Governmental Investigations of the Exercise of First Amendment Rights: Citizens' Rights and Remedies

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I. INTRODUCTION

Congressional committees and the press have recently exposed widespread investigations of private citizens conducted by the federal government.1 These disclosures have drawn attention to the need for stricter legislative controls of governmental investigatory and data-collecting powers2 and for effective judicial remedies for illegal governmental investigations. In the past, citizens subjected to unconstitutional or otherwise illegal governmental investigations have sometimes sought judicial relief while the investigations were still in progress.3 The recent

1. The final report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church committee) contained documented evidence of specific instances of the use of illegal and improper surveillance techniques to gather information about private citizens and subsequently used in covert actions against those citizens. For example, the FBI employed the following tactics as part of its COINTELPRO (Counterintelligence Program): anonymously attacking the political beliefs of targeted citizens in order to induce their employers to fire them; anonymously mailing letters to the spouses of intelligence targets for the purpose of destroying their marriages; and obtaining from the IRS tax returns of a targeted individual and then attempting to provoke an IRS investigation for the express purpose of deterring a protest leader from attending the Democratic National Convention. Other documents disclosed efforts by the FBI to discredit Dr. Martin Luther King as an effective civil rights leader, including mailing Dr. King a tape recording made from microphones hidden in hotel rooms with a threat to release the recording unless Dr. King committed suicide. SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, BOOK II, FINAL REPORT, S. REP. No. 755, 94th Cong., 2d Sess. 10-12 (1976). See also Stone, The Threat to the Republic, N.Y. REV. OF BOOKS (May 27, 1976).


disclosures, however, illustrate that governmental surveillance is becoming increasingly covert, thus limiting the opportunities for judicial relief before the investigations are completed. Post-investigation relief is therefore often sought in the form of damages for injuries already inflicted by the investigatory process and injunctions to control the future adverse use of the information gathered.4

This Note will analyze the role of the judiciary in remedying illegal governmental investigations of exercises of first amendment rights by American citizens. Essentially two issues are raised by citizen suits for relief from such investigations. The first is the determination of the types of governmental investigations that are illegal. Consideration will be given to the extent to which rights created by the first amendment, a constitutional right to privacy, and certain federal statutes limit the government's investigatory power. The second is the identification of what, if any, judicial relief may be available. Various judicial remedies will be examined, focusing on those provided in the Freedom of Information Act5 and the Privacy Act of 1974,6 the judicial power to order expunction of records, and damages recoverable under the constitutional tort theory.

II. RIGHTS OF THE PRIVATE CITIZEN THAT MAY BE VIOLATED BY GOVERNMENTAL INVESTIGATIONS

Although governmental investigations of exercises of first amendment rights by American citizens are not a new phenom-

4. The most recent case of this type is Paton v. La Prade, 382 F. Supp. 1118 (D.N.J. 1974), vacated, 524 F.2d 862 (3d Cir. 1975). In 1973, Paton was investigated by the FBI after she wrote to the Socialist Workers' Party requesting political literature needed for a high school term paper. When the FBI investigation became publicly known, Paton brought a civil rights suit against the Director and two agents of the FBI for declaratory and injunctive relief, damages, and expunction of the investigatory files. The trial court ordered expunction of the files, but granted summary judgment for defendants in the action for damages on the ground that Paton had shown no injury. 382 F. Supp. at 1120. The Court of Appeals for the Third Circuit reversed both rulings, holding that an expunction order must be based on a "clear and complete factual record" of the possibilities for dissemination of the records, the interests of the government in the records, and the potential harm to the plaintiff if the records were disseminated. Moreover, the court held that Paton's allegations of potential harm from the records had stated a justiciable claim for damages and other injunctive relief. 524 F.2d at 868-69.
6. Id. § 552a.
enon, the federal courts have seldom squarely faced the constitutional issues such investigations raise. The paucity of case law is in part explained by the difficulty of raising a justiciable issue prior to any injury or threat of injury caused by the investigation. With the recent disclosures of covert governmental investigations, however, the courts are beginning to directly confront questions of the legality of investigations of the exercise of first amendment rights and of the retention of records compiled during such investigations. In resolving these issues, three possible limitations on government powers must be considered: the first amendment, a constitutional right to privacy, and rights created by statute.

A. First Amendment Rights

The first amendment expressly limits government power and has been construed as creating certain rights that cannot be abridged absent a "compelling" state interest. In determining the constitutionality of governmental investigations of the exercise of first amendment rights, the courts have applied a balancing approach, weighing the type of activity engaged in by the citizen, the purpose of the government in conducting the investigation, and the effects of the investigation on the continued...

7. Cf. Laird v. Tatum, 408 U.S. 1 (1972); United Public Workers v. Mitchell, 330 U.S. 75 (1947). The requirement of standing to sue has been the primary barrier to review. See Warth v. Seldin, 422 U.S. 490, 499 (1975) (the harm must not be a "generalized grievance" shared in substantially equal measure by all or a large class of citizens); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973) (the plaintiff will have standing only if he has suffered "some threatened or actual injury resulting from the putative illegal action"). The doctrines of ripeness, mootness, exhaustion, and political questions may also present insuperable bars to judicial review.

8. See note 4 supra.
9. U.S. Const. amend. I. The first amendment provides: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
11. For cases in which participation in the Communist Party is compared with participation in the more popular American political parties, see, e.g., Galven v. Press, 347 U.S. 522 (1954); Carlson v. Landon, 342 U.S. 524 (1952).
12. For cases in which congressional purposes in conducting investi-
exercises of first amendment freedoms. The traditional first amendment test of constitutionality is to balance the citizen's interest in free speech or free association against the government's interest in conducting investigations; thus it is unnecessary to differentiate between governmental actions that are invalid because they serve no legitimate state interest and those that are invalid because they indirectly affect first amendment freedoms. The case law may be viewed as dealing with three separate but interrelated concerns: formulation of specific limitations on the scope of the government's power to investigate, prevention of "chilling" the continued exercise of first amendment rights, and limitation of collateral effects caused by the governmental investigation. The unique nature of covert governmental investigations raises the question of whether such activities can be properly examined under a traditional first amendment analysis.

The first concern under traditional first amendment analysis, the scope of the government's power to investigate and regulate first amendment activities, has led to the establishment of certain threshold requirements for governmental action. Several cases have involved activities of communist organizations and other allegedly seditious groups and individuals. To investigate such organizations and their members directly, the government must first show an actual attempt at violent overthrow of the government and then must establish that any investigations comply with the requirements of the fourth and fifth amendments. Other cases have involved mandatory disclosure of political activities to investigatory agencies or congressional committees, such as the House Un-American Activities Committee. The courts in these cases have required a showing of a compelling state in-

13. See, e.g., Lamont v. Postmaster General, 381 U.S. 301 (1965). In Lamont the Court was concerned with the effect of the Postal Service and Federal Employees Salary Act of 1962, Act of Oct. 11, 1962, Pub. L. No. 87-793, § 305(a), 76 Stat. 840, on the "uninhibited, robust, and wide-open" debate and discussion that are contemplated by the First Amendment." Id. at 307.


terest as a precondition to treating the investigations as constitutionally permissible. In DeGregory v. New Hampshire Attorney General, the state threatened to investigate a citizen's past subversive activities although he had denied any connection with the Communist Party. Concluding that the state had no valid interest in these matters, the United States Supreme Court held that

the First Amendment, as well as the Fifth, stands as a barrier to state intrusion of privacy. . . . [There must be a] showing of "overriding and compelling state interest" that would warrant intrusion into the realm of political and associational privacy protected by the First Amendment.

