THE APPEARANCE OF JUSTICE

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A JUDGE AND HIS CAUSE

"Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion, to recuse him before issue joined, so that the cause go to another."

Justinian Code

"No man can be a judge in his own cause."

Sir Edward Coke (1614)

Just as the independence and the impartiality of a court seem to go together, so is it hard to separate an attack on a court's independence from an attack on its ability to be fair. Any time a president of the United States—be he Nixon, Roosevelt, or whoever—makes a political issue of his determination to "turn the Supreme Court around," there is an attack on the court's independence that is fraught with danger for justice and the appearance of justice. Some conservatives may smack their lips at the hope for change, liberals may quail at the prospect of lost civil liberties; but thoughtful persons of left and right and middle will be concerned over the politicization of the highest court. The concern will be no less when the Court is conservative and its attackers are liberal.

Periods of such marked and conspicuous change put a heavy

strain on judicial ethics. Failure of a jurist to abide by high ethical standards can exacerbate the tensions that already run high when the courts are confronted by highly emotional, somewhat political, and deeply divisive issues. Observance of ethical restraints can ease tension and produce judicial decisions that are not only more fair, but that are also perceived as such.

Even under fairly normal circumstances, the changes in Supreme Court personnel can be unsettling to the law. Justice Felix Frankfurter, in a 1950 dissent from the Court's third change of direction in search-and-seizure law in three years, complained: "Especially ought the court not reenforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the court's composition and the contingencies in the choice of successors." In the spring of 1971, Justice Hugo L. Black dissented from an overruling made possible by the replacement of two justices by Nixon appointees. "This precious fourteenth amendment American citizenship should not be blown around by every passing political wind that changes the composition of this court," said Black. "While I remain on the court I shall continue to oppose the power of judges, appointed by changing administrations, to change the Constitution from time to time according to their notions of what is 'fair' and 'reasonable.' "

In the fall Black was gone, and with him John Marshall Harlan, and the winds of change were stirring anew. After a period of surveying a field of unqualified candidates, a period that itself was disquieting to those who appreciated the loss of the two judicial giants, the Nixon administration at last came up with two qualified nominees, Lewis F. Powell, Jr., and William H. Rehnquist. Both men were aptly classified as "conservatives," and even allowing for some slippage between a president's expectations and a justice's performance, the third and fourth Nixon nominees were certain to have a profound effect on the Supreme Court's future course. Powell's prestige and the moderation that for the most part had tempered his philosophy enabled him to sail through Senate confirmation with but a single dissenting vote. Rehnquist, however, had been the cutting edge

of Nixon's major differences with Congress, civil libertarians, and civil rights advocates. His confirmation on December 11, 1971, by a vote of sixty-eight to twenty-six, followed a bitter battle during which senators—both those who opposed him and some who ended up voting for him—were frustrated in their efforts to question Rehnquist about his views because he invoked the "attorney-client" privilege as the president's "lawyer's lawyer."

This chapter deals with how Rehnquist responded to the ethical issues raised by his sitting in judgment on matters deeply affecting his former client, the president. The sad conclusion—sad because it must be made of a jurist with brains, ability, and dedication to the Court—is that Rehnquist's performance was one of the most serious ethical lapses in the Court's history. Sad, too, because his behavior, documented in his own extraordinary memorandum justifying his conduct, came at an ethical watershed when the distress of past scandals was supposed to be behind us. The memorandum, the only one ever published by a justice in response to a motion to disqualify himself (such motions are themselves almost as rare), is itself a monument both to Rehnquist's technical ability and to his ethical shortsightedness. If the standards set forth in the memorandum are allowed to stand for Supreme Court justices or for the lower federal judiciary, we shall have learned nothing for all our anguish.

