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The assistant legislative clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask that further proceedings under the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

SUPREME COURT NOMINATIONS

Mr. DOLE. Mr. President, I would hope that we can move right along with the tax reform bill. The chairman is ready. The distinguished Senator from Louisiana is ready. They are ready for business. I also want to commend the President of the United States for the announcement he just made. He will be sending the Senate the nomination of Justice Rehnquist to become Chief Justice and the nomination of Antonin Scalia to be a justice of the Supreme Court. Chief Justice Burger will be retiring.

□ 1410

I believe that, without question, the President has selected two outstanding individuals who have the experience, the background, the integrity, the intelligence, and the right stuff. And I would guess that the nominations will be confirmed by this body without any great deal of delay.

Mr. LONG. Mr. President, will the Senator yield at that point?

Mr. DOLE. I am happy to yield to the distinguished Senator from Louisiana.

Mr. LONG. Mr. President, I want to join the distinguished majority leader in congratulating the President on his choice of Justice Rehnquist. In my judgment, Justice Rehnquist is a great justice on the Supreme Court. His views and mine are consistent with those of the President of the United States. I think it is appropriate that Justice Rehnquist be appointed Chief Justice. I think he has been a great Justice and a great American, and I will be pleased to support the confirmation of his nomination.

Mr. DOLE. I thank the distinguished Senator from Louisiana.

Mr. DOMENICI. Mr. President, will the Senator yield?

Mr. DOLE. I yield to my friend, the Senator from New Mexico [Mr. DOMENICI].

Mr. DOMENICI. Mr. President, I greatly appreciate the distinguished majority leader yielding to me.

I, too, want to congratulate the President on his two appointments today.

As an Italian-American whose parents came here from Italy, right to Albuquerque, NM, it is with a great deal of pride that I not only congratulate the President, because I think both of his nominees are excellent, but also, I should like to take a moment to talk about Judge Scalia. I know the judge very well. However, that is not why I rise.

I rise because this is the first Italian-American who will serve on the Supreme Court of the United States in the history of the Republic. I believe that is a magnificent tribute to the Italian-Americans of this Nation. I am convinced that President Reagan is absolutely faithful to what he has said about all his nominees: He will pick the very best. In this case, I am sure he picked the very best.

I do not think we will have a lot of trouble confirming the nomination of Judge Scalia. The President picked the very best, but in this case he also happens to be an Italian-American.

There are millions of Italian-Americans in this country, many of whom started with nothing, many of whom started with immigrant parents who saw that they got an education, all of whom have benefited from this magnificent country that permits all of us to share in its opportunities at every level, in every field of endeavor.

So today I think we are witnessing the first step in the confirmation of the nomination of a new justice who will serve on the U.S. Supreme Court, who will serve with distinction, and who will have the credit of being the first Italian-American to serve on that high court.

Looking at his background, obviously, it is absolutely exemplary. He attended Harvard and served as editor of their Review. He also was a distinguished professor at one of the best universities in the United States. There are many, but one of the best is the University of Virginia.

From that point on, everything he has done has been of a very high quality. His opinions, as he served on the circuit court here, are noted for their clarity, for their absolute distinction in terms of scholarship and following precedent.

I compliment the President, and I compliment Judge Scalia as the nominee, and I hope the U.S. Senate will act with dispatch.

Mr. DOLE. Mr. President, I thank my distinguished friend, Senator DOMENICI, who does have a personal relationship, a good relationship, and friendship with soon-to-become Justice Scalia. Senator DOMENICI has underscored the nominee's qualifications. I thank him for that.

Mr. DECONCINI. Mr. President, will the Senator yield?

Mr. DOLE. I yield to the distinguished Senator from Arizona [Mr. DECONCINI].

Mr. DECONCINI. I thank the leader. I will not take long.

Mr. President, I want to compliment my good friend from New Mexico, Senator DOMENICI, on raising the importance of ethnic Americans.

We are all Americans and we all pull together when the times make it necessary; but there is a certain pride, whether you are Polish-American, Irish-American, or Italian-American. Being of Italian-American ancestry, it is with great pride that I see the President choose Judge Scalia today as his nominee.

Many Italians have risen to some outstanding positions in our Government and served in the judiciary. I speak of my own father, who served as Supreme Court Justice in the State of Arizona. Yet, we have never had an Italian-American serve on the U.S. Supreme Court. So I hope the Senate will act very quickly.

As to Justice Rehnquist, he is an Arizonan. He was educated at Stanford University. He has served with distinction not only on the Supreme Court but also as a member of the Bar in the State of Arizona. He knows the law, and he is indeed a scholar.

I wish him every success, not because he is from Arizona but because he is taking on a tremendous job. He has proven his ability as a superior Justice of the Supreme Court, and now he has some very big shoes to fill.

I have had disagreements with Chief Justice Burger, but I have had many agreements with him. He has been an outstanding Chief Justice of the United States, and Justice Rehnquist is the ideal person to fill those shoes.

As an Italian-American, it makes me proud today for Judge Scalia; as an Arizonan, it makes me proud today for Justice Rehnquist; and as an American, it makes me proud to see President Reagan choose quality people for the Top Court of this land.

Mr. DOLE. I thank the distinguished Senator from Arizona.

Mr. President, I yield to the distinguished chairman of the Senate Judiciary Committee, Senator THURMOND.

Mr. THURMOND. I thank the majority leader very much.

Mr. President, just before 2 o'clock, the President called me and stated that he would announce new appointments to the Supreme Court. He has announced them. He stated that Chief Justice Burger had resigned and that he was going to nominate Justice Rehnquist to succeed him as Chief Justice.

In my opinion, this is a logical appointment. Justice Rehnquist is a comparatively young man. He is a conservative judge. I believe his thinking is in line with that of the administration, people as a whole and with that of President Reagan. Justice Rehnquist is a true scholar, and in my opinion, he will make an outstanding Chief Justice.

I told the President that I commended him for his appointment and I felt there would be no trouble in having the nominations confirmed by the Senate.

The President also announced that he is going to nominate Mr. Scalia who is now a member of the Circuit Court of the District of Columbia, to succeed Justice Rehnquist. Mr. Scalia, who will be the first person of Italian descent to serve on the Supreme Court of the United States, has a fine record. He was an outstanding student. In my opinion, he will be a worthy successor to Justice Rehnquist.

I do not think these changes will change the philosophy of the Court. Had there been some other resignations, it might have changed the philosophy. I have been asked the question as to what effect it would have on the Court. I do not think that, as a whole, the balance of the Court will be changed by these appointments.

Chief Justice Burger has resigned because he has been on the Court for 17 years. He has worked extremely hard; he has really been overworked. He is also chairman of the Bicentennial Commission on the Constitution. The 200th anniversary of the Constitution will be celebrated next year. I think he wants to devote the remainder of the time to that and give more time to it, and therefore he has resigned as Chief Justice.

Chief Justice Burger, in my judgment, has made one of the finest Chief Justices the Nation has ever had. He is a sound thinker, he is an able writer, and he is a great scholar. We are very proud of his service. We commend him for serving his Nation so actively and effectively and wish him success in the future.

□ 1420

I am very honored to serve with him on the Constitutional Commission to celebrate the Constitution, and I look forward to working with him until this work has been completed next year.

Mr. DOLE. Mr. President, I thank the distinguished Senator from South Carolina, the chairman of the Judiciary Committee, who will have the responsibility to move these nominations forward. I am not certain when they will be coming to the Senate. But I am certain as soon as they are here, we will start disposition and, hopefully, we can take action on these two nominations at the earliest possible time.

Mr. THURMOND. Mr. President, in response to the able majority leader's statement, as soon as the nominations come to the Senate, we will set hearings as promptly as we can, and we hope to expedite these nominations. There should not be a delay in filling vacancies on the Supreme Court of the United States. It is important that they be acted upon promptly, and that is exactly what we expect to do.

NOMINATION OF DANIEL A. MANION, OF INDIANA, TO BE U.S. CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT

Mr. DOLE. Mr. President, let me indicate in another matter, the President called me this morning to very strongly indicate his support for a nominee to the circuit court, Mr. Manion. I indicated to the President I would be bringing that nomination to the floor at the earliest possible time.

As I understand, minority views have not yet been flled, but hopefully will be filed soon.

I would like to dispose of that nomination before we commence the so-called July Fourth recess.

The President feels very strongly about this particular nominee. He gave me a lot of information, which will be available for the record, and which is already available about Mr. Manion's qualifications. The President feels strongly that Mr. Manion is well qualified and should be confirmed by the Senate. I hope that we can accommodate the President and the Senators from Indiana, who strongly support the nomination. Senator QUAYLE and Senator LUGAR have also made their views known to me.

I will, at the earliest possible time, bring that nomination to the floor.

TAX REFORM ACT OF 1986

The Senate resumed consideration of the bill.

The PRESIDING OFFICER (Mr. GRASSLEY). The distinguished Senator from New Mexico is recognized.

Mr. DOMENICI. Mr. President, I thank the Chair.

Mr. President, I shall take a few minutes this afternoon as we begin to wind up the tax bill, this monumental effort at reforming the American tax structure, to talk to the U.S. Senate about what I perceive to be a very serious problem.

I think we ought to all understand it as we move through completing our work on this major overhaul of the tax laws of this land. I do not come to the floor to in any way talk about, attack, or in any way complain about the new tax bill.

What I am going to assume, in my discussion with the U.S. Senate and with those who are interested in the fiscal policy of this land, is that, when we are finished with the tax bill over a 2- or 3- or 4-year period, the tax bill will be revenue neutral, and it will come out yielding the same amount of taxes that we now take from the American people for all of those things that the National Government provides for its citizens. Included in that overall big tax coffer are the taxes for Social Security and Medicare that make up what we ask the American people, the American working men and women, American corporations, all as taxpayers to pay into our tax coffers so we can run this Government of ours.

The purpose of my discussion today is to show the Senate the dramatic change that has occurred in the U.S. tax revenue base available to operate our Goernment on a day-to-day basis.

We hear a lot in this country with reference to 19 to 19.5 percent of our GNP coming to the U.S. Government by way of income taxes, corporate taxes, Social Security taxes, and those taxes imposed for the health care system called Medicare.

Some people say we got along with taxes at 18 or 19 percent of GNP 20 years ago, we ought to be able to get along with it now. Some would say we got along with 19 percent 10 years ago, we ought to get along with it now.

The purpose of this discussion today is to show the U.S. Senate and those who are interested why even though we got along with that 20 years ago and 15 years ago, we cannot get along with that amount of revenue any longer unless we are willing to live with deficits in the neighborhood of $160 billion to $200 billion.

I believe I can show the U.S. Senate in unequivocal terms that there is no way that the U.S. Government can maintain its posture on Social Security and Medicare which I understand the U.S. Senate, the U.S. House of Representatives, the President of the United States want to leave exactly as is. If we are going to leave those programs exactly as they are, and that is a given for now, and pay the interest payments that have now accrued that must be paid out of the National Treasury and insist that we have a tax base that is no more than 19 percent of our gross national product, I think I can convince the U.S. Senate that the only result will be deficits in the neighborhood of $160 to $200 billion.

Let me start with the simplest of charts. If you go back to 1955 and ask yourself what portion of the Social Security and Medicare taxes are as a percent of our gross national product, you will find that in 1955 it was slightly more than 1 percent. Now, if you then move up to 1985 and say, what portion of our gross national product is it now, it is now right at 6 percent.

Now, so everyone understands in 1955 we taxed our people and we paid for Social Security and Medicare, as Medicare phased in about here, we paid for that with just over 1 percent of our gross national product. One gets up around 1965 and you are at about 3 percent, and now we are at 6. The taxes for Social Security and Medicare are right up at 6 percent of the gross national product.

Now very simply so that everyone will understand the significance of each percent of GNP, let us use a round number. It is good enough for these discussions and reasonably accu-

share that with our colleagues. I think Senator DOLE serves as a very epitome of the grit and toughness which is needed in the face adversity if one is to overcome a personal handicap, and his very selfless participation in the creation of the Dole Foundation is but one more remarkable example of his strength and his tremendous leadership.

This foundation, since its inception in 1983, has aided lives all over America. I think last night's event underscores the importance of it all. It is a very unique foundation founded by a very unique person who serves us in such extraordinary ways as our leader.

With that, I join in the previous request and ask unanimous consent that the article from the New York Times of Monday, June 16, be printed in the RECORD.

(The article was printed earlier in today's RECORD.)

Mr. SIMPSON. Mr. President, I richly commend our leader for bringing this remarkable endeavor to the people of the United States who are so much less fortunate than we.

SUPREME COURT

Mr. SIMPSON. Mr. President, just very briefly, let me, while we are still waiting and dabbling in the mystic arts here, say something quite seriously, and that is with relation to the President's appointment of Justice Rehnquist to be the Chief Justice of the United States. There has been a great deal of discussion today of that. I think that is a remarkably fine appointment.

And I think that we are going to find that Justice Antonin Scalia will be a fine Supreme Court Justice. His accomplishments are extraordinary.

I will look forward as a member of the Judiciary Committee to participating in the confirmation of the appointment of the Chief Justice and the new Justice.

I certainly would be remiss if I did not just say a word about Chief Justice Burger whom I have come to know in my time here, a most extraordinary and delightful man—a man of good humor and warm spirit, and I say thanks to him for what he has done for this country.

He served with tremendous distinction and ability, with firmness and kindness and it has been a rich personal privilege to come to know him, to have visited with him in his chambers. He shall be greatly missed.

I say Godspeed to him and to his lovely wife Vera as they go forward to pursue the many things that they will enjoy in life. He is creative. He loves art and antiques and people. He is a cultured and civilized man.

I wish him well. To both of them we express our gratitude for a job very well done and very deeply appreciated by this country. God bless our Chief Justice as he goes on to new things in his life.

I thank you.

□ 1830

I suggest the absence of a quorum on behalf of the Senator from Ohio.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HARKIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Iowa.

Mr. HARKIN. Mr. President, I rise in support of the amendment offered by the distinguished Senator from Ohio. I cannot think of a worse time, nor can I think of worse circumstances under which we should try to repeal the FIRPTA law that was enacted in 1980.

Right now, under the committee bill, as it now stands, if a person in a foreign country wants to come in and buy U.S. farmland, that person can do so, realize a gain on the sale of that farmland, and not pay any taxes. But if a young farmer, a young person wanting to get into farming in America now wanted to go out and buy some land, realized a gain on it sometime later and wanted to sell it, then, under this bill, of course, that person would pay 27 percent taxes.

It seems rather odd to me that we are going to give this kind of a large tax break to foreigners who might want to come in and buy U.S. farmland. And we all know who those foreigners probably are. They are people with a lot of money. And we put in this law, this 30 percent withholding on the gain of a sale of real estate and farmland in 1980, specifically to keep our farmland from falling into the hands of foreign investors. And I believe that is a worthwhile goal.

Now, the Dear Colleague letter that came out asking us to keep this provision in the committee bill and to repeal FIRPTA asked us to repeal this because we need to have some investments in U.S. farmland. We need to bring in some foreign money.

And I heard the arguments made earlier here on the floor of the Senate that we indeed have to repeal this to bring foreign investments into farmland because then that would shore up the price of farmland, which we all know has fallen to disastrously low levels; that somehow this foreign investment would shore up the price of this farmland and that farmers would benefit from this because the farms that they now have, of course, the bottom would be shored up and we would not see this fall in land prices like we have seen over the last several years.

□ 1840

It is true. We have seen this fall in land prices. I can tell you right now that in my State of Iowa the last 4½ years, almost 5 years, we have seen over a 50 percent, almost 60 percent decline in the asset value of the farmland in Iowa over the last 5 years. We still have not seen the bottom. The price of farmland still continues to go down in the State of Iowa as I am sure it does in many States in the Midwest. So it is clear that we have a depressed situation in agriculture, and land prices are going down.

Let us examine this argument that somehow by repealing FIRPTA, repealing this 30 percent tax and letting a foreigner come in, buy farmland, not having any tax at all on the sale of that farmland, that somehow this is going to shore up the price of this farmland.

Well, I submit that is the worst thing we can do to shore up the price of farmland. The answer, the simple, straightforward answer to stopping the fall in land prices to our farmers is not to open the floodgates to foreign investment, but to get a better price for the commodities that those farmers grow.

You stop the fall in prices of corn, wheat, beans, cattle, and dairy and everything else, the fall in land prices is going to stop, too. The reason that the land is falling in price is because the price for commodities grown on that land has fallen to ridiculously low levels.

So really the answer to falling land prices is to get a better price for the commodities that are grown on that land. That can be done. All we have to do is modify the farm bill that was passed last year. I would bet anything as long as I am standing here today that prior to yearend we are going to see some changes in that farm bill, and I hope we will see the price of farmland start to come back up again, hopefully not in the too-distant future.

That is why I said at the beginning that the worst possible time to do away with FIRPTA is right now when land prices are at depressed levels. I mean they are at fire sale levels right now. To open up the gates, let foreign investors come in and buy at fire sale prices by telling them that any increase in the value of that land in the next year and two, you can turn around and sell it and there will not be any taxes. Yes. You are right. You repeal FIRPTA, you will get a lot of foreign investment in farmland. They will come in and buy it at fire sale prices. They will buy a lot of that farmland.

The last estimate I saw is we had something in the neighborhood of a quarter million acres of farmland right now in Iowa that is up for sale,

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SENATE—*Wednesday, July 30, 1986*

(Legislative day of Monday, July 28, 1986)

The Senate met at 10 a.m., on the expiration of the recess, and was called to order by the President pro tempore [Mr. THURMOND].

PRAYER

The Chaplain, the Reverend Richard C. Halverson, D.D., offered the following prayer:

Let us pray.

Lord God of truth and justice, lead the Senate through these crucial days when urgent issues and shortness of time combine to compound stress and strain. Grant that the powerful men and women who comprise this most powerful legislative body may function with maximum effectiveness and productivity and a minimum waste of time and energy. May individual power not be used to vitiate collective power. Protect the whole from being neutralized by any of its parts. May substance not be sacrificed to procedure and principle to political manipulation. Give to leadership special wisdom, strength and patience as they guide the ship of state through turbulent winds and heavy seas. Give to Senators the will and the way to minimize frustration and maximize accomplishment. Work Your will Lord, that truth and justice may prevail, in spite of us if necessary. For Thy sake and the welfare of the people. Amen.

RECOGNITION OF THE MAJORITY LEADER

The PRESIDENT pro tempore. The able and distinguished majority leader, Senator ROBERT DOLE, is recognized.

NOMINATION OF JUSTICE REHNQUIST

Mr. DOLE. Mr. President, I thank the distinguished Presiding Officer, the distinguished Senator from South Carolina, Senator THURMOND, the President pro tempore, who I know continues this morning at 10 o'clock on the nomination of Justice Rehnquist.

Let me indicate that his nomination is important to the President and important for the country and it deserves the prompt action it is receiving in the Judiciary Committee.

I had hoped there would be a spirit of bipartisanship but, having been there for a while yesterday and watched some of it on C-SPAN last night, there is already at least a little indication that some Members would rather apply a political litmus test to each and every nominee instead of an objective review based on merits. Fortunately, the President's candidate is so well qualified that the arguments we heard yesterday will not amount to a hill of beans.

But, in any event, this is a very serious matter. There should be serious review. There should be close scrutiny of the nominee's records. But I would suggest that we are not here to try Judge Rehnquist, or the Judiciary Committee. We are here to go into the cases, the decisions he has written. I do not believe that anybody on the Judiciary Committee has a hunting license, but I know there will be efforts to dredge up a lot of things that happened 25, 30 years ago. And I would assume that anybody could probably dredge up something about anyone that happened 25 or 30 years ago or less. But Justice Rehnquist, in my view, is well qualified.

I just hope that we can have a bipartisan look at this nominee. I know there are a number of Democrats on the committee who strongly support Justice Rehnquist. There are some who could not get Mr. Manion who are now out after Mr. Rehnquist—and I assume if they cannot get Mr. Rehnquist they will be out after Mr. Scalia—and who seem to have nothing more to object to than their political philosophy, making them, therefore, unsuited for the Court.

But I believe Justice Rehnquist will survive the interrogation, the questions. I believe that it was best stated by my colleague, Senator SIMPSON, who in a rather, I thought, candid way articulated what some nominees must face when they come before certain committees and certain members of certain committees.

So I would say to the Judiciary Committee, let us go ahead. Let us make certain everything is closely scrutinized. But I do not believe, and I do not believe many Americans believe, the litany that the distinguished Senator from Massachusetts related yesterday, that he is too extreme on this, and too extreme on that. What Senator KENNEDY was saying, in effect, was "He does not agree with me and, therefore, he is extreme." But I doubt that is the view of most Americans and I would hope, in the final analysis, we can bring this nomination to the floor after the recess and have appropriate debate and then move on to the nomination of Judge Scalia.

But it will be a give and take session. It should be. I assume things will crop up that should be addressed and I believe Justice Rehnquist is able to take care of that himself.

(Mr. DENTON assumed the chair.)

GRAMM-RUDMAN-HOLLINGS MODIFICATION

Mr. DOLE. Mr. President, I have been promised by the principals of Gramm-Rudman-Hollings that we are going to start voting around here shortly after noon. That would depend on the modification of the amendment, and those who are opposed to the amendment, I assume want to discuss it at some length and find out what is in the modification. So I am not certain what time or how soon after noon, but hopefully by early afternoon we will start voting.

I have indicated to the principals that, if that is not the case, it may be necessary to move on to something else, either to set aside their amendment and let other Members offer amendments—there are a number of Members on each side willing to offer amendments—and we would hope that we could start the action on that.

I have also, based on a request of the distinguished minority leader, instructed my staff to contact Senator NUNN and to contact Senator GOLDWATER or, in his absence, his staff director, to see if there is not some way to get a tight time agreement or at least a basis of one on the DOD authorization bill. It is important legislation. The House will take it up on August 4, which is next Monday. It will probably take a week in the House. And it contains a lot of very important areas, whether it is the SDI, whether it is AMB, whether it is the SALT resolution, whether it is the level of defense spending, so it is a vital piece of legislation.

So I hope that those who want to bring it to the floor would help us in every way they can. If we can get some reasonably tight agreement, then I am prepared, at the earliest opportunity, to bring that bill to the floor. So we may have some report later today for the minority leader and for others who feel strongly about that legislation.

Mr. BYRD. Mr. President, will the distinguished majority leader yield?

Mr. DOLE. I am happy to yield.

Mr. BYRD. Mr. President, I compliment the majority leader in stating to

● This "bullet" symbol identifies statements or insertions which are not spoken by the Member on the floor.

Senate on Thursday, July 31, in closed session, to conduct a business meeting, and to receive a briefing on intelligence matters.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON FOREIGN RELATIONS

Mr. HEINZ. Mr. President, I ask unanimous consent that the Committee on Foreign Relations be authorized to meet during the session of the Senate on Thursday, July 31, to hold a business meeting to consider State Department nominations; and S. 1917, to amend the Foreign Assistance Act of 1961, to provide assistance to promote immunization and oral rehydration, and for other purposes.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

Mr. HEINZ. Mr. President, I ask unanimous consent that the Committee on Commerce, Science, and Transportation be authorized to meet during the session of the Senate on Thursday, July 31, to hold a hearing on the issue of satellite signal scrambling.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADDITIONAL STATEMENTS

LIBERAL McCARTHYISM

● Mr. GOLDWATER. Mr. President, anyone reviewing the record objectively knows beyond a shadow of a doubt that Associate Justice Rehnquist meets every test of qualification for service as Chief Justice of the U.S. Supreme Court. He is a man of superior intelligence and proven excellence and his outstanding qualities have been recognized time after time by his colleagues of the bar. Twice he has received the American Bar Association's highest rating of professional competence, judicial temperament and integrity.

Yet, some of those at the extreme end of liberal philosophy persist in attacking Justice Rehnquist on the basis of his alleged insensitivity to their agenda. Yesterday, in its lead editorial, the Arizona Republic called this attitude "liberal bigotry." The editorial also called the opposition to the nomination of Mr. Rehnquist as "liberal McCarthyism" because his critics seem to be saying it is un-American to disagree with liberalism.

Mr. President, I believe the Arizona Republic has put its finger on the problem. I am concerned that the Senate is being asked to abuse the advice and consent power conferred upon us by the framers of the Constitution. I believe the exercise we are currently going through is a test of whether or not the Senate will take it upon itself to convert the confirmation power into a license to reject obviously qualified nominees at will because of their perceived political philosophy.

The road we are asked to take would distort the power the framers of the Constitution have conferred upon us in article II, section 2, by using it as a weapon for confrontation and open collision with the President's appointment power.

Certainly, Mr. President, we are expected to make an independent decision regarding the character and fitness of every nominee. But we are not to vote on the basis of a nominee's political beliefs. To the contrary, I believe the framers contemplated that the Chief Executive of the United States should be given broad discretion in making appointments. Alexander Hamilton stated in the Federalist paper No. 76 that it is "not very probable" that the President's nomination would often be overruled.

Let us remember that the President is chosen in the only nationwide election held in our country. Thus, the will of the people, as expressed in their choice of President, should be given due respect when acting on his nominations. This is particularly true where there is a nominee of such impeccable credentials for the office as Mr. Justice Rehnquist.

Mr. President, in recent weeks the Senate has been told by one wing of political thought that it should insist on the standard of "excellence" for all members of the Federal judiciary. William Rehnquist is eminently qualified under this standard or under any other rational test.

Mr. President, I ask that the text of the editorial published in the Arizona Republic may appear in the RECORD.

The editorial follows:

[From the Arizona Republic; July 30, 1986]

LIBERAL McCARTHYISM

The opposition to the nomination of William Rehnquist as chief justice of the United States is plainly ideological. Rehnquist is a conservative, which is all the reason some of his liberal detractors require to oppose his confirmation.

Objections raised thus far to Rehnquist's nomination are allegations that as a Republican party poll watcher 25 years ago he tried to prevent Phoenix minorities from voting, and ideological objections from the far left.

If Rehnquist was judged qualified to sit on the Supreme Court in 1971, he is qualified to be chief justice in 1986. It's that simple.

The chief justice is a *primus inter pares*, the first among equals, and casts only one vote. His sole power is to assign written decisions. *Any* justice already seated on the bench is qualified to hold the position.

Rehnquist categorically denied the charges of election tampering during his 1971 nomination hearings and he was confirmed on a 68-26 vote of the then Democrat-controlled Senate.

As California's attorney general, Earl Warren gave the Constitution short thrift, enthusiastically enforcing the World War II program in which thousands of American citizens of Japanese ancestry were deprived of their property and imprisoned without due process. If that dark episode in American history did not disqualify Warren from becoming chief justice 25-year-old partisan political recollections against Rehnquist certainly do not.

It is comical that the likes of Eleanor Smeal of the National Organization for Women call Rehnquist an ideological extremist. Smeal's real objection is not ideological extremism, but that Rehnquist is a conservative, for a far left ideological extremist would not be met with similar objections by NOW.

This liberal McCarthyism goes like this: The liberal agenda is identical to "the American way," and to disagree with liberalism is to advocate un-American ideas. It is liberal bigotry, pure and simple.

It is also an absurd idea that Rehnquist is disqualified because he regularly votes with the conservative minority against the liberal majority. Were that criterion forced on the presidency it would preclude any ideological change in the court by mandating majoritarian appointments, regardless of the political ideology of the president in office. Liberals would not stand for this were the ideological shoe on the other foot.

Just because the court has followed the path of liberal judicial activism for three decades does not mean the president cannot make appointments under the powers reserved to him in the Constitution which would shift the court toward a more conservative position.

Liberalism is not protected by the Constitution, nor is it entitled by right to control the Supreme Court indefinitely. Rehnquist should be confirmed without delay, and without petty partisan politics.●

THE VALIANT AFGHAN STRUGGLE

● Mr. HUMPHREY. Mr. President, during the long, tragic course of the brutal Soviet occupation of Afghanistan, many concerned legislators throughout the world have raised their voices in support of the valiant Afghan struggle. The bloodshed in Afghanistan cannot be stopped by materiel alone, although that is of critical importance. Accompanying this must be the roar of world public opinion and outrage. People and their governments worldwide must say loudly and in one voice that the continued occupation of Afghanistan and the genocide being waged on the Afghans will not be tolerated, and that the war will have an impact on the conduct of relations between the Soviet Union and the civilized community of nations.

This type of political and diplomatic pressure is an essential component of the overall effort to end the bloodshed in Afghanistan. National outrage has been accompanied by near unanimity in the United Nations, where the General Assembly has repeatedly condemned the Soviet presence there, voting last year by an unprecedented margin of 122 to 19, with 12 abstentions, to call for:

Indian health care providers. This new funding process known as the resource allocation methodology [RAM] is an attempt by the Indian Health Service to distribute funds on a more equitable basis.

Mr. President, while I support the Indian Health Service's general attempt to more equitably distribute funds I have concerns about several aspects of the process. RAM would make a number of radical changes in current IHS policy, all of which need to be studied carefully prior to implementation. For example, IHS proposes to offset 90 percent of Medicaid and Medicare collections against funding allocations for service units and areas, even where the costs of collection greatly exceed 10 percent. Another example is the proposal to distribute as much as 30 percent of IHS funds according to a health status indicator that is often criticized as severely flawed.

In an attempt to better inform tribes and tribal organizations about RAM and to seek tribal input, the Indian Health Service recently conducted a 4-day workshop on how RAM would be implemented. However, at that workshop the Indian Health Service unveiled a version of RAM that was radically different from the one described in previous meetings. To illustrate how radical the change was I will share some comparisons of how various service units would fare under the April RAM and the RAM that was presented at the workshop. Alaska, along with California and Oklahoma, for example would experience significant changes in funding levels under the April RAM as compared to the July RAM. While the IHS is attempting to seek tribal input, the tribes have no way of knowing whether the resource allocation of today will be anything like the methodology 4 months from now.

As a result of these developments, and of many discussions with Alaska Native groups, I have become firmly convinced that implementation of RAM must be postponed until the tribes and tribal organizations have the opportunity to study and comment on the proposed components of RAM which must be published in the Federal Register. Also, Congress must have the opportunity to scrutinize the methodology and to evaluate IHS' efforts to address the concerns of the Indian and Alaska Native people.

At my urging, the committee has included section 710 which would accomplish all of these requirements. It would require IHS to publish regulations on RAM, allow the opportunity for comment, and actively consult with tribes and tribal organizations.

Again, I emphasize that while I fully support the Indian Health Service's efforts to distribute funds on an equitable basis I believe that it is premature to implement RAM without adequate consultation with Indian and Alaska Native health providers.●

D'AMATO (AND OTHERS) AMENDMENT NO. 2277

(Ordered to lie on the table.)

Mr. D'AMATO (for himself, Mr. LAUTENBERG, Mr. WILSON, Mr. GRASSLEY, Mr. BOSCHWITZ, and Mr. KERRY) submitted an amendment intended to be proposed by them to the bill S. 2638, supra; as follows:

On page 59, between lines 3 and 4, insert the following new section:

SEC. 512. WEARING RELIGIOUS APPAREL NOT PART OF THE OFFICIAL UNIFORM

(a) IN GENERAL.—Chapter 45 to title 10, United States Code, is amended—

(1) by redesignating section 774 as section 775; and

(2) inserting after section 773 the following new section:

"§ 774. Wearing religious apparel

"(a) Except as provided in subsection (b), a member of the armed forces may wear an item of religious apparel if—

"(1) the wearing of the item of apparel is part of the religious observance of the religious faith practiced by the member; and

"(2) the item of apparel is neat, conservative, and unobtrusive.

"(b) The Secretary concerned may prohibit a member from wearing an item of religious apparel if the Secretary determines that the wearing of such item significantly interferes with the performance of the member's military duties.".

"(b) CONFORMING AMENDMENTS.—The table of chapters at the beginning of such chapter is amended—

(1) by redesignating the item relating to section 774 as 775; and

(2) by inserting below the item relating to section 773 the following new item:

"774. Wearing religious apparel.".

NOTICES OF HEARINGS

COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY

Mr. HELMS. Mr. President, I wish to announce that the Committee on Agriculture, Nutrition, and Forestry will meet on Thursday, August 7, 1986, at 9:30 a.m. in room SR-332, to continue the markup of amendments to the Federal Insecticide, Fungicide, and Rodenticide Act.

Please contact the committee staff at 224-2035 if further information is needed.

AUTHORITY FOR COMMITTEES TO MEET

SUBCOMMITTEE ON PUBLIC LANDS, RESERVED WATER, AND RESOURCE CONSERVATION

Mr. WARNER. Mr. President, I ask unanimous consent that the Subcommittee on Public Lands, Reserved Water and Resource Conservation of the Committee on Energy and Natural Resources be authorized to meet during the session of the Senate on Monday, August 4, to hold a hearing to consider: S. 485, to amend the Alaska National Interest Lands Conservation Act of 1980 to clarify the treatment of submerged lands and ownership by the Alaskan Native Corporation; S. 1330, to amend section 504 of the Alaska National Interest Lands Conservation Act to allow expanded mineral exploration of the Admiralty Island National Monument in Alaska, S. 2065, to amend the Alaska Native Claims Settlement Act to proved Alaska Natives with certain options for the continued ownership of lands and corporate shares pursuant to the act and for other purposes; and S. 2370, to allow the Francis Scott Key Foundation, Inc., to erect a memorial in the District of Columbia.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADDITIONAL STATEMENTS

THE NOMINATION OF JUSTICE REHNQUIST TO BE CHIEF JUSTICE

● Mr. SIMON. Mr. President, yesterday's New York Times editorial is as balanced and sensible a reflection on the dilemma which the Senate and the Nation face as any I have read.