Hence, past exercises of first amendment rights are protected from later governmental investigation and disclosure just as they are protected from direct prohibition.

The second concern expressed by the courts is that threatened governmental sanctions may curtail first amendment rights. Courts speak of the "chilling effect" of government actions on free speech and conclude that, absent a compelling state interest, "immediate and real injury is done to the [individual's] interests if he does not speak or act as he says he wants to." A chilling effect is typically found where the government threatens to prosecute allegedly illegal activities that cannot be distinguished from constitutionally protected speech or association. But a mere allegation of an adverse effect on first amendment rights will not be a sufficient basis on which to assert standing to sue. In Laird v. Tatum, the plaintiffs challenged the legality

19. See note 10 supra.
21. Id. at 827.
22. The basis for any investigation of DeGregory's pre-1957 activities was stale; the information being sought was historical, not current; and the state had made no showing of having anything other than a "remote and conjectural" interest at stake. Id. at 829-30.
23. Id. at 829.
25. In National Student Assoc. v. Hershey, 412 F.2d 1103 (D.D.C. 1969), members of student organizations challenged a selective service directive that ordered exempted students engaging in "illegal" political demonstrations to immediately be reclassified and inducted into the military. Plaintiffs brought suit for injunctive and declaratory relief alleging that the order "chilled" the exercise of their first amendment rights since it was impossible to determine what standards any local board would apply. The Court of Appeals for the District of Columbia Circuit agreed with the plaintiffs' characterization of the directive and held it to be "unauthorized and contrary to the law." Id. at 1123.
of the Army's program of surveillance of civilians during the war in Vietnam, alleging that the presence of the surveillance program had "chilled" political expression. To this argument, the Supreme Court responded that the

alleged "chilling" effect may perhaps be seen as arising from respondents' very perception of the system as inappropriate to the Army's role under our form of government, or as arising from respondents' beliefs that it is inherently dangerous for the military to be concerned with activities in the civilian sector, or as arising from respondents' less generalized yet speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to respondents. Allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm . . . .

Yet, where the threat of harm can be objectively proved, it is clear that the government may be enjoined from restricting first amendment political expression indirectly.

The third concern expressed by the courts is the collateral effect of government investigations. First amendment challenges:

27. Id. at 13-14. In distinguishing Laird from those cases in which a chilling effect was found, the Court said:

In none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concurrent fear that, armed with the fruits of those activities, 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 the regulations, proscriptions, or compulsions that he was challenging.

Id. at 11.

28. E.g., Lamont v. Postmaster General, 381 U.S. 301 (1965). The Supreme Court struck down as unconstitutional section 305(a) of the Postal Service and Federal Employees Salary Act of 1962, 39 U.S.C. § 4008(a) (1962), and regulations promulgated thereunder which required that an addressee of mail determined to be "communist political propaganda" be provided written notice to that effect and that the addressee specifically request receipt of such mail. The Court concluded that this procedure violated the first amendment because of both the "affirmative obligation" it placed on the addressees before the mail would be delivered and the manner in which it inhibited these persons from exercising the rights of political debate and discussion. Id. at 307.

A chilling effect that is merely incidental to a valid governmental action (one conducted for a compelling state purpose) will, however, be constitutionally tolerated. See Anderson v. Sills, 106 N.J. Super. 545, 256 A.2d 298 (Super. Ct. 1969), rev'd, 56 N.J. 210, 265 A.2d 678 (1970). There the court stated that "[I]f there is no intent to control the content of speech, an overriding public need may be met even though the measure adopted to that end operates incidentally to limit the unfettered exercise of the First Amendment right." 56 N.J. at 226-27, 265 A.2d at 687 (Weintraub, C.J.).
lenges have been raised by groups and individuals who have feared that enforcement of certain disclosure statutes would force them to reveal private associations and expose them to adverse collateral actions by the government, other individuals, or both.\textsuperscript{29} In \textit{NAACP v. Alabama},\textsuperscript{30} the Alabama chapter of the NAACP resisted a state statutory requirement that a membership list be furnished to the Secretary of State before the organization could do business in the state as a foreign corporation.\textsuperscript{31} The United States Supreme Court held that the state's order to produce that list violated the right of association of organization members. Responding to the state's argument that it would not use the list as a basis for harassing members of NAACP, the Court observed that "[t]he crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold."\textsuperscript{32} The state's production order thus violated the first amendment not simply because of the chilling effect on membership in protected political associations, but also because such disclosure could subject organization members to detrimental actions by private citizens, further inhibiting the continued exercise of first amendment rights.\textsuperscript{33}

The theories enunciated in this first amendment case law can be applied to cases of covert governmental investigations. Where an ongoing investigation is not conducted pursuant to a compelling state interest,\textsuperscript{34} it may run afoul of the first amend-


\textsuperscript{30} 357 U.S. 449 (1957).

\textsuperscript{31} In response to the action of the attorney general to enjoin it from doing business in the state, the NAACP admitted that it had not complied with the Alabama qualifying statute. The Alabama supreme court twice dismissed petitions for certiorari to review contempt citations against the NAACP. 265 Ala. 349, 91 So. 2d 214 (1956); 266 Ala. 132, 91 So. 2d 221 (1956).

\textsuperscript{32} 357 U.S. at 463.

\textsuperscript{33} The Court stressed that the NAACP as a group engaged in advocacy and depended heavily for its survival on the right of its members to freely and confidentially associate with one another. The Court also noted that the NAACP had made an uncontroversial showing that its members had been exposed to public hostility on other occasions when their identities had been exposed, thereby limiting the ability of the organization and its members to advocate their protected beliefs. \textit{Id.} at 462-63. See text accompanying notes 61-64 infra.

\textsuperscript{34} At the present time, it is difficult to state with any degree of
ment if the subject citizen can objectively show that the investigation limits his freedom of speech or other activities protected by the first amendment.\textsuperscript{38} The mere fact that an investigation is being conducted may give rise to a claim of a "chilling effect" on the continued exercise of first amendment rights. If, however, the complaining citizen speaks or acts despite the investigation, the proper conclusion would be that there has been no chilling effect and thus no violation of the first amendment.\textsuperscript{36} Where the existence of the investigation becomes known only after it has been completed, no chilling effect can be found unless the citizen can show that other investigations of the same sort will be undertaken in the future and that the threat of future investigation will curtail continued exercise of first amendment rights.\textsuperscript{37} Thus, to objectively demonstrate a present harm or threat of future harm, as defined in \textit{Laird v. Tatum},\textsuperscript{38} more must be shown than that the investigation simply took place.