Rehnquist had been through much of the anguish himself, first in giving advice to Attorney General John N. Mitchell during the Fortas episode in the spring of 1969, later that year as the lawyer trying to usher the Haynsworth nomination through the Senate, and in 1970 while performing similar functions for both the Carswell and Blackmun nominations. Indeed, he appeared to have learned from the Haynsworth fight that whatever might be said in judgment of that unfortunate nominee, the Senate had opted for a stricter ethical standard for the present and future. The Justice Department's correspondence with the Senate Judiciary Committee over Justice Blackmun's finances carried a notation that perhaps the old disqualification statute itself had been given a stricter modern meaning by the way the Senate interpreted it in the Haynsworth vote. And Rehnquist, quite possibly the author of that comment, testified at his own hearing

that as a justice "my own inclination would be, applying the standards laid down by [the disqualification law] and to the extent there is no conflict between them and the canons of judicial ethics, to try to follow that sort of stricter standards that I think the Senate, by its vote, indicated should prevail."

Senators had been anxious to know whether Rehnquist would consider himself qualified to sit in the forthcoming test of the president's power to wiretap, in the name of national security and without court authorization, individuals classified by the executive branch as domestic subversives. After many questions on the subject, Rehnquist assured the Judiciary Committee that since he had given key legal advice in the preparation of the Justice Department's position before the Supreme Court, he would not sit in the case although he did not personally sign the government's legal brief. Similar anxieties were expressed about Powell's participation in the same case, in view of his strong published statements that opponents of wiretapping were exaggerating its dangers. (Justice Rehnquist did indeed recuse himself in the case as the Court rejected the Justice Department's position by an eight to zero vote in an opinion by none other than Justice Powell.) Rehnquist indicated also that he would not sit in another important case, testing the power of prosecutors, grand juries, and even congressional committees to give only limited or "use" immunity from prosecution rather than total immunity when coercing them into giving self-incriminating testimony. In that case Rehnquist had actually signed the brief and had been prepared to argue for the government in support of such power. (The decision, which incidentally upheld the constitutionality of the procedures later used to squeeze testimony from many Watergate suspects, was by a five to three vote, with Justice Powell again writing the majority opinion.)

The most ethically sensitive cases that faced Rehnquist were the *Branzburg* and *Tatum* cases. The *Branzburg* case pitted much of the newspaper industry against the government's claimed power to subpoena unpublished and sometimes confidential information from newsmen Paul M. Branzburg of the *Louisville Courier-Journal*, Earl Caldwell of the *New York Times*, and Paul Pappas of television station WTEC-TV in New Bedford, Massa-

chusetts. The *Tatum* case, which would ultimately produce the famous Rehnquist memorandum, raised the question of whether peace workers and antiwar groups could take the government to court over the army's program of surveillance, infiltration, intelligence gathering, and dissemination to other federal agencies of information about law-abiding civilians.

Another case with a lurking though perhaps a more tenuous ethical question was the *Gravel* case, involving the government's attempt to elicit grand jury testimony about the source of the copy of the Pentagon Papers that came into the hands of Senator Mike Gravel, Democrat of Alaska, and that he published after unsuccessfully trying to make it a part of Congress's official record. Rehnquist as assistant attorney general had fired the first volley in the Pentagon Papers fight by telegraphing editors at the *New York Times* and *The Washington Post* to ask voluntary suspension of publication, a request that, when refused, was converted into a demand and a court complaint to enjoin publication. So far as anyone knew, Rehnquist had little to do with the Pentagon Papers after dealing with the issue of prior restraint on their publication by the press (decided in the newspapers' favor in June 1971) and before his Supreme Court nomination the following October. While the *Gravel* case also involved the Pentagon Papers and whether they could be lawfully disclosed to the public, the legal issues were different. While Justice Rehnquist clearly would have been disqualified from the prior restraint case, it is harder to insist on the basis of known facts that he should have stayed out of the *Gravel* case.

