. 10; App. 80), but it does not disclose that the raw data is first transferred to "agent reports," "after-action reports," "biographic reports," and "summaries of investigations".[22] Furthermore, although the investigative data abstracted from spot reports was no longer computerized after February 1970, non-computerized domestic intelligence reports continue to be maintained by the Army.[23] Similarly, the government contends that the identification list[24] was destroyed in February 1970 (*Id.*, p. 10), but fails to explain that the "order . . . to return" (*Id.*) the 300 copies of the list outside the Army was inexplicably changed at the last minute to an order to destroy all copies, which the Hearings testimony shows has not been carried out.[25] Finally, the government

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agent Joseph Levin, Jr. testified, the breadth of the collection plans resulted in even broader instructions to the agents in the field: "It is the nature of the Army system to expand on requirements as each directive travels down the chain of command. . . . [I]ntelligence requirements at field office level rarely bore any resemblance to the order issued from Fort Holabird or even Group Headquarters." *Id.*, p. 297.

[21] Ervin Hearings, Part I, pp. 115, 146, 151, 154, 156, 163, 202, 206-07, 210, 217-18, 322, 454, 462.

[22] *Id.*, pp. 177, 179, 180, 211, 234-35, 238, 264, 331, 390, 465.

[23] *Id.*, pp. 156, 159, 209-10.

[24] *Id.*, pp. 148, 166, 186, 191-92, 207-08, 211-13, 226-27, 249, 266-67, 269, 277, 455-56, 866; *Westmoreland* Transcript, pp. 455, 887-91, 1029.

[25] Ervin Hearings, Part I, pp. 216, 238, 249, 279-80, 394, 428.

points to a policy letter from the Adjutant General as evidence that domestic surveillance "was severely restricted in June 1970" (*Id.*, pp. 9, 45-52). Apart from this bald assertion, however, there is no basis for concluding that the letter eliminated the activities complained of in this lawsuit. Indeed, as Senator Ervin remarked in a letter to the Secretary of the Army, "the exceptions, qualifications and lack of criteria in your policy letter could lead the average citizen . . . to wonder just how much of a change it represents in government policy." [26]

Other errors and omissions in the government's Statement of the Case cast further doubt on its claim that Army surveillance has ceased. The assertion, for example, that "surveillance activity decreased" after the "Spring and Summer of 1968" (*Id.*, p. 9) flies in the face of the most comprehensive of all Army Collection Plans authorizing political surveillance, which was issued in May of 1969.[27]

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[26] Ervin Hearings, Part II, p. 1102. See also *Id.*, Part I, pp. 102, 214-15, 222, 281, 435; *Westmoreland* Transcript, pp. 536, 540, 912.

[27] Ervin Hearings, Part II, pp. 1731-37. The Plan includes, inter alia, the names and identification numbers of the following organizations to be monitored:

American Friends Service Committee (AFSC)	ZB 00 02 00
Americans for Democratic Action (ADA)	ZA 00 17 81
Committee for Non-Violent Action (CNVA)	ZB 00 87 79
Congress of Racial Equality (CORE)	ZB 00 14 77
Clergy and Laymen Concerned About Vietnam (CLCAV)	ZB 50 05 27
Fifth Avenue Vietnam Peace Committee (FAVPC)	ZB 02 12 68
Institute for the Study of Non-Violence (ISNV)	ZB 50 03 86
Interfaith Peace Mission (IPM)	ZB 50 10 64
National Association for the Advancement of Colored People (NAACP)	ZA 00 04 02
National Committee for a Sane Nuclear Policy (SANE)	ZA 00 90 26

(footnote continued on following page)

By the same token, the government's claim that political intelligence data and the special identification lists "were kept apart" from the Army's investigative files of "personnel, civilian employees and contractors' employees" (*Id.*, p. 8), cannot withstand evidence that the fruits of Army surveillance can now be found in the investigative files of a host of military and civilian agencies.[28]

B. *Plaintiffs have a right to file supplemental pleadings to substantiate their allegations of injury with facts unknown at the time the complaint was filed.*

Although their allegations of injury are more than sufficient to state a cause of action, plaintiffs would be entitled on remand to file supplemental pleadings to bring their complaint up to date.[29] There are at least five categories of

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Southern Christian Leadership Conference (SCLC)	ZB 00 87 94
Student Non-Violent Coordinating Committee (SNCC)	ZB 01 13 29
Veterans and Reservists to End the War in Vietnam (VREWV)	ZA 02 17 70
Veterans for Peace in Vietnam (VPV)	ZB 02 18 03
Women Strike for Peace (WSP)	ZB 01 36 95

[28] This is understandable in light of testimony in the Ervin Hearings that political intelligence data collected as "civil disturbance information" have been filed in security clearance dossiers. Ervin Hearings, Pt. I, p. 230. See also, *Id.*, pp. 151, 156, 160, 212, 216, 223, 225, 234, 259, 275, 323, 423, 428, 465; *Westmoreland* Transcript, pp. 849-50.

[29] An appellate court may, on proper showing, remand a case expressly for the purpose of permitting a party to file supplemental pleadings under Rule 15(d) of the Federal Rules of Civil Procedure, "setting forth transactions, occurrences or events which have happened since the date of the pleading sought to be supplemented." See, e.g., *Case-Swayne Co.* v. *Sunkist Grocers, Inc.*, 369 F.2d 449 (9th Cir. 1966); *Southern Pacific Railroad* v. *Conway*, 115 F.2d 746 (9th Cir. 1940).

allegations pertaining to their injury which the plaintiffs can now substantiate in even greater detail with witnesses who testified at the Ervin Hearings and at the evidentiary hearing in *ACLU* v. *Westmoreland*. First, the plaintiffs can prove the Army has conducted surveillance of wholly private activity;[30] second, that the Army's files and dossiers on civilians have been misused and indiscriminately disseminated;[31] third, that their employment or prospective employment within or without the government is jeopardized by such misuse and indiscriminate dissemination of files and dossiers on civilian political activity;[32] fourth, that their reputations have been damaged and defamed by the Army's investigative activities;[33] and finally, that as a result of the Army's investigation of civilian politics, members of the plaintiff organizations have been deterred from continuing their membership and prospective members have been dissuaded from joining.[34]

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[30] Ervin Hearings, Part I, pp. 171, 185, 198, 200-01, 204, 213, 217, 223, 234, 255, 285-86, 290-91, 294-95, 300, 306, 308-09, 387, 445; *Westmoreland* Transcript, pp. 178-79, 205-06, 216-18, 244, 269, 299-300, 311, 359, 373, 515, 560.

[31] Ervin Hearings, Part I, pp. 151, 153-55, 162, 166, 187, 191-92, 195, 211, 224, 234, 266, 270, 319-20, 460, 465; *Westmoreland* Transcript, pp. 103, 156, 179, 214-16, 653, 708, 759, 1016, 1069.

[32] Ervin Hearings, pp. 183, 231.

[33] *Id.*, pp. 131, 141, 183, 232, 266, 342; *Westmoreland* Transcript, pp. 64, 486-87, 498-99.

[34] *See, e.g.*, Ervin Hearings, Part I, p. 231; *Westmoreland* Transcript, pp. 41, 492, 499.