The cloud should be cleared. And this administration should be doing everything it can to get rid of that cloud.

The Supreme Court is one place where there should be no question in the public mind about our dedication to truth and justice.

I ask that the New York Times editorial be printed in the RECORD.

The editorial follows:

[From the New York Times, Aug. 3, 1986]

THE PAST IN MR. REHNQUIST'S FUTURE

An embarrassing thing has happened to William Rehnquist on his way to confirmation as Chief Justice of the United States. His testimony has been contradicted, and his credibility severely undermined, by a highly effective witness before the Senate Judiciary Committee.

Ordinarily, even a distinguished lawyer's word would be no contest against that of a sitting Supreme Court justice. Ordinarily, too, a minor confrontation nearly a quarter of a century ago would have little bearing on a nominee's present qualifications. But the clash is such that senators can no longer address the nomination without resolving a long-festering question about Mr. Rehnquist's behavior with voters in Phoenix in November 1962—and his present representation of it.

Accused of harassing black and Hispanic voters when he was a young Republican campaigner, Justice Rehnquist has repeatedly denied even legally challenging any prospective voter. But James Brosnahan, a former Federal prosecutor, now testifies that he saw Mr. Rehnquist acting as a challenger among highly agitated voters at a Phoenix polling station in 1962. So have some other witnesses.

Mr. Brosnahan, an experienced trial lawyer, was the most effective witness, for what he didn't say as well as what he did. He emphasized that he did not personally

see Mr. Rehnquist challenge a voter. He said he and an F.B.I. agent were summoned to a largely Democratic district by citizens complaining that Mr. Rehnquist was annoyingly challenging their right to vote. Mr. Brosnahan said Mr. Rehnquist defended his conduct, but never denied that he had challenged voters.

This is no ordinary conflict of testimony. Democratic opponents of Mr. Rehnquist's appointment as Chief Justice consider the Phoenix episode part of a pattern of undiminished hostility toward minority rights, as subsequently recorded in the Justice's rulings. And they also question his veracity on other issues. Mr. Rehnquist was confronted with a 1952 memorandum that he drafted to defend the "separate but equal" doctrine in race relations. He has clung to the discredited claim that he was not expressing his views but those of his boss, the late Supreme Court Justice Robert Jackson.

All this would appear as only momentary and partisan commotion if Justice Rehnquist's own testimony to the committee had made him appear a distinguished candidate for America's leading judge. He might have disarmed the skeptics with masterful readings of the Constitution, as did Sandra Day O'Connor five years ago. But when asked his number one goal for the judiciary, he rehashed the languishing proposal of retiring Chief Justice Warren Burger for a new court, a junior Supreme Court to settle questions not important enough for the Justices themselves.

Asked to demonstrate some new sensitivity to civil rights, he gave only cramped interpretations of his backward-looking decisions in that field. Asked about his previous sworn testimony about challenging voters, he was evasively technical.

President Reagan has not helped his candidate by invoking executive privilege to deny the committee the memorandums on civil liberties that Mr. Rehnquist wrote as Assistant Attorney General in the Nixon Administration. Justice Rehnquist did not object to their disclosure, but someone must fear it.

Justice Rehnquist's confirmation as Chief is no longer so certain that arguments against him can be brazenly evaded. The doubts now raised should be embarrassing to Americans. Both the nominee and the Senate should want these factual disputes cleanly resolved. A Chief Justice can be less than inspiring or less than an ardent civil libertarian, but he cannot be less than a champion of truth.●

TRIBUTE TO RACHEL SNYDER

● Mr. RIEGLE. Mr. President, I rise today to pay tribute to a courageous young woman from Lake Orion, MI. Rachel Snyder took her own life when she jumped in front of a van with three children inside to prevent it from rolling into the lake.

Rachel Snyder was an inspiration to her community as she often looked after the children of friends as well as delivering medicine to the sick or shopping at garage sales to buy used clothes for the needy.

To Ms. Snyder's family, I would like to extend my warmest sympathy and condolences. In addition, I would like to insert the following article about Rachel Snyder which appeared in the Detroit News on July 25, 1986.

The article follows:

[From the Detroit News, July 25, 1986]

HARD-LUCK LAKE ORION FAMILY GRIEVES FOR HEROIC BABY-SITTER

(By Robert E. Roach)

Rachel Snyder loved children, but none more than the three children of a hard-luck Lake Orion couple she befriended two years ago.

"She simply loved our kids as if they were her own," 25-year-old Robert Clemens said Thursday in the driveway where Miss Snyder, 19, died beneath her father's van. She had run into the vehicle's path to stop it after it started to roll downhill toward the lake with Clemens' children—ages 4 months to 2½ years—inside.

"She became the sister I never had," said Clemens' wife, Cindy. "She would often stop by and watch the kids, just to let us get out of the house.

"We would go to Meijer's grocery shopping and she'd take care of the kids, putting then on the (mechanical) horse. She'd take me to the doctor or run us to the grocery store. She took us anyplace we needed.

"She would go out of her way to make us happy. And just last week we talked of her becoming a godparent to the children. She wanted to let us know she would take care of them if something ever happened to us."

The accident occurred about 10:15 a.m. Wednesday, an hour after Miss Snyder drove Clemens to St. Joseph Mercy Hospital in Pontiac to visit his wife. After a weekend of dizziness and nausea, Mrs. Clemens was hospitalized Tuesday for testing and treatment for possible spinal meningitis.

Clemens, who works part-time as a tree trimmer, doesn't drive because of an eye disability. His wife met Miss Snyder in night school two years ago.

Miss Snyder would visit the Clemens' modest home in Rustic Cabins, an aging lakefront resort on South Broadway in the Lake Orion business district.

"Rachel just took over the whole family like it was her own," said Shirley Jenkins, the Clemens' landlady.

Religion played a major role in Miss Snyder's life, according to family and friends. When Lake Orion teachers went on strike at the beginning of her junior year in high school, she enrolled in the Indianwood Christian Academy in Oxford, where she improved academically and developed a close relationship with Christ, said her father, David Snyder.

"Through all of this, there is absolutely no question where she is right now," he said. "We know she is with the Lord."

Cheryl Cooper, former youth director at New Hope Bible Church in Clarkston, said Miss Snyder cared about people, especially children.

"She was our assistant and whenever we had something for the little kids, Rachel was always there—making calls, organizing and seeing that everyone knew what money or food to bring," she said.

The van was owned by Miss Snyder's father. The woman had parked it about 75 feet from the lake and police estimate it traveled no more than 15 feet before stopping.

"It probably would have hit a couple of trees and not gone in the lake, but Rachel didn't know that and tried to stop it," said James Leach, Lake Orion police chief.

There were no witnesses, but police said one of the children might have shifted the van's transmission out of park.

In addition to her parents, Miss Snyder is survived by a brother and four sisters, three grandparents and her great-grandfather.

Funeral arrangements are by the Harold R. Davis Funeral Home in Auburn Hills. Visitation hours are from 3 to 5 p.m. and 7 to 9 p.m. today in the funeral home. Service will be at 11 a.m. tomorrow at the New Hope Bible Church in Clarkston.●

UNITED STATES-CANADIAN TRADE

● Mr. SYMMS. Mr. President, in the past 2½ years, I have attempted to highlight major problems in United States-Canadian trade. In efforts to secure fair trade in lumber with Canada, I have met with top officials of both governments, sponsored legislation calling for a tariff on Canadian lumber and cosponsored a bill redefining natural resource subsidies. I supported the initiation of negotiations with Canada to establish a free trade zone between the two countries, with the understanding that this free trade would also be fair. One of the principal trade irritants between the United States and Canada has been the deluge of Canadian softwood lumber in the American market. I've consistently maintained that this deluge is fueled by a Canadian stumpage subsidy.

The evidence is so persuasive that the Coalition for Fair Lumber Imports in May initiated action to obtain a countervailing duty on Canadian softwood lumber. This action is progressing. The International Trade Commission has returned a preliminary finding that the American industry has suffered injury. It is now up to the Department of Commerce to determine if a subsidy exists. If there has been any doubt that a subsidy exists, a series of articles in the Vancouver Sun should help clear up those doubts. These articles, written by Mr. Don Whitely, the Sun's business writer, speaks frankly about "Sympathetic Administration". "Sympathetic Administration"—which has been in effect for the past 5 years—means that the Canadian Government has purposefully bent its rules to benefit the industry by allowing less valuable wood to be left to rot, permitting larger areas to be clear-cut and relaxing required forestry practices. Such policies on the part of the Canadians give overwhelming proof that they intend to push their lumber production at the expenses of the U.S. lumber industry. It also shows that this is an issue which cannot be resolved by forming task forces for discussions with the Canadians. To protect its own interests, the United States must strictly enforce its trade agreements. I'm delighted that this administration has adopted a realistic, aggressive portion in its dealings with Canada.

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with certain components of the air defense program. I specifically urge the Army to press forward vigorously with the pedestal mounted Stinger program and with the command and control programs. The pedestal mounted Stinger is the system designed for rear area air defense and can be an important intermediate system for use in the forward combat zones. The command and control systems are the indispensable framework that will make the entire system work. This approach should enjoy much greater priority with the Army and DOD.

Together, these two components are the key to prompt, responsive, and capable air defense systems and will be the core of any comprehensive program. The Army should spend less of its time searching for Divad's replacement and more time getting on with these critical components to the air defense problem.

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Mr. President, I would conclude by noting that the bill reported by the Armed Services Committee has specific proposals for expedited procedures for acquisition of new systems. Under the label "defense enterprise programs," this bill establishes the framework for shorter, more responsive lines of authority and responsbility for program managers, and more stability in funding within DOD by Congress. This is a key feature of the recommendations of the Packard Commission.

I mention this, Mr. President, because I strongly support these initiatives, and I believe they are very well suited to use for the pedestal mounted Stinger program. I encourage the Army to look at this as a candidate system for designation as a defense enterprise program this year.

Mr. President, I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the role.

The assistant legislative clerk proceeded to call the roll.

Mr. WILSON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

CALIFORNIA JURIST SUPPORTS JUSTICE REHNQUIST

Mr. WILSON. Mr. President, many people have entered the fray over the nomination of Justice William Rehnquist to be Chief Justice. Unfortunately, despite his broad and distinguished record established over a 15-year tenure on the Court, some in the liberal community have labeled him "too conservative" to serve as Chief Justice; that he is "too extreme"; that he does not properly appreciate the rights of the individual as set forth in their view of constitutional guarantees.

To those who have uttered such criticisms, I commend the distinctly different views of a celebrated liberal jurist, one well known in my State. Those who are inclined to oppose Justice Rehnquist on those grounds would do well to read the views of a very well-known liberal jurist from California, State Supreme Court Justice Stanley Mosk.

Justice Mosk states that he would vote to confirm Justice Rehnquist as Chief Justice because "he is a thoroughly competent craftsman and a thoughtful legal scholar."

Mr. President, I ask unanimous consent that the Los Angeles Times article by Justice Mosk, which appeared on July 30, 1986, be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Los Angeles Times, July 30, 1986]

A LIBERAL FOR REHNQUIST—HIS FEDERALISM SERVED THE CAUSE OF INDIVIDUAL RIGHTS

(By Stanley Mosk)

My good friend Pat Brown, for whom I have the utmost respect and affection, put his foot in his mouth the other day. While advocating retention of all justices on the California Supreme Court regardless of their philosophy or political origin, the former governor confessed that he would oppose William H. Rehnquist's nomination as chief justice of the United States. Why? Because Rehnquist is too conservative. Inconsistent? Well, yes, Pat conceded with his characteristic and lovable candor.

I must respectfully disagree. If I were in the Senate, I would vote to confirm the nomination of Justice Rehnquist. Though I have often found fault with his conclusions, in my view he is a thoroughly competent craftsman and a thoughtful legal scholar. The concepts that he advances, though often not to my taste, deserve to be ventilated and discussed.

It is assumed that Rehnquist is a diehard reactionary whose philosophy is totally out of step with modern reality. A thoughtful appraisal of his opinions does not confirm that assumption, at least not all of the time.

The Warren court, perhaps encouraged by the civil-rights movement of the 1950s and '60s abandoned the previous pathetic approach to overt injustice in our society and elected to employ the federal Constitution to achieve a liberating effect in the areas of political opportunity, criminal justice and racial equality. The states were compelled to fall in line, often reluctantly.

The Burger court, however, appears to have abandoned the role of keeper of the nation's conscience. There have been numerous retreats in the use of the Constitution to advance individual rights.

As a result, states have faced a difficult choice. They could react to the ebb and flow of the tide on the Potomac, and also reduce protection of individual rights. Or they could abandon dependence on the federal Constitution, and employ state constitutions as authority for preserving expanded rights. Many states, including California, opted for the latter. Indeed, the California Constitution provides that "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."

Some conservative politicians, disturbed at the use of the state Constitution to provide greater individual rights than the high court required, used the initiative process to compel California courts to employ only the federal charter in criminal cases. Nevertheless, the principle of federalism is still adopted whenever possible, so that the federal Constitution sets the floor below which individual rights may not fall, but the state establishes the ceiling.

This problem came to the attention of Rehnquist and his colleagues in a significant context. Where two constitutional rights conflict, which is to prevail? If a few orderly persons seek signatures on political petitions in a privately owned shopping center and the owner seeks to bar them, this conflict arises. The citizens are asserting their freedom of speech and their right to petition the government for a redress of grievances. The shopping center's owner is defending his right to determine the use of his private property.

In the case of Robin vs. Pruneyard, the state Supreme Court said that the rights of the petition circulators should prevail as long as there was no interference with the business of the shopping center. The case went up to the federal Supreme Court.

In this conflict between free speech and private property rights, where was Rehnquist? Forthrightly on the side of free speech and, more significantly, in defense of the right of the states to define the limits, if any, on speech and related activity. His court, he wrote, "does not limit the authority of the state to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the federal Constitution." This was true federalism.

It was interesting that some of his colleagues took a more conservative approach. Justices Lewis F. Powell Jr. and Byron R. White asked: What if the speakers advocated views seriously antithetical to the owner, as, for example, Ku Klux Klan Spokesman invading a shopping center owned by a black? A provocative question, but fortunately that issue was not involved in the Pruneyard case.

In the recent session of the court, Rehnquist demonstrated his concern for the environment. In Japan Whaling Assn. vs. Baldridge, he joined with Justices Thurgood Marshall, William J. Brennam Jr. and Harry A. Blackman in a dissent that excoriated President Reagan's secretary of commerce for not enforcing congressional regulations concerning the protection of whales.

I could cite other examples of Rehnquist opinions that would satisfy, or at least not offend, traditional liberals like Pat Brown. But, if I did, I would be falling into his error of weighing competence on the basis of agreement with case results.

The bottom line is that William Rehnquist has the academic background and the judicial experience to justify his elevation to chief justice. The quality of his opinions amply demonstrates judicial competence.

Yes, Pat Brown, you were wrong. Liberals can support the confirmation of Justice Rehnquist

Mr. WILSON. I thank the Chair. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative called the roll.

provides for counseling and mental health services for AIDS patients and for those individuals who have a positive test for the AIDS virus. Case-management services also will be provided to ensure that such individuals are aware of, and are provided with the full range of, health care services. I commend my colleagues on the Senate Committee on Labor and Human Resources for solidifying and expanding this Nation's commitment to those who are in such serious need of health care. I urge my colleagues to join me in affirming this commitment.●

"ADOPT AN EAGLE NEST:" SAVING AN ENDANGERED SPECIES

● Mr. KASTEN. Mr. President, the protection of endangered species is one of the most honorable tasks a person or organization can undertake. Saving unique animals and plants from extinction is a responsibility that no one can afford to ignore.

Over the past decades, concerned citizens have banned together to form such groups as the National Wildlife Federation, the Wilderness Society, the Audubon Society, and others. These groups have worked hard to heighten public awareness of the responsibility we share to protect endangered species.

But, Mr. President, sometimes it is the small voices that energize the actions of many. I offer as an example a program in my home State of Wisconsin working to preserve the bald eagle.

It is ironic, and very sad, that the bald eagle, our national emblem since 1782, is in danger. The bald eagle was placed on the Federal endangered species list in 1972. In 1976, 43 States listed the bird as endangered, and five other States, including Wisconsin, identified the bald eagle as "threatened."

This magnificent bird of prey, once so plentiful along Wisconsin's waterways, had fallen victim to logging, agriculture, and summer resorts—activities that provide work and recreation for the people of the State.

Today there is a movement afoot to help bald eagles and humans coexist in Wisconsin. Called the Adopt an Eagle Nest Program, this movement to save the bald eagle is growing in Wisconsin and could go a long way toward preserving this special and historically significant species.

Adopt an eagle nest was developed by a seventh grade English teacher from Burlington, WI, a town of 8,500 in the southeast part of the State, who spends his summer in Winchester, a small town in the lakes region just south of the Wisconsin-Michigan border.

Gary Humphrey saw a picture in the Lakeland Times showing Wisconsin Department of Natural Resources workers putting osprey nests in trees. He thought it would be a good idea for his students to learn about endangered species.

What began as a classroom assignment has developed into a statewide project to save the bald eagle. Humphrey and his students campaigned for the school to spend $100 to "adopt" an eagles' nest. When the DNR received the $100 voted by the Burlington Junior High student council, Ron Nicotera, who heads the DNR's endangered species division, visited the school to offer his thanks.

The $100, he told the students, would help pay for surveys, the banding of young birds, the collection of specimens for contaminant analysis, care, and rehabilitation.

Inspired by what their donation meant to the survival of bald eagles in Wisconsin, the students then challenged other schools to match the Burlington offer.

Mr. President, more than $17,900 has been received by the Wisconsin DNR through the Adopt An Eagle Nest Program, and interest continues to grow. To help promote the campaign, the DNR has offered a special print of two adult eagles by Wisconsin nature artist, Richard Van Order, entitled "The Call of Freedom."

Participants in the Adopt An Eagle Nest Program receive a certificate of adoption, a status report, and a photograph of young eagles in a nest. The goal is to see 400 pairs of eagles nesting and producing young. This would represent a healthy population and would remove the bald eagle from Wisconsin's endangered list.

This is an important program for Wisconsin, an important program for the protection of an endangered species, and a wonderful example of how the interest, concern, and initiative of private citizens can help preserve the best of America.

I commend Mr. Humphrey, the students of Burlington Junior High School, and Wisconsin's Department of Natural Resources for their creative concern in protecting America's bald eagle.●

A LIBERAL FOR REHNQUIST

● Mr. HECHT. Mr. President, a good friend of mine, Mr. Northcutt Ely of Redlands, CA., has brought to my attention an editorial by California Supreme Court Justice Stanley Mosk. I agree wholeheartedly with Mr. Northcutt that this article, which appeared in the July 30, 1986 edition of the Los Angeles Times, is a fine statement in support of the nomination of Justice William Rehnquist for the position of Chief Justice of the United States. Accordingly, I ask that the article be included in the RECORD.

The article follows:

A LIBERAL FOR REHNQUIST: HIS FEDERALISM SERVED THE CAUSE OF INDIVIDUAL RIGHTS

(By Stanley Mosk)

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The Burger court, however, appears to have abandoned the role of keeper of the nation's conscience. There have been numerous retreats in the use of the Constitution to advance individual rights.

As a result, states have faced a difficult choice. They could react to the ebb and flow of the tide on the Potomac, and also reduce protection of individual rights. Or they could abandon dependence on the federal Constitution, and employ state constitutions as authority for preserving expanded rights. Many states, including California, opted for the latter. Indeed, the California Constitution provides that "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."

Some conservative politicians, disturbed at the use of the state Constitution to provide greater individual rights than the high court required, used the initiative process to compel California courts to employ only the federal charter in criminal cases. Nevertheless, the principle of federalism is still adopted whenever possible, so that the federal Constitution sets the floor below which individual rights may not fall, but the state establishes the ceiling.

This problem came to the attention of Rehnquist and his colleagues in a significant context. Where two constitutional rights conflict, which is to prevail? If a few orderly persons seek signatures on political petitions in a privately owned shopping center and the owner seeks to bar them, this conflict arises. The citizens are asserting their freedom of speech and their right to petition the government for a redress of grievances. The shopping center's owner is defending his right to determine the use of his private property.

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long as there was no interference with the business of the shopping center. The case went up to the Federal Supreme Court.

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It was interesting that some of his colleagues took a more conservative approach. Justices Lewis F. Powell, Jr. and Byron R. White asked: What if the speakers advocated views seriously antithetical to the owner, as, for example, Ku Klux Klan spokesman invading a shopping center owned by a black? A provocative question, but fortunately that issue was not involved in the Pruneyard case.

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The bottom line is that William Rehnquist has the academic background and the judicial experience to justify his elevation to chief justice. The quality of his opinions amply demonstrates judicial competence.

Yes, Pat Brown, you were wrong. Liberals can support the confirmation of Justice Rehnquist.●

NAUM & INNA MEIMAN. PERSISTENTLY PERSECUTED

● Mr. SIMON. Mr. President, Naum and Inna Meiman are Soviet Jews who desperately want to emigrate to Israel. The Meimans have applied for exit visas several times, but the Soviet Government repeatedly refuses their requests.

The Soviets claim that because of classified work he once performed, Naum was privy to state secrets. Naum's calculations, however, were completed over 30 years ago. They are, in fact, long since outdated and well publicized. Even more ridiculous is the Soviets's denial to emigrate to Inna so she may obtain medical treatment for cancer.

The Meimans are good and caring people whose basic human rights have been denied by the Soviet Government based on trumped up charges. The Meimans have not committed any crime, yet the Soviets treat them like criminals and hold them captive in Moscow.

The Soviet Government has persistently persecuted the Meimans since they first filed emigration papers. Naum and Inna have been subjected to constant harassment and torment by the secret police. The Meimans home has been ransacked, their telephone has been disconnected, and much of their mail has been confiscated.

The Soviets must recognize that their harassment and denial of human rights will not be tolerated, and we shall never relent in our efforts on behalf of the refuseniks. As persistently as the Soviets deny the Meimans' basic rights, the more determined their friends around the world are in seeing them released.

I strongly urge the Soviet Government to allow Naum and Inna Meiman to emigrate to Israel.●

RETIREMENT OF BATES ELLIS: A DEDICATED PUBLIC SERVANT

● Mr. SASSER. Mr. President, I wish to pay tribute to Bates Ellis, who is retiring this year after 32 years of outstanding service as register of deeds for Robertson County, TN. Bates' commitment to his job and his community is a shining example that all public servants should look to for guidance.

In addition to serving his community for over three decades as an elected official, Bates has taken an active role in volunteer organizations. He has served with distinction as the president of the Tennessee Registers' Association for the past year. He has served as a member of the board of directors of the Senior Citizens of Springfield, worked as a member of his local Lion's Club for 23 years and been an active supporter of amateur sports in his community.

Bates' service to his community extends to his life in church as well. He has been a member of the First Baptist Church of Springfield since 1945. He has served the church as deacon since 1958 and secretary for 6 years.

Mr. President, the highest compliment that can be paid an individual is the respect of one's neighbors. Bates Ellis' lengthy tenure in public office speaks volumes about the respect he generated. Being elected to the same public office for eight terms is a tribute to his professional ability and an acknowledgment of the high esteem he is accorded by his neighbors.

Bates Ellis has done more than serve his community well. He has set a fine example for all of us who hold public office. I pay tribute to his outstanding service to his community and wish him well.●

□ 2330

NATIONAL DEFENSE AUTHORIZATION

Mr. SIMPSON. Mr. President, I want to commend the managers of the bill we are working on, Senators GOLDWATER and NUNN, and all Senators for the progress made today. I do hope, indeed, we can continue the good progress tomorrow. It is a necessary thing for us.

In the morning the leader will be inquiring of the Democratic leader to discuss delaying or vitiating tomorrow's cloture votes. He will be discussing that with the minority leader.

PROVIDING EMERGENCY ASSISTANCE TO FARMERS AND RANCHERS IN 1986

Mr. SIMPSON. Mr. President, after conferring with the Democratic leader, I ask that H.R. 5288, a bill to provide emergency assistance to farmers and ranchers adversely affected by natural disasters in 1986, which is at the desk, be read the first time.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

A bill (H.R. 5288) to provide emergency assistance to farmers and ranchers adversely affected by natural disasters in 1986.

AUTHORIZING REPRESENTATION BY SENATE LEGAL COUNSEL

Mr. SIMPSON Mr. President, I send a legal counsel resolution to the desk on behalf of Senator DOLE and Senator BYRD and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

A resolution (S. Res. 460) to direct the Senate legal counsel to represent Senator WILSON and Robert White and to authorize testimony in the matter of *Smith* v. *Ellis, et al.*

The PRESIDING OFFICER. Without objection, the Senate will proceed to its immediate consideration.

The Senate proceeded to consider the resolution.

The PRESIDING OFFICER. The question is on agreeing to the resolution.

The resolution (S. Res. 460) was agreed to.

The preamble was agreed to.

The resolution, with its preamble, reads as follows:

S. RES. 460

Whereas, in the matter of *Smith* v. *Ellis, et al.*, Misc. No. 175-86, pending in the Superior Court of the District of Columbia, one of the parties has obtained a subpoena for the deposition of testimony of Robert White, Administrative Assistant to Senator Pete Wilson, and for the production of documents by him at the deposition, and another of the parties has stated an intention to request a subpoena for the deposition testimony of Senator Wilson;

Whereas, pursuant to sections 703(a) and 704(a)(2) of the Ethics in Government Act of 1978, 2 U.S.C. 288b(a) and 288c(a)(2) (1982), the Senate may direct its counsel to represent Members and employees of the

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On page 14, line 21, delete $160,180,000 and insert in lieu thereof, $158,680,000.

DOLE AMENDMENT NO. 2790

Mr. DOLE proposed an amendment to the bill (H.R. 5233), supra; as follows:

On page 54, line 12, strike out "$41,000,000" and insert in lieu thereof "$36,500,000".

On page 54, between lines 16 and 17, insert the following:

For making a grant to the Kansas State University located in Manhattan, Kansas, to enable the Kansas State University to establish the Kansas Educational Satellite Video Communications Center in order to produce and disseminate television programming in subject areas of local, regional, national, and international importance, $4,500,000 to remain available until expended.

DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES APPROPRIATION ACT, 1987

DIXON AMENDMENT NO. 2791

(Ordered to lie on the table.)

Mr. DIXON submitted an amendment intended to be proposed by him to the bill (H.R. 5234) making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1987, and for other purposes; as follows:

Beginning on page 47, line 20, delete the linetype through page 48 line 2.

DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, EDUCATION, AND RELATED AGENCIES APPROPRIATION, 1987

DOLE AMENDMENT NO. 2792

Mr. DOLE proposed an amendment to the bill (H.R. 5233), supra; as follows:

At the end of the bill, add the following:

SEC. . Notwithstanding section 223(b) of the Trade Act of 1974 (19 U.S.C. 2273(b)), the certification made under section 223(a) of such Act on August 29, 1986, in response to a petition for trade adjustment assistance filed on April 23, 1986, by a group of workers of a firm that produces cardiopulmonary surgical devices and plastic administration sets shall apply to any worker of such firm whose last total or partial separation from such firm occurred on or after March 15, 1985.

PLACEMENT OF COMMEMORATIVE WORKS IN THE DISTRICT OF COLUMBIA

McCLURE AMENDMENT No. 2793

Mr. SIMPSON (for Mr. McCLURE) proposed an amendment to the bill (H.R. 4378) to provide standards for placement of commemorative works on lands administered by the National Park Service in the District of Columbia; as follows:

On page 16, line 8, strike "Natural elements" and insert in lieu thereof "Landscape features of commemorative works".

On page 17, line 6, strike "paid" and insert in lieu thereof "donated".

On page 18, line 3, strike "such moneys shall not be subject to deferral or rescission under the Budget Impoundment and Control Act of 1974, and".

On page 18, line 6, strike "Further, the funds shall not be subject to sequestration under the requirements of Public Law 99-177."

NOTICES OF HEARINGS

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

Mr. ROTH. Mr. President, the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, will hold a hearing on emerging criminal groups—Nigerian.

The hearing will be held on Wednesday, September 17, 1986, at 9:30 a.m. in Senate Dirksen 342. For further information please contact Daniel F. Rinzel or Howard L. Shapiro of the subcommittee staff at 224-3721.

COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY

Mr. HELMS. Mr. President, I wish to announce that the Committee on Agriculture, Nutrition, and Forestry, will hold a hearing to discuss the current financial condition of the Farm Credit System.

The hearing will begin at 10:30 a.m. on Wednesday, September 17, 1986, in SR 332.

For further information, please contact Ron Phillips of the committee staff at 224-6901.

AUTHORITY FOR COMMITTEES TO MEET

SELECT COMMITTEE ON INTELLIGENCE

Mr. WEICKER. Mr. President, I ask unanimous consent that the Select Committee on Intelligence be authorized to meet during the session of the Senate on Wednesday, September 10, in closed session, to hold a hearing on intelligence matters.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

Mr. WEICKER. Mr. President, I ask unanimous consent that the Committee on Environment and Public Works be authorized to meet during the session of the Senate on Wednesday, September 10, to hold a hearing to consider S. 2340, the Oil Pollution Liability and Compensation Act of 1986.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON GOVERNMENTAL AFFAIRS

Mr. WEICKER. Mr. President, I ask unanimous consent that the Committee on Governmental Affairs be authorized to meet during the session of the Senate on Wednesday, September 10, to hold a hearing to consider the nomination of John Agresto, to be Archivist of the United States.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

Mr. WEICKER. Mr. President, I ask unanimous consent that the Committee on Commerce, Science, and Transportation be authorized to meet during the session of the Senate on Wednesday, September 10, to conduct a hearing on S. 2565, the Federal Telecommunications Policy Act of 1986.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADDITIONAL STATEMENTS

COST ESTIMATE OF HENRY'S FORK OF THE SNAKE RIVER

● Mr. McCLURE. Mr. President, with regard to S. 2635, a bill to protect the integrity and quality of certain reaches of the Henry's Fork of the Snake River, ID, and for other purposes, I request that the Congressional Budget Office's estimate of the costs of this measure be printed in the RECORD at this point. The cost estimate was not available at the time the report was filed.

The cost estimate follows:

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, DC, August 15, 1986.

Hon. JAMES A. McCLURE,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2635, a bill to protect the integrity and quality of certain reaches of the Henry's Fork of the Snake River, Idaho, and for other purposes, as ordered reported by the Senate Committee on Energy and Natural Resources, August 14, 1986. CBO expects that this bill would result in no cost to the federal government, or to state or local governments.

The bill would prohibit the Federal Energy Regulatory Commission (FERC) from taking any further steps toward authorizing hydropower projects on a specific portion of Henry's Fork of the Snake River, Idaho. The prohibition established in the bill does not apply to the application for a FERC license for the Island Park Dam Hydropower project, or to the relicensing of the Island Park project. The prohibition also does not apply to relicensing of the Ponds Lodge hydropower project.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

RUDOLPH G. PENNER.●

THE NOMINATION OF JUSTICE WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

● Mr. METZENBAUM. Mr. President, the Senate will begin debate on the

nomination of Justice William H. Rehnquist to be Chief Justice of the United States very soon. In order to provide information for each Senator to consider in connection with this nomination, I ask that the following documents be printed in the RECORD:

LAIRD VERSUS TATUM

First. Letter from Prof. Stephen Gillers, New York University School of Law.

Second. Letter from Prof. Christopher H. Pyle, Mount Holyoke University.

Third. Letter from Prof. Floyd Feeney, University of California, Davis, and Barry Mahoney, attorney, and accompanying analysis.

Fourth. Letter from law professors from around the country.

RESTRICTIVE COVENANT

First. Legal Times article of August 4, 1986.

Second. Letter from Justice Rehnquist, dated August 4, 1986, with attached letter of July 2, 1984, from David Willis.

ETHICAL ISSUES REGARDING TRUST

First. New York Times article of August 15, 1986.

Second. Los Angeles Times article of August 2, 1986.

Third. National Public Radio interview with Harold Dickerson Cornell of August 27, 1986.

Fourth. Letter from Prof. Stephen Gillers, New York University School of Law.

The material follows:

NEW YORK UNIVERSITY
SCHOOL OF LAW,
New York, NY, September 4, 1986.

Hon. HOWARD M. METZENBAUM,
U.S. Senate, Washington, DC.

DEAR SENATOR METZENBAUM: Your office has requested my opinion regarding the ethical propriety of certain conduct of William Rehnquist, currently a Justice of the United States Supreme Court whom President Reagan has nominated to be Chief Justice of the United States.

