Nor was this the only time Senator Ervin made known his views on Justice Rehnquist's participation in the Tatum decision.On July 14, 1973, Senator Ervin had inserted in the Congressional Record an article concerning the case which had appeared in the Hofstra Law Review, and which Senator Ervin described as "excellent." (Cong. Rec., 7/14/73, S 13481.) In that article, the author commented upon "the serious ethical dilemma Mr. Justice Rehnquist's participation in Laird v. Tatum has posed for himself, the Court and the Constitution." (Id. at S 13485)

Let me state at the outset that with the added wisdom drawn from an additional 14 years of teaching federal procedure and practicing in the federal courts, I am convinced now more than ever that Mr.Justice Rehnquist acted in an ethically improper way in regard to the Tatum case. I believe his actions in regard thereto marked him as an intensely partisan, result-oriented jurist who was willing to evade and avoid the most basic principles of judicial ethics to make sure the case turned out in one particular way -- and more importantly, in favor of his own former "clients."

I recognize these are serious allegations; and in order to substantiate them I must now explain in some detail the factual and procedural history of the case of Tatum v. Laird.

I filed the Tatum complaint in the Federal District Court in the District of Columbia in the early spring of 1970 on behalf of a number of individuals and organizations involved in the civil rights and anti-war movements. The complaint alleged that the United States Army and Department of Defense had established a wide-ranging program of surveillance and infiltration of law-abiding, domestic organizations, maintained the information gathered in computerized data banks and had widely disseminated its intelligence reports to federal, state and local civilian agencies as well as military offices.

It was the theory of the complaint that the Army's Domestic Intelligence Program violated the First Amendment of the United States Constitution, and that the plaintiffs, all of whom had been targets of the military's surveillance program, were the proper parties to seek to enjoin it.

At our initial hearing in the District Court, before the filing of an answer or an opportunity to institute discovery proceedings, the District Judge dismissed the Complaint for failure to state a claim upon which relief could be granted, taking the position that there was nothing in the First Amendment which precluded the Army from carrying out the program described by the plaintiffs.

In April 1971, the Court of Appeals reversed the District Judge and ordered the case remanded for a trial of plaintiffs' allegations. The defendants petitioned for certiorari.

Meanwhile, Senator Ervin's Constitutional Rights Subcommittee opened its own hearings into the Army's Domestic Intelligence Program.

On March 9 and again on March 17, 1971, Mr. Rehnquist, who was then Assistant Attorney General, testified before the Committee on behalf of the Department of Justice. During that testimony, the witness engaged in a wide-ranging discussion both of his views on the power of the Executive Branch to surveil and keep data files on political activists as well as the law and facts, as he viewed them, involved in the case of Tatum v. Laird, then pending before the U.S. Court of Appeals for the District of Columbia.

In one exchange,the witness (now Justice Rehnquist) told Senator Ervin:

> My ... point of disagreement with you is to say whether as in the case of Tatum v. Laird that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the 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. (Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary of the United States Senate, 92nd Cong, 1st Sess., on "Federal Data Banks, Computers and the Bill of Rights," Part I, at 864-5. Hereinafter cited as "Hearings.")

In his wide-ranging colloquy with Senator Ervin, Attorney General Rehnquist made clear his disagreement with the substantive constitutional claims of the Tatum plaintiffs and challenged the basic factual predicate of the Tatum complaint: that Army surveillance cast a pall over civilian political activity and chilled its exercise, as the following excerpts demonstrate:

> SENATOR ERVIN: Don't you think a serious constitutional question arises where any government agency undertakes to place people under surveillance for exercising their first amendment rights?
>
> MR. REHNQUIST: .... When you ... say: Isn't a serious constitutional question involved, I am inclined to think not, as I said last week. This practice is undesirable and should be condemned vigorously, but I do not believe it violated the particular constitutional rights of the individuals who are surveyed.
>
> SENATOR ERVIN: ... [D]o you not concede that government could very effectively stifle the exercise of first amendment freedoms by placing people who exercise those freedoms under surveillance?
>
> MR., REHNQUIST: No, I don't think so, Senator. It may have a collateral effect such as that but certainly during the time when the Army was doing things of this nature, and apparently it was fairly generally known it was doing things of this nature, those activities didn't deter 200,000 or 250,000 people from coming to Washington on at least one or two occasions to express their first amendment rights by protesting the war policies of the President.
>
> * * *
>
> SENATOR ERVIN: Well there is also evidence here of photographers having been present at many rallies. Army intelligence agents pretending to be photographers were present at many rallies, took pictures of people, and then made inquiries to identify these people and made dossiers of them. Do you think that is an interference with constitutional rights?
>
> MR. REHNQUIST: I do not, Senator.....I don't think the gathering by itself, so long as it is a public activity, is of constitutional stature. (Hearings, at 861-62.)

