

Mr. Askin, you may proceed.

**TESTIMONY OF A PANEL CONSISTING OF FRANK ASKIN, PROFESSOR OF LAW, RUTGERS UNIVERSITY, NEWARK, NJ.; GARY ORFIELD, PROFESSOR OF POLITICAL SCIENCE, UNIVERSITY OF CHICAGO, CHICAGO, IL; AND MELANNE VERVEER, PUBLIC POLICY DIRECTOR, PEOPLE FOR THE AMERICAN WAY, WASHINGTON, DC**

Mr. ASKIN. Thank you, Mr. Chairman.

I am Frank Askin. I am a member of the faculty of Rutgers Law School in Newark, NJ, where I have taught constitutional litigation and Federal procedure for the past 29 years.

In 1970, I established the Constitutional Litigation Clinic as part of the academic program at the law school. One of the earliest matters my students and I handled in our clinic was the case of *Tatum v. Laird*, about which there has been much comment in the past 2 days.

It is my experience as the chief counsel in the *Tatum* case, which forms the basis of my testimony, because I believe, based on that experience, that serious doubt exists as to whether Justice Rehnquist possesses the judicial temperament appropriate to the Chief Justice of the United States.

My own personal experience suggests that Justice Rehnquist is a most partisan and result oriented jurist. Characteristics which may indeed disable him from being an even-handed, an impartial administrator of what has heretofore been considered the most respected judicial institution on the face of the earth.

I have already submitted a lengthy written statement, and in the time allotted for my oral presentation, it is impossible for me to do more than summarize its conclusions without repeating its evidentiary basis. So let me state in capsule summary that *Tatum* was a case in which I believe Justice Rehnquist breached the most elementary and universal principle of judicial ethics; that no one can be both advocate and judge in the same case.

The fact is that after serving as a most partisan advocate of the government's position on both the law and facts of the case, in testimony before a Senate investigating committee, Justice Rehnquist joined the Supreme Court in time to cast the deciding vote in favor of his own side in the dispute.

It was as if Billy Martin resigned as manager prior to the seventh game of the World Series, and accepted appointment as the umpire.

It was not merely that Justice Rehnquist in a colloquy with Senator Ervin before the Senate's Constitutional Rights Subcommittee expressed his personal opinion on the case, and the very legal issue that he ultimately decided as a member of the Court. That was the least of his ethical sins.

What he did was to transport his own view of a vigorously contested factual dispute into the hallowed marbled halls of justice.

I assure you that the plaintiffs in the *Tatum* case did not have any of their members or advocates sitting in the court's conference and casting a vote on the outcome. I think this is a most important factor for the committee to understand, for in his very facile opin-

ion, refusing to recuse himself in *Tatum*, Justice Rehnquist would have us believe that all he did was join an opinion which affirmed a legal view which he had previously endorsed. Not true.

He signed onto an opinion which endorsed disputed facts of which Assistant Attorney General Rehnquist had been a major proponent. The evidence of the serious allegations is set forth in my written testimony, which I hope the Committee will carefully read and consider.

I recognize that my testimony can be dismissed as the sour grapes of a defeated advocate. That is why I included in my written submission the recorded views of the late Senator Sam Ervin, who wound up being my co-counsel in the Supreme Court after filing an amicus brief. But, in addition to his recorded expressions, I will never forget the incredible disappointment that Senator Ervin expressed at Justice Rehnquist's behavior in *Tatum*.

I must tell you on the Friday before the Monday of the oral argument in *Tatum*, I met with Senator Ervin in his office to discuss that argument. As I was leaving, I resurrected an earlier conversation, and said, "Senator, you know, we still have time to file a motion for recusal of Justice Rehnquist. Do you think we should do it?" He replied to me, "Frank, do not worry. I know Justice Rehnquist. He is very conservative but he is a very honorable man. He will not sit on this case."

Monday morning, the case was called. Senator Ervin and I moved up to the front bench. And again I whispered to him, I said, "Senator, Justice Rehnquist has not left the bench." He was still nonplussed. He said "do not worry, he is not going to participate, he just wants to listen."

It was a year later after Justice Rehnquist cast that deciding vote in *Tatum* that I ran into Senator Ervin in Washington at a conference. And he saw me, and he came striding across the room and he said, Frank, I sure was wrong about Justice Rehnquist, wasn't I?"

[Statement follows:]