I am a professor of law at New York University, where I have been teaching since 1978. Prior to that, I was in the private practice of law for nine years and a law clerk to a United States District judge for one year. I teach professional and judicial ethics. I have written scholarly articles on the subject and articles for the popular press as well. I am also co-author of a casebook in professional responsibility entitled *Regulation of Lawyers: Problems of Law and Ethics.* I have served as an expert witness in several tribunals on issues of professional legal ethics. From 1980–83, I was a member of the lawyer disciplinary committee in Manhattan. In 1979–82, I was a member of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York.

The conduct about which you inquire is the decision of Justice Rehnquist to participate in the case of *Laird v. Tatum*, 408 U.S. 1 (1972), a decision he defended in a memorandum opinion reported at 409 U.S. 824 (1972).

In *Laird*, the Supreme Court held that the plaintiffs lacked standing to challenge what they alleged to be unconstitutional army surveillance of the legal activities of American citizens. The Court did not address the merits of the claim, nor was a trial necessary to determine whether the plaintiffs' alleged facts were true. The plaintiffs were not entitled to have the facts determined because they lacked the injury necessary to give them the right to invoke federal jurisdiction under Article III of the Constitution. The Court held that their claim of a subjective "chill" of their exercise of constitutionality protected rights could not "substitute for a claim of specific present objective harm or a threat of specific future harm." 408 U.S. at 13–14.

Although Chief Justice Burger did recount "facts" in his majority opinion, and although these "facts" were contested by plaintiffs and had not been determined at a trial, nevertheless, the asserted facts were analytically unnecessary to the majority's conclusion that the plaintiffs lacked standing.

Justice Rehnquist and three other justices joined the Chief Justice's opinion. The case was decided five to four. Had Justice Rehnquist recused himself, the lower court's decision would have been affirmed by an equally divided Court and discovery would have proceeded in the district court. The affirmation would have had no precedential value.

Laird was decided June 26, 1972. Justice Rehnquist's decision not to recuse himself was published October 10, 1972.

Three reasons appear why Justice Rehnquist ought not to have participated in the *Laird* case. Two have been raised at his confirmation hearings. A third reason, in my opinion, is most compelling of all and makes Justice Rehnquist's participation especially inappropriate.

Some have suggested that Justice Rehnquist should not have participated in *Laird* because in March 1971, as Assistant Attorney General, Justice Rehnquist testified before the Senate Constitutional Rights Subcommittee (the Ervin Committee) and expressed as facts some of the "facts" later recounted by the Chief Justice in his majority opinion in *Laird* and the accuracy of which the plaintiffs were attempting to challenge. While I do not applaud this action, I discount its seriousness because, as stated above, the facts did not play an analytically important role in the resolution of the case.

Some have also pointed to the fact that at the Ervin Committee hearings Justice Rehnquist had specifically addressed the legal issue in *Laird* (which was then pending in the District of Columbia Court of Appeals.) Mr. Rehnquist gave the Ervin Committee his view that the plaintiffs lacked standing. Later, in his opinion refusing to recuse himself from ruling on the very same standing issue with the same case came before the Supreme Court, Justice Rehnquist chose not to quote the statement to the Ervin Committee in which he had provided his view on the standing issue. Instead, he mischaracterized his colloquy with the Chairman of the Committee as "a discussion of the applicable law."

It was not such a discussion. Mr. Rehnquist gave the Ervin Committee his opinion on the way the law of standing should apply to the facts of the case that later came before him as a Justice. Justice Rehnquist told the Ervin Committee that his "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."

In my view, any person who has given his opinion of what a particular rule of law requires in a particular context—here the law of standing in the context of the *Laird* pleadings—cannot properly sit as a judge or justice charged with applying that rule of law in that context. This is fundamental and Justice Rehnquist's decision to sit was fundamentally wrong.

I reach this conclusion based on Section 455 of the Judicial Code, as it read at the time Justice Rehnquist joined in the majority opinion in *Laird* v. *Tatum;* on the basis of the Canons of Judicial Ethics, which were in existence when *Laird* was decided; and on the basis of the Code of Judicial Conduct, the final form of which was available to Justice Rehnquist at the time of the *Laird* decision and which the A.B.A. had formally adopted as of the time of Justice Rehnquist's denial of the motion to recuse himself.

Let me emphasize that I believe that a person who, before appointment to the bench, ventures a view on the meaning of a legal rule in general may therefore properly sit in judgment in a case where that rule must be applied to specific facts. But this is not what Justice Rehnquist did. Justice Rehnquist, as a witness before the Ervin Committee, did not simply express his general view of the standing principle. Rather, he applied his view of that principle to a particular case and reached a conclusion that there was a lack of standing in that case. Later, as a Justice, he participated in a decision dismissing the same case because of the same conclusion.

Third, and most egregious, Justice Rehnquist should have recused himself in *Laird* because he was personally at risk if the Court, without his participation, were to affirm the lower court decision by an equally divided vote. In other words, by voting in *Laird v. Tatum*, Justice Rehnquist violated the first principle of disinterested judging—he became a judge of his own cause. However—and this compounds the misconduct—the litigants and the public were unaware of Justice Rehnquist's personal stake in the outcome of the *Laird* case, and Justice Rehnquist did not reveal this stake when he denied the recusal motion.

It was apparently not until 1974 that the nation learned that as Assistant Attorney General Mr. Rehnquist had participated in defining the scope of the army's domestic surveillance of civilians. Among the documents published by the Ervin Committee at that time was a memorandum by Robert E. Jordan, III, General Counsel of the Army, and a copy of a draft memorandum to the President, dated March 25, 1969, prepared by William Rehnquist. These documents and others published by the Ervin Committee reveal Justice Rehnquist's critical role in fashioning the plan for the very military conduct challenged in *Laird.*

To see why Justice Rehnquist had a personal stake in avoiding an affirmation of the lower court's opinion in *Laird*, consider what would have happened if *Laird* had been affirmed. The case would have proceeded to discovery. The documents that did not come to light until 1974, and perhaps other documents, would have been obtained by the plaintiffs. Justice Rehnquist's involvement in the army surveillance plan would have been ascertained. Plaintiffs'

counsel would likely have sought to depose Justice Rehnquist. Depending on what the facts revealed, Justice Rehnquist could have been named as a defendant and sued for money damages. The Supreme Court's earlier decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), would have permitted just such a lawsuit.

By assuring with his swing vote that the case would go no further, Justice Rehnquist also assured that his participation in the creation of the challenged plan would go undiscovered and that he would avoid exposure to civil liability.

Justice Rehnquist's conduct is a clear violation (i) of the prohibition in Section 455 of the Judicial Code (as it read in 1972) against a justice or judge participating in "any case in which he has a substantial interest;" (ii) of the prohibition in Canon 29 of the Canons of Justicial Ethics against "performing any judicial act when his personal interests are involved;" and (iii) of the prohibition in the Code of Judicial Conduct against participating in a proceeding where the judge's "interest . . . could be substantially affected by the outcome of the proceeding." The Court has very recently and unanimously reaffirmed these established principles. *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986).

The fact that Justice Rehnquist chose not to reveal his role in developing the program challenged in *Laird*, thereby denying the plaintiffs a chance to argue that this participation required disqualification, compounds his impropriety.

In conclusion, because Justice Rehnquist had previously expressed an opinion on how the legal requirement of standing should operate in the case of *Laird v. Tatum*, it was improper for him to participate in an opinion that applied the standing rule in that very case. Because Justice Rehnquist was a potential defendant in the event of an affirmation of *Laird v. Tatum*, and had financial and professional exposure, it was improper for him to participate in a decision to reverse the case.

Sincerely yours,

STEPHEN GILLERS,
Professor of Law.

MOUNT HOLYOKE COLLEGE,
DEPARTMENT OF POLITICS,
South Hadley, MA, August 31, 1986.

Hon. HOWARD M. METZENBAUM,
Judiciary Committee, U.S. Senate, Washington, DC.

DEAR SENATOR METZENBAUM: From what I can gather from news reports of the Rehnquist hearings, you have been concerned with the ethics of his vote in the case of *Laird v. Tatum*. Accordingly, I am writing to add some information to your understanding of that vote.

First, I should explain the source of my knowledge. I helped to organize that case, which was based on information I had learned while a captain in Army intelligence. I testified about the surveillance before Senator Ervin's Subcommittee on Constitutional Rights in February 1971, and was hired by that subcommittee between 1971 and 1974 to write its two book-length reports on the Army's surveillance. I also wrote my doctoral dissertation on the subject. It is scheduled for publication this year by Garland Press.

According to the New York Times of August 25, the chief unanswered question regarding Justice Rehnquist's 1972 vote in *Laird* is whether he prejudged the case while testifying at the Ervin hearings in March 1971 as a Justice Department lawyer.

In my opinion, the ethical violation was much worse than that. Mr. Rehnquist not only prejudged the legal merits of *Laird;* he served as a custodian of evidence in that case. That evidence, computer printouts from the Army's files on civil rights and anti-war activists, were sent to the Justice Department by the Army in March 1970 so that a "pending litigation" excuse could be involved to prevent them from being subpoenaed by Senator Sam J. Ervin's Judiciary Subcommittee on Constitutional Rights.

At Justice Rehnquist's confirmation hearing last July 30, Senator Leahy asked him: "Did you have personal knowledge of the disputed evidentiary facts in *Laird*?" He replied "No." The Senator asked the question again, and again Justice Rehnquist said "No." I find this denial difficult to believe, for, while writing the Ervin committee's reports in the spring of 1971, I went to Mr. Rehnquist's office to inspect the computer printouts. They filed a large shopping cart.

The files were at the Justice Department in March 1971 when he prepared to defend the legality of the surveillance before Senator Ervin's subcommittee. Is it reasonable to believe that Mr. Rehnquist did not look at them before assuring the subcommittee that the surveillance that produced them was not unconstitutional? Even if he did not look at those files, his possession of them made him a potential witness (or deponent) in *Laird*, as the files turned out to be incomplete.

But the most unethical part of Justice Rehnquist's vote in *Laird* is not that he prejudged the case or that he had custody of the evidence as a lawyer in the "firm" which represented the defendants in both Congress and the courts. Much worse is the fact that he had a substantial personal and political interest in preventing the lawsuit from going forward.

As Assistant Attorney General, Mr. Rehnquist was part of the leadership group which decided, in the spring of 1969, to keep the Army's 1,500 plainclothes agents monitoring civilian politics. In March of that year, the Army's civilian leadership had tried to get their agents out of the surveillance business by transferring all responsibility for it to the FBI. Their reason: they had learned that the Army agents were not just passive recipients of FBI reports, but were conducting their own covert operations. They knew the "flap potential" of such activity, and wanted to get the Army out of it before it embarassed them personnally.

The Army's request went to Deputy Attorney General Richard G. Kleindienst and his protege William H. Rehnquist. However, their administration was determined to intensify, not curb, domestic political surveillance. Mr. Rehnquist's draft memorandum of March 25, 1969, "clarifying" the surveillance policy would have expressly retained the military's surveillance, although under the Attorney General's direction. The final memorandum prepared for Attorney General Mitchell was more circumspect. By authorizing surveillance by unspecified intelligence agencies, it left the Army's operation intact until I disclosed its existence in an article in the January 1970 issue of the Washington Monthly.

I find it difficult to reconcile Justice Rehnquist's participation in that decision with his statement, in writing, to Senator Mathias, in which he said: "I have no recollection of any participation in the formulation of the policy on the use of the military to conduct surveillance or collect intelligence concerning domestic civilian activities." That is precisely what he did with his draft memorandum of March 25, 1969. It would also seem probable that he helped to write the final memorandum signed by Attorney General Mitchell in April of that year, since that was the function of his office.

Intensifying the government's surveillance of civil rights and anti-war activists was a top priority of the Justice Department and the White House throughout 1969 and 1970. It is inconceivable that Mr. Rehnquist, as head of the Office of Legal Counsel, was not involved in its development. It was his task to prepare a legal rationale for these covert activities, which he did by inventing a doctrine of "partial martial law." The Assistant Attorney General with whom he worked on these matters was Robert Mardian, who was later convicted for his role in the Watergate affair.

Yet when Senator Leahy asked Justice Rehnquist "did you have knowledge about the military's domestic surveillance policy?," he replied: "I had—if you would consider information obtained in the course of preparing for the May Day demonstrations, which did involve some activity, I suppose you could say yes."

This is a curious answer. The May Day demonstrations occurred in 1971 and had nothing to do with *Laird v. Tatum* or the surveillance activity it challenged. Indeed, they occurred after Mr. Rehnquist and Mr. Mardian had assured the Ervin subcommittee (in March 1971) that the Army's surveillance had ended. By the time the May Day protest occurred, the Army's surveillance policy had been front page news, off and on, for 14 months. (One NBC-TV documentary about it was seen by 9.5 million people.) If Justice Rehnquist is to be believed, he has forgotten all that public controversy and all of the strategy sessions it generated within the Justice Department. He has also forgotten the Army's request and his own memorandum, one of the first he wrote as a new assistant in Washington.

If the plaintiffs in *Laird* had been permitted to go forward with pre-trial discovery, it is very possible that they would have discovered the role played by Mitchell, Kleindienst, and Rehnquist, in contmuing the surveillance in 1969. If they had, he might have been called as a witness (or to give a deposition) in the case about those decisions, as well as the missing computer printouts. They might also have discovered the 1970 Huston Plan, whereby the Nixon administration sought to commit the FBI, the CIA and military intelligence, in writing, to conducting admittedly illegal surveillance operations. Had that plan been disclosed during the summer of 1972, while the initial investigations of the Watergate burglary were underway in Congress, the administration's responsibility for those (and related) illegal activities might have been more fully disclosed before, rather than after, the 1972 elections.

But Justice Rehnquist blocked this inquiry in a court decision that was rendered in June 1972, just nine days after the Watergate burglary.

I hope this information is of use to you. If I can be of further assistance, I can be reached at (413) 532-3627.

Sincerely,

CHRISTOPHER H. PYLE,
Professor.

SEPTEMBER 5, 1986.

HON. STROM THURMOND,
The Judiciary Committee,
U.S. Senate,
Washington, DC.

DEAR SENATOR THURMOND: Enclosed is a memorandum concerning Justice Rehnquist's participation in *Laird* v. *Tatum*, a copy of which is being sent to each member of the Judiciary Committee. This submission has been prompted by two recent developments: (1) the release of information indicating that Mr. Rehnquist transmitted a memorandum to the Attorney General in March 1969 dealing with the Army's role in collection of intelligence data on civilians; and (2) Justice Rehnquist's responses to questions from Senator Mathias indicating that he had no recollection of the March 1969 memorandum and could not recall any participation in the formulaton of policy concerning military surveillance of civilian activities.

Under the agreement between the Judiciary Committee and the Justice Department following the close of the hearings last month, the contents of Mr. Rehnquist's March 1969 memo were to be treated as confidential. However, that memorandum and other relevant documents are included in the record of public hearings before Senator Ervin's Subcommittee on Constitutional Rights in 1974.

A detailed review of these and other publicly available records raises serious questions about the accuracy and candor of Justice Rehnquist's public statements and about the legality and propriety of his participation in the case. This review, based on public records and in large part on information not publicly available at the time of *Laird* v. *Tatum*, indicates the following:

1. Mr. Rehnquist was involved in issues relating to military surveillance of domestic political groups throughout his career in the Justice Department. Although acknowledged neither in his 1972 recusal memorandum nor his 1986 confirmation hearing testimony, his office played a critical role in drafting the 1969 Presidential order that established the basic division of responsibility between the military and the Justice Department for the gathering of intelligence concerning civil disturbances.

2. Both Attorney General Mitchell and Deputy Attorney General Kleindienst, the person most responsible for bringing Mr. Rehnquist into the Justice Department, attached critical importance to development of the 1969 Presidential order, as demonstrated by comments to the Department of Defense at the time. Given this importance, the small number of attorneys under Mr. Rehnquist's supervision in the Office of Legal Counsel and the knowledge that the draft plan was to be submitted to the President by the Attorney General and the Secretary of Defense, it seems difficult to believe that Mr. Rehnquist would not have personally become deeply involved in development of the plan.

3. Justice Rehnquist's testimony to the Senate Judiciary Committee in response to a question from Senator Leahy that he had no knowledge about the military's domestic surveillance policy prior to the spring of 1971 is directly contradicted by documents in the public record, including his own 1971 testimony to the Subcommittee on Constitutional Rights and his March 25, 1969, memorandum to Attorney General Mitchell.

4. In his March 1971 testimony before the Senate Subcommittee on Constitutional Rights, and on other occasions while the *Tatum* case was pending in the United States Court of Appeals, Mr. Rehnquist made statements about the disputed evidentiary facts and the legal theories involved in the case. Although Mr. Rehnquist was not formally designated as counsel of record in the court proceedings in *Laird* v. *Tatum*, his statements about the case were made in his role as head of the Office of Legal Counsel and as a public spokeman for the Government's position.

5. Justice Rehnquist's vote prevented the *Tatum* case from being sent back to the United States District Court with an extremely broad mandate from the United States Court of Appeals to determine the nature and extent of military surveillance of civilian groups. Pretrial discovery under this broad mandate would likely have uncovered Justice Rehnquist's involvement in the issue of military surveillance. Justice Rehnquist's vote thus prevented pre-trial discovery of both his own prior role and that of his Justice Department colleagues in the development of military surveillance policy.

6. Pre-trial discovery, if the Court of Appeals decision had been upheld, would have begun in the summer of 1972 and might have uncovered—months before the Watergate investigations—other controversial matters relating to domestic intelligence such as the then-secret Huston plan for relaxing restraints on the use of covert mail coverage, surreptitous entry and electronic surveillance. This plan had been temporarily approved by President Nixon in June 1970 and was known in the Justice Department at least to Attorney General Mitchell.

7. Upon remand of the *Tatum* case, Mr. Rehnquist would very likely have been a material witness for two reasons: (a) he had arranged for the transfer of custody of important evidence (an Army computer printout containing data on the political activities of civilians); and (b) he had been directly involved in development of the plan approved by the President that provided for continued use of Army personnel to collect data on civilian activities.

8. Under the terms of the disqualification statute (28 U.S.C. Sec. 455), as it read in 1972, we believe that Justice Rehnquist was subject to mandatory disqualification on at least two grounds: because it was likely that he would have been a material witness had the case been remanded to the District Court and because he had a substantial interest in the outcome of the case. There is also a strong argument that his role in formulating the challenged policy and publicly expressing his views on the factual contentions and legal merits of the *Tatum* case, while serving as head of the Office of Legal Counsel and spokesman for the Justice Department, constituted acting as counsel within the meaning of the disqualification statute.

9. Whether he was technically required as a legal matter to disqualify himself or not, it seems apparent that there are serious questions about the basic fairness of Justice Rehnquist's participation in the case and his sensitivity to the need to appear to be fair as well as to be fair. Do his actions meet the standards of propriety that the Senate requires for the highest judicial office in the land?

We recognize the seriousness of the matters discussed and do not lightly raise these issues. We are also aware that the public record from which we have worked is incomplete on many points. It is possible that the concerns about Justice Rehnquist's candor and judicial fairness could be resolved in his favor through a more searching scrutiny of the facts than has thus far been made. We believe that in fairness to him and to the nation that such a scrutiny should be undertaken.

Respectfully yours,

FLOYD TEENEY,
Professor of Law,
University of California, Davis.

BARRY MAHONEY,
Attorney, Denver, CO.

AN ANALYSIS OF THE PUBLIC RECORDS CONCERNING JUSTICE REHNQUIST'S PARTICIPATION IN LAIRD V. TATUM

I. INTRODUCTION: OVERVIEW AND CENTRAL QUESTIONS

In 1972, as a new member of the Supreme Court, Justice Rehnquist cast the crucial fifth vote in *Laird v. Tatum*, a 5-4 Supreme Court decision holding that a group of civil rights activists and anti-war protesters had failed to show that Army surveillance of civilian political activities created an immediate danger of direct injury to their First Amendment rights.[1] The effect of Justice Rehnquist's participation was to reverse a U.S. Court of Appeals decision in favor of the plaintiffs, and thereby preclude pretrial discovery concerning the Nixon Administration's domestic surveillance policies and practices during the summer of 1972.

A detailed review of Justice Rehnquist's participation in this case, in light of records that have become publicly available since the decision, raises serious questions about Justice Rehnquist's candor and integrity—issues which are central to the question of whether he should be confirmed as Chief Justice of the United States.

The questions involved turn on Justice Rehnquist's conduct over a consdierable period of time, beginning in 1969 when he became head of the Justice Department's Office of Legal Counsel, and continuing through August 1986. They relate particularly to Justice Rehnquist's testimony at the July-August 1986 hearings before the Senate Judiciary Committee on his nomination as Chief Justice and his subsequent correspondence with Senator Mathias:

At the Senate confirmation hearings, Justice Rehnquist testified that he had no personal knowledge of the disputed evidentiary facts in *Larid* v. *Tatum* and no knowledge about the military's domestic surveillance policy until the spring of 1971.

Following the close of the nomination hearings, Justice Rehnquist, in response to questions from Senator Mathias, stated in writing that he had "no recollection" of his personal role in the preparation of a March 1969 draft memo from the Secretary of Defense and the Attorney General to the President on a plan for response to civil disturbances and no recollection of "any participation" in the formulation of policy on use of the military to conduct surveillance or collect intelligence concerning domestic civilian activities."

This memorandum begins with a detailed statement of the publicly available facts about these issues and Justice Rehnquist's participation in *Larid* v. *Tatum*. It then discusses the legal and ethical issues involved, focusing on five central questions:

1. Did Assistant Attorney General Rehnquist participate significantly in the draft-

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ing and development of a Presidential order concerning military surveillance of civilian military activities?

2. What role, if any, did Assistant Attorney General Rehnquist have in the formulation of Nixon Administration policy concerning military surveillance of civilian political activities?

3. Was Justice Rehnquist legally required to disqualify himself from participation in the Supreme Court's consideration of *Laird v. Tatum*?

4. Did fairness require Justice Rehnquist to disqualify himself from participation in *Laird v. Tatum*?

5. Has Justice Rehnquist been honest and candid with the Senate and the American people?

II. THE PUBLIC RECORD

A. 1969: Development of plans concerning domestic intelligence

William H. Rehnquist was nominated by President Nixon to be Assistant Attorney General in charge of the Office of Legal Counsel on January 21, 1969, and confirmed on February 1. On March 17, Deputy Attorney General Kleindienst, the person most responsible for Mr. Rehnquist's appointment,[2] met with the General Counsel of the Army, Mr. Robert E. Jordan III, to discuss the handling of intelligence in connection with civil disturbances. At that meeting Mr. Kleindienst urged the need for "a comprehensive memorandum of understanding between the Attorney General and the Secretary of Defense," and it was agreed that the Army's General Counsel and Mr. Rehnquist's Office of Legal Counsel would prepare such a document.[3]

The Army developed the first draft, transmitting it to the Office of Legal Counsel around March 22.[4] The Office of Legal Counsel redrafted the plan and on March 25 Mr. Rehnquist sent a copy of the redrafted plan to the Attorney General.[5] He indicated that it "had been formulated in conferences between my staff and the staff of the General Counsel of the Army" and that "as soon as we have your comments and those of the Pentagon, we shall prepare a definitive revision for signature and transmission to the White House."[6] Around this time also the Secretary of the Army was informed by his General Counsel that "there is apparently considerable pressure from the Attorney General to accelerate submission of the paper to the President."[7]

During the next several days the Army gave the Office of Legal Counsel further comments by telephone and in writing.[8] On March 31 the Secretary of the Army informed the Secretary of Defense that the Office of Legal Counsel had accepted the Army's suggested revisions with two exceptions, one of which concerned "civil disturbance intelligence collection and analysis."[9]

A day later the Secretary of the Army transmitted the final Justice Department document to the Secretary of Defense indicating that "we have yielded to the strong views of the Attorney General" and accepted "a quite general statement of intelligence responsibilities."[10] The more general statement was "in lieu of" Army-developed language that would have reduced the military involvement and made it clearer that the FBI was "the primary intelligence collection agency."[11] The urgency of the need to finalize the document was indicated by a statement that the Attorney General had already signed the memorandum and "expressed his strong wish to put this paper in the hands of the President" by the next day.[12]

On May 19 President Nixon signed the Interdepartmental Action Plan for Civil Disturbances, noting that it involved "good planning."[13] In its final form the action plan took up six pages of print and involved drafts of two Presidential proclamations and two Executive Orders. The plan was not made a public document.[14]

B. 1970-71: Controversy in the courts and Congress about the legality of military surveillance

In January 1970, the Washington Monthly published an article by Christopher Pyle, a former Army intelligence officer, indicating that the Army had been conducting widespread surveillance of civilian political activities.[15] The following month, Arlo Tatum, one of the persons named in the article as a target, and twelve other individuals and groups sued Secretary of Defense Melvin Laird and other departmental officers, seeking to halt the Army's surveillance of their activities. The complaint, filed in the U.S. District Court for the District of Columbia, alleged that the Army's domestic monitoring activities were unauthorized and overbroad, that they deterred political expression and dissent, and that they inhibited other persons from associating with the plaintiffs. They asked the court for a declaration that the surveillance was unconstitutional and illegal, for an injunction forbidding such activity in the future, and for an order requiring destruction of all information acquired as a result of the monitoring.

The complaint specifically alleged that the plaintiffs had been the subjects of Army intelligence reports. One such report was attached to the complaint as an exhibit; it described the political activities of some of the plaintiffs as well as a number of other individuals and organizations.[16] Captain Pyle's *Washington Monthly* article, which was also attached to the complaint as an exhibit, described the Army's system for monitoring and keeping files on "virtually every activist political group in the country."[17]

While much of the information in the Army's data files had come from newspaper articles and other published sources, some of it was obtained through covert means. At the District Court level, the plaintiffs offered to introduce testimony about one such incident where a military intelligence agent was instucted to infiltrate a coalition of youth groups in Colorado.[18] The District Judge declined to hear the testimony, however, and in April 1970, he dismissed the case on the merits without holding an evidentiary hearing.

The plaintiffs appealed the dismissal order and ten months later, in January 1971, the case was argued before the U.S. Court of Appeals for the District of Columbia. Secretary Laird was represented on the appeal (as in the District Court) by attorneys from the Justice Department, not including Mr. Rehnquist.

In February and March of 1971, while the *Tatum* case was still pending in the Court of Appeals, the Senate Judiciary Committee's Subcommittee on Constitutional Rights, chaired by Senator Sam Ervin, held eleven days of hearings on federal data banks and information programs, focusing on the operation of these systems and their impact on citizens' privacy and other constitutional rights.[19] One of the areas addressed at the hearings was the Army's monitoring of civilian political activities.

Testimony at the 1971 Ervin Subcommittee hearings indicated that the breadth of the Army's domestic surveillance during the 1968-70 period was considerably greater than had been publicly known at the time the complaint in *Tatum* was first filed. It became clear that a great number of widely disparate groups, covering the full range of the political spectrum, had been subject to monitoring by the Army. These included the American Civil Liberties Union, the John Birch Society, Americans for Democratic Action, the Southern Christian Leadership Conference, the NAACP, and the League of Women Voters.[20] Files were also maintained on thousands of individuals not connected with the armed forces. Although much of the data consisted of matters of public record, information was also obtained through a variety of covert means. Robert Froehlke, then an Assistant Secretary of Defense, testified before the Subcommittee that it was "highly improbable" that many of the requirements for information contained in the Army's 1968 civil disturbance information collection plan could have been met in any way other than through covert collection means.[21]

Former members of Army intelligence testified at the Ervin Subcommittee hearings that the Army's domestic intelligence activities had included covert actions such as:

Infiltration of undercover agents into Resurrection City during the Poor People's Campaign in 1968.[22]

Having agents pose as newspaper reporters, press photographers, and TV newsmen (sometimes with fake press credentials) during the 1968 Democratic National Convention in Chicago.[23]

Sending agents, enrolled as students, to monitor classes in a Black Studies program at New York University.[24]

Infiltrating a coalition of church youth groups in Colorado Springs, Colorado.[25]

Keeping card files and dossiers on a wide range of public figures who had expressed opposition to the war in Vietnam, including then Senator Adlai Stevenson III, Rep. Abner V. Mikva (now a Federal Court of Appeals Judge), and the Rev. Jesse Jackson, as well as a number of faculty members and students at universities.[26]

The files that were kept on public officials and private citizens often included data on their private and personal affairs as well as on their political activities. Computer printouts and other publications generated by the Army during the 1968-70 period contained comments about the financial affairs, sex lives, and psychiatric histories of many individuals wholly unaffiliated with the armed foces.[27] Much of the information appears to have been unverified rumor or gossip.[28]

Following publication of the Pyle article and the filing of the *Tatum* lawsuit early in 1970, there had been a cutback in scope of the Army's monitoring activities. At the 1971 Ervin Subcommittee hearings, senior officials from the Defense Department testified about the development of the intelligence gathering effort and the subsequent scaling-back. However, the extent to which the monitoring activities had been "stopped" and the files destroyed remained unclear.[29]

In advance of the hearings, Senator Ervin had written to Attorney General Mitchell, asking him to testify concerning the Executive Branch's authority to conduct surveillance "on lawful political activities, personal beliefs and private lives."[30] Senator Ervin indicated a specific concern about the Army's "collection, analysis and malntenance of information on civilians" in connection with civil disturbances and asked for information concering "the degree to which

the Justice Department has indeed assumed responsibility for this program." Senator Ervin also asked for "a description of the interdepartmental Delimitations Agreements governing the respective roles of the Armed Services and the Justice Department in investigation of civilians and in retention of dossiers in non-criminal cases . . . the basis for these agreements and the reason for them."

Mr. Rehnquist appeared for the Justice Department at the Ervin Subcommittee hearings on March 9 instead of the Attorney General. In a prepared statement he acknowledged that there could be "isolated examples of abuse of [the Government's] investigative function."[31] He maintained, however, that "I think it quite likely that self-discipline on the part of the executive branch will provide an answer to virtually all of the legitimate complaints against excesses of information-gathering."[32] In the same statement he made a number of assertions about the status of the Army's monitoring system that was the subject of the complaint in *Laird* v. *Tatum*:

"The function of gathering intelligence relating to civil disturbances, 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, one printout from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed."[33]

In a later colloquy with Senator Ervin, Mr. Rehnquist commented further on the allegations in *Laird* v. *Tatum*. He indicated that he felt the plaintiffs had sustained no injury and that their claims of First Amendment violations were without merit:

"Senator ERVIN. Do you feel that there are any serious constitutional problems with respect to collecting data on or keeping under surveillance persons who are merely exercising their right to peaceful assembly or petition to redress a grievance?

Mr. REHNQUIST. My answer to your question is no, Mr. Chairman. And by saying 'no,' I do not think it involves constitutional violations. I would not want to be thought as disparaging the importance of it or the undesirability of it. But I do not believe it raises a constitutional question. . . .

Senator ERVIN. Don't you think most people are sort of afraid of governmental surveillance, Aren't they?

Mr. REHNQUIST. I do not doubt a number are, Mr. Chairman. I have noticed that certainly there have always been people willing to come forward and sue the government, as was done in the northern district of Illinois, and was done here in the District of Columbia, claiming that others were intimidated but really admitting that they were not intimidated at all."[34]

The question of the existence of a possible chilling effect on the exercise of First Amendment rights was subsequently pursued further, in another colloquy between Senator Ervin and Mr. Rehnquist. Mr. Rehnquist again took the position, with reference to specific surveillance activities of the Army, that no First Amendment violations were involved:

"Senator ERVIN. Do 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 well known that 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 exercise their first amendment rights by protesting the war policies of the President.

Senator ERVIN. Well, we have evidence here that on one occasion in Colorado, there were 119 people present at a rally to protest the war in Vietnam, and that of those 119 persons 52 of them were military intelligence agents. Not only that but a militray intelligence agent was sent there with orders to tape the speeches that were made at the rally and he couldn't tape them because the military forces had five helicopters flying right over the heads of the rally and making so much noise that the speeches that were made could not be taped. Do you think that was a legitimate exercise of governmental power in view of the fact that the testimony shows that the speeches were not inflammatory in nature, that they consisted of rather mild protests against the policies of the government and no violence occurred?

Mr. REHNQUIST. No, I do not and, as I have said before, I think that is an illegitimate use of government power. I do not think it amounts to a constitutional violation of the first amendment.

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 not think that is an interference of constitutional rights?

Mr. REHNQUIST. I do not, Senator.[35] In response to questions, Mr. Rehnquist indicated that the Justice Department's guidelines for its Internal Security computer were more restrictive than those which the Army had been using. When asked about the "civil disturbance file," Mr. Rehnquist indicated that he "did not have personal knowledge" in every field but that he understood that file to be "limited to situations involving either a violation of law or a potential violation of the law, not simply peaceful demonstrations or cataloguing people who go to meetings." Mr. Rehnquist agreed to make available to the Subcommittee the Army computer printout being held for the *Tatum* case.

Mr. Rehnquist discussed the 1949 Delimitation Agreement allocating responsibilty between the FBI and the Department of Defense for investigating espionage, counterespionage, subversion and sabotage. In discussing this allocation, however, he did not mention the 1969 Presidential order dealing with responsibility for collection of raw intelligence data that had been drafted by his Office of Legal Counsel.