It was those exchanges with Senator Ervin -- especially the first, in which the future Justice expressed his view on the precise legal issue upon which he was later to cast the decisive vote in the Supreme Court -- which has most often been cited as the reason why Justice Rehnquist ought to have recused himself from the Tatum argument and decision. See generally, Note, "Justice Rehnquist's Decision to Participate in Laird v. Tatum," 73 Col. L. Rev. 106 (1973); Note, "Laird v. Tatum: The Supreme Court and the First Amendment Challenge to Military Surveillance of Lawful Civilian Political Activity," 1 Hofstra L. Rev. 244 (1973).

In fact, it was neither the only nor the most persuasive of the reasons calling for recusal. In my view, the really egregious ethical breach committed by Justice Rehnquist had to do with the fact that he was an advocate, and indeed a "witness" to crucial and disputed factual issues which were resolved and relied upon in the majority opinion of Chief Justice Burger. To my mind, it was shocking that Justice Rehnquist should have joined in an opinion relying upon alleged facts upon which he had already expressed his own biased and partisan view as an advocate before a Senate investigating committee.

Justice Rehnquist's view of the "facts" of the Tatum litigation were clearly expressed by him in his earlier testimony. In his testimony on March 9, 1971, witness Rehnquist categorically told the Senate that the Army had disbanded its domestic intelligence program and that those functions had been turned over to the Justice Department. His testimony was as follows:

> The function of gathering intelligence relating to civil disturbance, which was previously performed by the Army as well as the Department of Justice, has since been transferred to the Internal Security Division of the Justice Department. No information contained in the data base of the Department of the Army's now defunct computer system has been transferred to the Internal Security Division's data base. However, in connection with the case of Tatum v. Laird now pending in the U.S. Court of Appeals for the District of Columbia Circuit, one printout from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed. (Hearings, at 601)

There are actually four significant factual assertions contained in that statement of witness Rehnquist:

1) The Army had ceased its domestic intelligence program;
2) The Army's computer system was defunct;
3) No information gathered through the Army's intelligence program had been transferred to the Justice Department;
4) There was only one remaining printout from the Army's computer which was destined for destruction at the conclusion of the Tatum litigation.

I do not question that Mr. Rehnquist believed everything he testified to before the committee. But they were not undisputed and established "facts."* They were factual claims made by the government in response to the Tatum complaint, which were disputed by the plaintiffs, and which plaintiffs never had an opportunity to rebut at an evidentiary hearing -- because District Judge Hart had considered the facts irrelevant and dismissed the complaint on a Rule 12(b)(6) motion to dismiss for failure to state a claim.

However, after the Court of Appeals reversed Judge Hart's ruling and remanded the case for a full evidentiary hearing, the defendants attempted to present these alleged "facts" to the Supreme Court in an effort to make it appear that there was no basis at all to plaintiffs' complaint and that if there ever had been a real controversy at stake it was by then moot, since the Army had dismantled its domestic surveillance program.

Precisely because of this effort by the defendants to create a fictitious factual record in the Supreme Court, the Statement of the Case in the Brief for Respondents opened as follows:

> The only issue before this Court is whether the complaint states a justiciable claim entitling plaintiff's to a hearing. Because much of the government's Statement of the Case is based upon representations and documents which are not properly part of the record, and because the government ignores many of the material allegations made by plaintiffs, we set out in some detail the allegations of the complaint and the facts which underlie them. (Respondents' Brief in the Supreme Court of the United States, October Term, 1971, No. 71-288, at 2.)

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* Indeed, it was subsequently demonstrated that at least some of these claims were patently false, although there is no reason to believe that Attorney General Rehnquist knew it at the time. Presumably, he was merely repeating "facts" which had been supplied to him by the Department of Defense.

Most of Respondents' 19-page Statement of the Case went on to challenge the claims of the defendant (the same claims made by Attorney General Rehnquist before the Ervin Committee) that the Army had ceased its surveillance program and had dismantled its computerized intelligence system, and set forth the record allegations disputing those alleged "facts." Respondents' Statement further pointed out that there was a factual allegation, unchallenged on the record before the Court, that the intelligence information collected under the surveillance program had been disseminated widely to military and civilian agencies of government, a claim apparently disputed by Mr. Rehnquist's testimony that no information had been transferred to the Justice Department's data base. (Because of the centrality of these facts to my main thesis, I am appending the entire Statement of the Case from the Brief of Respondents as Attachment B.)

