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Since 1953 U.S. citizens seeking work with the United Nations or the World Health Organization (WHO)[1] have been subject to loyalty investigations under Executive Order Number 10422 (the Order)[2] as a condition of employment. In *Ozonoff v. Berzak*[3] the First Circuit Court of Appeals held that the Order was overbroad as applied to prospective WHO employees.

The Order requires the Secretary of State to forward the names of U.S. applicants for permanent jobs with covered international organizations to the Office of Personnel Management (OPM) for a National Agency Check of FBI, OPM, Military Intelligence, and other investigative and intelligence agency files.[4] If this investigation

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[1] The World Health Organization, headquartered in Geneva, Switzerland, was established in 1946 by intergovernmental agreement. It provides a wide variety of health-related services in member nations throughout the world. *See generally* 17 Y.B. OF INT'L ORGS. A3548g (1978).

[2] Exec. Order No. 10422, 3 C.F.R. 921 (1949-53 Comp.), *as amended by* Exec. Order No. 10459, 3 C.F.R. 945 (1949-53 Comp.); Exec. Order No. 10763, 3 C.F.R. 411 (1954-58 Comp.); Exec. Order No. 11890, 3 C.F.R. 1064 (1971-75 Comp.); Exec. Order No. 12107, 3 C.F.R. 264 (1978 Comp.), *reprinted as amended in* 22 U.S.C. § 287 (1982) [hereinafter cited as Order]. The Order covers employees of the United Nations and other public international organizations that enter into loyalty screening agreements with the United States. *See* Order, *supra*, at Part I para. 1, Part III. President Truman issued the Order in response to a report by a commission of international jurists appointed by the U.N. Secretary-General following federal grand jury and Senate Internal Subcommittee investigations of U.S. citizens in the U.N. Secretariat. *See* Note, *Subversives in the UN: The World Organization as an Employer*, 5 STAN. L. REV. 769, 780-81 (1953); 28 DEP'T STATE BULL. 60-1 (1953). The Order was designed to ensure that "Americans who are Communists or are under Communist discipline" are not employed by the United Nations or other international organizations. 28 DEP'T STATE BULL. 58 (1953). Prior to its adoption the State Department and the Secretary-General used a secret agreement to prevent U.N. employment of "disloyal Americans." *Id.* at 58, 60. Under this arrangement the State Department sent any adverse comments deemed appropriate about a prospective employee's loyalty to the United States to the Secretary-General by word of mouth after making a national agency check. The Secretary-General did not receive the information on which the adverse comments were based. *Id.* at 60. Although the Secretary-General is solely responsible for hiring and firing U.N. employees, he has agreed that the U.N. should not employ persons who have engaged or might engage in subversive activities against the host government. *See id.* at 58-61; Note, *supra*, at 770-79.

[3] 744 F.2d 224 (1st Cir. 1984) (unanimous three-judge court).

[4] Order, *supra* note 2, at Part I paras. 1, 3(a).

reveals "derogatory information" about an applicant, the FBI conducts a full field investigation.[5] "Derogatory information" includes a wide range of activities and associations, including "treason or sedition or advocacy thereof" and "advocacy of revolution or force or violence to alter the constitutional form of government of the United States."[6] The full field investigation report is forwarded through the OPM to the International Organizations Employees Loyalty Board (the Board),[7] which conducts an inquiry[8] and submits to the Secretary of State an advisory opinion as to "whether or not on all the evidence there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."[9] The Secretary of State sends the opinion to the appropriate official in the international organization for use in making an employment decision.[10]

The court of appeals found that Dr. David Ozonoff, a former temporary WHO employee seeking a permanent position with the organization, had standing to challenge the Order on first amendment overbreadth grounds. Dr. Ozonoff suffered an actual injury, as required for standing under article III, because the threat of investigation under the Order had a "chilling effect" on his speech and associational activities.[11] The court reasoned that a person genuinely interested in WHO employment would believe it necessary to refrain from acting in ways deemed disloyal under the Order, so as not to threaten his or her opportunity for employment.[12] It cited a number of Supreme Court cases[13] supporting the proposition that "if the plaintiff's interest in getting or keeping a job is real, the likely 'chilling effect' of an apparent speech-related job qualification constitutes a real injury."[14]

The United States Supreme Court recently clarified the standing requirements imposed by the case or controversy clause of article III of the Constitution in *Valley Forge Christian College v. Americans United*

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[5] *Id.* at Part I para. 4.