At the March 17 hearings, the Subcommittee questioned both Mr. Rehnquist and Assistant Attorney General Mardian extensively as to whether the Justice Department had guidelines for conducting investigations of civilian political activities. Ultimately Mr. Mardian mentioned the 1969 memorandum drafted by Mr. Rehnquist's office, characterizing this as "the delimitations agreement." Mr. Rehnquist corrected Mr. Mardian, indicating that the delimitations agreement was an older agreement. Mr. Mardian was then asked whether this new agreement was issued by President Nixon in 1969. Mr. Mardian said that it was not, that it was "a memorandum of understanding between the two Departments." Mr. Rehnquist did not correct this misstatement.[36]

Two days later, while the *Tatum* case was still pending in the U.S. Court of Appeals, Mr. Rehnquist delivered an address to the National Conference of Law Reviews, in which he presented a wide-ranging defense of the Government's surveillance activities. In the course of his remarks, he stated:

"I believe that no legitimate interest of any segment of our population would be served by permitting individuals or groups of individuals to prevent by judicial action, the government's gathering information . . . ."[37]

On April 27, 1971, the U.S. Court of Appeals for the District of Columbia handed down its decision in the *Tatum* v. *Laird* case, holding 2-1 that the plaintiffs had standing to sue and that their allegations presented a justiciable case under established law regarding the exercise of First Amendment rights.[38] Judge Wilkey's opinion for the majority in the Court of Appeals noted particularly the combination of factors alleged in the complaint to have a chilling effect on First Amendment rights, including the conduct of activities beyond the Army's statutory authority, the intrusive and inhibiting effect of the activities, and the fact that the Army—an immensely powerful institution—was the governmental agency involved in the activities.

In remanding the case to the District Court, the Court of Appeals ordered that a thorough inquiry be made into the plaintiffs' allegations. It directed the District Court to determine "the nature of the Army domestic intelligence system made the subject of appellants' complaint, specifically the extent of the system, the methods of gathering the information, its content and substance, the methods of retention and distribution, and the recipients of the information."[39] The Government filed a petition for certiorari with the Supreme Court on September 20.

While the certiorari petition was pending, Mr. Rehnquist sent the Subcommittee a memorandum in response to questions posed by Senator Hruska at the March 9 hearings. The memorandum discussed several Supreme Court cases dealing with the Government's power to collect information, and also commented on the ending of the Army's data-gathering functions. It stated: "If anything, the now-terminated data-gathering functions of the Army seem to have stimulated rather than curtailed debate."[40]

C. 1972: Laird v. Tatum in the Supreme Court

During the months following the Ervin Subcommittee hearings and the Court of Appeals decision, Mr. Rehnquist was nominated and confirmed as a justice of the Supreme Court. In October 1971, prior to his confirmation, the Supreme Court granted the Government's petition for certiorari to review the Court of Appeals' decision in *Laird* v. *Tatum*.

The case was argued in March and decided by a 5-4 vote on June 26, 1972. The majority was made up of Chief Justice Burger and Justices White, Powell, Blackmun, and Rehnquist. Chief Justice Burger's opinion for the majority accepted the Government's

contention that the plaintiffs' claims of First Amendment violations did not present a justiciable controversy because they had failed to allege specific present objective injury or threat of specific future injury to themselves.[41] The opinion did not review the allegations of the complaint in any detail, nor did it address the plaintiffs' contention that they would prove the injuries they alleged—including invasion of their right of privacy, damage to their reputations and employment prospects, and infringement of their rights of free speech and association—if given an opportunity to do so at an evidentiary hearing. The majority opinion noted (as had then Assistant Attorney General Rehnquist at the Ervin Subcommittee hearings) that the plaintiffs themselves were apparently not chilled in the exercise of their First Amendment rights by the challenged system.[42] The opinion of Chief Justice Burger apparently accepted at face value the Government's contention that the Army's domestic intelligence activities had been significantly reduced,[43] although the extent of the cutback had never been established at an evidentiary hearing and was strenuously disputed by the plaintiffs.

Justice Douglas, joined by Justice Marshall, filed a vigorous dissent. Drawing on the public record developed in the Ervin Subcommittee hearings as well as the allegations in the complaint, Justice Douglas stressed the sweep and intrusiveness of the Army's monitoring activities, and noted the covert nature of the surveillance activities. Acknowledging that the Army might have cut back its surveillance activities since the start of the litigation, he emphasized that whether there had been an actual cutback could only be determined after a hearing in the District Court.[44]

Justices Brennan and Stewart also dissented, basically adopting the position taken by Judge Wilkey in his opinion for the Court of Appeals. That opinion stressed the plaintiffs' contention that the present existence of the Army's system of gathering and distributing information on civilian political activity—information not reasonable relevant to the Army's mission to surpress civil disorder when called upon—had an inhibiting effect on their exercise of First Amendment rights. In their view, the case was justiciable. Although the plaintiffs might not be able to prove their allegations of injury, they were entitled to try and should have an opportunity to do so in the District Court.[45]

D. 1986: Testimony at nomination hearings and subsequent developments

On June 17, 1986, President Reagan nominated William Rehnquist to succeed Warren Burger as Chief Justice of the United States. At his nomination hearings (July 29-August 1), Justice Rehnquist's participation in *Laird* v. *Tatum* was a focus of inquiry by several senators.

Senator Leahy asked Justice Rehnquist:

"Senator LEAHY. Did you have personal knowledge of the disputed evidentiary facts in *Laird*?

Justice REHNQUIST. No.

Senator LEAHY. When you were in the Justice Department, did you have knowledge about the military's domestic surveillance policy?

Justice REHNQUIST. I had—if you would consider information obtained in the course of preparing for the May Day demonstrations, which did involve some activity, I suppose you would say yes.

Senator LEAHY. But you deny, you were not aware of the evidentiary, or the disputed evidentiary facts?

Justice REHNQUIST. No.[46]

Subsequent to his confirmation hearings Mr. Rehnquist was asked a series of written questions by Senator Mathias.[47] Mr. Rehnquist indicated that he had "no recollection" of "my personal role in the preparation" of the April 1969 draft memo to the President, but that he assumed "from the text of the transmittal memo that the plan was primarily drafted by staff members in my office and in the Office of the General Counsel of the Army, and was reviewed by me." Mr. Rehnquist also indicated that he had "no recollection" as to his personal role in the preparation of the portion of the document concerning intelligence operations, "no recollection" of his personal role in arriving at the recommendations contained in the plan concerning the role of the FBI and the Army and "no recollection" as to how the language in the draft authorizing a domestic role for military intelligence first appeared.

In response to a question asking what consideration, if any, he had given to his role in preparing the Interdepartmental Action Plan in deciding whether to participate in *Laird* v. *Tatum* and as to why he had omitted any reference to the plan in his recusal memorandum, Mr. Rehnquist stated that his memorandum opinion "explaining my reasons for declining to recuse myself . . . describes my reasoning at that time regarding all considerations that in my judgment bore on the issue of recusal."

In response to a question concerning his knowledge of and participation in the formulation of policy on military surveillance of civilians. Mr. Rehnquist stated that:

I have no recollection of any participation in the formulation of policy on use of the military to conduct military surveillance or collect intelligence concerning domestic civilian activities. I do not think I had any first hand knowledge as to the use of the military to conduct such surveillance or collect intelligence, though I may have been briefed with such information as was necessary to enable me to testify before congressional committees or to publicly discuss legal questions.

III. ASSISTANT ATTORNEY GENERAL REHNQUIST'S ROLE IN THE DEVELOPMENT OF DOMESTIC SURVEILLANCE POLICY

Mr. Rehnquist headed the Justice Department's Office of Legal Counsel in March and April 1969 when that Office was responsible, along with the Office of the General Counsel of the Army, for drafting a Presidential order concerning civil disturbances and providing for the continuation of the Army's domestic surveillance activities. According to Mr. Robert E. Jordan III, who was then the Army's General Counsel, these negotiations were initiated by the Army, after senior Pentagon officials had concluded that "military intelligence ought to get out of the civil disturbance intelligence business."[48]

Following an initial meeting between Mr. Jordan and Deputy Attorney General Kleindienst on March 17, the Office of Legal Counsel was designated to handle the negotiations on behalf of the Justice Department.[49] A draft memorandum setting forth proposed allocations of responsibility in this field was prepared by the Army's Office of General Counsel and sent to the Justice Department around March 22. The Army's draft memorandum, which was intended to be sent jointly to the President by the Secretary of Defense and the Attorney General, provided for the Attorney General to have coordinating authority in the civil disturbance field and for the FBI to have primary operational responsibility for collection of raw intelligence data.[50] With respect to intelligence gathering during what was characterized as "Phase One" (i.e., planning and preparation before any disturbances occurred), the Army's March 22nd draft contained the following language:

"Of particular importance is the intelligence effort, which while it presently does not permit us to monitor civil disturbances, nevertheless enables us to monitor emerging disorders, note civil disturbance trends and identify dissident elements which may foment violence and disorder.

"The previous Administration never clarified responsibilities for the important intelligence collection effort which is an essential part of federal activities in Phase One. Currently, the Federal Bureau of Investigation collects and makes available a large amount of information on actual disorders and on persons engaged in disturbance-related conduct which might constitute a federal crime. Information from the FBI and from other Justice Department sources, such as United States Attorneys, is available to the Inter-Divisional Information Unit (IDIU) in the Justice Department. At the same time, the Army has been utilizing the U.S. Army Intelligence Command, which is principally a counter-intelligence field organization, to relay civil disturbance information for use by Department of Defense officials. This information is also made available to the Justice Department.

"Intelligence operations involve the collection, analysis, and dissemination of information. Collection activities involve principally contacts with state and local law enforcement officials and other local leaders. As you know, the FBI has a large network of offices throughout the United States which is daily involved in liaison activities with the kinds of officials who are in a position to furnish information relating to civil disturbances. We believe that the Federal Bureau of Investigation should be formally assigned primary responsibility for collecting and furnishing on a timely basis to other concerned agencies, raw intelligence. Although the Army Intelligence Command could perform this function, the salutary tradition of avoiding military intelligence collection activities in predominantly civilian matters reinforces our view that this responsibility belongs with the FBI."[51]

Two aspects of the Army's March 22nd draft are especially relevant. First, it states flatly that the U.S. Army Intelligence Command, "principally a counter-intelligence field organization," had been providing information to Defense Department officials and to the Justice Department. Second, it sets forth the Army's view that because of "the salutary tradition of avoiding military intelligence collection activities in predominantly civilian matters,' the FBI should have the responsibility for collection of raw intelligence data. This language indicates that, as Mr. Jordan later testified, the Army had been involved in intelligence gathering, that the Justice Department was a "consumer" of this information, and that the Army wanted to get out of the business and turn it over to the FBI.

Within three days after receiving the Army's draft, the Justice Department's Office of Legal Counsel prepared a counter draft of the proposed interdepartmental memorandum. The Office of Legal Coun-

sel's draft was sent to Attorney General John Mitchell, by Mr. Rehnquist, on March 25, 1969.[52] Mr. Rehnquist's memorandum to Attorney General Mitchell states that the draft "has been formulated in conferences between members of my staff and the staff of the General Counsel of the Army." [53] A copy of this draft, which adopted most of the language of the Army's March 22nd draft but made important changes in the language regarding responsibility for collecting raw intelligence, was also sent to Mr. Jordan.[54] With respect to the intelligence-gathering function, the draft prepared by the Office of Legal Counsel provided that the FBI should have primary responsibility but inserted language providing that the Army should be available to assist:

"The Federal Bureau of Investigation will be charged with the task of collecting raw intelligence data and transmitting it on a timely basis to the Department of Defense. At the request of the Attorney General, the Department of the Army, through the U.S. Army Intelligence Command, may assist in this effort. However, in order to preserve the salutary tradition of avoiding military intelligence activities in predominantly civilian matters, the U.S. Army Intelligence Command should not ordinarily be used to collect the intelligence of this sort." [55]

Following preparation of the March 25th draft by the Office of Legal Counsel, there was apparently a considerable amount of further discussion concerning the division of intelligence responsibilities between the Army and the Department of Justice. As part of the on-going negotiations during this period, at least one additional draft containing proposed revisions in the language concerning responsibility for intelligence collection was prepared by the Army and sent to the Justice Department on March 29th.[56] The final version of the "Interdepartmental Plan for Civil Disturbances," as submitted to President Nixon in April 1969 and approved by him in May, was ambiguous with respect to intelligence collection responsibilities. It provided simply that:

"Under the supervision of the Attorney General, raw intelligence data pertaining to civil disturbances will be acquired from such sources of the government as may be available. Such data will be transmitted to the Intelligence Unit of the Department of Justice, and it will be evaluated on a continuing basis by representatives from various departments of the government."[57]

The effect of the watering down of the language in the original draft was to leave the Army's domestic intelligence mission and activities essentially unchanged. They remained unchanged until the publication of the Pyle article and the initiation of the *Tatum* lawsuit in 1970. Mr. Jordan's view, expressed in two 1971 memoranda that reviewed the history of the Army's involvement in domestic surveillance and in his 1974 testimony before the Ervin Subcommittee, was that the Army had tried to shift responsibility for the collection activities to the Justice Department but had been unsuccessful in doing so.[58]

On the basis of these documents, it is not possible to know the extent of Mr. Rehnquist's involvement in the negotiations concerning the allocation of intelligence collection responsibilities between the Army and the Justice Department, or to assess the extent of his knowledge about the nature of the Army's monitoring activities. It is clear, however, from the phrasing of his March 25, 1969 memorandum to Attorney General John Mitchell, that he was at least aware of the negotiations on this subject and of the fact that the Army was engaged in some kinds of collection of raw intelligence data. Since Mr. Rehnquist's office was responsible for drafting a memorandum intended for review by the Attorney General and ultimately for approval by the President, it would be very surprising if he did not know a great deal more about details of the intelligence collection and distribution practices. The full extent of his knowledge and involvement cannot be gauged on the basis of the current public record.

IV. THE LEGALITY AND FAIRNESS OF JUSTICE REHNQUIST'S PARTICIPATION IN LAIRD V. TATUM

The lawyers for the plaintiffs had considered making a motion for recusal of Justice Rehnquist prior to the oral argument of *Tatum* v. *Laird* before the Supreme Court, because he had previously expressed views on the case in his testimony before the Ervin Subcommittee. According to Frank Askin, who argued the case for the plaintiffs, Senator Ervin (who was also a counsel in the case) advised against such a motion on the ground that it was unnecessary—he felt that Justice Rehnquist was "an honorable man" and would not participate in the case.[59]

After the decision was handed down, the plaintiffs—surprised that Justice Rehnquist had participated in it—filed a motion asking the Justice to disqualify himself. They argued that Justice Rehnquist should not have participated because "he had served as an expert witness" in the Senate hearings, had "intimate knowledge of the evidence underlying" the allegations and had made "public statements" about the issues. They also sought withdrawal of the opinion of the Court and filed a petition for rehearing. All of these applications were denied on October 10, 1972.[60]

Justice Rehnquist, in denying the motion for disqualification (which, in accordance with long-established practice, was referred to him for decision), wrote a 16-page memorandum opinion stating his reasons for not disqualifying himself.

The memorandum identifies the governing statute concerning disqualification as 28 U.S.C. Sec. 455, which as of 1972, provided as follows:

"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 on the trial, appeal, or other proceeding therein."

The statute has since been amended to provide for mandatory disqualification in a broader range of situations,[61] but for purposes of assessing Justice Rehnquist's actions in *Laird* v. *Tatum* the relevant statutory language is that set out above.

The disqualification statute has both mandatory and discretionary provisions. As it read is 1972, the statute required a justice to disqualify himself in three situations: (1) if he was a "material witness," (2) had a "substantial interest," or (3) had served "of counsel" in the case. Disqualification was discretionary when the ground asserted for it was the justice's relationship or connection with a party or the party's attorney.

A. The material witness issue

In his 1972 recusal memorandum Justice Rehnquist made two statements bearing on whether he was required to disqualify himself as a "material witness." [62] The clearest reference was his statement that since he had not "been a material witness in *Laird* v. *Tatum*," this disqualifying factor did not apply to him.

It is certainly true that Justice Rehnquist had not been called as a witness in the trial of *Laird* v. *Tatum*. The statute, however, requires disqualification not only for a person who "has been" a material witness but also for a person who "is" a material witness.

Justice Rehnquist did not refer to this part of the statute. It is particularly pertinent to the *Tatum* case, however, because the whole issue of the appeal was whether a trial was to be allowed. The District Court had dismissed the suit before witnesses could be called.

There is no definitive interpretation as to whether this part of the disqualification statute applied (as it was written in 1972) to the possibility that a judge might be a future witness. The relatively few appellate cases interpreting this section generally concerns judges who were challenged because of their prior involvement as a judge in an earlier phase of the proceeding.[63] The purpose of the statute seems clear, however. It is to disqualify judges who have personal knowledge about the facts involved in the lawsuit.

This purpose is made clearer by amendments to the disqualification statute adopted in 1974. These amendments were intended to bring the statute more into line with the American Bar Association's newly developed Code of Judicial Conduct adopted by the American Bar Association on August 16, 1972, while the disqualification motion in *Laird* v. *Tatum* was pending before the Court.[64] Justice Rehnquist referred to this newly adopted Code in his recusal memorandum indicating that he did not read the Code "provisions as being materially different from the standards enunciated in the statute" and that for this reason there was "no occasion for me to give them separate consideration."[65] Both the new statute and the ABA Code contain language indicating that a judge should disqualify himself in a proceeding in which he has "personal knowledge of disputed evidentiary facts concerning the proceeding." [66] The new statute also makes it clear that the judge must disqualify himself if he is to his knowledge "likely to be a material witness." [67]

Did Justice Rehnquist have personal knowledge of disputed evidentiary facts? Justice Rehnquist did not specifically address this issue in his recusal memorandum in *Laird* v. *Tatum*. He did, however, respond to the plaintiff's claim that he had "intimate knowledge of the evidence underlying the respondent's allegations." This claim, he said, "seems to me to make a great deal of very little." He said that Government spokesmen in legislative hearings are frequently persons who do "not have personal knowledge in every field." [68] He went on to say that he had very little knowledge about *Laird* v. *Tatum*. He indicated that he had made one reference to the case in his prepared statement and another at his subsequent appearance before the Senate Subcommittee. He also indicated that he had prepared a memo, supervised the preparation of a memorandum of law which had been sent to the Senate Subcommittee on September 20, 1971, and that he "would expect such a memorandum to have commented on" the *Tatum* case.[69]

One reference was to a printout from the Army computer containing the names of civilians that the Army had collected information about and that were contained in

the Army's computer. This printout was being held as evidence in *Laird* v. *Tatum* and was being held in custody of the Justice Department. Justice Rehnquist indicated that he "had then and have now no personal knowledge of the arrangement" and that "nor so far as I know have I ever seen or been apprised of the contents of this particular print-out."[70] He also stated, however, that he "later authorized its transmittal to the staff of the [Senate] Subcommittee at the request of the latter."

Justice Rehnquist's recusal memorandum thus deals primarily with his knowledge of the *Tatum* lawsuit itself. The subject of the lawsuit, however, was the existence of a system of military surveillance of civilian political activities. As Assistant Attorney General, Mr. Rehnquist had extensive knowledge of this subject. Although not mentioned in his recusal memorandum, his office had been responsible for drafting the Interdepartmental Act Plan on Civil Disturbances that had been adopted by the President and that served as the basic document for allocation of responsibility for domestic intelligence between the military and the Justice Department.

Had Justice Rehnquist not participated in the *Tatum* case, it would have gone back to the District Court with a mandate to determine, among other things, "the nature of the Army's domestic intelligence system made the subject of appellants' complaint, specifically the extent of the system, the methods of gathering the information, its content and substance, the methods of retention and distribution and the recipients of the information."

In attempting to make some assessment of what persons and what materials would be subject to discovery under this very broad mandate, it should be borne in mind that the relevance criterion used in measuring discoverability in a civil case is much broader than that used in determining admissibility at the subsequent trial of the case. Federal Rule 26(b) expresses this sweeping standard in the following words:

"Parties may obtain discovery regarding *any matter,* not privileged, which is *relevant* to the *subject matter involved in the pending action,* whether it relates to the claim or defense of any other party, *including* the *existence,* description, nature, *custody* and location of *any* books, *documents,* or other tangible things and *the identity* and locations of *persons having knowledge of any discoverable matter.* It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." (Emphasis supplied.)

Prior to the adoption of this liberal standard, discovery efforts frequently encountered the objection that the party seeking disclosure was simply embarked on a "fishing expedition." Under Rule 26, however, this is no longer a valid objection. As the Supreme Court expressed it in *Hickman* v. *Taylor:*

"No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."[71]

Under the broad and liberal "relevance-to-the-subject matter" criterion, any Government official who had prepared, reviewed, or approved an interagency agreement sanctioning and delineating the scope of military surveillance activities with respect to civilian protest movements would be the natural and inevitable target of the discovery efforts that the plaintiffs were authorized to carry out under the Court of Appeals mandate. If that same Government official had been involved in the custody of a computer printout containing the fruits of that surveillance policy, it would be essential for the plaintiffs to depose this official in order to gain access to the printout and to verify its contents and completeness.

More importantly, Mr. Rehnquist made a number of statements, both in 1971 and in 1986, about disputed evidentiary facts. In his prepared statement at the 1971 Ervin Subcommittee hearings, he made at least four factual assertions—that the intelligence-gathering function was no longer being performed by the Army, that the Army's computer system was now "defunct",[72] that no information that had been contained in the Army's data base had been transferred to the Internal Security Division of the Justice Department, and that there was only one remaining computer printout. All of these factual contentions were disputed by the plaintiffs. Mr. Rehnquist's testimony clearly implies that he either had personal knowledge of these facts or could indicate the sources of information he obtained from others.

In his 1986 testimony before the Judiciary Committee, he stated that he had "obtained" information about the military domestic surveillance policy "in the course of preparing for the May Day demonstrations which did involve some activity."[73] As these demonstrations occurred in May 1971, this knowledge would presumably have been acquired after March 9, 1971. That is the date on which Mr. Rehnquist told the Ervin Subcommittee that "the function of gathering intelligence related to civil disburbances" had "been transferred to the Internal Security Division of the Justice Department."[74] Since one of the key issues in *Laird* v. *Tatum* was whether the military surveillance was continuing, such knowledge standing alone was sufficient to make Justice Rehnquist a material witness.

B. Substantial interest

The statute also requires that a justice disqualify himself if he has a "substantial interest" in the outcome of the case. Justice Rehnquist did not specifically address this provision in his recusal memorandum.

The major target of this part of the statute is the pecuniary interests of the justice.[75] The statute is written broadly, however, and clearly covers other kinds of interests as well.[76] The Constitution itself would appear to require no less. As the Supreme Court said in *In Re Murchison,* a case not involving a pecuniary interest: "[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."[77]

Had the *Tatum* case been remanded for trial in the District Court, as would have happened if Justice Rehnquist had not participated in the case, there would have been extensive pretrial discovery. This discovery would likely have uncovered Justice Rehnquist's involvement—and that of his Justice Department colleagues—in the development of the Interdepartmental Action Plan for Civil Disorders and in the development of military surveillance policy in connection with it. Justice Rehnquist thus had a "substantial interest" in the outcome of the case. His vote in effect prevented discovery of his own prior role shaping the surveillance policy under challenge.

Pretrial discovery might also have uncovered other controversial matters such as the Huston Plan for relaxing restraints on the use of covert mail coverage, surreptitious entry and electronic surveillance for domestic intelligence purposes by the Defense Intelligence Agency, the FBI, the CIA and the National Security Agency.[78] Attorney General Mitchell apparently became aware of this plan on July 27, 1970.[79] If Justice Rehnquist had knowledge of this plan either before or after the Attorney General learned of it or of similar matters, this knowledge could also constitute a substantial interest requiring disqualification.

C. Acting as "counsel"

The statute also requires disqualification when a justice has previously been "of counsel" in a case. As to this ground Justice Rehnquist in his recusal memorandum said that he had not been of counsel in the case. He also said that he had not "actively participated" in the case even in "an advisory role."[80] Justice Rehnquist acknowledged that he had spoken publicly about the legal issues in the case, but concluded that neither the statute nor the practice of prior justices required that he disqualify himself for this reason.

If "of counsel" is construed in a sufficiently narrow and technical way, Justice Rehnquist's position is undoubtedly correct. If, however, the term includes acting as a lawyer for the same client on the same issue, the statute would seem to apply. Mr. Rehnquist, as head of the Office of Legal Counsel, did more than simply speak out on the underlying issues. He served as the principal spokesperson for the Justice Department before the Ervin Subcommittee on both the legal and factual matters at issue in the *Tatum* case.

While he recognized that surveillance might be unwise or undesirable, Mr. Rehnquist told the Ervin Subcommittee that it was not unconstitutional—even when it involved such intrusive activities as spying on church meetings, posing as press photographers, taking pictures of people at political rallies, and making inquiries to identify the people in the photographs and preparing dossiers on them.[81] He stated that he did not personally advocate such activities, but disagreed with the contention, "as in the case of *Tatum* v. *Laird,*" that an action by private citizens would lie 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."[82]

This position was developed more fully in a March 1971 address to Law Review editors, where Mr. Rehnquist stated categorically that "I believe that no legitimate interest of any segment of our population would be served by permitting individuals or groups of individuals to prevent, by judicial action, the government's gathering information."[83] Several months later he filed a legal memorandum with the Subcommittee which argued that the Supreme Court had never held that unauthorized information gathering violated an individual's constitutional rights except where the information was used as a basis of a proceeding against the individual. In closing, that memorandum referred specifically to allegations about Army surveillance, arguing that:

"Recent experience seems to establish that even if the strongest allegations con-

cerning Army data-gathering are assumed to be true, there has been no interruption in 'uninhibited, robust, and wide open debate on major controversial issues.' (*New York Times Company* v. *Sullivan*, 376 U.S. 254, 270 (1964)). Both the Veterans' demonstration and the later May Day demonstrations seem to substantiate that. If anything, the now-terminated data gathering functions of the Army seem to have stimulated rather than curtailed debate." [84]

In essence, Mr. Rehnquist was acting as a lobbyist in the legal community, seeking acceptance of the legal position being taken by the Justice Department in *Laird* v. *Tatum*. His statements advocate legal positions formulated at least in part by the Office of Legal Counsel; they seek to defend the legality of practices provided for in the 1969 Interdepartmental Action Plan that the Office of Legal Counsel was instrumental in negotiating,[85] and they obviously address the critical issue in the Supreme Court's *Tatum* decision—the justiciability of the plaintiffs' allegations—very directly.

D. Discretionary disqualification

The "discretionary" portion of 28 U.S.C. Sec. 455, as it read in 1972, provided that a judge should disqualify himself where he "is so related to or connected with any party as to render it improper, in his opinion, for him to sit on trial, appeal, or other proceeding therein." The words "in his opinion" are crucial—in essence, they make the exercise of discretion unreviewable as a matter of law.

In discussing the discretionary provision in his memorandum opinion denying the disqualification motion, Justice Rehnquist focused on two aspects of his work at the Justice Department: (1) the question of his possible connections with the defense of the case of *Laird* v. *Tatum*; and (2) his public expressions of his understanding of the law regarding the constitutionality of governmental surveillance. As to the first, he was emphatic that what he referred to as "my total lack of connection while in the Department of Justice with the defense of the case of *Laird* v. *Tatum*" meant that his previous relationship with the Justice Department should not suggest discretionary disqualification.[86] with respect to previous expressions of his views on law regarding particular issues, he reviewed at some length the practices of other justices and concluded that such expressions did not require disqualification.[87]

Justice Rehnquist's discussion of the discretionary disqualification provision, like his discussion of the provision regarding mandatory disqualification, made no mention whatsoever of many relevent aspects of his work at the Department of Justice. These actions and statements, while they did not constitute formally acting as counsel of record in the court proceedings in the *Tatum* case, went well beyond general expressions of opinion on points of law. Those directly related to the allegations and potential evidence in *Laird* v. *Tatum* included:

Development of the Interdepartmental Action Plan on Civil Disturbances.

Testimony before the Ervin Subcommittee that the Army had ceased its domestic intelligence gathering, that this function had been transferred to the Justice Department Internal Security Division, that the Army's computer system was now "defunct," and that no information contained in the Army's computer system had been transferred to the Internal Security Division [88]—the same factual contentions the Government later made to the Supreme Court.[89]

Testimony before the Ervin Subcommittee questioning the plaintiffs' allegations of harm, maintaining that those who sued the Government in the District of Columbia (i.e., the plaintiffs in the *Tatum* case) had been willing to come forward "really admitting that they were not intimidated at all." [90]

Testimony before the Ervin Subcommittee that there was no justiciable controversy where private citizens "as in the case of *Tatum* v. *Laird*," sought to enjoin executive branch information gathering but there had been no threat of compulsory process and was no pending action by the Government against them.[91]

Testimony before the Ervin Subcommittee that the specific types of military surveillance activities complained of by the plaintiffs in the *Tatum* case—e.g., surveillance of political rallies, taking of photographs of participants, development of dossiers on their political activities and beliefs—did not constitute violations of constitutional rights.[92]

Involvement in the custody of the Army computer printout—a key item of evidence containing information on the political activities of individuals and groups that would have been introduced at trial in the District of Columbia if the remand from the Court of Appeals to the District Court had been sustained in the Supreme Court.[93]

Any of these factors, taken separately, could be ground for discretionary qualification. Taken together, they present a picture of an extraordinarily close relationship between Justice Rehnquist and one of the parties to the case—i.e., the Government, represented by Justice Department lawyers who were arguing, in court and in their briefs, the same legal position that Mr. Rehnquist had developed and publicly articulated as head of the Justice Department's Office of Legal Counsel. Even assuming that recusal was not mandatory in these circumstances, and exercise of discretion that resulted in his participation in the *Laird* v. *Tatum* decision suggects a gross insensitivity to the appearance of fairness and justice.

V. THE ULTIMATE ISSUES: CANDOR, INTEGRITY, AND THE POSITION OF CHIEF JUSTICE OF THE UNITED STATES

In a 1973 speech to the Association of the Bar of the City of New York, Justice Rehnquist discussed the subject of judicial disqualification as an aspect of judicial ethics.[94] Without specifically mentioning his own actions in *Laird* v. *Tatum*, he developed a set of arguments similar to that made in his memorandum justifying his decision not to disqualify himself in that case. The closing paragraph of his address contained the following observation:

"Far more important than unanimity as to particular standards of disqualification is the recognition that outside of the area of corruption or reasonable suspicion of improper motives, disqualification is an issue to be decided by rational application of the governing standards to the facts of the case in a lawyer-like way." [95]

Rational application of the governing standards to the facts of the case requires, of course, that relevant facts affecting the disqualification issue be set forth for analysis "in a lawyer-like way." In the case of *Laird* v. *Tatum*, only some of the facts were already in the public record and known to the plaintiffs at the time they made their motion for recusal. The facts that were probably most significant—those relating to Mr. Rehnquist's role, as head of the Justice Department's Office of Legal Counsel, in negotiations with the Army and in development of Justice Department policy concerning allocation of responsibility for collection of raw intelligence data on civilian activities—were totally unknown to the plaintiffs when the case was pending in the Supreme Court and when they made their motion for recusal. Indeed, the fact that Mr. Rehnquist had been involved in the policy development process with respect to military surveillance activities did not become a matter of public record until 1974,[96] and has only come to public attention as a result of the hearings on his nomination to become Chief Justice.

In his 1972 memorandum denying the recusal motion, Justice Rehnquist made no mention of his role in the policy development process during 1969. His discussion in that memorandum of his public statements concerning the *Tatum* case before joining the Supreme Court did not set forth any of the specific references to the case he had made before the Ervin Subcommittee. When asked about his participation in the *Tatum* case at the 1986 Senate Judiciary Committee hearings, he explicitly denied having any knowledge of disputed evidentiary facts and indicated that he had no knowledge of disputed evidentiary facts and indicated that he had no knowledge about the military's domestic surveillance policies prior to the spring of 1971.[97]

What is to be made of the apparent contradictions between Justice Rehnquist's statements on these subjects and the facts as they appear in the public record? A number of different inferences can be drawn, but one thing seems clear: before a Senate vote is taken on his nomination to become Chief Justice, the serious questions raised by these inconsistencies need to be fully explored.

Among the many questions that should be addressed with respect to this issue are the following:

What was the nature and extent of Mr. Rehnquist's role in the Justice Department's negotiations with the Army's Office of General Counsel in March and April of 1969, concerning the allocation of domestic intelligence collection responsibilities between the departments?

How did the Justice Department's Office of Legal Counsel become involved in these negotiations? What were Mr. Rehnquist's instructions in this area from Attorney General Mitchell and Deputy Attorney General Kleindienst?

What instructions did Mr. Rehnquist give to members of his staff in the Office of Legal Counsel regarding issues in the negotiations? What (if any) discussions did he personally have with Mr. Jordan or others in the Army's Office of General Counsel?

What review, editing, or other functions did Mr. Rehnquist perform with respect to the March 25, 1969 draft memorandum prepared by members of his staff in the Office of Legal Counsel? What role, if any, did he have with respect to subsequent revisions of this draft before it was sent to the President for approval?

