

a riot, again which is close to associational rights. That the executive branch or the legislative branch may not even propose legislation like that, that the executive branch may not submit it or that Congress may not even debate it, is, I think, the logical conclusion to be drawn from such a broad extension of the chilling effect doctrine.

In short, I think you have got to have some governmental sanction imposed on the person before you get a first amendment problem.

Senator ERVIN. What more sanction can you have imposed on people than for the military, for example, to send military agents to photograph people and have helicopters flying overhead to watch them? Isn't that governmental sanction?

Mr. REHNQUIST. No, it is not a governmental legal sanction, in my opinion.

Senator ERVIN. What is it? In other words, I don't think that the Constitution permits the President of the United States to use military forces to discharge functions of a national police force or to spy on the civilian population of this country.

Mr. REHNQUIST. Well, certainly the Posse Comitatus Act places substantial limitations in that area.

Senator ERVIN. But it does not authorize the President to use the military except to suppress insurrection against the Government or violent actions which are so serious in nature as to obstruct the enforcement of the Federal Constitution or Federal laws or interfere with the ordinary course of justice in the courts. That is all the power he gets under the Constitution and under the acts of Congress implementing the Constitution.

There is not a syllable in there that gives the Federal Government the right to spy on civilians; that is, which gives the Army the right to spy on individuals who are not connected with the military. Yet we even had them spying on people in churches where presumably they had gone to worship the Almighty according to the dictates of their own consciences.

Mr. REHNQUIST. Well, as I say, I think that was unauthorized and reprehensible. I do disagree with you as to the first amendment question.

Senator ERVIN. Well, do you agree with me that the legislative branch of the Government has no right to collect information which tends to stifle the individual's inclination or desire to exercise his first amendment rights?

Mr. REHNQUIST. I agree with that it can't collect it by compulsory process.

Senator ERVIN. But you do take the position that the Army or the Justice Department can go out and place under surveillance people who are exercising their first amendment rights even though such action will tend to discourage people in the exercise of those rights?

Mr. REHNQUIST. Well, to say that I say they can do it sounds either like I am advocating they do it or that Congress can't prevent it or that Congress has authorized it, none of which propositions do I agree with.

My only point of disagreement with you is to say whether as in the case of *Tatum v. Laird* that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the execu-

tive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government.

Senator ERVIN. Well, now, this information that is collected goes into the Government files, doesn't it, and it is used to determine whether a man will be employed to work for the Government, and in some cases it is even made accessible to private industry for them to determine that question; is this not true?

Mr. REHNQUIST. I am not certain what use was made by the information gathered by the Army. The Justice Department has its own investigation made at the time a person seeks employment and, so far as I know, the information gathered by the Army was not used by the Department.

Senator ERVIN. We have a great deal of difficulty finding out what use the Army made of it. As a matter of fact, it appears here from testimony that the second in command of the military intelligence didn't even know that the information was over at Fort Holabird in a computer, and still they want us to believe some little doughboy who was sniped at in the Detroit riots was in some way hep to that information when the second in command of military intelligence didn't even know where it was or what it was.

In a dissenting opinion in a case from Arkansas where the State of Arkansas required teachers to make a disclosure of all the organizations they had belonged to for 5 years, Justice Harlan dissented from the ruling that the information sought there didn't serve a legitimate State purpose, but he laid down this proposition: he said when the Government goes to exercise its investigatory power there are two questions that have to be answered. The first is that the information which the Government seeks must be for a legitimate governmental purpose and, second, that even if it is for a legitimate governmental purpose, it must be relevant to the accomplishment of that purpose.

Do you agree that is a correct statement of law?

Mr. REHNQUIST. Certainly I agree when the Government seeks to obtain it either by threat of discharge from a job or by threat of compulsory process.

Senator ERVIN. But you think the executive branch of the Government can go out and obtain it either by overt or covert methods, and no constitutional question is involved even though it may intimidate people in the exercise of their first amendment rights?

Mr. REHNQUIST. Senator, I think you are putting words in my mouth which I have no desire to have put there. I do not think there is a first amendment violation in that situation. However, the general authority of the Government to do that, or when Congress has authorized it, these situations may present an entirely different question.

Senator ERVIN. The inference I would draw is that the power of the Congress under the Constitution is inferior to that of the executive branch of the Government.

Mr. REHNQUIST. Certainly I would hope you wouldn't draw it from anything I have said because I don't believe that.

Senator ERVIN. Well, in other words, a congressional committee can't get information about people under certain circumstances but the Army or any other Government agency can go out and collect that