[6] *Id.* at Part II para. 2(b)-(c).

[7] *Id.* at Part I para. 5; *see also id.* at Part IV (structure and functions of Board).

[8] *See id.* at Part I para. 5. The Board provides all persons whose cases it considers with a written statement of the derogatory information, an opportunity to answer the statement in writing, and an opportunity for an adversary hearing. *See id.* at Part IV para. 3.

[9] *See id.* at Part I para. 5, Part II para. 1, Part IV paras. 2, 4. The Board, however, may submit the derogatory information about the prospective employee to the Secretary of State for transmission to the international organization in question at any time during the investigation or Board proceeding. *See id.* at Part I para. 6.

[10] *See id.* at Part I para. 5, Part IV para. 2.

[11] *See Ozonoff*, 744 F.2d at 228-29.

[12] *Id.* at 228-30.

[13] *See id.* at 228 (citing Steffel v. Thompson, 415 U.S. 452 (1974); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 158-59 (1971); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278, 283-84 (1961).

[14] *Ozonoff*, 744 F.2d at 228.

for Separation of Church and State, Inc.[15] In *Valley Forge* a taxpayers' organization was denied standing to challenge, under the first amendment, a government transfer of surplus federal real property to a private religious college. The Court held that

> at an irreducible minimum, Article III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."[16]

Although the relevant cases have not frequently dealt with the issue in the standing context, the Court consistently has held that the Government directly harms a person when it conditions receipt of a benefit "on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech,"[17] even though the person has no "right" to the benefit.[18]

Many of these cases have involved investigations or compelled disclosures of the speech and associational activities of public employees, or of law students required to pass character examinations by the state bar. In *Baggett v. Bullitt*, for example, the Court held a state teacher loyalty oath unconstitutionally vague, noting that a teacher could not be compelled to choose between risking a perjury prosecution by taking the oath and losing his or her job by refusing to take the oath.[19] The oath violated the first amendment because it obliged teachers and public servants "to steer far wider of the unlawful zone . . . by restricting their conduct to that which is unquestionably safe."[20] The Court used similar reasoning to invalidate a complex plan for investigating and disqualifying teachers for disloyalty in *Keyishian v. Board of Regents*.[21] It found that the plan was "a highly efficient *in terrorem* mechanism" under which a teacher would

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[15] 454 U.S. 464 (1982).

[16] *Id.* at 472 (quoting Gladstone Realtors v. Village Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)).

[17] Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[18] *Id. See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1469 (1968); *but cf.* Milbrath, *The Free Speech Rights of Public Employees: Balancing with the Home Field Advantage*, 20 IDAHO L. REV. 703, 729 (1984) (arguing that recent decisions restricting public employees' right to criticize employers reassert right-privilege distinction with regard to speech-related employment conditions).

The principle appears in many contexts. *See, e.g.*, Healy v. James, 408 U.S. 169 (1972) (denying official campus recognition to student political group unconstitutional); United States v. Robel, 389 U.S. 258, 264-65 (1967) (criminal statute outlawing employment of Communist Party members at defense plants unconstitutional); Elfbrandt v. Russell, 384 U.S. 11, 18-19 (1966) (state teacher loyalty oath unconstitutional); Aptheker v. Secretary of State, 378 U.S. 500, 507 (1964) (denying Communist Party members right to travel abroad unconstitutional); Shelton v. Tucker, 364 U.S. 479, 485-86 (1960) (compelling teachers to disclose all associational ties unconstitutional); Speiser v. Randall, 357 U.S. 513, 525-26 (1958) (loyalty oath for state tax exemption applicants unconstitutional).

[19] 377 U.S. 360, 374 (1964).

[20] *Id.* at 372.

[21] 385 U.S. 589 (1967).