The government's retention of investigatory files regarding past exercises of first amendment rights compiled without a compelling state interest may, however, provide a citizen a stronger basis upon which to claim a constitutional violation.\textsuperscript{39} State action and collateral private action together may create a chilling effect on free speech or free association if the records compiled during illegal investigations are subject to dissemination.\textsuperscript{40} If the subject matter of the records is conduct or communications protected by the first amendment,\textsuperscript{41} disclosure of those records certainty what sorts of governmental investigations will be found to be constitutionally permissible. The recent disclosures of covert governmental investigations have not fully revealed the nature of or motive for the government's actions nor the scope of past investigations. Once more facts become known, perhaps through litigation challenging the government's conduct, it will be possible to accurately define which citizen activities are protected by the first amendment, at least by identifying cases in which no compelling state interest is found.

\textsuperscript{35} \textit{But see} \textit{Laird v. Tatum}, 408 U.S. 1 (1971); notes 26-29 supra and accompanying text.

\textsuperscript{36} \textit{See, e.g., Tatum v. Laird}, 444 F.2d 947, 959 (D.C. Cir. 1971) (MacKinnon, J., dissenting) (quoting plaintiff's statement in the trial record that they were "not people, obviously, who are cowed and chilled", but were willing "to open themselves up to public investigation and public scrutiny").

\textsuperscript{37} In such a situation, this threat of future investigation would be the sole basis for a claim of a chilling effect. Of course, the objectivity requirement of \textit{Laird v. Tatum}, 408 U.S. 1 (1971), would still have to be met by potential plaintiffs. \textit{See note 7 supra.}

\textsuperscript{38} \textit{Laird v. Tatum}, 408 U.S. 1 (1971).

\textsuperscript{39} \textit{See} notes 68-77 \textit{infra} and accompanying text.

\textsuperscript{40} \textit{See} note 33 \textit{supra}.

\textsuperscript{41} Although the right to petition the government is protected by the first amendment, \textit{see} note 9 \textit{supra}, it would appear that the govern-
may curtail constitutional rights just as effectively as actual or threatened sanctions against the activities that were investigated.\textsuperscript{42} In such a case, the citizen could argue that retention of the records generated by covert governmental activities must be prohibited because the investigation and resulting records exceed the permissible scope of the government’s constitutional powers.\textsuperscript{43} The courts could grant relief under this argument either by limiting the government’s power to investigate or by holding adverse collateral actions impermissible.\textsuperscript{44}

B. CONSTITUTIONAL RIGHT TO PRIVACY

The Constitution does not expressly provide a specific right to privacy. The United States Supreme Court, however, has referred to various constitutional provisions as protecting the individual’s right of privacy,\textsuperscript{46} though it has not yet explicitly identified the single source of such a right.\textsuperscript{46} Rather, the Court has spoken of the right to privacy only in a few narrowly defined and unrelated fact situations.\textsuperscript{47} These protections are invoked
most often in cases involving searches and seizures under the fourth amendment. Yet various other forms of governmental investigations and restraints on personal liberty have also been held to violate the constitutional right to freedom from unwarranted governmental intrusion. Commentators have observed that the constitutional right to privacy encompasses both an individual's right to be free from compelled disclosure of constitutionally protected activities and his right to remain autonomous.

In certain cases, then, the Supreme Court has recognized a general right of privacy that extends beyond protection from governmental investigation to protection for personal autonomy. The Court has referred to the penumbral protections of the first eight amendments, the ninth amendment, and the concept of fundamental liberty guaranteed by the first section of the fourteenth amendment as the constitutional bases for the privacy right. In *Griswold v. Connecticut*, the Supreme Court declared unconstitutional state statutes prohibiting the use and prescription of contraceptives insofar as those statutes applied to married couples. Although the Court was divided on identifying the appropriate constitutional theory underlying the privacy right, Justice Douglas, writing for the Court, relied on a penumbral theory, asserting that the specific guarantees of the first eight amendments also protect peripheral rights. Viewing these specific guarantees as an integrated whole, Justice Douglas concluded that they create "zones of privacy" into which a state may not intrude. The source of the right to personal autonomy

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52. *Id.* at 486 (Goldberg, J., concurring).
53. *Id.* at 484 (Goldberg, J., concurring).
54. 381 U.S. 479 (1965).
55. Justice Harlan considered the right of privacy to be protected by the due process clause of the fourteenth amendment since it was "implicit in the concept of ordered liberty." 381 U.S. at 500. Justice Goldberg relied on the ninth amendment, arguing that the first eight amendments were not to be considered exhaustive. *Id.* at 492.
56. *Id.* at 483-85.
57. *Id.* at 484.
was differently identified in *Roe v. Wade*,\(^{58}\) where the Court held that a woman has an absolute right to an abortion during the first trimester of pregnancy. Relying on a fundamental rights approach, the Court agreed that the fourteenth amendment’s concept of personal liberty and restrictions on state action combined with the ninth amendment is broad enough to encompass a woman’s choice of whether to have an abortion.\(^{59}\)

The first amendment itself has also been treated as a source of a specific constitutional right to privacy. In these cases, however, the Supreme Court has not relied on the concept of personal autonomy, but has instead created a limitation on governmental power to affect those activities of citizens that are deemed to merit constitutional protection.\(^{60}\) Thus, in *NAACP v. Alabama*,\(^ {61}\) the associational right of NAACP members was accorded constitutional protection and the state could not force disclosure of membership lists. Similarly, in *DeGregory v. New Hampshire Attorney General*,\(^ {62}\) past associations that were placed by statute beyond the reach of a legitimate state investigation were held constitutionally immune from compelled disclosure.\(^ {63}\) In both cases the right to privacy was considered independently of the possible “chilling effect” that disclosure might have had on continued exercise of first amendment rights. Thus, the Court has established an independent constitutional right to freedom from compelled disclosure of otherwise protected activities.\(^ {64}\)

The proper approach to analyzing the constitutional right to privacy in the context of the exercise of first amendment rights is to examine permissible governmental actions, rather than to

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59. The Court held that the “right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state actions, as we feel it is, or, as the district court determined, in the Ninth Amendment’s reservations of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” Id. at 153.
63. *DeGregory* also comports with those cases from the 1950’s in which the Court refused to support compelled testimony before the House Un-American Activities Committee. See, e.g., *Barenblatt v. United States*, 360 U.S. 109 (1959); *Uphous v. Wyman*, 360 U.S. 72 (1959).
determine whether a direct right that stands as a barrier to governmental action has been conferred on the citizen. From this perspective, the right to privacy in the first amendment context is more akin to the fourth amendment’s restrictions on searches and seizures than to a specifically expressed guarantee, such as the thirteenth amendment guarantee of freedom from involuntary servitude. Where the courts have formulated restrictions on governmental action, they have occasionally required a compelling state interest before the government may act. This is what the courts have done with the first amendment. And where a compelling state interest is found to exist, the government may intrude only so far as is reasonably necessary to fulfill its legitimate goals. An ascertained limit on the scope of permissible governmental actions, then, also defines the resultant rights of citizens, including a right to privacy from certain types of governmental actions. Although this “permissible governmental actions” approach does not incorporate the “fundamental rights” theory, it is consistent with the manner in which the courts have dealt with the majority of claims to a right to privacy. Consequently, the approach affects only the types of judicially enforceable remedies available, not whether a remedy will in fact be afforded.