These questions are now relevant not because of what they may reveal about Mr. Rehnquist's past views about surveillance policy but, more importantly, because answering them will help reveal information about the full extent of his knowledge about and participation in the process of formulating (or continuing) Justice Department policy regarding Army involvement in domestic surveillance of civilian activities.

As matters now stand, it appears that Mr. Rehnquist has failed to disclose material facts about his involvement in that process, both in his 1972 memorandum on the disqualification issue and in his 1986 testimony before the Senate Judiciary Committee.

The position of Chief Justice of the United States is both the highest judicial office in the land and a symbol of this nation's commitment to justice under law. Regardless of what a Chief Justice's legal views and ideological predilections may be, the American people—including members of the bar and the judiciary—have the right to expect that the Chief Justice is a person of candor and integrity. It is possible that the doubts on this score that are raised by the inconsistencies between Justice Rehnquist's statements and the public record can be resolved in his favor through a more searching examination of the facts than has thus far been made. Clearly, however, the Senate and the American public need to learn the full facts about his role in military surveillance policy and his participation in this *Laird* v. *Tatum* decision.

FOOTNOTES

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

[2] See, e.g., Richard Kleindienst, *Justice* (1985), pp. 121-122.

[3] U.S. Congress, Senate, "Military Surveillance," Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, 93rd Congress, Second Session (April 9 and 10, 1974) (hereafter cited as "1974 Ervin Subcommittee Hearings on Military Surveillance"), pp. 20 (testimony of Robert E. Jordan III), 324-360. (Memorandum prepared by Robert E. Jordan III, dated March 22, 1971, on "The Background of the Interdepartmental Action Plan for Civil Disturbances of 1 April 1969") at pages 324-325. See also Memorandum for Record prepared by Milton Hyman, Office of the Army General Counsel, 1974 Ervin Subcommittee Hearings on Military Surveillance, pp. 299-324, and 318-319.

[4] *Ibid.*, at 325.

[5] *Ibid.*, at 325. The draft memo sent by Mr. Rehnquist to Attorney General Mitchell is one of a number of attachments to the Jordan memorandum, and appears at pages 335-341 of the 1974 Ervin Subcommittee Hearings on Military Surveillance. It is one of the documents requested by the Judiciary Committee at the conclusion of the hearings on Justice Rehnquist's nomination as Chief Justice.

[6] *Ibid.*, at 335.

[7] *Ibid.*, at 325, 342.

[8] *Ibid.*, at 325.

[9] *Ibid.*, at 325, 345.

[10] *Ibid.*, at 325, 346.

[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*, at 325, 353.

[14] The Office of Legal Counsel continued to be involved in the plan after it was transmitted to the President. In May the Army discovered that the Justice Department in its final retyping had omitted a paragraph. The Army called this omission to the attention of the Office of Legal Counsel, which checked and determined that the omission was purely inadvertent. On June 2, the Army wrote to Deputy Attorney General Kleindienst suggesting that the Presidential order be treated as if it included the omitted paragraph. On June 6, Mr. Kliendienst wrote to the Army concurring in this recommendation. 1974 Ervin Subcommittee Hearings on Military Surveillance, pp. 325, 354-355.

[15] Christopher M. Pyle, "CONUS Intelligence: The Army Watches Civilian Politics," *Washington Monthly*, January 1970, pp. 4-16.

[16] For example, the Rev. Albert Cleague, a black clergyman who was one of the plaintiffs, was said to have spoken "to an estimated 100 persons at the Emmanuel Methodist Church . . . on the topic of black unity and the problems of the ghetto." Complaint in *Tatum* v. *Laird*, U.S. District Court District of Columbia, Civil Action Docket No. 459-70, Appendix A.

[17] *Ibid.*, Appendix B; see also Pyle's article, supra note 15. The article noted, as one of several illustrations of the monitoring, that an IBM card prepared for the files of Arlo Tatum contained the notation that "Mr. Tatum delivered a speech at the University of Oklahoma on the legal rights of conscientious objectors."

[18] "Mr. ASKIN [counsel for the plaintiffs]: Your honor, he will testify that he was instructed to infiltrate a group known as the Young Adults Project, an organization composed of a number of church groups in the Colorado Springs area which also included the participation of the Young Democratic organization. . . . ." Transcript of the Proceedings, *Tatum* v. *Laird*, Civil Action 459-70, D.C. D.C., April 22, 1970, at 29.

[19] U.S. Congress, Senate, "Federal Data Banks, Computers, and the Bill of Rights," Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, 92d Congress, 1st Session (hereafter cited as "1971 Ervin Subcommittee Hearings on Federal Data Banks").

[20] 1971 Ervin Subcommittee Hearings on Federal Data Banks, pp. 100-130 (Testimony of John O'Brien); 184-188 (statement of Christopher H. Pyle); 264-265 (statement of Ralph M. Stein). See also "Army Surveillance of Civilians: A Documentary Analysis by the Staff of the Subcommittee on Constitutional Rights," Committee Print, 92d Congress, 2d Session (Washington, D.C.: U.S. Government Printing Office, 1972) (hereafter referred to as *"Subcommittee Staff Report"*), pp. 12-14, 39-40.

[21] 1971 Ervin Subcommittee Hearings on Federal Data Banks, p. 384.

[22] *Ibid.*, pp. 197-198 (Pyle testimony); 272 (Stein testimony).

[23] *Ibid.*, pp. 200-201 (Pyle testimony).

[24] *Ibid.*, pp. 290-296 (testimony of Joseph J. Levin, Jr.).

[25] *Ibid.*, pp. 305-309 (testimony of Oliver A. Peirce).

[26] *Ibid.*, pp. 106-130 (O'Brien testimony); 218-219 (Pyle testimony).

[27] Overall, the amount of information collected and stored during the 1968-70 period was enormous. The Army apparently had over 350 separate records centers containing files on civilian political activities. In one such center, at Fort Sam Houston, in Texas, there was the equivalent of over 120,000 file cards on "personalities of interest." While considerable duplication of files undoubtedly existed, the staff of the Senate Subcommittee on Constitutional Rights was probably conservative in estimating that in 1970 Army intelligence had reasonably current files on the political activities of at least 100,000 individuals not affiliated with the armed forces. At least two of the Army's data banks had the capacity for cross-reference among "organizational," "incident," and "personality" files, thus providing the technical capacity to produce correlations of persons, organizations, political activities, and addresses—virtually instantaneously, *Subcommittee Staff Report*, pp. 96-97, 196.

[28] *Ibid., passim.*

[29] 1971 Ervin Subcommittee Hearings on Federal Data Banks, pp. 224-225 (Pyle testimony); 394ff (testimony of Robert Froehlke).

[30] *Ibid.*, Part II, pp. 1368-1369.

[31] 1971 Ervin Subcommittee Hearings on Federal Data Banks, p. 602.

[32] *Ibid.*, p. 603.

[33] *Ibid.*, p. 601.

[34] 1971 Ervin Subcommittee Hearings on Federal Data Banks, pp. 620-621.

[35] *Ibid.*, pp. 861-862.

[36] Five days later Mr. Mardian transmitted a copy of the Interdepartmental Action Plan for Civil Disturbances to Senator Ervin, indicating that although the document was not classified, it was "an internal working memorandum" and was furnished as confidential. He did not correct his prior statement denying President Nixon's role in the plan. (In December Senator Ervin wrote to the Attorney General indicating that the Interdepartmental Action Plan did not appear to contain any sensitive material and that he planned to include it in the record of the hearings.) 1971 Ervin Subcommittee Hearings on Federal Data Banks, Part I, pp. 908-909; Part II, p. 1410.

[37] William H. Rehnquist, "Privacy, Surveillance, and the Law," Remarks before the National Conference of Law Reviews, Williamsburg, Va., March 19, 1971; reproduced in 1971 Ervin Subcommittee Hearings on Federal Data Banks, pp. 1590-1596. The quoted passage is at page 1593. Assistant Attorney General Rehnquist apparently also spoke with other groups concerning surveillance around this time. See, e.g., "Curbs on Investigators Called Serious Mistake," Arizona Republic, March 16, 1971; remarks of William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, at the American Bar Association Convention, Sonesta Tower Hotel, London, England, July 15, 1971, at pp. 12-13, cited in Note, "Justice Rehnquist's Decision to Participate in *Laird* v. *Tatun*," 73 Columbia Law Review, 106, 117

[38] *Tatum* v. *Laird*, 444 F.2d 947 (D.C. Cir., 1971).

[39] *Ibid.*, p. 958.

[40] 1971 Ervin Subcommittee Hearings on Federal Data Banks, pp. 1407-1409.

[41] *Laird* v. *Tatum*, 408 U.S. 1, 10.

[42] 408 U.S. 1 at 13-14.

[43] 408 U.S. 1 at 8.

[44] *Ibid.*, at 27.

[45] 408 U.S. 1, 38-40. Justice Marshall also joined in this dissent.

[46] Typed transcript of Rehnquist nomination hearings, July 30, 1986, pp. 196-197.

[47] U.S. Senate Committee on the Judiciary, Excerpts of Correspondence between Senator Mathias and Justice Rehnquist, August 1986.

[48] 1974 Ervin Subcommittee Hearings on Military Surveillance, pp. 287, 296. (Undated memorandum by Robert E. Jordan III, for the Secretary of the Army, apparently prepared in preparation for the 1971 Ervin Subcommittee hearings). See also Jordan's testimony at the 1974 hearings, pp. 14-32, and his "Memorandum for Record," with attachments including successive drafts of what ultimately became the "Interdepartmental Action Plan for Civil Disturbances," in the 1974 Ervin Subcommittee Hearings on Military Surveillance, pp. 324-360.

[49] *Ibid.*, pp. 324-325.

[50] Tab B to Jordan's "Memorandum for Record," 1974 Ervin Subcommittee Hearings on Military Surveillance, pp. 330-335.

[51] *Ibid.*, pp. 332-333.

[52] Tab C to Jordan's "Memorandum for Record," 1974 Ervin Subcommittee Hearings on Military Surveillance, pp. 335-341.

[53] *Ibid.*, pp. 335.

[54] *Ibid.*, pp. 335, 336-337. This draft kept the Army language referring to the "the salutary tradition of avoiding military intelligence activities in predominantly civilian matters," but nevertheless provided explicitly for Army involvement in the collection of intelligence. Mr. Jordan noted that "I find in the files a March 25, 1969 memorandum from Bill Rehnquist, Assistant Attorney General (Office of Legal Counsel) to the Attorney General and the Deputy Attorney General. This represents the first formal Justice draft of the Civil Disturbance Plan intented for the President's approval." He goes on to comment that "the FBI was not at all happy" with the additional responsibilities that would be thrust upon them by the proposed memorandum. See Memorandum for the Secretary of the Army—the Under Secretary of the Army," 1974 Ervin Subcommittee Hearings, pp. 287, 296.

[55] Tab C to Jordan's "Memorandum for Record," 1974 Ervin Subcommittee Hearings on Military Surveillance, p. 337.

[56] 1974 Ervin Subcommittee Hearings on Military Surveillance, pp. 20, 29-31 (Jordan testimony); 296-297 (undated Jordan memorandum for the Secretary of the Army); 325 (Jordan "Memorandum for Record"); 343 (Army's suggested changes in draft memorandum sent to Justice Department on March 29, 1971).

[57] Tab H to Jordan's Memorandum for Record," 1974 Ervin Subcommittee Hearings on Military Surveillance, pp. 346, 348. The final version of the memorandum was approved by President Nixon in May 1969. A copy of a one-page cover memo to President Nixon from John D. Ehrlichman who was then the White House advisor for domestic affairs, dated May 19, 1968 is included as Tab I of the Jordan "Memorandum for Record," at page 353 of the 1974 Ervin Subcommittee Hearings on Military Surveillance. It shows President Nixon's approval of the plan and his handwritten comment "Good planning."

[58] 1974 Ervin Subcommittee Hearings on Military Surveillance, pp. 20, 296, 325.

[59] Testimony of Frank Askin, typed transcript of the Rehnquist nomination hearings, July 31, 1986, pp. 380-381. Senator Ervin argued the case on behalf of the Unitarian Universalist Association as amicus curiae. Senator Ervin's views on Justice Rehnquist's participation in *Laird* v. *Tatum* are set forth in strong terms in the 1974 hearings: ". . . the only reason that you have the decision in that case is because the attorney who had represented the Department of Justice and defended the Army spying before this committee and who had voluntarily stated before this committee that the *Tatum*

case had no merits, insisted on sitting on the case in violation of a canon of ethics which said no judge should sit on a case in which he has been a lawyer." (p. 114).

[60] 409 U.S. 824, 901.

[61] Public Law 93-512 (1974); further amended by Public Law 95-598 (1978). As amended, the statute requires disqualification of a justice "in any proceeding in which his impartiality might reasonably be questioned" and "where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceedings or expressed an opinion concering the merits of the particular case in controversy."

[62] 409 U.S. 824, 828. Justice Rehnquist acknowledged that plaintiffs were "substantially correct" in characterizing him as having been an "expert witness" but apparently did not regard this as relevant to whether he had been a material witness.

[63] See, e.g., *United States* v. *Smith*, 337 F.2d 49 (4th Cir. 1964). In this situation the lower federal courts have held that a judge is not a material witness within the meaning of the statute because of his or her prior judicial involvement at an earlier stage of the case. *Ibid.* Even here, however, the courts have indicated that disqualification is often "a rule of good practice." *United States* v. *Hughes*, 325 F.2d 789 (2d Cir.) cert. denied, 377 U.S. 907 (1964). The language in the *Hughes* case indicating that section 455 does not apply to situations in which the judge "might be" a witness but only to cases in which a judge "is a witness" may be relevant to prior involvement in the case as a judge but clearly would not be correct if applied to nonjudicial involvement. A judge who was one of 20 witnesses to a murder would clearly seem disqualified by the statute whether he was actually called as a witness or not.

[64] U.S. Congress, House Report No. 93-1453, Judiciary Committee, Oct. 9, 1974; Senate Report (Judiciary Committee) No. 93-419, Oct. 3, 1973.

[65] 409 U.S. 824, 825.

[66] 28 U.S.C. sec. 455 (1986 Cum. Supp.); ABA Code of Judicial Conduct Canon 3C(1)(a).

[67] 28 U.S.C. 455(b)(5)(iv). S. 1886, 92d Cong., 1st Session, was introduced on May 17, 1971, prior to the time of the disqualification motion in *Laird* v. *Tatum*.

[68] *Ibid.*, at 826.

[69] *Ibid.*, at 828. Justice Rehnquist's memorandum opinion denying the recusal motion incorrectly states that the hearing records do not contain a copy. It can be found at pages 1407-1408 of the 1971 Subcommittee Hearings on Federal Data Banks.

[70] *Ibid.*, at 827. It is not clear what Justice Rehnquist meant when he said that he had never been apprised of the contents of this printout. At the March, 1971 hearings before the Ervin Subcommittee, Senator Ervin said: "We are anxious to get copies of the Army's Compendium . . . . I take it you will give the committee access to that document and allow us to copy the names of persons that were under surveillance by the Army." Mr. Rehnquist replied that his assistant had been working with the Subcommittee staff "and I know we had it examined down at the Department." 1971 Ervin Subcommittee Hearings on Federal Data Banks, p. 866.

[71] U.S. 495 (1947).

[72] 1971 Ervin Subcommittee Hearings on Federal Data Banks, p. 601.

[73] Typed transcript of Rehnquist nomination hearings, pp. 196-197.

[74] 1971 Ervin Subcommittee Hearings on Federal Data Banks, p. 601.

[75] The common law standard for disqualification was apparently limited to pecuniary interests. See Frank, "Disqualification of Judges," 56 Yale Law Journal 605, 609-611 (1747).

[76] "Although it is doubtless true that the term 'substantial interest' normally refers to a pecuniary or beneficial interest of some kind, we construe the language broadly enough to comprehend the interest that any lawyer has in pushing his case to a successful conclusion." *Adams* v. *United States*, 302 F.2d 307, 310 (5th Cir. 1962).

[77] 349 U.S. 133, 136 (1955). See also *Tumey* v. *Ohio*, 273 U.S. 510, 532 ("every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true . . . denies the . . . due process of law.").

[78] Commission on CIA Activities Within the United States, Report to the President (June 1975), pp. 124-125.

[79] *Ibid.*

[80] 409 U.S. 824, 829.

[81] 1971 Ervin Subcommittee Hearings on Federal Data Banks, pp. 861-862.

[82] *Ibid.*, pp. 864-865.

[83] William H. Rehnquist, "Privacy, Surveillance, and the Law," Remarks before the National Conference of Law Reviews, Williamsburg, Va., March 19, 1971; reproduced in 1971 Ervin Subcommittee Hearings on Federal Data Banks, pp. 1590-1596. The quoted passage is at page 1593.

[84] 1971 Ervin Subcommittee Hearings on Federal Data Banks, pp. 1407, 1408.

[85] Frank, "Disqualification of Judges," 56 Yale Law Journal 605, 625 (1947) takes the position that participation in the formulation of the policy that the case involves is ground for disqualification. See also Note, "Justice Rehnquist's decision to Participate in *Laird* v. *Tatum*," 73 Columbia Law Review 106, 110, 117-121 (1973).

[86] 409 U.S. 824 at 830.

[87] 409 U.S. 824, 830-840.

[88] 1971 Ervin Subcommittee Hearings on Federal Data Banks, p. 601.

[89] Brief for Respondents in *Tatum* v. *Laird*, U.S. Supreme Court, October Term, 1971, No. 71-288.

[90] 1971 Ervin Subcommittee Hearings on Federal Data Banks, p. 621.

[91] *Ibid.*, pp. 864-865.

[92] *Ibid.*, pp. 861-862, 864-865.

[93] *Ibid.*, p. 901.

[94] William H. Rehnquist, "Sense and Nonsense About Judicial Ethics," 29 *Record of the Association of the Bar of the City of New York*, pp. 694-713 (November, 1973).

[95] *Ibid.*, p. 713.

[96] The materials filed with the Senate Subcommittee on Constitutional Rights by Robert E. Jordan III in 1974, which appear at pages 287-360 of the 1974 Ervin Subcommittee Hearings on Military Surveillance, appear to be the first public record of Mr. Rehnquist's involvement in this process.

[97] See note 46, supra, and accompanying text.

[A letter to the U.S. Senate From American Law Professors on the Confirmation of Justice Rehnquist]

We the undersigned members of the law teaching profession ask that the Senate of the United States weigh with especially solemn deliberation the nomination of Justice William Rehnquist as Chief Justice. We ask this for two reasons.

First, it will take a conscious effort to resist the tendency to accept as determinative the 13-5 vote of the Judiciary Committee. The unanimous vote of the same Committee in favor of Judge Scalia proves that the opposition to Justice Rehnquist was not, as has been asserted, based solely on politically or ideologically motivated grounds. Five votes against a sitting Justice is really reason for pause. The conscience-searching questions that Senator Leahy wrestled with are matters that every Senator must, in fidelity, decide upon alone in a quiet place and time, away from the political arena. We ask therefore that each of you resist the political push and decide this most important appointment of all as a matter of individual conscience.

The second reason that we ask for this extraordinary personal effort from every single Senator, even those who voted favorably in Committee, is related to the first. As teachers we are troubled by a growing cynicism among our students, particularly with respect to ethics in government. Paradoxically, in the post-Watergate period, proof of statutory crime is becoming the standard by which we measure the highest officials of the land. This perception must be changed. If history and tradition are guides, the Senate and the Judiciary are the institutions that can best signal that change. In many respects then this very significant confirmation hearing has become a testing ground for the ethical standards of this nation.

The questions that have been raised about Chief Justice designate William Rehnquist are varied. Nevertheless there is a common and disturbing thread that runs through all of the matters that have been raised at the hearings. That common thread pertains to the integrity and ethical standards of the nominee. And taking the character measure of judicial candidates is the primary duty of the Senate under the Advice and Consent clause.

The doubts that have been expressed about Justice Rehnquist's fitness arise not only from the particular charges of improper behavior but also from the responses in each instance the nominee has made to the charges. These charges and the responses are summarized below.

(1) First there is the response to the charges of voter harassment in the Arizona elections. In his testimony at the recent hearings and after the first confirmation hearing Mr. Rehnquist claimed that he had not personally challenged a voter on literacy grounds and that in any event literacy challenges were then legal under Arizona law. But the testimony against him and his own admissions establish that he at least knew what was going on and participated in some manner in the strategy of challenging voters at the polling places. Such strategy was bound to and indeed did involve intimidation and delay, as witnesses testified. Nevertheless, to this day Justice Rehnquist sees little wrong with what took place there because no technical violation of the law had been proven. There is a question of moral obtuseness in this response that we ask our Senators to reflect upon as they consider the other charges that have been raised.

(2) With respect to the restrictive convenants it is not a matter of what he did or failed to do, but likewise a question of his response to the existence of such obnoxious clauses. One response he made was that the clauses were unenforcible, again revealing a lack of appreciation for the ethical and symbolic dimensions of law. But he also said that he did not know of the existence of these clauses, an explanation that was only plausible if he had left the reading of his deeds to his lawyers. After the hearings however, he turned over a letter from one of his lawyers in which the restrictive covenant language was explicitly drawn to Justice Rehnquist's attention. This seemed to refute the Justice's testimony that he had no prior knowledge of the offensive language, or worse, it suggested that he felt compelled to correct his testimony because one of his lawyers was unwilling to accept the implied blame for failing to address the question of the restrictive convenants. We ask our Senators to consider what this initial willingness to implicitly shift blame to his lawyers for failing to do anything about such covenants in the deeds says about the integrity of the nominee.

(3) This same willingness to shift blame for an embarassment or a misdeed is also possibly revealed in the manner in which Justice Rehnquist responded to the questions about the memorandum opinion he drafted while clerking for Justice Robert Jackson. Notwithstanding the fact that there is no historic evidence that Justice Jackson ever supported the separate but equal doctrine, Mr. Rehnquist intimated that Jackson was considering a dissent in the *Brown* case. Holding the views expressed in that memorandum opinion in the fifties is not nearly as bad as disowning them and implied assigning them to someone of whose reputation the nominee, as a

former clerk, should be solicitous. We ask once more that our Senators consult their collective experience about human behavior and apply this to the pattern of responses the candidate has made to the various charges brought against him.

(4) There have been charges by Justice Rehnquist's brother-in-law of a breach of ethics in connection with a trust fund. Such charges would be the basis of a bar committee investigation if lodged against an ordinary attorney. So far there has been no response from Justice Rehnquist and to the best of our knowledge no investigation by an official body.

(5) Lastly, in the light of the foregoing, we ask our Senators to review in close detail the explicit charge of the failure of judicial ethics arising from the refusal of Justice Rehnquist to disqualify himself in the case of *Laird* v. *Tatum*. Perhaps this is the most significant matter because in this instance the response to an ethical demand is largely set forth in the words of Justice Rehnquist for all to read and fairly judge.

In a memorandum submitted to the Judiciary Committee Professor Askin of Rutgers Law School has emphasized one basis for questioning the judicial ethics of the nominee. That basis was that testimony before the Ervin Committee by then Assistant Attorney General Rehnquist revealed that he had knowledge of or *had formed an opinion about facts* that were in dispute in *Laird* v. *Tatum* and were depositive of one of the questions before the Court. This point is clearly made by Professor Askin and we simply ask every Senator to study Professor Askin's submission with care. But there are two other points that require less careful study and these points raise serious questions of intellectual honesty.

When the subject of the Army surveillance of civilians came up at Mr. Rehnquist's first confirmation hearings he said that it would be improper for him to comment on issues involving the surveillance investigation because of his "lawyer-client relationship" with the President and Attorney General. *Laird* v. *Tatum* dealt specifically with the subject of the Army surveillance of civilians yet Justice Rehnquist stated his relationship to the subject under review very differently in his recusal opinion. There he said "that my total lack of connection with . . . the case of *Laird* v. Tatum does not suggest discretionary disqualification here because of my previous relationship with the Justice Department." Although Mr. Rehnquist declined to testify before the Senate Committee, once on the Court he had no difficulty deciding a case that dealt with the very subject for which he had claimed an attorney-client privilege.

The same issue of intellectual honesty appeared even more plainly perhaps in another portion of his recusal opinion. Justice Rehnquist dismissed the applicability of the Canons for "Standards of Judicial Conduct" by describing them as "not materially different from the standards enunciated in the [federal disqualification] statute." The statute, in pertinent part, required disqualification in any case where a justice "has a substantial interest, [or] has been of counsel or has been a material witness." The Canons, which were not set forth in the opinion, in pertinent part state: "A judge should disqualify himself in a proceeding in which *his impartiality might reasonably be questioned* including but not limited to instances where: (a) he has . . . personal knowledge of disputed evidentiary facts concerning the proceeding; (b) he served as a lawyer in the matter in controversy . . . ." We ask the Senators whether under any interpretation of language these two standards honestly can be described as "not materially different."

The matters that appear on the face of the *Laird v. Tatum* disqualification case as well as the responses to all the other matters previously summarized are not political attacks nor are they trivial. Each of them relate directly to the central issues of integrity, honesty and character. Whatever the outcome of the confirmation vote, Mr. Justice Rehnquist will sit on the Supreme Court. The ultimate question that each Senator must answer is whether Justice William Rehnquist, in the words of Canon 2 of the Code of Judicial Conduct of the American Bar Association, has conducted *"himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."* If a Senator entertains the slightest doubt on that question with respect to the nominee for the highest judicial post in the land we humbly ask that consent be withheld and the President be advised to submit the name of a candidate who unequivocally meets the demanding standards the people have the right to expect.

Arthur Berney, Boston College.
David Chambers, University of Michigan.
David Cobin, Marie Falinger, Howard Vogel, Mary Jane Morrison, Hamline University.
Michael Kindred, Ohio State University.
Grayford B. Gray, University of Tennessee.
Patrick Charles McGinley, West Virginia University.
William L. Andreen, Timothy Hoff, Jerome Hoffman, Wythe Holt, Gene Marsh, Norman Stein, Manning Warren, University of Alabama.
Mark Brodin, Kenneth Ernstoff, Zygmund Plater, Alexis Anderson, Paul Tremblay, Peter Donovan Mark Spiegel, Robert Cottrol, Robert Berry, Ruth Arlene Howe, Robert Smith, Boston College.
Rhonda Rivera, Ohio State University.
Mark Tushnet, Georgetown University.
Kurt Strasser, University of Connecticut.
Otis Cochran, University of Tennessee.
Peter Shane, University of Iowa.
Jerry Phillips, University of Tennessee.
Carrie Menkel-Meadow, Leon Letwin, University of California at Los Angeles.
Robert Steinfeld, Isabel Marcus, Errol Meidinger, State University of New York at Buffalo.
Debra Evenson, DePaul University.
Paul Chevigny, Chester L. Mirsky, Stephen Gillers, Sylvia Law, Peggy Davis, New York University.
Peter Bayer, University of Baltimore.
Elizabeth M. Schneider, Brooklyn Law School.
Paul Brietzke, Valparaiso University.
Charles E. Wilson, Ohio State University.
Richard Ottinger, Pace University.
Arthur Pinto, Mary Jo Exster, Neil Cohen, Brooklyn Law School.
Herman Schwartz, American University.
Peter Aron, George Washington University.
Alan Freeman, State University of New York at Buffalo.
Burt Wechsler, American University.
Nadine Taub, Barbara Stark, Robert Westreich, Edward Lloyd, Carlos Garcia, Jack Feinstein, Rutgers University.
William J. Quirk, University of South Carolina.
Stephen Dycus, Vermont Law School.
Bernadette Hartfield, Paul Milch, Nicholas Richter, Jodi English, Norman Townsend, Charles Marvin, Roy Sobelson, Kathryn Urbonya, Georgia State University.
Laura Macklin, Georgetown Law School.
Egon Guttman, American University.
Bailey Kuklin, Brooklyn Law School.
Ndiva Kofele-Kale, Tennessee.
Neil Gotanda, Western State University.
Liz Ryan Cole, Pamela Ryan, Ben Aliza, Vermont Law School.
David Hill, University of Chicago.
Harvey M. Johnson, Prakash Sinha, James J. Fishman, Gayle Westerman, Ralph Stein, Frank Bress, Stuart Madden, Merrill Sobie, Donald Dorenberg, Norman B. Lichtenstein, Pace Law School.
Susan Kovac, University of Tennessee.
Richard L. Abel, University of California at Los Angeles.
Lawrence Schlam, Joel H. Swift, Northern Illinois University.
Jules Lobel, University of Pittsburgh.
Stefan Krieger, University of Chicago.
Nancy Rogan, Vermont Law School.
Barlow Burke, Edwin Hazen, Elliott Milstein, Ann Shattuck, American University.
Naira Soifer, University of Maine.
Ronald Collins, University of Puget Sound, in Tacoma, Washington.
John Strait, University of Puget Sound.
Barbara Salken, Barbara Atwell, Carol Olson, Pace Law School.
Charles Carr, University of Buffalo.
Irene Scharf, Pierre Schlag, University of Puget Sound.
Ken Kreiling, Vermont Law School.
Leonard Sharon, University of Maine.

[From the New York Times, Aug. 15, 1986]

REHNQUIST QUIET OVER TRUST, ILL BROTHER-IN-LAW CONTENDS

(By Marcia Chambers)

LOS ANGELES, August 14.—The disabled brother-in-law of William H. Rehnquist maintains the Supreme Court Justice acted unethically by failing for more than 20 years to tell him about a trust fund set up to help him through his illness.

The brother-in-law, Harold Dickerson (Dick) Cornell, who lives in San Diego and was a prosecutor there, said in an interview that Justice Rehnquist and other family members concealed the trust fund, from which they could benefit if Mr. Cornell did not collect. The fund was set up by Mr. Cornell's father.

The 73-year-old lawyer said he decided to tell his story because he wanted to prevent Justice Rehnquist from becoming Chief Justice of the United States. "I think he is too radically conservative, and from my experience in the trust case, I think he committed a serious breach of ethics," he said.

Some Cornell family members said Mr. Rehnquist and other family members followed their father's wishes when they concealed the trust from Dick Cornell because he spent money carelessly. After Mr. Rehnquist had left Pepperdine University in Malibu, where he had been teaching for two weeks, a spokesman there, Larry Bumgardner, vice president for university communications, said the Justice would have no comments until after the confirmation proceedings had finished.

Lawyers are bound by standards of professional conduct, that if violated, may result in disciplinary charges. Several legal scholars said Justice Rehnquist as a lawyer was obligated to disclose the existence of the trust, particularly if it was not being administered properly. Others were not so sure.

A DUTY TO ACT

Stephen Gillers, professor of legal ethics at New York University law school and the author of a book on legal ethics, said Mr. Rehnquist had a duty to act "because he had a surviving duty of loyalty to his client," his father-in-law, "and because fraud could have occurred given the length of time the trust went unreported," he said.

"His failure to act when he personally stands to gain by the failure is especially wrong," Professor Gillers said.

According to the trust, drawn up by Mr. Rehnquist in 1961, when he was a lawyer practicing in Phoenix, Mr. Cornell, who has multiple sclerosis, was to receive funds from the $25,000 trust whenever he "was unable to provide for himself in the manner to which he was accustomed."

Mr. Rehnquist, who is married to Mr. Cornell's youngest sister, Natalie, drew up the trust fund at the request of his dying father-in-law, Dr. Harold Davis Cornell, a San Diego physician. Dick Cornell said that a year later, when he was 49 years old and earning about $50,000 a year, he as forced to retire because of his debilitating illness.

FUNDS BASED ON LIVING STANDARD

The trust says funds were to be paid to Mr. Cornell whenever his standard of living fell below the level he maintained when the trust was written. His brother, George, was named trustee.

Dick Cornell said he was poverty stricken soon after retiring.

"I was in serious circumstances," he said. "It reached the point where I was making stew out of dog bones. At that time I was able to walk with crutches, and I didn't expect to live very long. I rented a small place. The rent was $68 a month and I used the remainder of my $96 in social security benefits to eat."

Mr. Cornell said he learned about the existence of the trust only in 1982, when his brother, George, died and one of his sisters was supposed to take his place as trustee. Her lawyer told her to inform him, he said.

Over its 21 years the $25,000 trust grew by $10,000, a fact that Mr. Cornell said astounded him. He said the documents he had received so far did not explain why the funds did not appreciate more. Professor Gillers said the trustee or his estate was answerable for that. "If Rehnquist was aware of this fact he had a duty to investigate and to blow the whistle if he found malfeasance," Professor Gillers said. "It is quite remarkable."

Mr. Cornell said at one point that his financial condition was so precarious that he asked his family at a yearly reunion if he could get funds from another family trust fund set up by his parents for emergency use and for education.

"Bill was at that meeting," Mr. Cornell said. "He certainly knew about my trust and he knew I was disabled and in serious financial straits. Bill and the others decided I didn't have the right to the emergency trust fund even though I was 100 percent disabled. And they never said, "Hey, you have your own trust.' "

"How could I squander trust money?" Mr. Cornell asked, "It's ridiculous."