"stay as far as possible from utterances or acts which might jeopardize his living."[22] The Court applied the same reasoning in *Baird v. State Bar*,[23] invalidating a bar examination inquiry into a candidate's affiliations with subversive organizations. Noting that such inquiries discourage the exercise of constitutionally protected rights, the Court held that "whatever justification may be offered, a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes."[24]

The Court thus has struck down government inquiries into a person's loyalty as a precondition of public or private employment because of their chilling effect on protected speech and conduct. Nonetheless, the Court has held that allegations of a chilling effect on first amendment activities arising from the mere existence of a government data-gathering program will not confer article III standing. In *Laird v. Tatum*[25] the Court held that plaintiffs had not shown the requisite injury when their claims were based on bare knowledge of an Army domestic surveillance program not aimed specifically at them.[26] The Court distinguished *Laird* from cases such as *Baird, Keyishian*, and *Baggett*, in which the chilling effect arose from "regulatory, proscriptive, or compulsory" governmental acts to which "the complainant was either presently or prospectively subject."[27]

The *Ozonoff* court found *Laird* inapposite, holding instead that the Order created a chilling effect like that arising from the loyalty oaths and investigations in *Baird, Keyishian*, and *Baggett*.[28] Ozonoff's

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[22] *Id.* at 601.

[23] 401 U.S. 1 (1971).

[24] *Id.* at 6-7.

[25] 408 U.S. 1 (1972).

[26] *See id.* at 13-14.

[27] *Id.* at 11.

[28] *Ozonoff*, 744 F.2d at 229. *Ozonoff* differs from *Baird, Keyishian*, and *Baggett* insofar as the latter cases dealt more clearly with facial overbreadth in the classic sense. Those decisions turned on a generalized chilling effect which the challenged regulations could have on the conduct of all persons subject to them, and not merely on that of the plaintiff. For a discussion of the chilling effect doctrine in first amendment jurisprudence, see generally Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685 (1978). The chilling effect theory has been criticized as an unsubstantiated empirical claim. *See* Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U.L. REV. 1031, 1040-41 (1983); *but see* Haiman, *Comments on Martin Redish's The Warren Court, the Burger court and the First Amendment Overbreadth Doctrine*, 78 NW. U.L. REV. 1071, 1074 (1984). One commentator has argued that the chilling effect theory need not be based on empirical assumptions. Instead, he argues that the chilling effect doctrine is, in effect, a principle of comparative harm. An imperfect legal system, with its inherent error and uncertainty, creates fear and deterrence by hypothesis, because human beings are risk averse. Because the first amendment embodies preferred values, the threat of deterrence of protected activity is by definition more harmful than the threat of first amendment "overprotection," which also exists in an imperfect legal system. This is so regardless of empirical claims about individuals' behaviors. *See* Schauer, *supra*, at 685-704, 730-31.

Personal investigations like those required by the Order divulge more information than do oaths or compelled disclosures by a prospective employee, and thus "may have a

application for WHO employment would not be processed without a National Agency Check of a variety of investigative files. As a result, he reasonably felt compelled to constrain his behavior so as not to appear disloyal. He therefore suffered an injury sufficient to confer standing, regardless of whether the FBI would conduct a full field investigation, or whether he ultimately would be "cleared" or hired.[29]

The First Circuit declined to decide whether the President had authority under the Constitution, absent congressional legislation, to investigate the loyalty of U.S. citizens seeking work with international organizations.[30] Instead, it held that the Order was overbroad because it was directed at political advocacy.[31] The *Ozonoff* court focused on the Order's investigative standards, which classified evidence of "treason or sedition or advocacy thereof [and] advocacy of revolution or force or violence to alter the constitutional form of government of the United States" as derogatory information that cast reasonable doubt on the loyalty of a U.S. applicant for employment with an international organization.[32] The court found that the

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particularly substantial deterrent effect on the exercise of first amendment rights." *Developments in the Law: The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1182 (1972); *cf.* Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 22-23 (1964) (necessary investigational apparatus incompatible with a free society). The threat of dissemination exacerbates this effect "as technology for storing, correlating, and regurgitating information improves, and government inquisitiveness grows in geometric progression." American Fed'n of Gov't Employees Local 421 v. Schlesinger, 443 F. Supp. 431, 434 (D.D.C. 1978). *See also* Note, *Governmental Investigations of the Exercise of First Amendment Rights: Citizens' Rights and Remedies*, 60 MINN. L. REV. 1257, 1264-65 (1976).