To develop the definition of a constitutional right to privacy fully, restrictions on governmental action must be related to basic constitutional concepts of the proper function of government. Under the first amendment, it has been urged that free speech is necessary to foster communication among citizens and the application of information gained thereby to decisions of self-governance. The focus is on separating the individual from

65. Since the first eight amendments of the Bill of Rights are phrased in terms of restrictions or prohibitions on governmental action, this approach appears more consonant with constitutional language. Often, the concern will not be whether a citizen’s particular right has been infringed, but rather whether the action taken by the government is within the scope of its constitutional powers. By focusing on restrictions on governmental action, this analysis gives less weight to the specific injury suffered by the complaining citizen. Even so, the case or controversy requirements of Article III still must be met by a claim of personal harm or injury resulting from the government’s impermissible actions. See text accompanying note 26 supra.

66. U.S. CONST. amend. XIII.


68. Id. at 154-56.

69. See notes 45-46 supra.

70. See note 65 supra.

71. See text accompanying notes 58-59 supra.
governmental influence in personal matters that are so constitutionally favored that no governmental intrusion is permissible.\textsuperscript{72} Using an analysis similar to that in \textit{Roe v. Wade},\textsuperscript{73} this theory could be said to create an area of personal autonomy. But since the courts also speak of the exception under the first amendment for compelling state interests,\textsuperscript{74} it is more consistent to view a first amendment-based right of privacy as the consequence of a restriction on governmental action. Thus, the "permissible governmental actions" approach should be viewed as the model for the right to privacy,\textsuperscript{75} leading to the conclusion that the right exists in all areas in which the government may not permissibly act.

C. Statutory Rights

Statutes that regulate governmental surveillance and record-keeping and statutes that define the powers of certain government agencies constitute a third source of rights that may be invoked by a citizen who has been subjected to an illegal governmental investigation. Statutory rights are expressly created by the Freedom of Information Act,\textsuperscript{76} which confers a broad right of access to government files, and by the Privacy Act of 1974,\textsuperscript{77} which limits the scope of governmental investigations and grants some degree of control to citizens over dissemination of certain types of investigatory files. Indirect statutory rights include limitations on investigations by governmental agencies,\textsuperscript{78} certain provisions of the Privacy Act of 1974 regulating the permissible subject matter and methods of acquisition of records,\textsuperscript{79} and numerous other specific regulatory statutes.\textsuperscript{80} Thus, the first group of statutes directly confers a right that may be relied on

\textsuperscript{72} See also DeGregory v. New Hampshire Attorney General, 383 U.S. 825 (1966); text accompanying notes 20-23 supra.

\textsuperscript{73} 410 U.S. 113 (1973).

\textsuperscript{74} See note 10 supra.

\textsuperscript{75} The fourth amendment is consistent with this analysis, through its requirement of reasonableness, although it does not as readily demonstrate the judicial balancing of competing interests that must take place under the first amendment.


\textsuperscript{77} Id. § 552a.

\textsuperscript{78} See, e.g., 18 U.S.C. § 2516 (1970). The section authorizes the Attorney General or his designee (which includes members of the FBI) to obtain court orders for wiretapping, but only on application to a federal judge and only with respect to certain enumerated offenses.


in seeking a remedy, while the second group creates a zone of protection within which the citizen may be included. Reliance on either group of statutory rights simplifies the necessity of establishing the violation of a vested right and avoids difficult constitutional issues.

The Privacy Act of 1974 is the most significant of the protective statutes. The Act directly limits the government's power to collect records on the exercise of first amendment rights by providing that no agency may gather information "describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or . . . unless pertinent to and within the scope of an authorized law enforcement activity . . . ." The citizen who challenges a governmental investigation need only prove that the action was beyond the legitimate grant of authority to the particular agency. Even though the Privacy Act of 1974 provides limited remedies for violations of the above section, it can be argued that the section creates rights which extend beyond the specific limitations on government action.

III. REMEDIES FOR COVERT GOVERNMENTAL INVESTIGATIONS THAT VIOLATE CIVIL RIGHTS

Before seeking judicial relief from a covert governmental investigation it is necessary to determine whether an investigation has been conducted, whether investigatory records still exist, and whether a constitutional or statutory right has been violated. At least four methods are presently available to resolve these questions: access to the records under the Freedom of Information Act and the Privacy Act of 1974; expunction of the investigatory records; declaratory and injunctive relief; and a damages action under the Bivens constitutional tort theory.

83. Although the initial burden on the plaintiff is lessened by such an approach, there is no indication of greater final success, except with statutes, such as the Privacy Act of 1974, which have very specific remedial provisions.
85. See notes 178-81 infra and accompanying text.
87. Id. § 552a.
A. Access to the Investigatory Records

Absent the fortuitous discovery of investigatory records concerning a private citizen, the first step in the remedial process is to determine the existence of records through use of the Freedom of Information Act (FOIA). The request procedures of the FOIA provide a means for determining the existence of investigatory records, even though in some cases actual access to the files cannot be gained. Whether a right of access exists turns on the applicability of recently amended exemption 7 of the FOIA, which provides that disclosure is not required for materials that are “investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings . . . .” The FOIA expressly requires a court to decide whether exemption 7 applies to protect the material from disclosure under the Act. The specificity of the requirement ensures that the governmental agency claiming the exemption has the burden of demonstrating which enumerated interest would be harmed by disclosure.

88. Id. § 552(a) (3).
90. (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel; . . . .
91. Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Baltimore, 508 F.2d 945 (4th Cir. 1974); Washington Research Project, Inc. v. Department of HEW, 504 F.2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975); Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). To achieve these results, the 1974 Amendments authorize a court to inspect the records in camera to determine whether an exemption should be granted. 5 U.S.C. § 552 (a) (4) (B) (Supp. V 1975). See also Ash Grove Cement Co. v. FTC, 511
Exemption 7 is crucial in determining whether the FOIA will operate to compel disclosure. Several problems exist in applying the exemption, however, including the resolution of whether the records are in fact “investigatory records compiled for law enforcement purposes,” whether disclosure will “interfere with enforcement proceedings,” and whether governmental illegality in record compilation will affect the exemption.

The first problem concerns the phrase “investigatory records” contained in exemption 7. The Court of Appeals for the District of Columbia Circuit in Bristol-Meyers v. FTC,92 recognizing that the title given to specific records cannot be treated as indicative of their actual contents, stated that an “agency cannot, consistent with the broad disclosure mandate of the Act, protect all its files with the label ‘investigatory.’”93 The FOIA now expressly permits in camera review to verify government contentions relating to the character of the records.94 To meet its burden, the government must show that the contents of the records are actually investigatory in nature and not simply data collected for some purpose other than law enforcement.95

The statutory language, “compiled for law enforcement purposes,” is the source of the second major problem in applying the exemption. In the past, courts have had difficulty in determining when such a purpose is present. Some courts have focused on the government’s intent at the time the investigation was conducted in order to ascertain whether law enforcement was a significant aspect;96 others have stressed preventing pre-

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93. 424 F.2d at 939. See also Aspin v. Department of Defense, 491 F.2d 24 (D.C. Cir. 1973). There the court stated that to “prevent the unauthorized use of a § 7 exemption by agencies as a shield against disclosure, there must be some method of assuring that the exemption is being properly invoked.” Id. at 29.
94. See note 91 supra.
96. See, e.g., Rural Housing Alliance v. Department of Agriculture, 490 F.2d 79 (1973), reh. denied, 502 F.2d 1179 (D.C. Cir. 1974) (consideration whether purpose of the records was to determine if an enforcement...
mature disclosures of an enforcement action. The District of Columbia Circuit has stated perhaps the most reasonable construction of this exemption 7 language:

For a file to be deemed to have been compiled for law enforcement purposes it is not necessary that an adjudication have been imminent or even likely . . . at the time the material was amassed. . . . [Yet] where the inquiry departs from the routine and focuses with special intensity upon a particular party, an investigation is under way.