Although it was not a surprise to see Justice Rehnquist on the bench taking part in the *Gravel* hearing, it was a shock to see him there when the *Branzburg* and *Tatum* cases were called for oral argument. Assistant Attorney General Rehnquist had been the Justice Department's chief public spokesman, second only to the attorney general himself, for the Justice Department's controversial policy of subpoenaing newsmen for investigations of Black Panthers and other groups. On one occasion immediately recalled by newsmen, Rehnquist had appeared in the role of administration spokesman to defend the department's 1970 subpoena guidelines, which his Office of Legal Counsel had

helped to prepare. He played the apologist's role on a panel of commentators that included critics of administration policy. The guidelines were instructions to United States Attorneys' offices across the land, and they served as "litigating" material that the government cited in every court case to show the reasonableness of Mitchell's policy. Justice Rehnquist, from the outset of his Supreme Court service an active questioner from the bench, showed no consciousness of impropriety in his frequent give-and-take discussions with counsel for the three newsmen. He said nothing, however, during the entire oral argument in the *Tatum* case, perhaps signaling that it did involve an ethical question on which he was reserving judgment. This unaccustomed reticence only added confusion to the stunned surprise of counsel for Arlo Tatum, director of the Central Committee for Conscientious Objectors, and the other political dissenters who were trying to maintain their suit against the army. Did Rehnquist actually intend to vote in the case or was he merely sitting to hear the case out of interest? Was he there on some sort of provisional basis to determine for himself whether his previous involvement was disqualifying? Unlikely as this was, did not this possibility counsel caution to anyone tempted to move to strike the justice from the case? If the justice were inclined against participating, a move to recuse him might offend not only him but perhaps others on the Court as well. Senator Sam J. Ervin, Jr., the North Carolina Democrat whose outspoken defense of privacy rights and First Amendment freedoms later entered millions of American households through televised coverage of the Watergate hearings, was more sensitive than most to why Justice Rehnquist should not sit; but sitting alongside lawyers from the American Civil Liberties Union in the High Court's hearing room, he quietly counseled the cautious approach. Ervin, who joined the argument as a friend of the court on the side of the civilian plaintiffs, was unwilling to assume the worst. He recalled that when he argued in the *Darlington* labor cases, Justice Potter Stewart sat on the bench but dropped out when something said at the hearing reminded him of a close association with a textile official.

Broadly, Rehnquist was considered disqualified because of his

role as principal administration defender and witness at extensive hearings on military surveillance held before Ervin's Subcommittee on Constitutional Rights. There Rehnquist stated that the Pentagon program, however unwise or regrettable, did not violate anyone's constitutional rights. Specifically and crucially, he had testified that the *Tatum* lawsuit, which was pending in lower courts while the Ervin hearings were under way, was not "justiciable"; that is, it was the kind of lawsuit that courts should and would dismiss as judicially unmanageable. This was the very issue in the case when it reached the Supreme Court.

Furthermore, Rehnquist had made clear to Ervin the department's determined resistance to any legislation attempting to control the military practices—which he said had stopped anyway—or to any attempt to impose a judicial remedy by statute. The problem was best left to the "self-discipline" of the executive branch, Rehnquist testified in a vein that later became so much more familiar to Americans when the war and Watergate were aired publicly.

Central to the administration's position that there was no violation of constitutional rights was its contention that nobody had been hurt. It was not enough, in this view, that there was no congressional authorization for the program, or even that the military exceeded its constitutional bounds by intruding into the civilian sector of American life. The program would have been unconstitutional not because of its mere existence, but only if it actually infringed the rights of specific plaintiffs who went to court. According to the *Tatum* complaint, the surveillance did just that by threatening the privacy of political dissidents and hindering their exercise of First Amendment rights of free speech, assembly, and political association. But, said the Justice Department, Tatum and his friends were not hindered; they continued meeting, marching, protesting the war, and they even went to court to assert their rights to do so. Tatum countered by pointing to that portion of his complaint that specified that other less hardy souls were indeed inhibited from associating with the Tatums and other protesters. It was not denied—indeed, it could not be denied under the rules of pleading. When a party moves to dismiss a lawsuit without undergoing a trial, it must accept

every charge in the complaint as true, at least for the sake of argument, and then go on to show the court that there is no case under the law even if all the charges are true.