[29] *See Ozonoff*, 744 F.2d at 227-30. The court nonetheless noted that Ozonoff was particularly likely to forego legitimate utterances and acts because it virtually was certain that the FBI would investigate him. "Derogatory information" about Ozonoff was apparently on file with some investigative or intelligence agency because Ozonoff was the subject of a full-scale investigation in connection with his previous temporary WHO position. *See id.* at 226-29.

[30] *Id.* at 230. The Supreme Court has been extremely deferential to exercises of executive power in matters involving foreign policy. *See* Regan v. Wald, 104 S. Ct. 3026, 3039 (1984); Dames & Moore v. Regan, 453 U.S. 654, 660-62 (1981); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936). It has held that when the President acts without express congressional authorization:

> a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II. Past practice does not, by itself, create power, but long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been taken in pursuance of its consent . . . .

Dames & Moore, 453 U.S. at 686 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring); United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)). *See also* Haig v. Agee, 453 U.S. 280 (1981). The Executive Branch nevertheless is bound and limited by the first amendment. *See Valley Forge*, 454 U.S. at 511 (Brennan, J., dissenting). *Cf.* Schneider v. Smith, 390 U.S. 17, 26-27 (1967) (merchant marine loyalty program exceeded congressional authorization and first amendment limits).

[31] *Ozonoff*, 744 F.2d at 230.

[32] Order, *supra* note 2, at Part II para. 2(b)-(c); *see Ozonoff*, 744 F.2d at 230. *See also* Order, *supra* note 2, at Part I para. 4.

sweep and vagueness of these provisions deterred political speech, and that this chilling effect on the exercise of first amendment rights outweighed the Government's asserted interest in national security and foreign policy.[33]

The court initially noted that the Government's power to limit advocacy is circumscribed narrowly. It relied on *Brandenburg v. Ohio*,[34] a challenge to a criminal statute in which the Supreme Court held that "advocacy of the use of force or of law violation [may not be proscribed] except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[35] Similarly, the *Ozonoff* court found that the Government's power to limit advocacy indirectly through speech-related conditions on employment was constrained.[36] Employing reasoning similar to that used to find that Ozonoff had suffered an actual injury giving him standing to sue,[37] the court held that the Order was overbroad because it "aim[ed] directly at political advocacy."[38]

The *Ozonoff* court's analysis is consistent with pre- and post-*Brandenburg* Supreme Court decisions involving similar issues. In *Healy v. James* the Court explicitly applied the *Brandenburg* standard to hold unconstitutional a university's denial of official campus recognition to a student group that allegedly advocated a "philosophy of disruption."[39] Prior to *Brandenburg* the Court in *Keyishian* had condemned as unconstitutionally vague a teacher loyalty program that apparently forbade the employment of persons who engaged in various kinds of abstract advocacy.[40]

Shortly after deciding *Healy* the Court limited the use of the first amendment overbreadth doctrine in *Broadrick v. Oklahoma*, upholding a state statute that regulated state employees' political activities.[41] It held that

> facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests. . . . [P]articularly where conduct and not merely speech is involved, we

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[33] *See Ozonoff*, 744 F.2d at 230-33.

[34] 395 U.S. 444 (1969) (per curiam).

[35] *Id.* at 447-48.

[36] *See Ozonoff*, 744 F.2d at 231-33.

[37] *See id.* at 231, 233-34. The court relied on the kind of unconstitutional conditions/chilling effect analysis discussed *supra* notes 13-24, 28-29 and accompanying text.

[38] *Id.* at 232.

[39] 403 U.S. 169, 187-92 (1972).

[40] 385 U.S. 589, 599-601 (1967).

[41] 413 U.S. 601 (1973). For analysis and criticism of *Broadrick* and cases following it, see generally Redish, *supra* note 28; Note, *First Amendment Vagueness and Overbreath: Theoretical Revisions by the Burger Court*, 31 VAND. L. REV. 609 (1978). *See also* Schauer, *supra* note 28, at 685-86 & n.8.

> believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.[42]

Though the *Ozonoff* court failed to mention *Broadrick* in its overbreadth analysis, *Ozonoff* is readily distinguishable from *Broadrick* and its progeny.[43] In *Ozonoff* the challenged regulation was aimed directly at advocacy, which clearly is not "otherwise unprotected behavior" under the standard developed in *Keyishian, Brandenburg*, and *Healy*.[44] Although it has not addressed the advocacy issue, the Supreme Court has indicated that the substantial overbreadth test is inapplicable when the challenged statute is aimed directly at speech.

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[42] *Broadrick*, 413 U.S. at 615. The speech-expressive conduct distinction has been attacked as artificial, illogical and an inexplicable departure from prior case law. *See* Redish, *supra* note 28, at 1058-61; Note, *supra* note 41, at 614-16. The Court apparently has abandoned, or at least retreated from, the distinction in cases decided after *Broadrick*. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980); Ward v. Illinois, 431 U.S. 767 (1977); Erznoznik v. City of Jacksonville, 422 U.S. 206 (1975).

The point of the *Broadrick* substantiality requirement apparently is that "if the majority of cases reached by the statute does not involve protected conduct, the statute's overbreadth will not be deemed 'substantial,' even though it might be 'real.' " Redish, *supra* note 28, at 1064; *see also* Note, *supra* note 41, at 616-17, 622-23. The substantiality test has been criticized as creating an unworkable standard that leads to entirely subjective results. *See* Note, *supra* note 41, at 616-17; *but cf.* Redish, *supra* note 28, at 1064 (requirement stems from Court's "apparent fascination with easily-applied 'code' words in overbreadth analysis in lieu of a more sophisticated and open interest-balancing process"). One commentator has noted that "[t]here is no reason to assume that 'the extent of deterrence of protected speech' somehow necessarily decreases in an absolute sense when the number of instances of unprotected activity reached by the challenged statute increases, relative to the number of protected instances." Redish, *supra* note 28, at 1065.

[43] *See* cases cited *supra* note 42; *infra* notes 45-48 and accompanying text. *See also* Arnett v. Kennedy, 416 U.S. 134 (1974) (upholding federal statute allowing discharge of government workers "for such cause as will promote the efficiency of the service" as not reaching constitutionally protected speech); Parker v. Levy, 417 U.S. 733 (1974) (upholding military regulations forbidding "conduct unbecoming an officer and a gentleman" and punishing willful disobedience).

[44] *See supra* notes 34-40 and accompanying text. It thus seems unlikely that the Order could be sustained as not substantially overbroad even though it also classifies as "derogatory information" evidence of activities such as espionage, sabotage, intentional and unauthorized disclosure of confidential U.S. information, and knowing membership in, with specific intent to further the aims of, groups seeking to overthrow the Government by illegal means. *See* Order, *supra* note 2, at Part II paras. (a), (d), (f).

The phrase "otherwise unprotected conduct" in *Broadrick* may be a reference to the traditional third-party standing rules used in facial overbreadth analysis. These rules permitted a litigant to challenge a statute's facial validity even though his own conduct legitimately could be regulated under a more narrowly drawn statute. *See* Redish, *supra* note 28, at 238-29; Note, *supra* note 41, at 611 & n.7, 629-30. To the extent that *Broadrick* was designed to limit the use of such third-party standing, it clearly should not control in *Ozonoff*, where the plaintiff argued that the Order was overbroad as applied to him. It has been argued, however, that "the overbreadth doctrine pertains exclusively to the question of standing. If a party attacking a law or defending a prosecution has engaged in constitutionally protected behavior the overbreadth doctrine serves no purpose." Schauer, *supra* note 28, at 692 n.39. *But see* Redish, *supra* note 28, at 1042 (substantive inquiry of overbreadth doctrine is whether challenged regulation "impedes first amendment rights more than is necessary to achieve a legitimate goal;" therefore, doctrine is relevant where litigant argues that his own conduct is protected by the first amendment).