The third major problem with exemption 7 concerns the showing that the government must make to come within the terms of the specific requirements exempting law enforcement records from disclosure. The statutory language barring interference with enforcement proceedings has presented the greatest difficulty. Judicial disagreement over the assessment of the likelihood of future prosecutions was resolved by the 1974 amendments to exemption 7. The Amendments now place the burden on the government to factually demonstrate that a prosecution is about to occur or that some other legitimate law enforcement interest will be harmed by disclosure. Arguably, this statutory change compels the government to present a court with objective proof that the stated grounds for exemption actually involve an enforcement proceeding or an investigation that has a justifiable legal basis.

The exemption 7 barriers to disclosure of governmental records thus should not prevent disclosure where the records were illegally compiled and retained. In camera inspection of...
the records may reveal that the files are not "investigatory records compiled for law enforcement purposes," but instead are the product of an unconstitutional or otherwise illegal investigation. Where the investigation involved protected first amendment activities, disclosure will not "interfere with enforcement proceedings," since no enforcement action may be based on those activities. In the vast majority of cases, these arguments should suffice to rebut a claim of exemption from disclosure under the FOIA.

The Privacy Act of 1974 also provides for access to investigatory records compiled on individuals. Virtually all records compiled for criminal law enforcement purposes, however, are beyond citizen access; and unlike the FOIA, the Privacy Act does not require the government to demonstrate with specificity that access to the records would harm its law enforcement interests. Therefore, it is more difficult for citizens to gain access to records under the Privacy Act than under the FOIA when an exemption is claimed by the government. Nevertheless, a citizen may invoke the Privacy Act by arguing that the govern-

102. It may become necessary for a citizen to prove that the speech or conduct investigated, or which served as the basis for the investigation, was constitutionally protected. If this was not clearly the case, the citizen seeking access to the records will have to litigate the first amendment issue to argue that the exemption in §7 does not apply. See notes 9-33 supra and accompanying text. While the evidence supporting this contention will remain in the control of the court, the FOIA provisions permitting in camera inspection can aid in making certain that the government has a foundation for its claim of exemption.

103. When such a claim is presented, the court must necessarily view the factors that have traditionally been used in determining whether the first amendment protects the subject conduct. If the court concludes that the citizen was engaged in protected conduct, then it generally will follow that no prosecution of the citizen can be undertaken. Often, the contents of the records themselves may demonstrate that the subject matter of the investigation does not involve illegal activity.


105. The Privacy Act specifically exempts from disclosure:

(A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

Id. § 552a(j) (2).

106. Compare note 105 supra with note 90 supra and accompanying text.
ment is not entitled to an exemption since the records in fact are not "information compiled for the purpose of a criminal investigation." Any possible conflict between the standards of the Privacy Act and the FOIA should be resolved by allowing the narrower language of the latter’s exemption 7 to control, thereby making disclosure more readily available.

B. EXPUNCTION OF THE INVESTIGATORY RECORDS

Court-ordered expunction of investigatory records constitutes the most important remedy for the citizen subjected to an illegal governmental investigation. That remedy may have the effect of permanently precluding the government from using the fruits of its illegal inquiry. Although a request for expunction generally accompanies a request for declaratory or injunctive relief, an expunction demand may be the only relief sought. When invoking their broad equitable powers to order expunction, courts normally balance the relative interests of the parties. Standing to sue seldom presents a problem since a showing of possible future use or dissemination of the records has been treated as an immediate threat of injury. Similarly, the courts almost always assume that expunction requests are otherwise justiciable. Since these requests most often occur in the context of arrest records, the analysis of expunction of investigatory records must be based on those cases.

107. The same analysis and requirements as to exemption seven of the FOIA would appear to apply. See notes 92-103 supra and accompanying text.


Initially, it must be noted that since the expunction is equitable in nature, no absolute right to relief exists even if governmental illegality can be proved.\footnote{114} Preservation of illegally compiled records appears to be proper only when the government's interests in those records, based on some continuing need for the information, outweighs the potential harm to the plaintiff's reputation or economic future.\footnote{115} On the other hand, courts have generally ordered total expunction of records of an illegal arrest when the plaintiff demonstrates the likelihood of serious future harm if the records are disseminated.\footnote{116} Thus, requests for expunction of investigatory records must be accompanied by proof that the records are subject to dissemination.\footnote{117} In the arrest records situation, a plaintiff need not demonstrate the exact consequences that may result from the maintenance of a criminal file,\footnote{118} but only that the records will be provided upon request to other governmental agencies, to potential employers, or to an adverse party in litigation.\footnote{119}

\begin{itemize}
\item \footnote{114} Sullivan v. Murphy, 478 F.2d 938, 970 (D.C. Cir. 1973).
\item It may be, however, that measures short of physically destroying the records in question will prove adequate to assure complete and effective relief. For example, an order placing the original documents under seal and prohibiting disclosure of their contents, except upon further order of the District Court predicated on a showing of good cause, may provide a remedy reasonably equivalent to expungement in terms of protection of plaintiff's rights. The balance of government interests may warrant different treatment for different . . . records \footnote{Id. at 973.}
\item Id. at 973.
\item \footnote{115} See, e.g., Finley v. Hampton, 473 F.2d 180 (D.C. Cir. 1972).
\item Id. at 973.
\item \footnote{117} Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969);
\item Finley v. Hampton, 473 F.2d 180 (D.C. Cir. 1972).
\item \footnote{118} Although [plaintiff] cannot point with mathematical certainty to the exact consequences of his criminal file, we think it clear that he has alleged a "cognizable legal injury" . . . This court, like other courts, held that unlawful maintenance of records of arrests results in "injuries and dangers" that are "plain enough" . . . and that "this threat is not dissipated, or rendered insubstantial or illusory, by the fact that arrest was not followed by a prosecution" . . . Menard v. Saxbe, 408 F.2d 1017, 1023 (D.C. Cir. 1974). Courts easily reach this conclusion concerning arrest records because the FBI has established procedures for retaining and disseminating records of all arrests referred to its resources. Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974).
\item \footnote{119} See, e.g., Kowall v. United States, 53 F.R.D. 211 (W.D. Mich. 1971):
\item Information denominated [in] a record of arrest . . . may subject an individual to serious difficulties. Even if no direct economic loss is involved, the injury to an individual's reputation may be substantial. Economic losses themselves may be
Records of illegal governmental investigations of the exercise of first amendment rights present more difficult problems. If the investigation was conducted by an investigatory agency, such as the FBI or IRS, then the usual record-keeping and dissemination processes will be sufficient to establish that a danger exists in continued retention of the records.\textsuperscript{120} If the investigation was conducted covertly or outside of the normal agency procedures, however, there may be little opportunity to discover the full extent of potential dissemination, even by means of the FOIA or the Privacy Act of 1974.\textsuperscript{121} In such a case, the government should be required to show exactly what use has been made of the records, where and how they have been stored, and what sort of dissemination may occur.\textsuperscript{122}

If some risk of dissemination is established by the citizen, a balance must be struck between the competing interests of the government and the individual. Courts recognize a government both direct and serious. Opportunities for schooling, employment, or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved.\textsuperscript{123}

In major metropolitan areas, distribution of arrest records upon request by other police departments, branches of the same government or private citizens is a matter of course. For a synopsis of a report concerning the effects of arrest records in the District of Columbia, see Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969). Similar studies have been conducted in other metropolitan areas of the country. See, e.g., Note, The Arrest Record and New York City Hiring; An Evaluation, 9 COLUM. J. LAW & SOC. PROBLEMS 442 (1943).