In large measure the case came down to how one viewed First Amendment rights and the measures necessary to safeguard them. To civil libertarians, First Amendment rights are not only basic, they are also very fragile. They need the solicitude of courts—what Justice William J. Brennan, Jr., calls "breathing space"—to survive. Government conduct that discourages free expression may defy precise measurement, since the identities of those discouraged are often by definition unknown and unknowable. When the federal government or a state is challenged on these grounds, it conventionally argues that there is nobody in the case with the requisite injury, no one with the kind of legal standing to make the case judicially manageable.

This description of the issues might seem weighted on the side of the *Tatum* plaintiffs, but it is their perspective that must be appreciated when considering their ethical complaint. The rest of the ethical issue is whether the complaint was grounded on a reasonable fear that the jurist was biased against them. They said that they felt just such a fear about a jurist who not only was out of sympathy with their cause but also had publicly stated his opinion that they had no case.

On June 29, 1972, the Supreme Court ruled against the newsmen. Three days earlier the Court had ruled that the *Tatum* lawsuit should be dismissed without a trial to examine the Pentagon practice or to demonstrate the alleged injuries. Each time the vote was five to four and each time the four Nixon appointees—Chief Justice Burger and Justices Blackmun, Rehnquist, and Powell—were joined by Justice White to make the majority. In each case the dissenters were Justices Douglas, Brennan, Stewart, and Marshall. By the same margin and by the same lineup the Court rejected the contention of Senator Gravel, which the Senate itself had supported, that the senator and his aide were constitutionally immune from inquiry into the acquisition of the Pentagon Papers. On these highly contested issues at least, the Supreme Court had indeed been turned around, the result swung by appointees of a different philosophy.

With little hesitation, both the American Civil Liberties Union on behalf of the *Tatum* plaintiffs and Senator Gravel decided to seek a rehearing and disqualification of Justice Rehnquist. Although the newsmen and their lawyers appeared to have a stronger claim than Gravel to an ethical challenge, it was not in their strategic interest to file a protest and they did not. In two of the three cases the withdrawal of Justice Rehnquist would not have made a difference, since a four to four vote would only affirm their contempt convictions for refusing to cooperate with grand juries; the third newsman, Caldwell, by this time was no longer sought by the grand jury. Some counsel privately expressed reluctance to appear to join a cabal of dissatisfied litigants in moving against Justice Rehnquist in so personal a manner. Unquestionably the course of moving to disqualify a justice would be a disagreeable, abrasive process, but the ACLU deemed the legal issue clear enough. If they had been silenced by a Velvet Blackjack, they would remain silent no longer.

"This motion is not made lightly," the ACLU told Justice Rehnquist, "but only after careful consideration by counsel and their colleagues in full knowledge of its unprecedented nature." The only precedent the ACLU could cite for such an action by a party was that unhappy episode in 1945 when the losing party in a celebrated miners' wage dispute had called for a rehearing on the ground that Justice Black, whose law partner of two decades earlier had argued for the labor union, should not have participated. The Court rejected this motion, however, with a most unusual separate concurrence by Justice Robert H. Jackson, joined by Justice Felix Frankfurter, pointing out that a justice's colleagues lacked power to judge the propriety of his action. Two years later, in a bitter open letter, Justice Jackson made clear that he indeed disapproved of Justice Black's role in the case. (Current canons support Justice Black and call for disqualification only where the case was in the law firm when the jurist and lawyer were partners.) That regrettable precedent did not augur well for the ACLU or for the Court's ability to handle the new motion dispassionately.

Accompanying the motion asking Justice Rehnquist to step aside was a petition for rehearing addressed to the entire Court.