It held an ordinance prohibiting the use of "opprobrious language" toward police officers overbroad in *Lewis v. City of New Orleans*[45] without mentioning *Broadrick*. Subsequently, in *Bigelow v. Virginia*[46] the Court invalidated a prohibition on advertisements for abortion services, stating explicitly that the substantial overbreadth test was not controlling.[47] The Court also refused to apply the *Broadrick* analysis in *Village of Schaumburg v. Citizens for a Better Environment*,[48] in which it sustained a challenge to an ordinance prohibiting door-to-door fundraising by charities that used less than seventy-five percent of their receipts for charitable purposes.[49]

The *Ozonoff* court completed its overbreadth analysis by concluding that the Order violated the first amendment because it was aimed at advocacy of revolution or sedition.[50] Noting that "government standards tending to inhibit speech must be clear and precise,"[51] the court found the Order's advocacy provisions irreconcilable with *Baggett*[52] and *Keyishian*.[53] In *Baggett* the Supreme Court held that a loyalty oath that incorporated a definition of "subversive person" as one who "advocates . . . any act intended to overthrow, destroy or alter . . . the constitutional form of government . . . by revolution"[54] was unconstitutionally vague.[55] Similarly, in *Keyishian* the Court invalidated, on vagueness grounds, an employee loyalty program that required a worker's removal for "treasonable or seditious utterances or acts."[56] The statutes in question did not define the word "seditious" precisely,[57] but indicated that the prohibition encompassed the advocacy of sedition and thus had "virtually no limit."[58]

While the *Ozonoff* court did not distinguish overbreadth from vagueness,[59] it found the overbreadth of the Order harmful because

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45 415 U.S. 130 (1974).
46 421 U.S. 809 (1975).
47 *See id.* at 815-17.
48 444 U.S. 620 (1980).
49 *See id.* at 628-33.
50 *Ozonoff*, 744 F.2d at 232.
51 *Id.* at 231.
52 377 U.S. 360 (1964).
53 385 U.S. 589 (1967).
54 *Baggett*, 377 U.S. at 362.
55 *See id.* at 366-68.
56 *Keyishian*, 385 U.S. at 597.
57 *See id.* at 597-98.
58 *Id.* at 599.
59 *See Ozonoff*, 744 F.2d at 232. "An overbroad statute encompasses constitutionally protected conduct within its proscriptive sweep." Note, *supra* note 41, at 610. "[A] statute will be held void for vagueness when it 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " *Id.* (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). The vagueness and overbreadth doctrines overlap. *See* NAACP v. Button, 371 U.S. 415, 432-33 (1963) ("objectionable quality of vagueness and overbreadth" lies in danger of regulations "susceptible of sweeping and improper application"). *See also* Note, *supra* note 41, at 611, 626, 636.

it chilled protected first amendment activity.[60] The Supreme Court in *Baggett* and *Keyishian* used similar analyses to articulate the evils of vagueness.[61]

The *Ozonoff* court rejected the Government's proffered bases for distinguishing the cases from earlier Supreme Court decisions which invalidated employment conditions that infringed first amendment freedoms.[62] It noted initially that despite "the President's unique foreign policy role, the Executive still must bear some burden of justification when depriving citizens of basic free speech and associational rights."[63] The court held that the Government had not met this burden because it had failed to identify "any tangible harms that might occur to United States security or foreign policy concerns" if WHO employees were not subject to the investigative requirements of the Order.[64] Because Ozonoff was a medical doctor who "did not want to represent the United States abroad, engage in diplomacy, or practice politics"[65] and did not seek employment with the federal government,[66] the court observed that the Order, as applied to WHO job applicants, was unsupported by any significant governmental interest.[67]

The first amendment limits Executive as well as congressional action.[68] While recognizing the Government's substantial interest in ensuring the fitness of those who hold sensitive positions,[69] even though they are not government employees,[70] the Supreme Court

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60 *See Ozonoff*, 744 F.2d at 231; *see generally supra* notes 11-14, 19-29 and accompanying text.

61 *See Keyishian*, 385 U.S. at 603-04; *Baggett*, 377 U.S. at 372.