120. The difficulties with demonstrating possible dissemination of such investigatory records arise from the fact that it is not generally known what use the government makes of the records. It seems reasonable to expect that dossiers are exchanged among the agencies of the federal government. But presently it is almost impossible to determine if these records are also disseminated to state governments or the private sector. Because of the covertness involved with regard to these investigatory records, once a request for expunction has been made by the citizen, the burden should be placed on the government to affirmatively show that the records will not be utilized in any manner adverse to the citizen.

In Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975), discussed in note 4 supra, the court found that a general allegation of the possibility of dissemination sufficed to establish Paton's standing to request an expunction order, although it remanded to the district court for further determination of the propriety of an order. Absent a government rebuttal to a claim of probable dissemination, the courts should simply assume that dissemination is certain to occur in the future.

121. If there originally existed the motive to conduct a covert and illegal investigation, that same motive may include keeping the records hidden from any judicially enforced attempts at discovery.

122. See note 120 supra.
interest in retaining arrest records to facilitate criminal investigations, to bring formal charges against an individual, and to impeach witnesses at trial. In Morrow v. District of Columbia, the elements of the government's interest were expanded:

The inquiry might better be directed to the question: what valid law enforcement purposes are served by retaining and disseminating to law enforcement agencies the arrest record in a particular case? Thus the focus would include the reasons for the dismissal or other disposition of the case (if dismissed on a technicality there might be better reason to keep the records intact than if dismissed for lack of evidence; further in the rare case of a malicious prosecution there seems no valid reason for maintaining the records). Another focus would be the nature of the crime; some types of crimes may follow a pattern, in which case it would be more reasonable to retain a record of who has been repeatedly arrested in a certain area for such a crime.

The government may attempt to justify the retention of records compiled in the course of investigations of exercises of first amendment rights by reliance on factors such as these. Against these factors, however, must be balanced the reasoning of some courts that no colorable claim of a valid public interest arises in preserving records of illegal arrests. These courts maintain that an invalid arrest vitiates any right to retain the resulting records. Such a conclusion is appealing though not persuasive. Many illegal contacts with citizens produce valuable information and there may be a strong governmental interest in retaining the record of that contact. Nevertheless, since illegally obtained information is inadmissible in court in any subsequent prosecution, illegally obtained investigatory and arrest

124. 417 F.2d 728 (D.C. Cir. 1969).
125. Id. at 743.
Arrest records exist to facilitate criminal investigation, but the plaintiffs' records here perform no such function. Plaintiffs have committed no crimes, and retention of their arrest records cannot be justified as "criminal identification."
129. The worth of investigatory records cannot be measured solely by their admissibility in court, since in at least some cases illegal contacts with the public may lead to information that will be admissible in a prosecution.
128. Such information, however, may be used for impeachment purposes. See Mapp v. Ohio, 367 U.S. 643 (1961).
records should be treated as having no practical value to the government and hence need not be protected when they almost certainly will harm the subject citizen.

The interests of the private citizen in expunction must also be considered in applying the balancing test. The citizen's primary concern with arrest records is "the adverse effect on job opportunity." A refinement of that problem that has been noted by the courts is that "employers cannot or will not distinguish between arrests resulting in convictions and arrests which do not." A further concern has been the damage to a citizen's reputation if arrest records are disseminated, causing collateral social and economic consequences. Thus, when a prosecution is dismissed for lack of a chargeable offense, the courts have deemed expunction necessary to give full effect to that dismissal. Expunction has also been viewed as an attempt to restore those legal rights that existed prior to illegal action by the government. Some courts have even expressed concern over the invasion of privacy resulting from broad dissemination of legal arrest records and have ordered expunction when no strong governmental interest in retaining possession of the records has been shown. The concerns over individual interests in the context of arrest records should apply even more strongly to records of illegal governmental investigations of the exercise of first amendment rights. Where these records are subject to dissemination, there are grave risks to personal reputation and privacy. Since few potential employers or other persons can distinguish between valid and invalid investigations, the protections afforded by expunction should be accorded to those subjected to illegal investigations.

Records of covert governmental investigations present few problems for the court confronted with an expunction request.

130. Upon request for expunction the better test for evaluation of the government's interest in the records is admissibility as evidence, rather than mere informational benefit. If based on this test, expunction will likely cure any underlying illegality in the police investigation.


132. Id. at 741.


137. See generally text accompanying note 132 supra.
There is no overriding justification for retention of the records because no valid law enforcement purpose originally existed for conducting the investigation. This conclusion would also necessarily follow if the investigation was an unconstitutional invasion of personal privacy. In contrast to arrest records, the citizen is less likely to know when or where such investigatory records will be released, thereby reducing the opportunity for the citizen to take corrective action on his own. Thus, only a total expunction of the records can protect the legal rights of the investigated citizen and return him to the same position as that before the investigation. Moreover, like the exclusionary rule under the fourth amendment, total expunction not only prevents the government from benefiting from illegally acquired records, but it also may serve as a sanction against continued misconduct by the government. Finally, expunction provides the most logical and potentially successful remedy when dealing with covert actions, since much of the investigatory process may be hidden even from the courts.

If a plaintiff fails to obtain an expunction order or does not object to the existence of records, he should at least be able to compel correction of inaccuracies in his records. In *Tarlton v.*

138. But a societal interest, the historical value of records of governmental wrongdoing, must also be taken into consideration in the balancing of interests prerequisite to an expunction order. Arguably, in order to guard against future illegal or unconstitutional actions by governmental agents, society must know when and how such activities occurred in the past. This societal interest, however, will almost always be outweighed by the interest of the citizen. For example, if the records concern wide-spread investigations of the exercise of first amendment rights, such as protests against the war in Vietnam, and if the citizen would only be minimally harmed by dissemination of the records, an order prohibiting dissemination would adequately protect the citizen's interests and the societal interest in historical data would be paramount. Where there is a strong possibility of relatively immediate harm to the citizen, however, his interest should outweigh the societal interest, leading to a conclusion that expunction is the appropriate remedy.

139. With an arrest record, the citizen is at least on notice that such a record may be distributed to potential employers and others. The extent of the dissemination of records of covert investigations, however, will seldom be known.

140. *See Mapp v. Ohio, 367 U.S. 643 (1961).*

141. This would hold true to the extent that the government is deprived of information that it desires to use. In this circumstance, the sanction may be more effective than the exclusionary rule under the fourth amendment.