The petition pointed to five separate instances in which the ACLU claimed that the five-member majority had accepted as though proven critical facts that underlay the decision, including the unproven assertion that the government had destroyed key surveillance records whose existence had been part of the complaint. In addition, the petition contended, the majority opinion had ignored numerous assertions of fact by the plaintiffs that, under the previously mentioned pleading rules governing motions to dismiss, must be accepted by the courts. It was needless to add that none of these alleged errors could have been committed by the Court if there had been no majority, since the consequences of a four to four tie vote are an affirmance of the lower court's judgment, which was that the case should go to trial rather than be dismissed, and no written opinion of any kind. The petition seemed correct in all respects and was most temperately worded. There was no opportunity for the government to dispute these points since the Supreme Court's rules do not call for an answer to a rehearing request unless the Court is considering granting it.

The motion to recuse Justice Rehnquist was based in part on the same federal disqualification statute, Section 455 of Title 28 of the U.S. Code that had been debated during the Haynsworth fight: "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit. . . ."

The second prong of the ACLU motion, more telling as a matter of policy though not based on any yet-recognized law, was the new ABA Code of Judicial Conduct. The code had been published in final draft form and was then scheduled for final ABA approval at the summer convention. Approval took place on schedule and the code was ABA policy by the time the Supreme Court convened again in the fall.

The motion said Rehnquist had been a self-styled Justice Department "spokesman" on the broad question of the constitutionality of surveillance and had appeared twice as a witness before Ervin's subcommittee. On one occasion the witness said he

did not agree that "there are any serious constitutional problems with respect to collecting data on or keeping under surveillance persons who are merely exercising their rights of peaceful assembly or petition to redress a grievance." The witness did not limit himself to such generalities, the petition continued, but instead, "the concrete factual setting which he chose to discuss was the surveillance of civilians by the United States Army as depicted in the pleadings and the District Court decision in *Tatum v. Laird*, the very lawsuit" he voted on as a justice. A second statement had been even more pointed as Assistant Attorney General Rehnquist told Ervin:

> My point of disagreement with you is to say whether in the case of *Tatum v. Laird* that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government.

Besides speaking publicly in the same vein, Rehnquist also complied with a request from Senator Roman L. Hruska, Republican of Nebraska, for a legal memorandum supporting his constitutional thesis. The memorandum denied that there had been any interruption in robust debate as a result of the program of surveillance. In addition, Rehnquist during the hearings had been the government's custodian of large amounts of computerized evidence that the ACLU had been trying to get.

As for the new ABA code, the motion emphasized the broad admonitions of canon 2 that a judge "should avoid impropriety and the appearance of impropriety in all his activities" and canon 3C requiring disqualification when "his impartiality might reasonably be questioned." The ACLU said it was by no means questioning the good faith of Rehnquist's pre-judicial expression of views. "Indeed, it was precisely because of the clarity and finality of his testimonial views and the intimacy of his knowledge of the evidentiary facts at issue in this case that the respondents [the *Tatum* plaintiffs] were convinced that Mr. Justice Rehnquist would not participate in the Court's deliberation and decision. . . ."

The disqualification statute, strictly construed, was indeed severe, the ACLU admitted, but it argued that, in the language of an important 1955 Supreme Court decision, it "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' " There was no need to get into the question of actual bias, the ACLU said, when the judge has merely the normal concern about a case he had started before going on the bench. Citing a decision disqualifying then federal trial judge G. Harrold Carswell from a case that had been handled in his office when he had been United States attorney, the ACLU described it as "the interest that any lawyer has in pushing his case to a successful conclusion." This was a broad definition of the term "case" suggested by the fact that the Ervin hearings and the *Tatum* lawsuit were parallel proceedings going on in different forums.

Under the circumstances, said the ACLU,

> Mr. Justice Rehnquist's impartiality is clearly questionable because of his appearance as an expert witness for the Justice Department in Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims.