[From the Los Angeles Times, Aug. 2, 1986]

REHNQUIST RELATIVE SAYS JUSTICE KEPT TRUST FUND SECRET

(By Jim Schachter)

SAN DIEGO.—A disgruntled relative says that Supreme Court Justice William H. Rehnquist joined other family members in concealing from him for two decades the existence of a trust fund from which the justice stood to gain financially if the bedridden brother-in-law did not collect its proceeds.

Experts in legal ethics say that Rehnquist's role in the family financial matter placed him in a murky area of professional responsibility and constituted at least a technical conflict of interest, although they disagreed about the seriousness of the ethical dilemma. Some experts said that Rehnquist was obliged as a lawyer to have disclosed the existence of the trust.

The relative, Harold Dickerson (Dick) Cornell, 73, a former San Diego prosecutor who is disabled by multiple sclerosis, said he was telling his story about Rehnquist's involvement with the $25,000 trust because he does not want the conservative Rehnquist to become chief justice. Cornell says he is a liberal.

REFUSES TO COMMENT

Rehnquist refused to comment on the allegations. "It would be inappropriate for Justice Rehnquist to comment on the matter in the midst of his confirmation hearings," a spokesman said.

However, other family members said that they and Rehnquist simply were following the wishes of Cornell's late father in concealing the trust fund from Cornell, who they feared would not spend the money wisely. One of Cornell's sisters discounted his claims of ethical wrongdoing, saying that the disabled former lawyer nursed a long-standing grudge against Rehnquist and others in the family.

But the trust document itself, drawn up by Rehnquist in 1961 for his dying father-in-law, states explicitly that funds were to be paid to Cornell whenever his standard of living fell below the level he maintained when the trust was written—a time when Cornell had a successful private legal practice. The document says nothing about keeping the trust a secret from him.

In an interview at his small home in the Ocean Beach section of San Diego, Cornell said: "I'm not looking for sympathy or condolence at all. But I think Bill (Rehnquist) is a threat. He's a threat to our nation. I know how reactionary he is."

CRANSTON INVESTIGATING

The office of Sen. Alan Cranston (D-Calif.) is investigating the allegations, according to Harold Gross, an aide to the senator.

Rehnquist has been married for nearly 33 years to Cornell's sister Natalie. In 1961 when Rehnquist was in private practice in Phoenix, his father-in-law, Dr. Harold Davis Cornell, asked him to draw up a trust benefiting his disabled son, according to Cornell.

Probate documents filed in San Diego County Superior Court state that the income from the $25,000 trust was to be paid to Dick Cornell if he was "unable to provide for himself in the manner to which he (was) accustomed."

The trustee, Cornell's brother George, was authorized by the document to begin liquidating the $25,000 principal of the trust if the income alone was not enough to meet the disabled man's needs.

Cornell's debilitating illness forced him to retire in 1962. And though family members knew, he says, that he was living much of the time on a meager income from disability insurance and Social Security payments, he was not made aware of the existence of the trust until January, 1982, shortly after the death of his brother George. When his sister Ruth Sawday was to succeed her brother as trustee, her lawyer advised her to inform Cornell of the trust's existence, according to another of the sisters, Mary Cornell.

GIVES MOST MONEY AWAY

Cornell ultimately received $35,000, the amount that has accumulated in the trust, in March, 1982. He purchased a hospital bed and motorized scooter for use at home, Cornell said, and gave most of the money away to his children and other people.

His brother George, the longtime trustee, was responsible for distributing the money, Dick Cornell said, But Rehnquist discussed Dick Cornell's condition with other family members, according to Mary Cornell. He was the only attorney in the family who knew about the trust.

Dick Cornell contends that Rehnquist had a special ethical duty as a lawyer to alert him to the existence of the trust. He also contends that Rehnquist had a conflict of interest in connection with the trust.

If Cornell had died, the trust directed that the money be divided among his children, his brother and his five sisters, including Rehnquist's wife. Cornell therefore contends that Rehnquist and his wife had a financial interest in concealing the existence of the trust.

EXPERTS SEE DILEMMAS

Experts in legal ethics agreed that the circumstances pose ethical dilemmas, but they disagree about whether Rehnquist had breached any of the legal profession's standards of professional conduct. The experts were asked to react to the facts of the case initially without knowing that Rehnquist was involved in the transactions.

Geoffrey Hazard, a professor at Yale Law School, said precedents in California law have established a duty for attorneys to heed the interests of the intended beneficiary of a will.

Those rulings set up a standard for the handling of trusts such as the one drafted by Rehnquist for Cornell's benefit, according to Hazard, who compiled the current edition of the American Bar Assn.'s model rules of professional conduct.

"There would be a pretty good case in saying the lawyer in question had an obligation, if he knew the person was destitute . . . to do something other than just keep quiet," Hazard said. "There would be a real problem about his duty if he knew about this trust condition and knew about the state of that brother. It's not a very pleasant matter."

A legal ethics expert and professor at a California law school who asked not to be named said that an attorney in Rehnquist's position would be obligated either to tell Cornell about the existence of the trust or to tell his brother George, the trustee, that he might have been flouting the trust's intentions by withholding payments.

Other ethics experts said that the obligation to expose the existence of the trust falls to the trustee, not the lawyer who drew up the document. Frank Sander, a professor at Harvard Law School, said a lawyer who contradicts his client's wishes for secrecy by disclosing the existence of a trust could be held to have breached the attorney-client relationship. This would be the case even if the request was not included in the document.

The law professors all said that there is a clear conflict of interest for a lawyer in drawing up a trust from which he could benefit, indirectly, through his wife. But

they disagreed about whether the conflict constituted any sort of ethical shortfall.

Stephen Gillers, a professor at New York University Law School, said there is always a conflict when an attorney has a self-interest in a document he is drafting. But the conflict could be overcome if the lawyer fully disclosed to his client—in this case Rehnquist's dying father-in-law—that there was a potential conflict and that it might be advisable to contact a disinterested attorney, said Gillers, co-author of a text on legal ethics.

Thomas D. Morgan, former dean of the Emory University Law School in Atlanta, noted that lawyers often draw up legal documents for family members and that the only way to avoid the attendant conflicts is not to draft family legal papers in the first place.

Other experts, though, dismissed the conflict for a lawyer in Rehnquist's position as a niggling concern. Charles Wolfram, a professor at Cornell University Law School, said: "Technically, it's a conflict of interest. Whether it's an impermissible one—I find that highly unlikely, because it's so obvious to everyone."

Other family members rejected Cornell's contentions of wrongdoing, saying he was emotionally unstable because of his long illness and motivated to lash out at Rehnquist by anger.

Mary Cornell, of San Diego, said Rehnquist and other family members were following her father's wishes by concealing the existence of the trust from her brother. "Dick has been unable to hold money all his life," she said Wednesday. "Father felt if Dick knew about it, he'd just spend it and it was intended for his terminal illness."

Rehnquist's contact with her brother had been minimal during the years the trust was hidden. "I don't imagine he thought much about it," she said.

But family members knew Dick Cornell "was in bad straits," she added. "I would go over to have dinner at his house," she recalled. "He'd tell me how thrifty he was, how he'd make a stew and it would last a whole week. I thought that was fine. I was recently divorced and I couldn't help him much."

TRANSCRIPT OF AUGUST 27, 1986

This is morning edition, I'm Bob Edwards. Four Senate Democrats are asking for a further FBI investigation of charges that Chief Justice designate William Rehnquist acted unethically while he was a lawyer in private practice. The charges concern the trust fund that had been set up to benefit Rehnquist's brother-in-law. NPR legal affairs correspondent Nina Totenberg reports.

TOTENBERG. Justice Rehnquist has been married for nearly 33 years to the former Natalie Cornell. When Rehnquist was a private lawyer in 1961 his father-in-law asked him to draw up a trust to benefit one of Natalie's brothers, Dick Cornell, who was disabled with multiple sclerosis. The trust was to be paid to Dick Cornell, "If he was unable to provide for himself in the manner to which he was accustomed." Shortly after the trust was drawn up the senior Mr. Cornell died, and some months later Dick Cornell was forced by his illness to retire from his practice as a trial lawyer. Now, Dick Cornell is charging that Rehnquist conspired with other family members to keep the trust a secret from him for 20 years while he, Cornell, lived at times in severe poverty.

Senators Howard Metzenbaum, Edward Kennedy, Alan Cranston, and Paul Simon, have asked for an FBI investigation of the matter. Dick Cornell is now 73 and bedridden. He says when he retired at age 49 he was earning about $50,000 a year, but a divorce and his illness soon wiped him out. And while he says he lived often with little to eat, he did not know that his father had set up a trust fund for him.

CORNELL. For a large stretch of that time I lived on $96 a month from Social Security. I wasn't eating regularly for at least a year. I was in financial straits and the whole family knew, that included Bill and Nan who were there. My sister and Rehnquist.

TOTENBERG. You had a family meeting over this?

CORNELL. We had a number of them, yeah. I told them what my circumstances were, and how I was living on stew and ate out of dog bowls and so forth and they thought that was funny.

TOTENBERG. How did you finally find out about the trust?

CORNELL. My brother who was the trustee, died in '81 and they had to get an appointment of a new trustee and since I was the main beneficiary I had to receive a notice of the motion of the court to reappoint a trustee. That's the only way I found out.

TOTENBERG. Cornell says he hired a lawyer, threatened to sue his family, and the money was turned over. The Los Angeles Times first reported the Cornell story and quoted another sister, Mary Cornell, as saying that Rehnquist and other family members were simply following their father's wishes in keeping the trust a secret. "Dick has been unable to hold onto money all his life," she is quoted as saying. "Father felt if Dick knew about it he would just spend it and it was intended for his terminal illness." Dick Cornell responds this way.

CORNELL. You can't be a spendthrift of the trust if the only money you get is what the trustee gives you. I've never been a spendthrift, but the story my sisters have brewed up—uh, uh—and the story of his wanting it to be a secret, is a story they brewed up to protect their position.

TOTENBERG. The trust was originally $25,000, by the time you finally got it some 20 or more years later it was $35,000.

CORNELL. Very interesting, don't you think? Depend(ing) on the bank it would have been $100,000.

TOTENBERG. That's what the accrued interest would have added up to?

CORNELL. Sure. Run in T bills it'd been—I'd figure—$115 thousand, something like that.

TOTENBERG. Now you know, everybody listening to us, as they eventually will hear part of this, anyway, will say to themselves, oh these family situations are just excruciating. You can just never know what the truth is. There's always somebody in the family who is just terribly difficult. How can we know what the truth really is? And should we really rest a case against a nominee for Chief Justice on a family feud?

CORNELL. Of course, that's the great—and I think that he is so conservative reactionary that it is a danger to the Supreme Court, but in addition to that the fact that, uh, that Bill knew that he drew the trust, he knew it, that he knew my circumstances, that he was in false relation with the family who were committing a serious breach of trust, now that is a serious violation to breach a trust. He knew it and he did nothing to, uh, break it, and of course the fact that he was a party at interest, it gives it an awful bad omen.

TOTENBERG. If Dick Cornell had not received the trust funds they would have gone upon his death to his siblings including Rehnquist's wife. For this reason a number of legal ethics experts have said Rehnquist had a conflict of interest. But the experts do not agree on whether the conflict is a major breach of ethical conduct. Some specialists in legal ethics also have said that in circumstances such as these with Dick Cornell proverty stricken and ill, Rehnquist had an obligation to reveal the existence of the trust. Other experts say the obligation belonged to the trustee. The FBI conducted a limited investigation of the Cornell charges before the Senate Judiciary Committee voted earlier this month to approve the Rehnquist nomination by a vote of 13 to 5. Now, with the full Senate preparing for a vote on the Rehnquist nomination next month, four Democratic Senators have asked for a more thorough investigation to resolve what they say are unanswered questions about whether Rehnquist actually knew about Dick Cornell's desperate economic condition and whether Rehnquist knew of the decision to keep the trust a secret from Cornell. Rehnquist has had no comment on the Cornell matter. I'm Nina Totenberg in Washington.

NEW YORK UNIVERSITY,
SCHOOL OF LAW,
New York, NY, September 4, 1986.

Hon. HOWARD M. METZENBAUM,
U.S. Senate,
Washington, DC.

DEAR SENATOR METZENBAUM: Your office has requested my opinion regarding the ethical propriety of certain conduct of William Rehnquist, currently a Justice of the United States Supreme Court whom President Reagan has nominated to be Chief Justice of the United States.

I am a professor of law at New York University, where I have been teaching since 1978. Prior to that, I was in the private practice of law for nine years and a law clerk to a United States District judge for one year. I teach professional and judicial ethics. I have written scholarly articles on the subject and articles for the popular press as well. I am also co-author of a casebook in professional responsibility entitled *Regulation of Lawyers: Problems of Law and Ethics.* I have served as an expert witness in several tribunals on issues of professional legal ethics. From 1980–83, I was a member of the lawyer disciplinary committee in Manhattan. In 1979–82, I was a member of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York.

The incident about which you inquire concerns Justice Rehnquist's creation of a trust document for his father-in law, Howard Cornell, while Justice Rehnquist was a lawyer in private practice. The trust is dated November 28, 1961. Apparently, the trust was created in California, where Howard Cornell lived. I do not know if Justice Rehnquist was then a member of the California Bar or whether, for some other reason, he was authorized to prepare this document for a California citizen. If a lawyer practices law where he or she is not admitted to do so, the lawyer may violate state laws against unauthorized law practice and, as well, Canon 47 of the Canons of Professional Ethics, which was the American Bar Association document governing a lawyer's conduct in 1961.

Mr. Cornell wished to make the trust in order to provide for a disabled son, Harold Cornell. I have read the trust instrument. Essentially, it requires the trustee to pay Harold and his children from the income of

the trust in the event that they are unable to support themselves in the manner to which they were accustomed as of the date of the trust instrument. The trustee of the trust is George Cornell, another son of Mr. Cornell.

The instrument also gives fairly broad authority to George to invade principal in the event of the same contingency and on behalf of the same beneficiaries.

The trust was funded with $25,000. Money not distributed to Harold or his children was to go to Mr. Cornell's seven children, including Justice Rehnquist's wife Natalie.

Mr. Cornell died September 7, 1962. George died in October 1981. Harold was not told of the existence of the trust for the twenty years between its creation and the death of George. After George's death, another daughter of Mr. Cornell, Ruth Sawday, petitioned to be substituted as trustee. Harold was served with the petition. Only then (in early 1982) did Harold learn of the trust.

Harold has asserted that the condition for the distribution of the income and principal—his inability to support himself in the manner to which he had been accustomed—had occurred. Indeed, he has alleged that his financial condition became desparate and that Justice Rehnquist was aware of it.

Assuming Harold is telling the truth, what if anything were Justice Rehnquist's responsibilities?

Justice Rehniquist had a potential conflict of interest when he drew the trust. The less money that went to Harold, or the less likely Harold was to get the money, the more that would be left for the other children, including Justice Rehnquist's wife Natalie. Justice Rehnquist had a duty to inform his father-in-law, who was his client, about this conflict and to explore with him the possibility of retaining disinterested counsel. If Justice Rehnquist fulfilled this responsibility and his father-in-law nevertheless wished Justice Rehnquist to prepare the document, then assuming it was not the unauthorized practice of law, Justice Rehnquist could ethically have done so. In other words, Justice Rehnquist's conflict is one Mr. Cornell, if fully informed, could have waived.

If after the death of Mr. Cornell, Justice Rehnquist became aware that the trust's condition for distribution of income or principal had occurred and that, nevertheless, George (the trustee) had distributed no money to Harold, Justice Rehnquist had a duty at least to investigate and, if he discovered that George was violating his fiduciary duty under the document Justice Rehnquist drew, to take steps to rectify the situation.

Justice Rehnquist owed this duty to his father-in-law and to Harold, the object of his client's concern. Justice Rehnquist could not ethically remain silent once he had reason to know that his client's fiduciary was ignoring his obligations to the detriment of his client's beneficiary.

Although two successive documents have governed the conduct of lawyers between 1961, when the trust was drawn, and 1982, when it was revealed to Harold, and although these documents vary in their exact language from state to state, both share the principle that a lawyer must not fail to seek the lawful objectives of his client or fail to carry out a contract of employment entered into with a client. See, e.g., Code of Professional Responsibility DR 7-101(A)(1), (2). Both also forbid a lawyer to favor his own interests over those of his client. See, e.g., A.B.A. Code, Canon V.

California has long recognized that an attorney for the maker of a will owes certain duties to the beneficiary of the will as well. See, e.g., *Lucas* v. *Hamm*, 364 P.2d 685, 689 (Sup. Ct. 1961). (Mr. Cornell's trust, though *inter vivos*, had a testamentary purpose.) The California rule is one example of the general proposition that a lawyer for a client may owe duties to nonclients, despite the absence of a direct relationship between himself and the nonclients. This rule varies from state to state but courts often invoke it, including in California, when the lawyer's client retains the lawyer for the very purpose of benefiting the nonclient. Mr. Cornell intended to benefit his son Harold. Justice Rehnquist owed certain duties to Harold and among them, in my opinion, the duty to take action on learning that the trustee under Mr. Cornell's trust may have been violating his fiduciary duties to Harold's detriment.

This duty to Harold is simply a continuation of Justice Rehnquist's duty to his client, Mr. Cornell. If Mr. Cornell were still alive, and Justice Rehnquist became aware that the trustee was violating his trust, he could not remain silent. After Mr. Cornell's death, Justice Rehnquist had the same responsibility to his client's beneficiary, Harold. He either had to alert Harold to the possible breach of trust or to investigate and take steps to rectify the breach if it existed.

Inaction under these circumstances is further aggravated by the fact that Justice Rehnquist's wife stood to gain if the trust funds were not distributed to Harold or his children. Justice Rehnquist's wife would ultimately receive one-seventh of undistributed funds. Especially when a lawyer is in a conflict situation, as Justice Rehnquist was here, he must take special care to assure that the interests of his client (or his client's beneficiary), not his own or those of others, are protected.

I therefore conclude that if Justice Rehnquist was on notice that the trustee was violating his fiduciary duty, he was required to investigate and to take remedial measures if the investigation confirmed the violation.

Sincerely yours,

STEPHEN GILLERS,
Professor of Law.

[From the Legal Times, Aug. 4, 1986]

REHNQUIST'S LAWYER URGED HIM TO NOTE DEED RESTRICTION

(By James Lyons)

Associate Justice William Rehnquist's lawyer in the 1974 purchase of a Vermont home said in an interview with Legal Times Friday that he had sent a letter to Rehnquist before the purchase advising him to read the property deed, including "the conditions set forth in the deed." One of those conditions was a covenant prohibiting sale or lease of the property "to any member of the Hebrew race."

According to the lawyer, David Willis of St. Johnsbury, Vt.'s three-lawyer Zuccaro, Willis & Bent, he sent Rehnquist a letter dated June 24, 1974, asking the associate justice to read the deed and its conditions. Willis, who said that Rehnquist gave him permission to discuss the matter publicly, read the letter to Legal Times.

The one-page letter, as read by Willis, includes the following language: "I would recommend that you examine closely the attached abstract copy of the deed of the main cottage property. . . . I would direct your attention particularly to the width of the right of way which would appear to be 20 feet and the conditions set forth in the deed."

Willis said a copy of the deed was attached to his letter, and added, "I wasn't calling particular attention to the covenant [restricting sale or lease of the property to members of the "Hebrew race"], but [the letter] was referring to all of the covenants—such as beach rights, mailboxes and so forth."

Willis said that he could not remember whether he discussed the restrictive covenant with Rehnquist. "I don't recall discussing [the covenant] with him," Willis said.

In confirmation hearings before the Senate Judiciary Committee on his nomination to become chief justice, Rehnquist said Wednesday that he was not aware of the restrictive covenant until it was brought to his attention by the Federal Bureau of Investigation, and could not recall reading the deed on his Vermont home.

A spokeman in Rehnquist's Supreme Court office said Friday that the associate justice will not make any statements to the press until the confirmation process is completed.

Rehnquist purchased the Vermont property from John and Joan Castellvi. Counsel for the Castellvis was St. Johnsbury lawyer John Downs of Downs Rachlin & Martin. Downs said that both he and Willis were aware of the restrictive covenant at the time of the sale. Downs read to Legal Times an excerpt from a letter dated July 2, 1974, from Willis in which Rehnquist's lawyer said he had examined the deed.

According to Downs, the July 1974 letter states, "The property is also subject to restrictions relative to use, with the rights of way, construction on the various parcels, and ownership by members of the Hebrew race."

John Castellvi, one of the former owners of the Vermont property, is now living in Venezuela and was unavailable for comment at press time, according to Carlos Rabassa, executive vice president of New York's M. Castellvi, Inc., a company founded by John Castellvi's father.

SUPREME COURT OF THE UNITED STATES,
Washington, DC., August 4, 1986.

Hon. STROM THURMOND,
Chairman, Senate Judiciary Committee, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: After the conclusion of my testimony before the Senate Judiciary Committee last week, review of my file on the purchase of my Vermont property disclosed the attached letter of July 2, 1974. As you can see, the letter is from my attorney, Mr. David Willis, to the seller's attorney, Mr. John Downs, and describes the condition of title, including a reference to the restrictive covenant about which I was asked at the hearing. While I do not doubt that I read the letter when I received it, I did not recall the letter or its contents before I testified last week.

By letter of July 31, 1986, I requested Mr. Willis to undertake the legal measures necessary to remove the restrictive covenant from the title of my Vermont property.

I would appreciate your providing a copy of this letter, with the attached correspondence, to all members of the Committee.

Sincerely,

WILLIAM H. REHNQUIST,
Justice.

WITTERS, ZUCCARO, WILLIS & LIUM,
ATTORNEYS AT LAW,
St. Johnsbury, VT, July 2, 1974.

JOHN H. DOWNS, Esq.
Downs, Rachlin & Martin, St. Johnsbury, VT.

DEAR JOHN: I have examined the title to the Castellvi property in Greensboro.

I, of course, found that the property was subject to the mortgage to the Hardwick Trust and the usual lien for taxes. The property is also subject to restrictions relative to use, width of rights-of-way, construction on the various parcels, and ownership by members of the Hebrew Race. There is an more or less ancient mortgage given by Frank J. and Mira D. Chase to George N. Soule which mortgage was dated January 7, 1893 and recorded in Book I, Page 447 of the Greensboro Land Records in the original amount of $350.00. The mortgage was assigned from George N. Soule to Carrie Soule by an assignment dated April 23, 1893 and recorded in Book J. Page 392 of the Greensboro Land Records. The mortgage subsequently was discharged by the Hardwick Savings Bank. There is no evidence of any assignment from Carrie Soule to Hardwick Savings Bank. Although, this lack of assignment creates a gap in the title, I have advised Justice Rehnquist in view of the age and size of the mortgage that the gap can most probably be safely disregarded.

There is, however, one mortgage of somewhat more substantial size which is not discharged on the record. Vermont Summer Estate, Inc. which was a predecessor in title to the Castellvi's and Highland Lodge, Inc. gave a mortgage to J. E. Appolt, Melvin G. Morse, Elmer J. Mathews, Archie Cuthbertson, and John H. Barrington Dated March 23, 1933 and recorded in Book Q, Pages 52-53 of the Greensboro Land Records. The mortgage in question was to provide security for the five individuals in exchange for their co-signing notes for the Corporation totaling $17,500.00. The mortgage was attempted to be discharged by the signing on the margin thereof of J. E. Appolt, J. H. Barrington, and A. B. Cuthberston. The discharge as signed on the margin does not follow the statutory form in that it is completely unwitnessed. Furhermore, two of the five original mortgagees apparently did not sign. This incomplete and technically defective discharge of such a substantial mortgage was somewhat disturbing to my client. The mortgage in question was recorded in the Bound Volume and therefore I was unable to photocopy the pages. I will hopefully by the time you receive this have secured a copy from the Town Clerk's Office however. If at all possible the Justice would either like this cleared up or some adjustment made so that the financial burden of clearing it up in the future would not be his.

I have the signed contract which I am enclosing herein. The Justice was in Greensboro on the 26th and apparently inspected the property and found the condition satisfactory. I have arranged for financing at the Merchants Bank and pending the resolution of this matter set forth above relative to the Vermont Summer Estate's mortgage, the closing papers could be prepared.

Cordially yours,

DAVID L. WILLIS.●

ARKANSAS GOVERNOR CLINTON NAMED CHAIRMAN OF NATIONAL GOVERNORS' ASSOCIATION

● Mr. PRYOR. Mr. President, the Governor of Arkansas, Bill Clinton, recently accepted the chairmanship of the National Governors' Association during its meeting at Hilton Head, SC.

The people of my State are proud of Governor Clinton and the leadership he has given Arkansas during his tenure. And we are proud that he has taken on this national responsibility at a crucial time in the development of our State and region.

In his acceptance speech, Governor Clinton spelled out several areas of importance to him and to the Governors' Association in the months and years ahead. To deal with these issues, he named five task forces that range from welfare reform to education, alcohol and drug abuse, and adult illiteracy. He emphasized that what we need is not reports but action.

Mr. President, I think the Members of this body would profit from Governor Clinton's emphasis on action and his insistence that all of us do more in these and other areas of concentration. It is an eloquent call to arms, and I ask that it be printed in the RECORD. It is my hope that colleagues on both sides of the aisle will read Governor Clinton's speech.

The speech follows:

BILL CLINTON, GOVERNOR OF ARKANSAS, CHAIRMAN, NATIONAL GOVERNORS' ASSOCIATION

I accept the chairmanship of the National Governors' Association with gratitude and enthusiasm. Of all the pleasures which have been mine since I first became a governor in 1979, few match the opportunity to get to know, learn from and become friends with you and your predecessors who have been my colleagues. This year at least 19 governors will leave our ranks, a great loss to the rest of us individually and as an Association. We will miss you and we wish you well.

I want to thank Governor Alexander for his outstanding work in education this year and for his more general commitment to giving us the chance to work together in ways that will help us do our jobs better.

I pledge to continue the emphasis on working together to do better for our people.

If you have seen my fellow Arkansans in their T-shirts proclaiming "Bill Clinton is 40," you know I just had a birthday. This is a milestone or millstone year for the first of the baby boomers, the generation which was born and reared in the economically charmed if socially turbulent years after World War II, the generation which grew up taking the American dream for granted.

Today we know better. Today I come as the first of the "over the hill" baby boomers to ask: Can we make America work again for all her people? I believe we can, but only if we can find ways for Americans to be able to work and to have work.

After World War II, for the first time in our history, America stood alone as the dominant economic power in the world. Our adversaries and our allies were largely in ruins. They could not compete. Other nations which are today our competitors had primitive economies then. Some, like Taiwan and South Korea, did not even exist as nations in 1945.

Thus, we enjoyed three decades of unparalled and virtually unbroken growth and prosperity. In 1964 in the middle of this period, when I graduated from high school, we had low unemployment, low inflation, and high growth. The nuclear family was alive and well. Poverty was under attack and receding. And I did not know a person old or young, rich or poor, black or white, with or without an education who wanted to work but was out of a job. My grandfather who raised me until I was 4 had barely more than a grade school education but he was never out of work. My stepfather did not have a high school diploma but he was never out of work.

In my part of the country, the South, which had always been America's poorest region, we were living proof of John F. Kennedy's adage: "A rising tide lifts all boats." Between 1945 and 1978, our per capita income rose from 65 percent to 85 percent of the national average.

But all that has changed now.

Over the last decade, we have been pulled into a world ecomomy which we no longer dominate and for which we are still largely unprepared. While the percentage of our GNP directly tied to trade has grown to 13 percent, the reconstructed economies of Japan and Europe have had higher productivity growth than ours. Newly emerging economies have captured many of our former markets by providing quality products at labor costs we can't hope to match.

The long term consequences are alarming. From 1981 to 1986, 40 percent of the American people actually suffered a decline in their incomes. Productivity growth rates are still too low. The trade deficits remain astronomical in spite of the dollar drop against the yen and some other major currencies. In May and June, for the first time, in 27 years we actually had an agricultural trade deficit. About twenty states are suffering from severe deflation in farm and other primary products.

Parelleling these economic disruptions have been deep and troubling changes in the fabric of American society: a dramatic rise in the number of single parent households; latch key children; huge numbers of young women and children in poverty; millions of adults so illiterate they are unemployable; high rates of welfare dependency; teen pregnancy; school dropouts; and alcohol and drug abuse.

Of course the news is not all bad. The bicoastal economy is doing well. The urban heartland is doing well. Some of our most prosperous states like Massachusetts are even worried about impending labor shortages. We seem to be more serious than ever before in dealing with the social ills that cripple so many of our people, undermining the quality of life for all of us.

But the hard fact remains that unless we can do more with these economic and social problems which limit the ability of our people to work, we cannot preserve the American dream as we know it.

For the past few years we have focused on education as the key with which governors could unlock a brighter economic future for our people. Under Governor Alexander's leadership we have produced the 1991 Report and with it a commitment to continued education reform. I am pleased that Governor Kean has agreed to serve again as the lead Governor on Education and to

We looked at the U.S. net international investment position, and again saw that just in the last 2 or 3 years, the United States has fallen into a deficit position with regard to investment, and that situation is worsening every month.

We looked at the amount invested in plants and equipment by American businesses, and again saw a decline in the 1980's from the level of investment in plant and equipment that we have enjoyed in either the 1960's or the 1970's.

Those were some of the economic indicators we looked at.

Mr. President, based on these trends—I believe they are irrefutable trends—we then went on to try to fashion a list of concrete recommendations that we could make to try to come to grips with some of the underlying problems causing these adverse economic trends. We came up with 11 specific, concrete legislative recommendations which are contained in the measure I introduced a few moments ago.

Those proposals include efforts to improve our ability to monitor information on foreign technological developments. We suggest that an office be established in the U.S. Patent Office which would do technology assessment forecast and outreach.

We also suggest that in the Department of Commerce, a new onsite function be established in foreign embassies—five foreign embassies, in particular—for the establishment of an Office of Technology Assessment, for the new technological developments occurring in foreign nations.

The PRESIDING OFFICER. The time yielded to the Senator from New Mexico has expired.

Mr. BINGAMAN. I thank the Chair. We will return to this subject later.

□ 1050

Mr. DOLE. Mr. President, I apologize to my colleagues. We were attending the joint meeting with the Brazilian President. I would just take a couple minutes of the leader's time and reserve the remainder of my time.

REHNQUIST AND SCALIA

Mr. DOLE. Mr. President, this morning the Senate begins final deliberations on the President's Supreme Court nominations. He has chosen two men of unimpeachable character and credentials to shoulder the tremendous responsibilities of our Nation's highest court.

They have endured microscopic inspection in the Judiciary Committee. And they have seen and heard more than their fair share of political rhetoric. But as far as this Senator is concerned, William Rehnquist and Antonin Scalia have passed inspection with flying colors.

So, in case there is any doubt at all—or if the critics harbor any hopes at all—let me indicate again that Justice Rehnquist and Judge Scalia in my opinion will be confirmed by the Senate and they will be confirmed by overwhelming numbers.

GRAFFITI SMEAR

I am aware of the last ditch attempt by some to derail William Rehnquist's confirmation to be the new Chief Justice.

In truth, however, it is just another attempt to deface a brilliant career, and I do not believe it will succeed.

Ever since the President nominated these two dedicated jurists, the newspapers, the radio and TV and the Halls of Congress have been filled with all kinds of technical legal talk. It can be confusing and arcane for any of us; and certainly, it may not be clear to many Americans who are following this story. But if you cut through all the legalese, the case boils down to one simple fact: Those who would torpedo these nominations are liberal, and the President's nominees are conservative.

CARRYING OUT THE REAGAN MANDATE

But it just seems to me that the people voted for Ronald Reagan by landslide proportions in 1980 and 1984. And they expect the President to carry their mandate all the way to the Supreme Court. That means the Court will be a people's court, not a court for special interests.

SALUTE TO THE CHAIRMAN

Mr. President, I salute the chairman of the Judiciary Committee, the distinguished senior Senator from South Carolina, Senator THURMOND, for his superb handling of the President's Supreme Court nominations. His work in the committee was exemplary: The deliberations moved quickly, but not so fast as to deny any Member—or any point of view—their fair chance and their fair hearing, and that is important in the process in the Senate.

We do have a tremendous amount of work to do before we adjourn. These are important nominations. They deserve full and complete debate.

And having said that, I would hope that we could move as quickly as possible on both these nominations.

The issue has been more than explored by the committee. It is time to wrap up the Supreme Court nominations and move on to the business that awaits us.

I am reminded again by the Attorney General that we are getting into the fall term and it is very important that these two justices, Judge Scalia be confirmed as a Justice and Justice Rehnquist be confirmed as the Chief Justice, so they will be prepared to participate in the fall term.

CONTRA AID

Mr. DOLE. Mr. President, let me also just indicate very quickly that I have received a letter from the President this morning. The President, recognizes our heavy work schedule prior to sine die adjournment which I still believe should come on October 3. It is going to require working on Mondays and Fridays in both the House and Senate and there may be a Saturday session or two, but I believe we can complete our work.