(I must at this point apologize for the length and detail of this statement. However, I believe the detail is essential to a proper understanding of the role of Mr. Justice Rehnquist in the litigation of this case.)

As a matter of legal analysis, it might be possible to conclude that these "factual" claims asserted by the government in its brief and by Attorney General Rehnquist before the Ervin Committee were irrelevant and unessential to the decision in Tatum, which held that the plaintiffs' complaint was not justiciable. The problem with that analysis lies not only in the fact that the government's lawyers thought it important, but also in the fact that the majority opinion, which Mr. Justice Rehnquist joined, makes much of them.

In establishing the "factual" predicate for the decision, the majority opinion stated:

> By early 1970, Congress became concerned with the scope of the Army's domestic surveillance system; hearings on the matter were held before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. Meanwhile, the Army, in the course of a review of the system, ordered a significant reduction in its scope.

> For example, information referred to in the complaint as the "blacklist" and the records in the computer data bank at Fort Holabird were found unnecessary and were destroyed. One copy of all the material relevant to the instant suit was retained, however, because of the pendency of this litigation. (408 U.S. at 7.)

That language has a remarkable resemblance to the testimony of Attorney General Rehnquist before the Ervin Committee. And -- I cannot over-emphasize -- these "facts" were sharply disputed by the plaintiffs, who did not happen to have any of their "witnesses" sitting on the Court which voted 5 to 4 to uphold the government's position.

In response to the plaintiffs' post-decision motion for rehearing and recusal, Justice Rehnquist minimized his personal connection to the facts of the Tatum case and defended his prior comments on the legal questions with a lengthy discussion which is best summarized by his unexceptional observation that no Justice arrives on the Court with a mind which is "a complete tabula rasa in the area of constitutional adjudication."

The Justice's opinion insisted that his only comment on the "facts" of Tatum at the Ervin Committee hearings was contained in the statement "one print-out from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed." This comment totally ignored his personal testimony on the dis-establishment of the Army's intelligence program, an issue much disputed by the plaintiffs but asserted in the majority opinion as if it were established fact. (Mr. Justice Rehnquist's opinion denying plaintiffs' motion for recusal is printed at 409 U.S.824 (1972).)

The fact is that any careful reading of Attorney General Rehnquist's testimony before the Ervin Committee leads to the inescapable conclusion that, as a government attorney, he had been an advocate for a very partisan view of both the facts and the law in Tatum v. Laird and, therefore, could not ethically participate as an impartial judicial officer in its ultimate decision.

As the New York Times commented editorially at the time: "The question is not the Justice's prior views or opinions on matters before the Court; it is rather his prior active involvement in a case itself ..." (New York Times, editorial page, October 12, 1972.)

A similar conclusion was reached by several academic commentators, even without the benefit of a detailed and intimate familiarity with the factual context of the case. A note in the Columbia Law Review concluded as follows:

> Justice Rehnquist did not violate the specific provisions of Section 455 , the only statutory standard to which he was bound. His participation was not, however, consistent with the goal of an impartial judiciary, as embodied in the Code of Judicial Conduct, section 144, section 7 of the Administrative Procedure Act, and Supreme Court pronouncements. Having made widely publicized statements on the factual and legal issues involved in Laird v. Tatum, Justice Rehnquist failed to take adequate cognizance of the need to maintain the "appearance of justice" when he chose to participate in the Laird decision. Although his judgment might have been impartial, his participation in Laird lacked the appearance of impartiality necessary to maintain public confidence in the Supreme Court. (Note, "Justice Rehnquist's Decision to Participate in Laird v. Tatum,"73 Col. L. Rev. 106, 124 (1973).)

The Hofstra Law Review article cited earlier concluded that Mr. Justice Rehnquist's participation posed "a serious ethical dilemma" "for himself, the Court and the Constitution." ("Laird v. Tatum: The Supreme Court and a First Amendment Challenge to Military Surveillance of Lawful Civilian Political Activity," 1 Hofstra Law Review 244, 271 (1973).)

Mr. Justice Rehnquist's opinion acknowledged that the question of his recusal was "a fairly debatable one" and that "fair-minded judges might disagree" with his decision. 409 U.S. at 836. He then went on to state that the prospect that his recusal would result in affirmance of the Court of Appeals' decision by an equally-divided court propelled him to decide the case.