The answer came from the Court and the justice on October 10, 1972, the first decision day of the new term: "Motion to withdraw opinion of this Court denied. Motion to recuse, *nunc pro tunc*, presented to Mr. Justice Rehnquist, by him denied." There followed a sixteen-page memorandum by the justice that was as unusual for its content as it was unprecedented in law.

First the memorandum disposed of the ABA code as a separate and distinct basis for decision on the motion. "Since I do not read these particular provisions as being materially different from the standards enunciated in the congressional statute, there is no occasion for me to give them separate consideration," Justice Rehnquist said. This was a startling statement in light of the universally acknowledged fact that the new canons set a much

stricter disqualification standard than the existing federal statute. As discussed in the previous chapter, the new canons applied the "appearance of justice" test that would disqualify a judge in a doubtful case in place of the "duty to sit" concept that federal judges had evolved so that they would sit in the doubtful cases. For his legal authority in support of this remarkable conclusion, the justice cited none other than the 1969 report of the Senate Judiciary Committee majority supporting the Haynsworth nomination, which argued that the old canons then in effect should be read to harmonize with the federal statute in judging that nominee's ethical conduct. That this was dubious authority indeed was underscored by Rehnquist's own confirmation hearing testimony, quoted earlier in this chapter, that the full Senate's vote against Judge Haynsworth, which had of course *rejected* the Judiciary Committee's views, inclined him, in applying the federal disqualification law, "to the extent there is no conflict between them and the canons of judicial ethics, to try to follow that sort of stricter standards that I think the Senate, by its vote, indicated should prevail."

Having reduced his problem to the dimensions of the less restrictive federal law, Justice Rehnquist proceeded to take the narrowest possible view of the word "case." Said he: "I never participated, either of record or in any advisory capacity, in the District Court, in the Court of Appeals, or in this Court in the government's conduct of the case of *Laird v. Tatum.*" He added, "Since I have neither been of counsel nor have I been a material witness in *Laird v. Tatum*, these provisions are not applicable. . . . I did not have even an advisory role in the conduct of the case of *Laird v. Tatum*. . . ."

Turning to the statements made before the Ervin subcommittee, Rehnquist said there were two. One, in his prepared statement, was simply that the government had retained one printout from the army's computer for inspection by the court in the *Tatum* case. Justice Rehnquist quoted this statement in his memorandum. He did not quote the second statement, however, the one set out in full on page 217. If he had, he might have faced the disqualification issue more squarely. This was the remark of witness Rehnquist disagreeing with Chairman Ervin over

whether "an action will lie" in the case of *Tatum* v. *Laird* Justice Rehnquist called this exchange "a discussion of the applicable law." But this, as all lawyers will recognize and most lawyers will freely state, is not a mere discussion of the "applicable law." It is a statement of how the law should be applied to a particular case. Time after time throughout the memorandum's sixteen pages, Justice Rehnquist repeated that characterization of his Senate testimony. Time after time he refused to treat the ACLU charge that he had commented on the merits—or, as witness Rehnquist had testified, lack of merits—of the lawsuit itself.

For example, the memorandum said that since most justices come to the bench no earlier than their middle years, "It would be not merely unusual, but extraordinary, if they had not at least given opinions *as to constitutional issues* [emphasis supplied] in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." The ACLU had not contested this truism.

Later in the memorandum the justice said that since no jurist starts from dead center on such issues, "it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding *of the meaning of some particular provision of the Constitution.*" [Emphasis supplied.] This, too, was not contested as a general proposition.