But the President is very concerned as he has a right to be about our failure to act on the $100 million for Nicaraguan freedom fighters. The President indicates:

> The Nicaraguan freedom fighters cling to our promise of assistance. The affirmative votes of the House and Senate have confirmed congressional commitment to that goal. However, months have passed since House action and weeks have passed since the Senate reaffirmed its position. In the intervening time, supplies of food and medicine have been drained and the ability of the democratic resistance to defend itself has been significantly reduced. There has been no lack of resolve on the part of the Soviets or their proxies in arming and sustaining a regime that clearly seeks to destroy the hope of freedom for millions in Central America.

The President is right. We have been starving the freedom fighters around here for the past several months. It is by design. It is deliberate. We understand there will now be an effort by the Democratic leadership in the House to further delay coming to grips with this issue by somehow attaching the Contra aid provision to the so-called continuing resolution.

Now, in my view, that is not what the majority of Americans and I think the majority of Congress had in mind.

This is a very sensitive issue. It is a very controversial issue, but it has been decided. It has been decided twice in the U.S. Senate with a bipartisan vote. If we want the Russians, the Cubans, and the Communists to strengthen their beachhead in that part of the world while we sit back and do nothing, in fact, do less than nothing, refusing to help those who want freedom and liberty, then I believe we have made a grave mistake.

I would also suggest that this is a concern of the distinguished subcommittee chairman, Senator MATTINGLY. On his behalf I submit the following statement.

MILITARY CONSTRUCTION CONFERENCE STALLED

Mr. President, on behalf of Mr. MATTINGLY, I wish to state that 1 month ago today, on August 11, the Senate began consideration of H.R. 5052, the fiscal year 1987 military construction appropriation bill. Three days later, after much debate, the Senate passed that legislation. That bill contained the funding for critically needed improvements to the airfields, the ports,

EXHIBIT No. 1

[From the New York Times]

DRUG CRAZED

What does America think it is doing about drugs? The House orders the military to halt drug traffic into the country within 45 days. Candidates challenge each other to submit to urinalysis and rush to endorse the death penalty for drug dealers. White House aides bicker over how many Federal workers should take drug tests. Congress suddenly wants to throw money at the drug problem. In bills hastily coopered together, House Democrats would commit $1.5 billion for enforcement, treatment and education; Senate Democrats would add $100 million more. No one knows what it will buy.

The new spending would be added to the $1.5 billion Washington already spends on drug enforcement and border interdiction. That's serious money for more personnel and equipment like radar planes. Yet there's no reason to think it will do much good. Trafficking profits are so huge that dealers match the cops gun for gun, plane for plane.

Such proposals are enough to stir up the ghosts of the old Law Enforcement Assistance Administration, which in 14 years doled out $8 billion to help fight local crime. Yet in those years, crime grew faster than ever. So it is now with Federal spending against narcotics. It has nearly doubled since 1982 but more cocaine flows in than ever.

The tragedy is that more useful ways to spend are obvious.

Sooner or later, most addicts seek help as the frustrations of supporting a habit grow. Yet the search for help often produces only more frustration: overcrowded programs turn them away for weeks or months. The House bill offers only $100 million for drug treatment, barely restoring cuts in Federal funding since 1982. The Senate does somewhat better with $300 million. But even that's modest, given the need and potential effect.

Both bills offer only a trivial $50 million for the most promising strategy of all: eradication of drug production at the source. It worked for a time with Turkey during the Nixon Administration and more recently, for a short time, in Mexico. Bolivian officials claim some success for recent American aided raids to destroy jungle drug factories.

Producer countries are becoming more sympathetic to American demands for cooperation since drugs increasingly threaten their own societies. Instead of dubiously investing another billion-plus in enforcement, why not try spending on that scale to buy up coca and help Andean peasants plant rice, coffee or cirtus fruit?

The haste to look good undermines hopes for initatives that would do good. So does the rush to partisanship; these rough Democratic proposals are likely to be misshapen further in negotiations with Congressional Republicans and the White House. The need for drug spending is urgent but the need for quick and dirty legislation is not.

DEBATE ON THE REHNQUIST NOMINATION

Mr. DOLE. Mr. President, I would also hope that we could reach some agreement on when to vote on the Rehnquist nomination. I happen to believe that it is a very important nomination. It deserves thorough discussion and consideration. No Senator who wishes to speak on the matter should be denied that opportunity.

Yesterday Senators had good solid debate for about 6 hours. I was a bit disappointed we did not stay in longer last evening. But we were still discussing the Rehnquist nomination until almost 7 o'clock. So there was a good 7 hours, I would guess, on the Rehnquist nomination. I hope there can be another good 5 or 6 hours today on the Rehnquist nomination.

I am quite certain there will not be a vote on the Rehnquist nomination today. I think it has been indicated to me that we would not vote on the Rehnquist nomination today. But I would hope and I have indicated to the distinguished minority leader that we might have a vote on Tuesday. That would give another full day Monday. We would be prepared to vote late on Tuesday, 3, 4, or 5 o'clock, and still hope to take up the Scalia nomination on that same day. That should give everyone ample opportunity to discuss this nomination.

□ 1010

We would like to avoid filing cloture. It seems to me this should not be necessary on this nomination. It will come to a vote. The only reason I urge my colleagues, the primary reason, is I am still convinced we can finish our work by October 3. I must say I had different signals as I visited the House in the joint meeting yesterday morning. They were wringing their hands, saying there was no way to do it by October 3. In any event, that is a possibility. I hope we would reach some agreement on when we might vote on the nominations.

Today we have special orders. I ask that the order in favor of Senator HAWKINS be vitiated.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. DOLE. That will leave Senators BOSCHWITZ, PROXMIRE, and LEVIN with special orders, with routine morning business until 11 o'clock.

At 11 o'clock we will resume consideration of the Rehnquist nomination.

RECOGNITION OF THE MINORITY LEADER

The ACTING PRESIDENT pro tempore. Under the previous order, the Democratic leader is recognized.

THE REHNQUIST NOMINATION

Mr. BYRD. Mr. President, I share the distinguished majority leader's hope that cloture will not need to be sought on the nominations, certainly on the Rehnquist nomination. I do not see any indication on this side of the aisle or on the other side of the aisle that a filibuster is in progress. I think Senators are rightfully expressing their support or opposition to the nomination. There has been good debate on the nomination thus far.

I applaud the distinguished majority leader for not offering a cloture motion today.

I will explore the possibilities on this side for a time for the vote, as the majority leader indicated his desire to do that.

THE DRUG EPIDEMIC

Mr. BYRD. Mr. President, on the drug legislation matter, I commend the House for yesterday's passage of drug legislation. I realize that cost is a factor in this or any other matter. But I think we also have to contemplate the cost of not doing something. When I say not doing something, I say not doing something that is meaningful and effective in dealing with this drug epidemic.

If we do not take effective, immediate, and meaningful action then the cost in wasted lives and increasing crime will certainly dwarf any cost of any meaningful, effective program which might otherwise have been the case.

Already there are crocodile tears beginning to be shed about the penalties that the House has included in their bill. But I say to the cynics, "What would you do? What would you do?"

All too long we have been soft on criminals in this country, and it appears there is still a lot of thinking out there that these are poor guys who are caught pushing drugs, selling drugs—making millions of dollars. This is a multibillion dollar business in this country and it results in wasted lives. It results in crime, crime in which innocent victims pay the price, a high price—sometimes the price of life.

I hope we have not reached the point where we look at the cost of everything and the value of nothing. If an individual seeks to enrich himself by destroying a life, and in this instance the lives of many, and in all too many instances the lives of young people who have otherwise promising futures ahead of them, in such instances it seems to me that life in prison is a low price to ask for those who perpetrate this crime against society.

If it is the death penalty, so be it. I know it sounds tough and it may sound mean-spirited. But what about the children who go to our schools and who become addicts, slaves, to this costly, deadly habit? What about them? What about their lives? How about that? Is that mean-spirited, to think in those terms?

So I would say to the cynics, "What would you do? You have tried your way. We have been soft too long. We have not had a coordinated, comprehensive program to deal with this epi-

tional military chain of command runs to the unified and specified combatant commanders through the JCS Chairman.

I would like to ask Senator GOLDWATER to explain how the conference committee resolved the differences in these two provisions.

Mr. GOLDWATER. I would be happy to respond to my distinguished colleague. The Senate conferees were able to convince their House counterparts to recede to the Senate position on the chain of command and the role of the chairman in transmitting communications. Other than two technical changes, the only change to the Senate provision was to authorize the President to assign duties to the chairman to assist the President and the Secretary of Defense in performing their command function.

Mr. LEVIN. I appreciate that explanation. In light of my longstanding concern over the role of the chairman in the chain of command, I am pleased that the Senate position on this issue prevailed in conference.

To further clarify this conference action, could Senator GOLDWATER explain the expectations of the conferees for the manner in which these new statutory authorities should be exercised?

Mr. GOLDWATER. The conference report authorizes the President to take two actions. First, he may direct that communications to and from the unified and specified combatant commanders be transmitted through the JCS Chairman. Second, he may assign duties to the chairman to assist the President and the Secretary of Defense in performing their command function.

Should communications run through the JCS Chairman, the orders that come from the chairman must be initiated by, authorized by, and in the name of the President or the Secretary of Defense. Even if the President should exercise these authorities, the conferees intend that the JCS Chairman would not be part of the chain of command, and the chain of command would not run through the JCS Chairman. The conferees determined that the role of the JCS Chairman regarding operational matters must be carefully preseribed in order to ensure the absolute and unquestioned integrity of the fundamental principle of civilian control of the military.

Mr. LEVIN. Again, Mr. President, I would like to thank the chairman of the Armed Services Committee for his helpful remarks.

On a related matter, the Senate bill on defense reorganization also would have ended the term of the JCS Chairman not later than 6 months after a new President takes office. Like the other provisions that Senator GOLDWATER and I have already discussed, this provision was intended to guarantee strong civilian control of a more influential Chairman of the Joint Chiefs of Staff. It would have given a newly elected President an automatic opportunity to release or retain the military officer who will serve as his principal military adviser.

This Senate provision was dropped in conference in favor of a House provision that specifies that, if a chairman did not complete his term, his successor would serve for the remainder of the unexpired term before being reappointed or replaced. Combined with beginning the chairman's term on October 1 of odd-numbered years, this conference agreement, in effect, reaches the same goal as the original Senate provision. A President will always be able to appoint a new chairman or reappoint the incumbent no later than October 1 of his first year in office.

Could Senator GOLDWATER confirm my understanding of this conference decision?

Mr. GOLDWATER. The Senator's understanding of this provision of the conference report is correct.

Mr. LEVIN. Mr. President, I am grateful to Senator GOLDWATER for his cooperation and patience in explaining these important provisions of the conference report pending before the Senate today.

Mr. GOLDWATER. Mr. President, there being no other amendments, I ask that the question be put on the conference report.

The PRESIDING OFFICER. The question is on agreeing to the conference report.

The conference report was agreed to.

Mr. GOLDWATER. I move to reconsider the vote by which the conference report was agreed to.

Mr. EXON. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. GOLDWATER. Mr. President, I thank the Chair. I yield the floor.

Mr. EXON. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

□ 1910

Mr. SARBANES. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. TRIBLE). Without objection, it is so ordered.

Mr. SARBANES. Mr. President, I ask unanimous consent to address the Senate as if in executive session, so that I might speak on the nomination of William Rehnquist to be Chief Justice of the United States.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

Mr. SARBANES. Mr. President, I rise to speak to the nomination by the President of the United States of William Rehnquist, an Associate Justice of the Supreme Court, to be the Chief Justice of the United States.

Mr. President, as many of our colleagues have stated in the course of the debate on this nomination, this is perhaps as important a responsibility as any that the Senate is called upon to discharge, certainly as important a responsibility as we are called upon to discharge with respect to nominations to high Federal office.

I say this because of the special and unique place which the Supreme Court occupies in our constitutional system of Government. In fact as a democracy we have carved out a role for the Supreme Court which in many respects runs directly counter to democratic theory.

Upon mature reflection, however, I think the vast majority in the country recognize that a written constitution, including especially within it the Bill of Rights, the protection of individual rights from unbridled Government power, is fundamental to a system of free self-government, and that the complex system of checks and balances established under our Constitution has served our country well. It has provided flexibility to develop and evolve under changing circumstances, hence the 14th amendment adopted after the Civil War provided the means whereby we extended to minorities and women over time their citizenship rights and made them an integral part of our system of Government, central participants in the American experience, an essential part of American democracy.

So the Court has a unique place in our tripartite system of Government, and it is therefore exceedingly important that the Senate review carefully, very carefully, nominees to the Court and in particular the nomination of a person to be the Chief Justice. A nomination to be not the Chief Justice of the Supreme Court but as the Constitution says the Chief Justice of the United States, a position as important and powerful and as exalted as any under our constitutional system with the possible exception of the Presidency itself.

Now, in considering nominations to the Court, I do not accept the argument that a nominee is entitled to confirmation simply because he is the President's choice. I am prepared to recognize a presumption in favor of a Presidential nomination with respect to nominees to the executive branch of the Government, where the responsibility of the nominee will be to assist the President in the performance of

his executive duties and in the formulation of his administration's program.

But the situation is very different when we are talking about the third independent branch of Government, the judiciary, appointed for life with responsibilities to function as a separate, independent branch of our constitutional system of Government. In such instance it seems to me that the Senate is called upon to make much more of an original judgment with respect to the nominee—to regard the President's nomination as representing the judgment of the President as to who should go on the Court and to accord it respect as representing the decision of a coequal branch of Government, but then to press beyond that to make to a significant degree an independent Senate judgment representing the legislative branch of our national Government.

In fact, the constitutional fathers at the convention in Philadelphia in 1787 even considered whether judges should be selected by the Senate, a proposal which James Madison favored, and in the Virginia plan it was proposed to give sole authority to the Congress with respect to the judiciary.

I have engaged in this discussion on how we should think about nominations because I am becoming increasingly concerned about what I perceive to be the acceptance in this body of a nonindictable, noncertifiable standard for approving nominations by the President, including even nominations to the judiciary. What I mean by a nonindictable, noncertifiable standard is that people come along and say, "He hasn't been indicted for a crime and he hasn't been certified in terms of his mental stability, or instability, and therefore in the absence of finding that kind of disqualification, the nominee ought to be confirmed."

It seems to me that the question ought not to be why a nominee should not hold high public office. The question ought to be why a nominee should hold public office. In other words, what is it about their character and intellect, their ability and integrity, their record which would lead one to conclude that, indeed, they ought to hold high public office.

Now, in fact, I would extend that sort of questioning to nominees to the executive branch although, as I said, with a greater willingness to defer to the President's judgment since there it is people who are going to help him to execute the responsibilities of the executive branch of our Government. When it comes to the judiciary, we are talking about a wholly separate independent branch of Government, the third branch of Government. It seems to me the responsibility of the Senate is to take the President's nomination as the initiative by which the nominee comes to us to recognize that it represents the President's judgment, and then to proceed from there in order to make our own judgment with respect to whether we think the national interest will be served by having this person confirmed for high office.

□ 1920

I have indicated that in this process of examination, the Chief Justice holds a unique place. As the Society of American Law Teachers has stated in a letter to Members of the Senate:

> The office of Chief Justice is unique in our constitutional government. Only 15 citizens have served this country in that capacity. A Chief Justice must embody the spirit of our highest aspirations for honest, impartial judicial conduct.

Only 15 persons in our Nation's history have served in the office of Chief Justice of the United States. There is no other political office of consequence that has had so few occupants in the course of our Nation's history.

Now let me turn to some aspects of the Rehnquist record.

First of all, it is interesting in considering Mr. Rehnquist that in the 1971 hearing, to note that matters were raised which were never in a sense fully resolved, and to some extent the same thing is happening again.

I intend to vote against the cloture motion. In my view, there are still additional aspects of the Rehnquist record that need to be developed and examined, just as I believe there were in 1971.

First of all, Mr. President, we have the very disturbing question of the Justice Jackson memorandum. This came up in the previous confirmation hearings for Mr. Rehnquist. That memorandum came to light in 1971, at the beginning of the final week of the Senate debate on the Rehnquist nomination to be an Associate Justice of the Supreme Court.

Newsweek had printed a memorandum written by Mr. Rehnquist in the fall of 1952, when he was a law clerk for Justice Robert Jackson, a memorandum entitled "A Random Thought on the Segregation Cases." In that memorandum, it was argued that the Court should not intervene to end school segregation by overturning the decision of Plessy versus Ferguson, the 1896 decision of the Supreme Court that upheld racial segregation. That memorandum concluded:

> I realize that it is an unpopular and unhumanitarian position for which I have been excoriated by liberal colleagues, but I think Plessy v. Ferguson was right and should be reaffirmed.

I want to repeat the concluding sentence of that memo:

> I realize that it is an unpopular and unhumanitarian position for which I have been excoriated by liberal colleagues, but I think Plessy v. Ferguson was right and should be reaffirmed.

At that time, the hearing was not reopened and the memo was not carefully probed. But on December 8, Mr. Rehnquist wrote a letter to Senator Eastland, the chairman of the Judiciary Committee, in which Mr. Rehnquist said that the views expressed in the memo were not his own but, rather, were prepared as a "statement of Justice Jackson's tentative views, for his own use at conference," prepared at Justice Jackson's request.

In other words, he argued that the memo did not represent his views but was written to represent Justice Jackson's tentative views, at his request.

Mr. President, simply reading the memo makes that interpretation of it extremely difficult to come by. In fact, in my view, it is a disingenuous explanation of the memorandum.

Justice Jackson's long-time secretary, Mrs. Elsie Douglas, was obviously quite exercised about this. She wrote a letter to one of our colleagues on this matter in August of this year, in which she said, "I have been following the proceedings on the confirmation of Justice William Rehnquist for Chief Justice." I am now quoting from the letter of Mrs. Douglas, Justice Jackson's long-time secretary. She wrote:

> I have been following the proceedings on the confirmation of Justice William Rehnquist for Chief Justice. It surprises me every time Justice Rehnquist repeats what he said in 1971, that the views expressed in his 1952 memorandum concerning the segregation case then before the Court were those of Justice Jackson, rather than his own views.
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> As I said in 1971, when this question first came up, that is a smear of a great man, for whom I served as secretary for many years. Justice Jackson did not ask law clerks to express his views. He expressed his own and they expressed theirs. That is what happened in this instance.

Mr. President, if Mr. Rehnquist was writing it for Justice Jackson, the memo would hardly end with the sentence, "I realize that it is an unpopular and unhumanitarian position for which I have been excoriated by liberal colleagues, but I think Plessy versus Ferguson was right and should be reaffirmed." The person who had been excoriated by liberal colleagues was law clerk Rehnquist, in conversation with other clerks.

In fact, one of the clerks, Donald Cronson, recently said in an interview in the Washington Post, "Unquestionably, in our luncheon meetings with the clerks, he, Rehnquist, did defend the view that Plessy was right."

Mr. President, I have two problems here: One is with the position which law clerk Rehnquist took at the time on Plessy versus Ferguson. Of course that was not a totally isolated position at that time.

□ 1930

Nevertheless, it says something about Mr. Rehnquist's constitutional vision then, and I am very frank to say that I think the constitutional vision reflected then on Plessy versus Fergu-

son has continued to be reflected in his approach to the very basic question of civil rights in this country and of equal justice under law.

But further is the question with respect to attributing the memo—shifting the memo away from law clerk Rehnquist, as representing his views, and associating it directly with Justice Jackson, who, of course, was deceased by that time and could not offer his own explanation. I simply quote again from Mrs. Douglas when she says:

It surprises me every time Justice Rehnquist repeats what he said in 1971, that the views expressed in his 1952 memorandum concerning the segregation case then before the Court were those of Justice Jackson rather than his own views. As I said in 1971 when this question first came up, that is a smear of a great man for whom I served as secretary for many years. Justice Jackson did not ask law clerks to express his views. He expressed his own and they expressed theirs. That is what happened in this instance.

Mr. President, let me now turn to the ballot security program in which, by his own admission, Justice Rehnquist was involved in Arizona in 1960, 1962, and 1964.

It was brought out in the 1971 hearings, at the very end of the hearing process, that Mr. Rehnquist had participated in his home State of Arizona in a so-called ballot security program which, to be very blunt about it, involved activities designed to intimidate minority voters.

Mr. Rehniquist denied those allegations when they were first made in 1971 and continues to do so, but there was not time in 1971 to investigate them fully.

This is a second instance in the prior confirmation of Mr. Rehnquist in which serious questions are raised but not fully addressed.

I have already made reference to the Justice Jackson memorandum, which came up actually after the nomination was on the floor of the Senate, and I now make reference to the ballot security program in Arizona which came up too late, simply because they would not reopen the hearing to look into it fully in 1971.

Now in the recent hearings Mr. Rehnquist again denied it but there was extensive testimony from a number of witnesses about his activity in this ballot box security program.

Even if one were to accept the Rehnquist assertion that he did not personally engage in challenging voters, and as I said there is extensive testimony to the contrary, he did not deny that he helped to formulate, implement, and orchestrate the Arizona Ballot Security Program, a program, as I have said, whose end result was really to intimidate voters at the polling place and particularly minority voters.

Now similar programs of intimidation continue to take place. They occurred in New Jersey in 1981. They occurred in my own State of Maryland. They occurred in Texas and that came up before when we considered another nominee to the Federal bench.

I raise this to underscore again Justice Rehnquist's approach to the most fundamental right in our democratic system, and that is the right to vote.

It also reflects, of course, since we are talking essentially about minority voters, a continuing insensitivity to the inclusion of minorities in the operation of our democratic system, an insensitivity reflected as I have already indicated by Mr. Rehnquist when he was law clerk to Justice Jackson beginning back in 1952. The same attitude which marked that memo in 1952 with respect to Plessy versus Ferguson, was reflected in the early 1960's in this so-called ballot security program in Arizona.

There were witnesses who testified that they actually saw Mr. Rehnquist at the polling place challenging voters. Rehnquist denied that but admitted that he had been part of developing, formulating, and implementing the program. In fact, he was designated in 1960 as cochairman of the ballot security program. In fact, he was designated in 1960 as cochairman of the ballot security program. He was involved in teaching challengers the procedures they were to use and in 1964 he was chairman of the ballot security program.

So there is this whole program of voter intimidation and we have seen it continue to take place unfortunately in various parts of the country. The remedy obviously to ensure fair elections is to proceed through the mechanism established in each State and locality to guarantee fair elections, usually an election board that is charged with the responsibilities, and not to undertake to engage in a separate so-called ballot security program which results in the intimidation of voters.

Now, third, Mr. President, in the current hearings, another matter has come up, and this is somewhat reminiscent of what occurred in the two previous cases in 1971, and that is a matter which has not been fully answered before we are called upon to act on the nomination. It involves claims of a Mr. Harold Cornell concerning allegedly inappropriate conduct of Justice Rehnquist in his capacity as a private attorney—specifically, a trust drawn up for Mr. Cornell, who was Mr. Rehnquist's brother-in-law. It raises the question about whether Mr. Rehnquist was under some obligation to disclose the existence of the trust to his brother-in-law given the financial circumstance which Mr. Cornell encountered.

Mr. President, I am not arguing that Mr. Cornell's allegations upon investigation would be substantiated or would be found to have merit. I simply do not know the answer to that question. But four of my colleagues at the end of August wrote to the chairman of the Judiciary Committee asking him to have the FBI look into a number of issues involving Mr. Cornell.

It is my understanding that was never done, that the requests made in their letter were not complied with and therefore the questions raised remain outstanding.

I ask unanimous consent to print that letter at the conclusion of my remarks. It is a letter from Senators METZENBAUM, CRANSTON, KENNEDY, and SIMON to Chairman THURMOND of the Senate Committee on the Judiciary.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

□ 1940

Mr. SARBANES. I thank the Chair.

There are lawyers concerned with the question of legal ethics who have expressed the view that Mr. Rehnquist did not meet his obligation in this situation. I am very frank to tell you that I think the Senate ought to know the answer to this issue before it approves Justice Rehnquist to be the Chief Justice of the United States.

This is a matter which, if you were a practicing attorney in any town or village or city in America today, and this question were brought up, would be considered serious. It would be a matter that would have to be looked into and investigated because it would go to the very question of your responsibilities and obligation as an attorney and to the question of professional legal ethics.

It seems to me, very frankly, remiss on the part of the committee that they did not thoroughly examine this matter and, if there is nothing there, put it to rest. It should not have been brushed aside, just as the Jackson memo should not have been brushed aside in 1971 and just as the allegations with respect to the ballot security program should not have been brushed aside in 1971.

Mr. President, I want to turn to a matter that I regard as even more serious than the ones I have made reference to thus far and that involves the decision of Justice Rehnquist in 1972 not to recuse himself in the case of Laird versus Tatum.

Laird versus Tatum was a case that came up soon after Justice Rehnquist became a member of the Court. In that case, the plaintiffs had alleged that the Army and the Department of Defense had established a wide-ranging program of surveillance and infiltration of law-abiding domestic organizations, and that they maintained the information in computerized data banks and widely disseminated their intelligence reports to Federal, State, and local civilian agencies as well as

military offices. The plaintiffs claim that they were targets of the military surveillance program and that the surveillance program violated the first amendment.

The question was whether they had the right to litigate this matter, whether it was justiciable. And that case was working its way up through our court system because, if they had the right to litigate it, if it were justiciable, then they could undertake discovery, they could undertake in effect to find out what it was in every dimension that the Government was doing.

The appeals court held that it was justiciable, that they did have the right to bring suit and the case went up to the Supreme Court. The plaintiffs asked that Justice Rehnquist recuse himself because of some testimony he had given before Senator Ervin. Justice Rehnquist refused to do that, sat on the case, and the case was decided on a 5-to-4 vote against the plaintiffs—a 5-to-4 vote. In other words, had Justice Rehnquist recused himself, the Court would have divided 4 to 4 and the appellate decision would have stood and that decision was that the plaintiffs could go ahead with the case and they would have gone back to the district court level and proceeded with the case.

Prof. Geoffrey Hazard of the Yale Law School, perhaps our Nation's preeminent authority on legal ethics, has written a letter to my colleague from Maryland which has been made generally available to Members of the Senate and included in the RECORD. Professor Hazard, from 1969 to 1972, served as consultant to the ABA Special Committee on Standards of Judicial Conduct, during which the committee examined the canons of judicial ethics and produced the new code of judicial conduct adopted in 1972.

Later Professor Hazard served as reporter for the ABA committee that revised the standards of legal ethics. He has taught legal ethics for several years and has published books and articles on legal and judicial ethics.

Let me simply quote from the Hazard letter, because I think it sets out this problem very clearly. He acknowledges being asked for his opinion about the propriety of the conduct of Justice William Rehnquist in regard to Laird versus Tatum.

The essential facts as I have been given them are as follows: *Laird* v. *Tatum* was a suit to enjoin a certain Government information gathering and surveillance program that was adopted in 1969. The case was brought to the Supreme Court by the Government's appeal from a decision of the Court of Appeals, which had held that the lawsuit was maintainable. The effect of the Court of Appeals' decision was that the plaintiffs could have proceeded to the discovery stage and perhaps then on to the merits. The Supreme Court reversed, holding that the plaintiffs lacked standing and hence that the suit should be dismissed without going into the merits. Justice Rehnquist participated in that decision and, since the decision was 5-4, cast a vote necessary to the result.

When *Laird* v. *Tatum* came before the Supreme Court, a motion to recuse Justice Rehnquist was filed by the plaintiffs. They argued that Justice Rehnquist was disqualified by reason of his prior relationship to the case, in that he had expressed opinions on issues in the case and that he had presented the Justice Department's position before a Senate Committee hearing. Responding to the motion, Justice Rehnquist rejected these contentions . . .

In recent testimony before the Senate concerning his participation in the transaction out of which *Laird* v. *Tatum* arose, Justice Rehnquist stated, "I have no recollection of any participation in the formulation of policy on use of the military to conduct surveillance or collect intelligence concerning domestic civilian activities."

□ 1950

In fact, in answers put to him by Senator MATHIAS, written questions after the close of these hearings—after the close of these hearings—we have the following responses: "Question: What was your personal role in the preparation of this document?" This is a draft directive concerning the involvement of the government in such activities. "Answer: I have no recollection of my personal role in the preparation of this document."

Question: With particular regard to the portion of the document concerning civil disturbance planning and intelligence operations prior to outbreak, what was your personal role in its preparation?

Answer: I have no recollection of my personal role in the preparation of this document."

Senator MATHIAS then asked Justice Rehnquist about Robert Jordan's testimony (Robert Jordan was the general counsel of the Army at the time the surveillance policy was formulated because in testimony he made it appear that Mr. Rehnquist had a relationship to the surveillance program beyond that disclosed in his opinion in Laird versus Tatum. According to that evidence, the surveillance policy was formulated in the early months of 1969. At that time, Mr. Rehnquist was assistant attorney general in charge of the Office of Legal Counsel. On behalf of the Justice Department that office, the office which Mr. Rehnquist headed, negotiated with the Army in formulating the surveillance policy. The negotiations were extensive, and obviously the circumstances stronly suggest that Mr. Rehnquist was personally and substantially involved in them. This was, after all, a very important subject. The Office of the Legal Counsel is small in size, and actually Mr. Rehnquist himself sent a key transmittal memorandum.

The negotiations between the Office of Legal Counsel and the Department of Justice and the Army resulted in a policy statement that was adopted by President Nixon, and which in turn was the basis of the Government action complained of in the litigation in Laird versus Tatum.

In light of the above development of the facts, the question Senator MATHIAS also asked Justice Rehnquist about Robert Jordan's 1974 testimony on the role of the Army in domestic surveillance becomes particularly relevant. He asked whether language authorizing a domestic role for military intelligence first "* * * appeared in the March 25 draft prepared by your office and transmitted over your signature." Justice Rehnquist answered: "I have no recollection how the language referred to first appeared in the draft."

Senator MATHIAS also asked whether Justice Rehnquist "* * * knew of or participated in the formulation of policy on the use of military to conduct domestic civilian surveillance." Justice Rehnquist answered: "I have no recollection of any participation in the formulation of policy on use of the military to conduct surveillance or collect intelligence concerning domestic civilian activities."

"I have no recollection." "I have no recollection." I have no recollection." "I have no recollection." repeatedly marks Mr. Rehnquist's response on this important issue.

Mr. President, let me just quote what Professor Hazard says when he comments on the facts that have been set out above, and the whole question, whether Justice Rehnquist should have recused himself in the litigation of Laird versus Tatum. I am now quoting from Professor Hazard's letter.

I ask unanimous consent that the entire letter be included at the end of my testimony.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit No. 2.)

Mr. SARBANES [reading].

First, in my opinion Justice Rehnquist's position as head of the Office of Legal Counsel constituted grounds of disqualification from participating in *Lard* v. *Tatum*, unless the significance of that relationship were overcome by additional evidence showing that he in fact was not involved in the matter it was in the office. In a matter of such substance and complexity as the surveillance policy, it is implausible that the head of the government law office responsible for development of its legal aspects would not be personally involved in considereable detail concerning the facts and issues going into the policy and its formulation. On that basis, Mr. Rehnquist was the responsible counsel in the matter in question, and as well a potential witness concerning any factual issues regarding the policy. Each of these two relationships is independently a ground for disqualification.

A lawyer directly involved in a transaction cannot properly later sit as a judge in a case in which that transaction is in dispute. As stated in the article by Mr. Frank, which Mr. Justice Rehnquist cited—

And this was at the time of his opinion on this matter in 1972:

Justices disqualify in Government cases when they have been indirectly involved in some fashion in the particular matter, and not otherwise.

Professor Hazard goes on to say:

Mr. Rehnquist's relationship to the transaction was essentially the same as if he had been involved as legal counsel for the Internal Revenue Service in working up a tax investigation program and then sat as judge in a case challenging the program, or while in the Justice Department passed upon corporate merger or electoral districting policy and then sat in a case involving the policy.

In his opinion in *Laird* v. *Tatum*, Justice Rehnquist stated that "I never participated, either of record or in any advisory capacity . . . in the government's conduct of the case of *Laird* v. *Tatum*."

Listen very carefully to that. What Justice Rehnquist said when he refused to recuse himself was that he "* * * never participated, either of record or in any advisory capacity * * * in the Government's conduct of the case." But as Professor Hazard goes on to point out, "* * * that statement is irrelevant if he was counsel in the transaction out of which the case arose, a basis of disqualification that was well recognized then as now."

In other words, it does not matter that Mr. Rehnquist was not of counsel in the case of Laird versus Tatum or did not serve in an advisory capacity in the Government's conduct of that case. That case was challenging a Government policy which Mr. Rehnquist had been involved in formulating. That was the challenge. The fact that Mr. Rehnquist was not involved in the specific case itself is not enough.

□ 2000

Having developed the policy within the Government as an attorney, he should have recused himself when the policy was being challenged.

As Professor Hazard stated:

Mr. Rehnquist's relationship to the transaction was essentially the same as if he had been involved as legal counsel for the Internal Revenue Service in working up a tax investigation program and then sat as judge in a case challenging the program, or while in the Justice Department, passed upon corporate merger or an electoral districting policy and then sat in a case involving the policy.

He then goes on to say:

Justice Rehnquist appears also disqualified because he was a potential witness, at least at the discovery stage in *Laird* v. *Tatum*.