This notion that the normal rules of judicial impartiality do not count when the judge's vote may be crucial, seems to turn the doctrine of recusal on its head. As the New York Times observed in the editorial cited earlier: "[T]o argue thus seems only to underscore the impropriety of a former Government representative continuing a Government case on the Supreme Court -- the court of last resort." (NYTimes, Oct. 12, 1972.) Another critical commentary on this aspect of Justice Rehnquist's opinion appears in a recent book on the Supreme Court by Prof. Stephen L. Wasby of the State University of New York at Buffalo. Introducing a discussion of his Tatum opinion, the author says:

> A Justice's participation in a case solely to create a full court is not necessarily proper, as a particular problem involving Justice Rehnquist illustrates. (Wasby, The Supreme Court in the Federal Judicial System, Holt, Rinehart & Winston, 1984, 2d Ed.)

Indeed, even Justice Rehnquist's notion that a split court would have left the principle of law involved "unsettled," 409 U.S.at 837-8, was a bit sophistic. Affirmance of the Court of Appeals' decision in Tatum would really have "settled" nothing. It would merely have permitted a trial of plaintiffs' claims to proceed. Indeed, generally accepted rules of judicial restraint would have counseled against premature Supreme Court determination of such issues without a full factual record -- especially in light of the sharp factual conflict over the continuation of the Army's surveillance program.

With all due respect, there seems to be no other explanation for Justice Rehnquist's participation in Tatum than his desire to shield his former government colleagues from having to defend their (and his) factual claims and contentions in an adversary proceeding.

* * *

It is my concern that the behavior described here reflects a judicial temperament which is so partisan and result-oriented that it raises questions about Mr.Justice Rehnquist's qualifications to be the nation's Chief Magistrate, an office in which the nation reposes its greatest trust for the fair and impartial administration of the Laws of the Land.

While I do not claim to be a careful student of Mr. Justice Rehnquist's judicial output, I am aware that at least one eminent scholar has discerned a similar result-orientedness in the Justice's work product. In an exhaustive survey of Justice Rehnquist's early opinions, Prof. Daniel Shapiro of Harvard Law School produced a lengthy and detailed analysis of what he considered Justice Rehnquist's partisanship, commenting that: "[I]n too many instances Justice Rehnquist's efforts have been impeded by his ideological commitment to a particular result." (Shapiro, "Mr. Justice Rehnquist: A Preliminary Review," 90 Harv. L. Rev. 293, 328 (1976).) See also Riggs and Proffitt, "The Judicial Philosophy of Justice Rehnquist," 16 Akron L. Rev. 555 (1983).

This Committee and the United States Senate has an awesome responsibility when called upon to offer its advice and consent to the appointment of a Chief Justice. The United States Supreme Court is a majestic institution, the most inspiring and respected judicial body in the history of the earth. It has been the bedrock of our constitutional democracy for 200 years. It is the world's leading symbol of equal justice under law. It requires a Chief Justice worthy of the office. I offer these comments in the hope that they may be of some small value in helping in the performance of that function.

United States Senate

WASHINGTON, D.C. 20510

Morganton, North Carolina 28655
June 26, 1975

Professor Louis Menand, III
Department of Political Science
Room 3-234
Massachusetts Institute of Technology
Cambridge, Massachusetts 02139

Dear Professor Menand:

This is to thank you for your letter of June 19, 1975, and the copy of your letter to the Senate Subcommittee on Constitutional Rights which accompanied it.

I have never been able to understand why Chief Justice Burger said so much about the destruction of the surveillance records acquired by the Army during its spying on civilians in his opinion in Laird v. Tatum. The only question before the Supreme Court in that case was the sufficiency of the complaint to state a cause of action. Four of the Justices combined with Justice Rehnquist, who ought to have disqualified himself from participating in the case because he had acted as Counsel for the Defense Department in the hearing before the Senate Subcommittee on Constitutional Rights, held the complaint to be insufficient.

Solicitor General Griswold argued the case for the Defense Department, and repeatedly invoked affidavits which had been offered by the government in the District Court in opposition to a motion of the plaintiff for a temporary restraining order although these affidavits had no relevancy whatsoever to the point being considered by the Supreme Court, as I pointed out to the Supreme Court. Nevertheless, the Solicitor General got away with this, and Chief Justice Burger's opinion is based in large part on what the government said and not on what the complaint alleged.

The suit was a suit for an injunction to prevent threatened injuries. The Chief Justice treated it as if it was a suit for damages, and held that the plaintiff could not maintain the suit unless he could show he had suffered an injury -- instead of the threatened injury which was sought to be averted. I am glad that you have asked for an investigation.

Sincerely yours,

Sam J. Ervin, Jr.

Sam J. Ervin, Jr.

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ATTACHMENT A