Although the ACLU pitched that part of its argument based on the federal statute on the so-called mandatory clauses of section 455—those that require disqualification if a judge has a substantial interest, has been of counsel, or is or has been a material witness—Justice Rehnquist devoted most of his memorandum to the so-called discretionary clause—"so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit"—on which the ACLU apparently had deemed it useless to rely. Much of his argument here had to do with the historic practices of different justices, some of whom sat in close cases. He noted that Justice Black had been criticized for sitting in Fair Labor Standards Act cases but not, to Rehnquist's knowledge, because he had been the legisla-

tion's floor manager while a senator from Alabama. Frankfurter wrote about the evils of the antilabor injunction and helped sire the 1933 federal law against it, then wrote the Court's opinion in a major 1941 case involving the law. Justice Jackson voted in a 1950 case based on an issue he had decided as attorney general before he joined the Court in 1941. Charles Evans Hughes criticized a decision in a law lecture a few years before becoming chief justice and nine years later wrote the Court's opinion in another case overruling the decision. Justice Harlan felt free in 1961 to join with the Court in rejecting a view he had expressed while a judge on the Second U.S. Circuit Court of Appeals. And Justice Holmes sat on no fewer than eight cases in which he had taken part while chief justice of the Massachusetts Supreme Judicial Court (this at a time when the federal law on such matters, enacted in 1891, did not apply to members of the U.S. Supreme Court). But all of these examples, except possibly the Holmes cases, were irrelevant, since they did not involve a justice sitting in a *case* about which he had already publicly commented while it was pending.

Justice Rehnquist's final reason for sitting was based on supposed problems in judicial administration posed by an equally divided Court and the doctrine, developed in several federal circuits but repudiated in the new ABA code and perhaps by the Senate's Haynsworth vote, that a jurist had a "duty to sit" unless clearly disqualified. He deemed it undesirable that a case heard by the Supreme Court should be nondecided by a deadlocked vote. It should not be left "unsettled" in that fashion. This concern, which is a valid concern as a general proposition, scarcely applied to the *Tatum* case, which might have been quite effectively resolved by a four to four affirmance. A tie vote would have sustained the court of appeals and required a trial on the complaint. How much preferable such a result, rather than having it decided by the vote of a disqualified justice, fresh from the ranks of the Nixon administration where he had made something of a cause out of defending the challenged surveillance practice from legal attack.

Justice Rehnquist said the "duty to sit" doctrine impelled him to sit even though "I would certainly concede that fair-minded

judges might disagree about the matter." In addition to the doctrine's abandonment in the new ABA code, another code provision seemed to apply with special relevance to his situation: the section that said a judge formerly employed by a governmental agency "should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association." That test would seem to call for disqualification under the justice's own concession that his judgment might indeed reasonably be questioned. But of course Justice Rehnquist had already rejected any argument based on the new code since he saw them as not "materially different" from the standards he was applying.

Admittedly, some close questions, intriguing to lawyers and scholars, may arise when a judge sits in a case with a trace of past involvement. Often the proper response is a matter of degree. For example, Justice Thurgood Marshall's participation in civil rights cases sometimes stirs discussion, despite the fact that jurists of the white race decided civil rights cases without challenge for generations. Justice Marshall has recused himself when the National Association for the Advancement of Colored People is a party in a case before him but understandably does not sit out every new case brought by lawyers for the NAACP Legal Defense Fund, Inc., where he served as director-counsel before 1962. Justice Byron R. White repeatedly declines to sit in some criminal cases, apparently because they involve a law he lobbied through Congress as deputy attorney general under Attorney General Robert F. Kennedy. Others on the Supreme Court constantly confront ethical problems with subtle features. But there was nothing subtle about the *Tatum* case and Justice Rehnquist's relationship to it. Try as he might to restate the matter, Rehnquist judged the rights of parties after giving his view that one of the parties had no rights and after working to defeat that party's claim to rights.

Even when the Supreme Court has been taken over and reconstituted by a series of new appointments, justice is not administered by lining up the Court's members and simply polling them on controversial questions. The Court sits to decide cases, and unless its work is done judicially and judiciously it is

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not a court, it is only supreme, and that not for long if its credibility erodes. The civil libertarians who were so heavily engaged in the *Tatum* case could not expect to win on the issue in the long run, given the High Court's makeup, but they had a right to expect that they would not lose the issue except in a case decided by disinterested justices.