62 In addition to the arguments discussed *infra* notes 63-84 and accompanying text, the Government pointed out that "[t]he Order says only that advocacy is a factor that '*may* be considered in connection with' a loyalty determination; and that the resultant determination is simply forwarded to WHO for its use." *Ozonoff*, 744 F.2d at 233 (emphasis in original). The court found the case indistinguishable from the loyalty oath cases because it created an identical chilling effect. *See id.* at 233-34. It noted that the Order suggested no narrower standards for determining loyalty, and that there was no evidence that international organizations made hiring decisions contrary to loyalty appraisals under the Order. *See id.; see also supra* note 2.

63 *Ozonoff*, 744 F.2d at 233. *Cf.* Baird v. State Bar, 401 U.S. 1, 6-7 (1971) (State Bar must show inquiry into associations "necessary to protect a legitimate state interest"); De Gregory v. New Hampshire Att'y Gen., 383 U.S. 825, 829 (1966) (investigating citizen's past subversive activities requires "overriding and compelling state interest"); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546 (1963) (same, with regard to compelled disclosure of NAACP membership list); American Fed'n of Gov't Employees Local 421 v. Schlesinger, 443 F. Supp. 431 (D.D.C. 1978) (similar reasoning used to invalidate questionnaire regarding Department of Energy employees' associational activities).

64 *Ozonoff*, 744 F.2d at 233.

65 *Id.* at 232-33.

66 *Id.* at 233.

67 *See id.*

68 *See supra* note 30.

69 *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589, 602 (1967) (teachers); Shelton v. Tucker, 364 U.S. 479, 485 (1960) (same).

70 *See, e.g.*, Schneider v. Smith, 390 U.S. 17, 24-25 (1967) (merchant marines); United

has held that "the purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved."[71] In *Shelton v. Tucker* the Court held that although teachers occupied sensitive positions, the state could not compel them to disclose all of their associational ties.[72] Similarly, in *Baird* it held that a state could not inquire whether a bar applicant had belonged to an organization that advocated overthrowing the government,[73] even though limited inquiries into Communist Party membership could be justified.[74] The factors that distinguish *Ozonoff* from *Shelton* and *Baird* show that the cases are consistent in principle. Even assuming that the Order is related to foreign policy and national security interests,[75] the investigations it requires are not limited to persons seeking sensitive posts. It is the sensitivity of the jobs involved that justifies some limited inquiries into the speech and associational activities of certain employees; absent such sensitivity, *Shelton* and *Baird* logically would foreclose sweeping inquiries of the kind invalidated in *Ozonoff*.[76]

The *Ozonoff* court declined to narrow the language of the Order through interpretation,[77] finding "no obvious or natural interpretation of 'advocacy' or 'sedition' that would render the Order constitutional."[78] Furthermore, neither the Order itself nor the Government "provided any suggestions for a permissibly narrow reading."[79] The court's position is consistent with that taken by the Supreme Court in *Aptheker v. Secretary of State*[80] and *United States v. Robel*.[81] The Court has imposed a limiting construction on some federal statutes to save them from constitutional infirmity,[82] but not when doing so would amount to rewriting a statute. In *Aptheker* the Court found that a stat-

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States v. Robel, 389 U.S. 258, 264 (1967) (defense plant employees); Koningsberg v. State Bar, 366 U.S. 36 (1961) (lawyers).

71 *Shelton*, 364 U.S. at 488.

72 *See id.*

73 *See Baird*, 401 U.S. at 6-7.

74 *See id.* at 9 (Stewart, J., concurring).

75 The justification for the Order, at least with regard to United Nations employees, is to protect the United States, as host government, from subversive activities. *See* 28 DEP'T STATE BULL. 60-61 (1953); *supra* note 2. Such reasoning does not necessarily extend to WHO doctors living and working abroad.

76 *Cf. Developments, supra* note 28, at 1174 ("The governmental interest in many loyalty programs is . . . too insignificant to justify any substantial chilling effect on speech or association [w]here nonsensitive positions are involved"). *See also* United States v. Robel, 389 U.S. 258, 266 (1967) (challenged statute barring employment of Communist Party members in defense facilities did not distinguish sensitive and nonsensitive jobs).

77 *See Ozonoff*, 744 F.2d at 234.