142. Of course, there is no assurance that the government agency involved will not retain a copy of the expunged record. Thus, even judicially enforceable remedies cannot be expected to be successful in all cases.
the Court of Appeals for the Second Circuit held that the FBI has a continuing duty to establish the accuracy and completeness of all entries into its national arrest records system, particularly entries relating to the disposition of any arrest and the reasons for that disposition. A court order to correct inaccuracies was suggested as a possible remedy to preserve the legally protected interests of subject individuals. The applicability of the Second Circuit's holding may be somewhat restricted because the FBI's duty to correct its records was conditioned on feasibility in terms of costs and administrative burdens. Illegal governmental investigations should stand on a different ground, however. The right to have any inaccuracies in the investigatory records corrected must outweigh the costs and administrative burdens involved. If the investigated citizen does not object to the continued existence of the records, Tarlton should be read as conferring a right to correction of any inaccuracies in the records that may prove potentially harmful.

C. DECLARATORY JUDGMENTS AND INJUNCTIONS

Actions in which expunction of records or damages for a violation of constitutional rights are sought typically include requests for declaratory and injunctive relief. The Federal Declaratory Judgment Act provides that a federal court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not relief is or could be sought." If standing requirements are met the Declaratory

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144. 507 F.2d at 1129.
145. FBI Has An Affirmative Duty, supra note 112, at 1314.
146. The rationale of Tarlton should apply if the complaining citizen can demonstrate that the inaccurate records may be distributed, either to the public or among governmental agencies. If the citizen is proceeding under the Privacy Act, however, the reasoning of Tarlton will not apply because there are no provisions in the Privacy Act for correcting inaccurate records maintained by an agency pursuant to the enforcement of criminal laws. Such records are exempt from the provisions of the Act that specify correction procedures. 5 U.S.C. § 552a(j) (2) (Supp. V 1975).
147. See, e.g., Peters v. Hobby, 349 U.S. 331 (1955) (action for declaratory relief in which expunction was also ordered); Chastain v. Kelley, 510 F.2d 1232 (D.C. Cir. 1975) (action for expunction and injunctive relief respecting dissemination of employment records); Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973) (action for expunction and injunction against prosecution).
tory Judgment Act may be utilized to obtain a determination of the legality of the government’s investigation. Of course, such a declaration will never be an essential prerequisite to granting the particular relief sought.

Where an illegal agency investigation is involved, injunctive relief may also be granted in addition to expunction of the records obtained. An injunction against the dissemination or future use of investigatory records may be necessary to protect against duplication of the records. Additionally, it would seem desirable to obtain an injunction against future illegal investigations of the plaintiff.

Whether a plaintiff has standing to sue is the threshold issue that must be resolved in both declaratory judgment and injunctive actions. In Laird v. Tatum, the United States Supreme Court held that the plaintiffs did not have standing to challenge the Army’s program of domestic surveillance of civilians because they did not show that they would definitely be subjected to surveillance or that they would personally suffer any adverse consequences as a result of that surveillance. On the other hand, the standing doctrine has not presented an obstacle to courts in actions for declaratory judgments or injunctions regard-

149. While courts act within their equitable powers to grant the relief necessary to protect the legal rights of the parties involved, there is no federal statute generally providing for injunctive relief. Cf. Chastain v. Kelley, 510 F.2d 1232, 1235 (D.C. Cir. 1975).

150. See note 121 supra. An injunction prohibiting use of the records may prove to be the most effective remedy, since it is of indefinite duration and is enforceable through the contempt powers of the court. Yet an injunction against future governmental use of investigatory records may amount to a judicial prohibition against prosecution. Such a prohibitory injunction would contradict the doctrine that equity will not enjoin a prosecution. Theoretically, this problem would not exist if the subject matter of the investigatory records is protected under the first amendment.

151. See note 150 supra.


153. Similarly, in United Public Workers v. Mitchell, 330 U.S. 75 (1947), the Court found that a claimed violation of the first amendment by the Hatch Act was not justiciable. Postal workers challenged the application of the Act, which prohibits federal employees from engaging in political campaign activities, but they had not yet acted nor had the Justice Department indicated what types of actions it would treat as violations of the Act. The Supreme Court held that there was no “case or controversy” as required by Article III of the Constitution and dismissed the action. Mitchell can also be read as dealing with the standing issue, since the plaintiffs had not alleged the sort of injury necessary to meet Article III requirements.
ing arrest records. Since arrest records remain in the possession of the government, which has the ability to distribute or use them, courts have concluded that a great risk of harm through adverse disclosure exists. These courts typically base standing on facts implying that a definite injury may occur if no judicial action is taken.

A different test for standing is required in cases involving records compiled in the course of illegal governmental actions, such as investigations of activities protected by the first amendment. The citizen faces greater difficulties in proving that adverse consequences will result from retention of such records. Since there is no systematic process of retention and dissemination, as with arrest records, it is almost impossible to ascertain a precise risk of harm to the plaintiff from covert government conduct. The constitutional "case or controversy" requirement can be met, however, by the adversarial positions of the two parties and the intention of the government to retain the records of the illegal investigation. To deny adjudication until actual social or economic harm has occurred would serve no useful purpose and place too great a burden on the plaintiff. Hence, the proper approach would be to liberally grant standing to plaintiff's seeking declaratory and injunctive relief, especially if a constitutional right to privacy is recognized.

D. ACTIONS FOR DAMAGES

Compensatory relief may be obtained when the government's investigation of the exercise of first amendment rights results

The general requirements for standing have also been defined as the constitutional necessity that the plaintiff show an "exercise of governmental power [that is] regulatory, prescriptive, or compulsory in nature, and that the complainant [is] either presently or prospectively subject to the regulations, proscriptions, or compulsions that he is challenging." Laird v. Tatum, 408 U.S. 1, 11 (1971).


156. Id.

157. Article III requirements could be met by such a showing if the constitutional right to privacy is considered the controlling doctrine. See note 65 and accompanying text, supra. Otherwise, under the present interpretation of the first amendment, a more definite harm would have to be shown. See text accompanying note 26 supra.

158. Since the constitutional right to privacy functions more as a limitation on governmental actions than as a right of autonomy, declaratory judgments should be encouraged by such liberal standing requirements.
in actual harm. The appropriate basis for such relief is the constitutional tort theory established by the Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.* In an action to recover damages for injuries sustained during an arrest and search conducted by federal agents in violation of fourth amendment rights, the Court held that the plaintiff could recover for such injuries because it was "'well settled that where legal rights have been invaded, . . . federal courts may use any available remedy to make good the wrong done.'" Although *Bivens* dealt exclusively with the fourth amendment, its reasoning has also been applied to the fifth amendment and the first amendment. Under *Bivens*, a plaintiff can recover monetary damages in a federal tort action "if he can demonstrate an injury consequent upon the violation by federal agents of his [constitutional] rights."2

Recovery of damages for investigations of first amendment exercises is beginning to emerge as an issue in the federal courts. Recently, the Third Circuit Court of Appeals in *Paton v. LaPrade* held that public disclosure of the fact and substance of an FBI investigation may present a cause of action for damages under the first amendment. The difficulty with damage claims under the first amendment lies in defining what constitutes an injury to first amendment rights. To date no federal court has granted damages for a "chilling effect" on the exercise of first amendment rights. There is, however, no reason why damages could not be recovered if the plaintiff "does not speak or act as he says he wants to," and is thereby harmed in some tangible manner. The claim would proceed under a theory of loss of opportunity, seeking compensation for losses occasioned by the non-exercise of a first amendment right.