78 *Id.*

79 *Id.; see also id.* at 233.

80 378 U.S. 500 (1964).

81 389 U.S. 258 (1967).

82 *See, e.g.*, Schneider v. Smith, 390 U.S. at 24-26 (statute authorizing President "to 'safeguard' vessels from 'sabotage or other subversive acts' " did not authorize exhaustive merchant marine loyalty screening program). *See also* Note, *supra* note 41, at 624.

ute prohibiting overseas travel by Communist Party members could not be narrowed "without substantial rewriting."[83] The Court in *Robel* refused to attempt to narrow a statute that prohibited the employment of Communist Party members in defense plants.[84]

Ozonoff probably will have little immediate effect on Government loyalty screening programs based on legitimate foreign policy and national security interests. The First Circuit invalidated Executive Order Number 10422 only as applied to applicants for nonsensitive WHO positions.[85] Although the court's overbreadth analysis could be applied equally well to hold that the Order has an impermissible chilling effect on the speech and associational activities of U.S. applicants for employment with the United Nations, the decision leaves open to the Government at least some opportunity in future cases to articulate compelling reasons for continuing to apply the Order to such applicants.[86]

The *Ozonoff* court's rather novel approach to the chilling effect theory may have a significant impact on future challenges to overbroad statutes, particularly those involving domestic surveillance or investigations of citizens' speech and associational activities. The decision clearly establishes that the chilling effect analysis appropriately may be applied to a litigant's own first amendment activities as well as those of third parties also subject to the challenged regulation.[87] Further, the reasonable person standard that the court used to validate Dr. Ozonoff's claim that the Order deterred him from engaging in protected activities[88] distinguishes the individual chilling effect analysis from the "mere subjective allegations" that the Supreme Court found wanting in *Laird*.[89] *Ozonoff* thus provides a means for litigants to overcome the barriers to overbreadth challenges raised by *Broadrick* and its progeny.[90] The *Ozonoff* individual chilling effect analysis allows a party to apply the constitutional standards developed in cases dealing with facially vague or overbroad statutes to show that his own speech and associational activities have been curtailed, thereby avoiding the difficulties involved in establishing third-

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[83] *Aptheker*, 378 U.S. at 515.

[84] *Robel*, 389 U.S. at 262.

[85] *See Ozonoff*, 744 F.2d at 225.

[86] The court recognized the President's enhanced authority in matters related to foreign policy. *See id.* at 232-33; *see generally supra* note 30. The court held that such authority alone was insufficient when the Government presented no specific foreign policy or national security concerns to justify the Order. The Government might at least attempt to do so with respect to prospective United Nations employees. *See supra* note 75. The Order, however, was not based originally on any "evidence justifying a conclusion that there was spying or espionage on the part of American citizens employed in the United Nations." 28 DEP'T STATE BULL. 58 (1953). *See also supra* note 2.

[87] *See Ozonoff*, 744 F.2d at 227-39.

[88] *See id.* at 230, 234.

[89] *See supra* notes 25-29 and accompanying text.

[90] *See generally supra* notes 41-49 and accompanying text.

party standing and substantial overbreadth.[91]

The *Ozonoff* court's individual overbreadth analysis is perceptive and potentially groundbreaking. The First Circuit analyzed a variety of cases and articulated a central theme in first amendment jurisprudence developed in an era characterized by increasing governmental control over daily life coupled with greater governmental power to monitor the individual citizen's activities. It applied its analysis to a unique fact pattern to reach a compelling result. The court's failure to realize fully the implications of its analysis was, perhaps, its major shortcoming. Because the individual chilling effect does not raise third-party standing issues, the court might have dispensed with a good deal of its detailed explication of the rules of standing.[92] Further, the court would have added force to its overbreadth analysis of the Order's advocacy provisions had it referred to the *Broadrick* substantial overbreadth theory and explained why that theory was not controlling. Its failure to do so is not fatal, however, because the court showed clearly that the advocacy provisions fell squarely within the prohibitions on governmental action developed in a long line of Supreme Court cases.

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[91] *See id.*

[92] *See Ozonoff*, 744 F.2d at 227-30; *supra* notes 87-91 and accompanying text.