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159. 403 U.S. 388 (1971).
160. *Id.* at 396, citing *Bell v. Hood*, 327 U.S. 678, 684 (1946).
163. 403 U.S. at 397. It should be noted, however, that damage actions under *Bivens* and the Civil Rights statutes, such as 42 U.S.C. § 1983, have rarely been successful.
164. 524 F.2d 862 (3d Cir. 1975).
166. This theory should not be a strict analogy to contract law, however. Rather, the concept employed should be the actual loss suffered
The Supreme Court's recognition in *NAACP v. Alabama* that the danger involved in some violations of first amendment rights is the combination of state and private action indicates that a cause of action will be recognized where state and private action coalesce to damage the plaintiff. Thus, if an illegal governmental investigation is disclosed to a potential employer, damages would lie for any loss of job opportunity caused by the disclosure. On the other hand, if all that is shown is an agency investigation based on an impermissible motive, then no damage action would lie because there has been no proof of actual injury to the citizen. Speculation as to possible future consequences may suffice to establish standing to sue, but such speculation is insufficient to establish a right to damages.

If the courts further develop and accept the constitutional right to privacy doctrine, the theory of damages recoverable for violation of that right will be the same as that for violations of first amendment rights. Even though it can be persuasively argued that amassing investigatory records on certain protected matters violates constitutional rights, that conclusion itself presents only a basis for granting equitable relief. In order for a damage action to be successful, there must be an actual injury resulting from the violation of the right to privacy. The same reasoning applies to violations of rights conferred by statutes.

Next, it is necessary to consider the defense of official immunity, which will almost always be raised by the federal officers who are sued. After *Bivens*, the federal courts were confronted with the problem of defining defenses to the new tort due to the fact that the citizen was prevented from acting in the constitutionally protected manner.

Reliance on a contractual theory for recovery of damages would raise the question whether the citizen has a duty to mitigate any possible damages by acting despite the government's threat. Although no court has dealt with this question (perhaps because it appears inconsistent with the psychological theory behind the "chilling effect" doctrine) there may be some benefit to requiring citizens to mitigate damages in first amendment cases by speaking or acting in spite of illegal government conduct. Probably the most significant benefit to be derived from such an approach is that the citizen's challenge may induce the government to refrain from further threats, or where the government proceeds with its threatened action, the issues presented by the citizen's first amendment claim will be more directly confronted than through a request for expunction or damages. Cf. *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

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168. See text accompanying notes 155-156 supra.
169. In both instances, damages can be measured only in terms of the consequences of the government's unconstitutional action.
170. See text accompanying note 178 infra.
action. Because the defendants in such cases are agents of the executive branch, the issue of official immunity arises. Official immunity may be invoked when two elements co-exist: the federal agent must be acting within the scope of his authority and the act must be of a discretionary nature. The latter element has also been described as a requirement that the federal officer act in good faith and on the basis of probable cause that an offense has been committed. Unless these elements of official immunity are established, the officer or agent will be held personally liable if the alleged tort is proved. Although official immunity may apply in some cases of illegal governmental investigations, the defense presents no difficulties where an agent knowingly violates a particular constitutional guarantee.

Although it is unlikely that most covert governmental investigations will result in judicial awards of both equitable and compensatory relief, recovery of damages nonetheless remains an important remedy. To effectuate such relief, courts must apply the Bivens analysis, examining the consequences of the violation of civil rights rather than limiting damages to the direct frustration of the right itself. By such an approach, the courts can fully protect constitutional rights by compensating not only the violation of the right but also the secondary injuries that would not have occurred but for the initial violation of the constitutional right at issue. Certainly, this theory of

171. On remand from the Supreme Court, the Second Circuit in Bivens held that the immunity concepts developed from past cases dealing with suits against federal officers should be available to the defendants. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339, 1343 (2d Cir. 1972).

172. Id. at 1343.

173. Id. at 1347.

174. Because the Privacy Act of 1974 generally prohibits investigations of the exercise of first amendment rights, see text accompanying note 90 supra, the good faith immunity defense will not be readily available to federal officers. Rather, if a citizen can show that the government's investigation was occasioned by a violation of his protected rights, there prima facie will be a lack of good faith and probable cause. Difficult questions of immunity arise only when the actions of federal officers were discretionary in nature and there was a genuine question as to whether the citizen was engaging in protected conduct. See Paton v. LaPrade, 524 F.2d 862, 872 (3d Cir. 1975).

175. Since injuries sustained in violation of the first amendment will never be direct, analogous to the intrusion upon property occurring during a search violative of the fourth amendment, damages must always be measured through the Bivens method of an "injury consequent upon the violation . . . of [constitutional] rights." See text accompanying note 163 supra.
damages must still be conditioned upon a showing of actual injury and a further showing that the injury was a direct consequence of the government's illegal action. But to otherwise restrict the damages remedy would be to fail to fully recognize the scope of constitutional or statutory rights.

The Privacy Act of 1974 also contains a damages remedy that could be applied to governmental maintenance of records concerning the exercise of first amendment rights. The government directly violates section (e)(7) of the Act if it maintains such records. Damages may be sought for violation of any provision of the Act for which there is no specific civil remedy whenever a district court determines that "the agency acted in a manner which was intentional or willful." The plaintiff must show that the government knowingly compiled the records, a fact often established by the records themselves. If liability is found, the United States is obliged to pay only if "actual damages [are] sustained by the individual as a result . . . but in no case shall a person entitled to recovery receive less than the sum of $1000," and the cost of litigation and attorney's fees. Although there may be some question as to whether the term "actual damages" simply refers to a violation of section (e)(7) or another comparable section, the statutory language appears to cover only injuries other than simple maintenance of the records. Thus, an "actual injury" is an injury sustained as a consequence of dissemination of the records. The Privacy Act would be considerably more effective if amended to provide a right to expunction and injunction where files are compiled and maintained in violation of section (e)(7).

IV. CONCLUSION

Although governmental investigations of the exercise of first amendment rights by American citizens are not a new phenomenon, the increasing public awareness of investigations conducted during the past decade will probably lead to a greater number of citizen suits.

Increased public concern, if expressed through litigation, will in turn force the judiciary to face some of the difficult issues.

177. See text accompanying note 84 supra.
179. This requirement is necessary to distinguish the case in which the complaining citizen is named in otherwise properly compiled records concerning another individual's activities.
discussed in this Note. Existing legal doctrines will need to be adapted or new doctrines developed to meet the peculiar difficulties of providing effective remedies for citizens injured by covert government action.

Congress can contribute significantly towards solving these problems. First, it could place strict limits upon investigations not conducted to enforce valid statutory provisions. Second, statutes could be passed expressly providing for expunction of illegally obtained records and the recovery of minimum damages. Creative action by both the judicial and legislative branches must be forthcoming in order to ensure effective protection of the first amendment rights of American citizens.