In his testimony before the Senate, he denied having knowledge of "evidentiary facts." The standard relevant to the question is not evidentiary facts but facts relating to the subject matter of the litigation.

Second, when the case of *Laird* v. *Tatum* was before the Supreme Court, it was Justice Rehnquist's responsibility on his own initiative to address and resolve all issues concerning his disqualification. It was not the parties' responsibility to raise such matters, although they had a right to do so if they had access to the necessary facts. In his opinion in *Laird* v. *Tatum*, Justice Rehnquist referred, first, to the fact that he had not been counsel in the "case," i.e., the litigation that ensued after his involvement in the transaction—

The transaction being the formulation of the policy—

and second to his statements in public and as spokesman for the Justice Department before the Senate. Thus, Justice Rehnquist addressed only his publicly known involvements and omitted any reference to an involvement, as counsel in the transaction, that was at least as significant but which was not publicly known.

Professor Hazard goes on to say:

It was his duty to resolve both the publicly known possible bases of disqualification and those arising from an involvement that was confidential. Indeed, it is even more vital to fairness in adjudication that a judge resolve grounds of recusal which arise from confidential facts, for the parties ordinarly are helpless to raise such grounds.

Justice Rehnquist's addressing the publicly known grounds of recusal, but omitting reference to the confidential ones, would have been proper only if he had forgotten that his office in the Justice Department handled the surveillance policy negotiations, and that he himself was involved to a substantial extent. If when writing his opinion in *Laird* v. *Tatum*, Justice Rehnquist had not forgotten his involvement in the surveillance policy negotiations, than his opinion consituted a misrepresentation to the parties and to his colleagues on the Supreme Court. In such a matter, a lawyer or judge is expected to give the whole truth.

Finally, Justice Rehnquist has a duty of candor to the Senate in answering questions concerning *Laird* v. *Tatum*. The Senate hearing was an evidentiary inquiry into his qualifications for the office of Chief Justice. In making statements before such a tribunal, whether sworn or not, a lawyer or judge has an obligation to be fully truthful. Justice Rehnquist complied with duty only if his statement is accepted that he had "no recollection of any participation in the formulation of policy on the use of the military to conduct surveillance." Whether that statement should be accepted is a matter of judgment. It was made by a lawyer of the highest intelligence concerning sensitive state policy over which his office had direct responsibility early in his service in Government, and about which he had been asked to search his recollection on three official occasions.

Mr. President, Mr. Rehnquist was an Assistant Attorney General and head of the Office of Legal Counsel. The question of surveillance was not a small matter. It was a major matter involving negotiations between the Department of Justice and the Department of the Army. It was a matter important enough to be carried to the President for his approval. There is in existence a memorandum dealing with this matter by Justice Rehnquist, over his signature.

Mr. President, in my judgment Justice Rehnquist's involvement should have been revealed to plaintiffs in the Laird versus Tatum matter and Justice Rehnquist should have recused himself. This is no small matter, particularly when one is talking about the nominee to be Chief Justice of the United States.

I am very frank to say to you that I think in light of Justice Rehnquist's answers he really should come back before the committee so that the matter could be addressed further; so should the other matters to which I have alluded. Two of them were moved quickly in 1971—the Jackson memo, and the ballot box security program, both of which the committee had as a consequence to go back and examine carefully this time, and in which they found upon more thorough examination, very sharp differences in Mr. Rehnquist's conduct. The same deficiency now exists, I think, with respect to the Cornell matter and the matter of Laird versus Tatum.

Finally, Mr. President, I want to turn to a broader question. That is the breadth and depth, or lack thereof, of Justice Rehnquist's constitutional vision.

He himself in the Harvard Law Review in 1959 wrote:

Until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

In looking at judicial philosophy, I think it is important to approach it in a broad and not a specific sense. I am not really concerned with specific cases except to the extent that they establish a pattern which, in turn, reveals a broad and consistent philosophy, a philosophy which raises important questions about the future direction and development of our society.

□ 2010

An editorial in the Baltimore Sun on the 11th of September said:

But the record Justice Rehnquist has compiled on the Supreme Court strongly suggests that this is a case of a great intellect in the service of a closed and narrow mind, one not functioning within the very broad boundaries of the conservative consensus. He has been the leading dissenter, often alone, from even this moderately conservative Court. The inappropriateness of his elevation to the highly symbolic office of Chief Justice is best seen in his votes in the civil rights area.

It goes on to say in closing:

After careful consideration of the record that unfolded in the Senate Judiciary Committee hearing this summer, we believe that Senators concerned about the direction of the Court in the Nation now and into the 21st century should vote against the confirmation of Justice Rehnquist as Chief Justice.

Mr. President, this nomination is a very important matter and it does not rest, as I said, on any one particular decision; in fact, I do not believe that one ought to undertake, as it were, a litmus test list of decisions: Here are 10 important decisions, how did you

rule on them? I differed with you on them, therefore, I am going to vote against you.

What one has to do is look at the decisions in their totality to see what they reflect about a judicial philosophy, to form some idea of where this nominee stands with respect to his colleagues on the Court and what it reflects about his basic attitudes and about his constitutional vision.

As my very able colleague from Maine [Mr. MITCHELL] pointed out yesterday in speaking on this matter:

"He views the Court's role as being one of preserving the framework within which the articles of the Constitution can be used to sustain majority rule"—in other words, an approach to the machinery of Government—"but in which the amendments to the Constitution—most notably the first 10 which make up what we know as the Bill of Rights—do not figure prominently."

In fact, as my colleague from Maine points out, Mr. Rehnquist argues that the Court should give great deference to legislatures, especially State legislatures.

Of course, this theory if not developed to recognize the role of the Supreme Court in protecting individual rights would render the Bill of Rights, the first 10 amendments, subsequently expanded through the 14th amendment, secondary.

The Constitution would never have been ratified but for the assurance that a bill of rights was going to be adopted. It was an essential issue at a number of the ratification conventions in the States subsequent to the Constitutional Convention in Philadelphia in the summer of 1787. The assurance of the Bill of Rights, now embodied as the first 10 amendments to our Constitution, was essential to the ratification of the Constitution.

As Senator MITCHELL went on to point out:

But even when the question of Justice Rehnquist's view of the Bill of Rights is set aside, his claimed deference to majority opinion that is expressed in statutory law—

a deference which he has consistently repeated as an operating principle of his constitutional interpretation—

does not lead him to defer to that majority, acting through their elected representatives in Congress, when the subject is civil rights.

This is very important to understand. Justice Rehnquist takes the general proposition in interpreting the Constitution, he is going to attach special weight, to defer to majority opinion as expressed in statute. If it is asserted therefore, that the statute is in conflict with the Constitution—an assertion frequently made by individuals asserting a right guaranteed to them by the Bill of Rights or the 14th amendment—Justice Rehnquist is going to be predisposed to the approach that affirms the statute against the claim that it is invalid because of conflict with the Constitution.

Many see this as a limited, pinched view of the Constitution when it comes to the protection of individual rights. But when you move beyond that question to the question of deferring to statutory laws expressed by the majority to protect individual rights, then Justice Rehnquist no longer defers to statute.

Careful analysis has shown that since 1971, the Supreme Court has disagreed, to some extent, on the application of Federal civil rights statutes in 83 specific cases. According to Justice Rehnquist's own carefully articulated standards, such statutes—the civil rights statutes—embody the majority will of the people duly expressed through their legislature. Yet he does not attach to them the same weight he attaches to noncivil rights statutes, in spite of his repeated avowals of the necessity of deferring to the judgments of the majority as expressed in statutory law—an assertion he makes repeatedly statutory law is asserted to be in conflict with a constitutional provision. Ordinarily when an individual comes before him and says, this statute is unconstitutional, I am being denied an individual right, Justice Rehnquist says, "No, I am strongly for upholding statutes, they represent the opinion of the majority; therefore, I am not going to accept your challenge to this statute under the Constitution; that is one of my major operating principles."

□ 2020

But then, despite this verbal deference to the judgment of the majority expressed in statutory law, in 80 of the 83 civil rights cases in which statutory law was on the side of the individual, in terms of asserting his or her rights, Justice Rehnquist joined in or wrote the dissenting opinion which most severely curtailed the exercise of the legislagive majority's powers. In about half of those cases the Court actually ruled with the individual asserting his civil rights. Justice Rehnquist—I want to underscore this point—in 80 of the 83 cases joined in or wrote the dissenting opinion which most severely curtailed the exercise of the legislative majority's powers. "In other words, his view," as my colleague, Senator MITCHELL, said, "is that we must defer to the will of the majority as expressed by legislative action—except when civil rights are involved."

Mr. President, engraved in stone over the entrance to the Supreme Court directly across from the Senate are four words: "Equal Justice Under Law." Any of us, if we stop for a moment to reflect, recognize that this principle lies at the very heart of our constitutional system. In my view, Justice Rehnquist's career, both before he went on the Court and in his opinions since going on the Court, reflect an insensitivity—more than insensitivity, a resistance—to this essential concept to such a degree that he ought not to be confirmed as Chief Justice of the United States.

This is not a minor question of judicial philosophy. This is central to one's constitutional vision for the Nation. This is not a matter of disagreement with a particular decision. After all, the Court has to make hard judgments. Justices differ amongst themselves. But this is a question of the consistent pattern which has existed from Mr. Rehnquist's very early, very early career.

What we have here is judicial implacability. We have, as was stated, an intellect in the service of a closed and narrow mind, not functioning even within the very broad boundaries of a conservative consensus.

I do not believe that this record—a record both of insensitivity to important questions of candor and integrity, and a lack of commitment at the very heart of one's judicial philosophy to the principle "equal justice under law" emblazoned above the Supreme Court, justifies confirmation as Chief Justice. On the contrary this record argues persuasively against confirmation. Therefore, I will vote against the cloture motion in order that some of these matters may be further explored, and intend to vote against Justice Rehnquist's confirmation as Chief Justice if we reach that point.

Mr. President, I ask unanimous consent that some newspaper editorials on this nomination be included in the RECORD.

There being no objection, the editorials were ordered to be printed in the RECORD, as follows:

[From the Washington Post, Sept. 12, 1986]

THE REHNQUIST NOMINATION

Fourteen years ago, when William Rehnquist was nominated to be an associate justice of the Supreme Court, this newspaper opposed his confirmation because of the restrictive, almost cold-blooded view of the role of government that suffused his writings and public statements in the fundamental fields of civil rights and civil liberties. The intervening years and the opinions Justice Rehnquist has written on the Supreme Court have only reinforced these misgivings. For many of the same reasons we set forth in 1972, we urge the Senate to reject his nomination to be chief justice.

We accept that in most cases there is a strong presumption in favor of a presidential nominee, especially when, as in this case, the chief executive has won an overwhelming electoral victory. But judicial appointments, which are for life and to an independent branch of government, should be held to a higher standard than executive positions. The standard must be highest of all for Supreme Court justices, whose views are not subject to appeal and who can stray from the precedents that they themselves help form. So, while it is clear that Justice Rehnquist is well qualified by intellect, edu-

cation and professional experience to assume this high office, and while he is a man of sufficient integrity and moral character—the hearings, in our judgment, did not prove otherwise—we believe that the doctrinaire quality of his understanding and application of the law renders him unacceptable for the office of chief justice.

It is not simple conservatism that gives us pause but something much more—an inflexible position on the role of the federal courts in American life and an unvarying refusal to look beyond the consequences of that philosophy to its impact on individual Americans. Justice Rehnquist is a forthright proponent of legislative over judicial decision-making and the prerogatives of states over the demands of the federal government. His opinions consistently adhere to this framework even when the result is both avoidable and devastating to individual liberties and social justice. It is not necessary to believe that Justice Rehnquist favors the results to which his decisions lead—tax-exempt status for segregated private schools, for example. It is enough that he will not bestir himself—not take advantage of the considerable discretion that the Constitution affords Supreme Court justices for precisely such occasions—to avoid the result. Where the statute does not expressly vindicate the rights of individuals neither will he. Nor would he have judges second-guess the decisions of democratically elected state legislatures on constitutional grounds, even if these mean a continuation of second-class citizenship for some groups or an encroachment on the privacy of individuals. Justice Rehnquist is not always alone in these opinions, but he is unvarying.

What seems to be missing from his work is an acceptance of the court's responsibility to protect individuals from the majority, and sometimes the majority from itself. Some of the finest moments in the high court's history have occurred when justices have taken a stand, on constitutional grounds, against the prevalent views in legislatures. School desegregation, one-man one-vote, miscegenation laws and compulsory prayer in the public schools are only a few examples. It is unlikely that Justice Rehnquist would have been in the majority in these cases—decided before his time on the court—even to vindicate the constitutional rights of those who suffered because of discriminatory laws.

But the pattern goes beyond this. The Leadership Conference on Civil Rights made a study of Justice Rehnquist's opinions over the years. It found 83 cases involving civil rights that (1) were statutory, not constitutional, involving interpretation not of the intent of the Founders but the will of Congress, and (2) were not unanimously decided; they were close calls. Mr. Rehnquist, the conference reported, voted against the civil rights complainant in 80 of these 83 cases. In two of the remaining three, he voted for a narrower result than the majority. That is a record, not of conservative philosophy, but judicial implacability.

The other nominee before the Senate, Judge Antonin Scalia, of the Court of Appeals for the D.C. Circuit, lacks such a record at this point in his career. That is what distinguishes these nominations. Judge Scalia is a conservative jurist whose opinions, especially in cases involving the First Amendment, also cause us considerable concern. But he does not have a history of inflexibility that would lead us to the same conclusions that we have reached on Justice Rehnquist. After a review of his work, all 18 members of the Senate Judiciary Committee voted to recommend him for confirmation, and we cannot disagree.

If he is not confirmed as chief justice, Mr. Rehnquist will remain on the bench as an associate justice for as long as he chooses. He will undoubtedly continue to decide cases in the same manner, and he will have a vote equal to that of the chief justice, whoever that might be. And for the time being Judge Scalia will stay where he is. We are aware that the chances of the Senate's refusing to confirm Justice Rehnquist are small. Nevertheless, a vote to confirm him in the higher office seems to us to be a vote of confidence in his approach to the law and the Constitution. Our deep disagreement with this approach and its results leads us to urge a vote against him.

[From the New York Times, Sept. 11, 1986]

VALID DOUBTS ABOUT JUSTICE REHNQUIST

President Reagan has earned the right to try to shift the philosophy of the Supreme Court. But the Senate has an equal right to insist on high-quality appointments—particularly for Chief Justice, the noblest position in American law. The debate that begins today on the nomination of Justice William Rehnquist will properly turn on concerns beyond the mundanely partisan. The Senate's own investigation has raised valid questions about the nominee's credibility and convictions.

Justice Rehnquist has served on the high court for 15 years and there is no doubt about his legal ability or agreeable personality. But brilliance and courtesy are not enough. The Supreme Court's center seat demands a symbol of impartiality, fairness and integrity that resoundingly affirms America's commitment to equal justice. At critical junctures in his confirmation hearings, when senators sought to explore Justice Rehnquist's beliefs and past actions, he stonewalled with failures to remember and unpersuasive explanations of embarrassing facts.

As Assistant Attorney General in 1971, Mr. Rehnquist defended the Nixon Administration in Senate hearings into the military's surveillance of civilian protesters of the war in Vietnam. He testified then that plaintiffs suing the Defense Department had no case, yet still voted as a Supreme Court Justice in 1972 to throw out their lawsuit. When Senator Charles Mathias recently asked what role the nominee played in formulating the surveillance policy, he said that he couldn't remember. Does the Senate believe that?

Justice Rehnquist also testified this summer that he favored from the start the Supreme Court's 1954 school desegregation decision. A memorandum to the contrary that he wrote as a law clerk in 1952, he said, was not really his opinion but that of the late Justice Robert Jackson. Does the Senate believe that? And how does that testimony square with a memorandum that surfaced only last week in which Assistant Attorney General Rehnquist urged a constitutional amendment that would have permitted widespread evasion of this decision?

Confronted with restrictive covenants on two of his homes, the nominee first said he had been unaware of them. Then he wrote to the Senate Judiciary Committee that he had found a letter in his file cautioning that his Vermont home could not be sold to "anyone of the Hebrew race." He said he "undoubtedly" read that letter when buying the property in 1974 but did not recall doing so. If the Senate believes that, what does this say of the sensitivity of a Supreme Court Justice?

Accused of harassing black and Hispanic voters in Phoenix during turbulent elections in the 1960's Justice Rehnquist has categorically denied over the years lodging even a legal challenge to any voter's qualifications. Yet a former Federal prosecutor has testified that he encountered Mr. Rehnquist in 1962 at a polling place where voters were registering complaints and that while denying impropriety, Mr. Rehnquist never denied having challenged persons attempting to vote. Can the Senate rest easy with this unresolved conflict?

Justice Rehnquist's unhappy record on matters of civil rights, civil liberties and judicial ethics is a legitimate concern. He has frustrated the Senate's inquiry with evasive and unconvincing replies. The Senate's pride and the serious task of passing a candidate for Chief Justice ought to make it demand more. This venerated post should not be conferred midst so much nagging doubt.

[From the Evening Sun, Sept. 15, 1986]

REJECT REHNQUIST

The word prejudice means to judge on the basis of instinct, emotion, and personal attitudes without regard to reason or evidence. We are all subject to this human frailty to some degree, but it is a pernicious and wholly unacceptable trait when it infects the men and women we appoint as society's neutral arbiters of disputes. For a judge to harbor prejudice toward a party before him is the equivalent of a doctor deliberately to worsen his patient's condition, or a lawyer secretly to represent the interest of his client's adversary, or a journalist to print a story he knows to be a lie. So in a sense a prejudiced judge is a contradiction in terms; he is not a judge at all, but rather a advocate with a hidden agenda who gives absolution to injustice in the name of justice.

Is William H. Rehnquist a prejudiced man? Unhappily, the totality of his record in public as well as private life suggests that he holds indifference and outright hostility to the great American tradition of equal justice for all. As a young Supreme Court law clerk 35 years ago he wrote a memorandum urging that segregated schools were perfectly legal, and everything he has written since then suggests that he still holds such notions—not only for blacks but also for women and others who have suffered legal disabilities.

We would like to believe that Rehnquist has been chastened by having his past laid out for public view, but we fear this is a vain hope. His is a deep-seated prejudice which is as fundamental as his gender or the color of his skin.

The edifice which houses the United States Supreme Court is emblazoned with four words which capture the spirit of the Constitution with a simplicity that approaches ultimate truth: "Equal Justice Under Law." The confirmation of Rehnquist as chief justice would make a mockery of those words; he should be rejected.

[From the Baltimore Sun, Sept. 11, 1986]

A JUSTICE'S PREDILECTIONS

In his pre-Supreme Court career, as a law clerk, as a Republican leader in Arizona, and as a legal adviser to the Nixon administration, William Rehnquist supported segregation, before and after the Brown vs. Board of Education decision of 1954 and the Civil Rights Act of 1964, and he almost certainly

approved of and perhaps engaged in polling place intimidation of minority group voters.

His defenders say this is irrelevant. The test of his fitness to be chief justice is how well he has done as an associate justice since 1972. But as Chief Justice Charles Evans Hughes once said to Associate Justice William Douglas, "You must remember • • • [that] at the Constitutional level at which we work 90 percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections." So it is not enough for Mr. Rehnquist's supporters to praise his brilliant legal skills and mind, as revealed in his opinions since 1972. His predilections are important, too.

If it were just his predilections, we would give him the benefit of the doubt. Lawyerly advice from a clerk, counselor or partisan is not necessarily a good indication of one's true views. But the record Justice Rehnquist has compiled on the Supreme Court strongly suggests that this is a case of a great intellect in the service of a closed and narrow mind, one not functioning within even the very broad boundaries of the conservative consensus. He has been the leading dissenter, often alone, from even this moderately conservative court.

The inappropriateness of his elevation to the highly symbolic office of chief justice is best seen in his votes in the civil rights area. Mr. Rehnquist's defenders often say his anti-civil rights votes are a reflection of his pro-majoritarian constitutional philosophy. But the NAACP Legal Defense Fund has identified 83 cases since 1972 in which the Supreme Court has disagreed over the meaning of modern civil rights laws—acts of congressional majorities. In approximately half the cases, this conservative Supreme Court sided with the minorities, but in all but one of the 83 cases Justice Rehnquist interpreted the law unfavorably to the minorities.

Is that rationality at work, or predilection? We believe it is the latter. To honor such a mind-set and record with the highest judicial office in the land, as the head of the branch of government that best protects the constitutional and statutory rights of the nation's minorities, is an insult to those minorities and a repudiation of at least the last 32 years of Supreme Court history. This is a reactionary, not a conservative, nomination.

After careful consideration of the record that unfolded in the Senate Judiciary Committee hearings this summer, we believe that senators concerned about the direction of the court and the nation now and into the Twenty-First Century should vote against the confirmation of Justice Rehnquist as chief justice.

EXHIBIT 1

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, August 26, 1986.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary, Washington, DC.

DEAR STROM: As you know the committee has been made aware of claims by Harold Dickerson Cornell. Mr. Cornell asserts and has documentary evidence of instances of allegedly inappropriate conduct of Justice Rehnquist in his capacity as a private attorney prior to his confirmation as an Associate Justice of the Supreme Court.

A recent article in the New York Times, August 15, 1986, (attached), reports Justice Rehnquist as having drawn up a trust in 1961 to provide monetary benefits to Mr. Harold Dickerson Cornell during a prolonged illness. According to the report, the trust was drawn up at the request of Justice Rehnquist's father-in-law, Dr. Harold Davis Cornell. Mr. Cornell has alleged that Justice Rehnquist and other members of the family concealed the existence of the trust from him. As a result, Mr. Cornell alleges that he became poverty stricken during a period when he was suffering from the debilitating illness of multiple sclerosis. Further, Mr. Cornell claims that Justice Rehnquist knew about his dire financial condition, yet never disclosed the existence of the trust to him.

A number of legal scholars have stated that an attorney is obligated to disclose the existence of a trust under these circumstances. Consequentiy, if these allegations are true, they raise serious questions about Justice Rehnquist's ethical conduct as the attorney who drew up this trust.

We understand that the FBI conducted a limited investigation of this issue, but that a number of fundamental questions remain unanswered. We would appreciate your forwarding to the FBI our request that the following additional issues be resolved.

1. Was Mr. Cornell ever paid any benefits from the trust during the period before he became aware of it in 1982? What were the amounts and dates of any benefit payments?

2. Did Mr. Cornell's standard of living drop below the level specified in the trust for benefits to be paid during the period 1961-1982?

3. Did Justice Rehnquist become aware, either through conversations with Mr. Cornell or anyone else, or in any other way, of Mr. Cornell's financial condition during this period?

4. Did Justice Rehnquist take any steps to inform Mr. Cornell of his rights under the trust or to encourage the trustee to provide benefits to him from the trust?

5. Did Justice Rehnquist or members of his immediate family stand to gain financially if any of the trust benefits were not paid to Mr. Cornell?

6. Were any withdrawals made from the trust other than payments to Mr. Cornell? What were the amounts, dates and purposes of these withdrawals? Was Justice Rehnquist aware of any of these other withdrawals?

In view of the importance of this information to the Senate in viewing the nomination of Justice Rehnquist to be Chief Justice, we request that the FBI inform us of the results of this additional investigation within one week of its receipt of this letter.

Thank you for your assistance.

Sincerely,

PAT LEAHY.
HOWARD M. METZENBAUM.
PAUL SIMON.
ALAN CRANSTON.

EXHIBIT 2

YALE LAW SCHOOL,
401A YALE STATION,
New Haven, CT, September 8, 1986.

Senator CHARLES MATHIAS,
United States Senate, 387 Senate Russell Office Bldg., Washington, DC.

DEAR SENATOR MATHIAS: You have asked my opinion about the propriety of the conduct of Justice William Rehnquist in regard to *Laird* v. *Tatum*.

The essential facts as I have been given them are as follows: *Laird* v. *Tatum* was a suit to enjoin a certain Government information gathering and surveillance program that was adopted in 1969. The case was brought to the Supreme Court by the Government's appeal from a decision of the Court of Appeals, which had held that the lawsuit was maintainable. The effect of the Court of Appeals' decision was that the plaintiffs could have proceeded to the discovery stage and perhaps then on to the merits. The Supreme Court reversed, holding that the plaintiffs lacked standing and hence that the suit should be dismissed without going into the merits. Justice Rehnquist participated in that decision and, since the decision was 5-4, cast a vote necessary to the result.

When *Laird* v. *Tatum* came before the Supreme Court, a motion to rescue Justice Rehnquist was filed by the plaintiffs. They argued that Justice Rehnquist was disqualified by reason of his prior relationship to the case, in that he had expressed opinions on issues in the case and that he had presented the Justice Department's position before a Senate Committee hearing. Responding to the motion, Justice Rehnquist rejected these contentions as insufficient to require his disqualification. In doing so he relied extensively on the analysis in Frank, "Disqualification of Judges: In Support of the Bayh Bill," 35 Law & Contemp. Prob. 43 (1970), which in my opinion correctly summarized the law of disqualification as it then stood.

In recent testimony before the Senate concerning his participation in the transaction out of which *Laird* v. *Tatum* arose, Justice Rehnquist stated, "I have no recollection of any participation in the formulation of policy on use of the military to conduct surveillance or collect intelligence concerning domestic civilian activities." From other evidence, chiefly the testimony of Mr. Robert Jordan, General Counsel of the Army at the time that the surveillance policy was formulated, it appears that Mr. Rehnquist, as he then was, then a relationship to the surveillance program beyond that disclosed in his opinion in *Laird* v. *Tatum* or revealed in his testimony before the Senate last month. According to this evidence, the surveillance policy was formulated in the early months of 1969. At that time Mr. Rehnquist was Assistant Attorney General in charge of the Office of Legal Counsel. On behalf of the Justice Department that office negotiated with the Army in formulating the surveillance policy. The negotiations were extensive. The circumstances strongly suggest that Mr. Rehnquist was personally and substantially involved in them. These circumstances are that the subject was highly important, the office is small in size, and Mr. Rehnquist himself sent a key transmittal memorandum. The negotiations resulted in a policy statement that was then adopted by President Nixon, and which in turn was the basis of the government action complained of in the litigation in *Laird* v. *Tatum*.

First, in my opinion Justice Rehnquist's position as head of the Office of Legal Counsel constituted grounds of disqualification from participating in *Laird* v. *Tatum*, unless the significance of that relationship were overcome by additional evidence showing that he, in fact, was not involved in the matter while it was in the office. In a matter of such substance and complexity as the surveillance policy, it is implausible that the head of the government law office responsible for development of its legal aspects would not be personally involved in considerable detail concerning the facts and issues going into the policy and its formula-

tion. On that basis, Mr. Rehnquist was the responsible counsel in the matter in question, and as well a potential witness concerning any factual issues regarding the policy. Each of these two relationships is independently a ground for disqualification.

A lawyer directly involved in a transaction cannot properly later sit as a judge in a case in which that transaction is in dispute. As stated in the article by Mr. Frank which Justice Rehnquist cited: "Justices disqualify in Government cases when they have been directly involved in some fashion in the particular matter, and not otherwise." Mr. Rehnquist's relationship to the transaction was essentially the same as if he had been involved as legal counsel for the Internal Revenue Service in working up a tax investigation program and then sat as judge in a case challenging the program, or while in the Justice Department passed upon corporate merger or electoral districting policy and then sat in a case involving the policy.

In his opinion in *Laird* v. *Tatum*, Justice Rehnquist stated that "I never participated, either of record or in any advisory capacity . . . in the Government's conduct of the case of *Laird* v. *Tatum.*" But that statement is irrelevant if he was counsel in the transaction out of which the case arose, a basis of disqualification that was well recognized then as now.

Justice Rehnquist appears also disqualified because he was a potential witness, at least at the discovery stage in *Laird* v. *Tatum*. In his testimony before the Senate, he denied having knowledge of "evidentiary facts." The standard relevent to the question is not "evidentiary facts" but facts relating to the "subject matter" of the litigation.

Second, when the case of *Laird* v. *Tatum* was before the Supreme Court it was Justice Rehnquist's responsibility on his own initiative to address and resolve all issue concerning his disqualification. It was not the parties' responsibility to raise such matters, although they had a right to do so if they had access to the necessary facts. In his opinion in *Laird* v. *Tatum*, Justice Rehnquist referred, first, to the fact that he had not been counsel in the "case," i.e., the litigation that ensued after his involvement in the transaction, and, second, to his statements in public and as spokesman for the Justice Department before the Senate. Thus, Justice Rehnquist addressed only his publicly known involvements and omitted any reference to an involvement, as counsel in the transaction, that was at least as significant but which was not publicly known. It was his duty to resolve both the publicly known possible bases of disqualification and those arising from an involvement that was confidential. Indeed, it is even more vital to fairness in adjudication that a judge resolve grounds of recusal which arise from confidential facts, for the parties ordinarily are helpless to raise such grounds.

Justice Rehnquist's addressing the publicly known grounds of recusal, but omitting reference to the confidential ones, would have been proper only if he had forgotten that his office in the Justice Department had handled the surveillance policy negotiations and that he himself was involved to a substantial extent. If when writing his opinion in *Laird* v. *Tatum*, Justice Rehnquist had not forgotten his involvement in the surveillance policy negotiations, then his opinion constituted a misrepresentation to the parties and to his colleagues on the Supreme Court. In such a matter, a lawyer or judge is expected to give the whole truth.

Finally, Justice Rehnquist had a duty of candor to the Senate in answering questions concerning *Laird* v. *Tatum*. The Senate hearing was an evidentiary inquiry into his qualifications for the office of Chief Justice. In making statements before such a tribunal, whether sworn or not, a lawyer or judge has an obligation to be fully truthful. Justice Rehnquist complied with duty only if his statement is accepted that he had "no recollection of any participation in the formulation of policy on the use of the military to conduct surveillance." Whether that statement should be accepted is a matter of judgment. It was made by a lawyer of the highest intelligence concerning sensitive state policy over which his office had direct responsibility early in his service in government, and about which he had been asked to search his recollection on three official occasions.

Sincerely,

GEOFFREY C. HAZARD, Jr.

Mr. DOLE. Mr. President, I thank the distinguished Senator from Maryland.

The PRESIDING OFFICER. The distinguished majority leader.

DISTRICT OF COLUMBIA APPROPRIATIONS—1987

Mr. DOLE. Mr. President, let me indicate that the managers are now here and prepared to do battle on the District of Columbia appropriations bill. As I indicated earlier, we already passed it one time. It was retrieved, I guess is the appropriate term. We now have it before us. The distinguished minority leader is here.

I ask unanimous consent the Senate now turn to the consideration of H.R. 5175, District of Columbia appropriations.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered. The clerk will now report.

The bill clerk read as follows:

A bill, H.R. 5175, making appropriations for the Government of the District of Columbia and other activities chargeable in whole or in part against the revenues of said District for the fiscal year ending September 30, 1987, and for other purposes.

The Senate proceeded to consider the bill which had been reported from the Committee on Appropriations, with amendments, as follows:

(The parts of the bill intended to be stricken are shown in boldface brackets, and the parts of the bill intended to be inserted are shown in italic.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the District of Columbia for the fiscal year ending September 30, 1987, and for other purposes, namely:

TITLE I

FISCAL YEAR 1987 APPROPRIATIONS

FEDERAL PAYMENT TO THE DISTRICT OF COLUMBIA

For payment to the District of Columbia for the fiscal year ending September 30, 1987, **[**$414,147,000**]** *$444,500,000,* as authorized by the District of Columbia Self-Government and Governmental Reorganization Act, Public Law 93-198, as amended (D.C. Code, sec. 47-3406): *Provided,* That none of these funds shall be made available to the District of Columbia until the number of full-time uniformed officers in permanent positions in the Metropolitan Police Department is at least 3,880, excluding any such officer appointed after August 19, 1982, under qualification standards other than those in effect on such date.

FEDERAL PAYMENT FOR WATER AND SEWER SERVICES

For payment to the District of Columbia for the fiscal year ending September 30, 1987, in lieu of reimbursement for charges for water and water services and sanitary sewer services furnished to facilities of the United States Government, $28,810,000, as authorized by the Act of May 18, 1954, as amended (D.C. Code, secs. 43-1552 and 43-1612).

FEDERAL CONTRIBUTION TO RETIREMENT FUNDS

For the Federal contribution to the Police Officers and Fire Fighters', Teachers', and Judges' Retirement Funds as authorized by the District of Columbia Retirement Reform Act, approved November 17, 1979 (93 Stat. 866; Public Law 96-122), $52,070,000.

TRANSITIONAL PAYMENT FOR SAINT ELIZABETHS HOSPITAL

For a Federal contribution to the District of Columbia, as authorized by the Saint Elizabeths Hospital and District of Columbia Mental Health Services Act, approved November 8, 1984 (98 Stat. 3369; Public Law 98-621), $35,000,000.

CRIMINAL JUSTICE INITIATIVE

For the design and construction of a prison within the District of Columbia $20,000,000 to become available October 1, 1987 together with funds previously appropriated under this head for fiscal year ending September 30, 1987: Provided, That the District of Columbia shall award a design and construction contract on or before October 15, 1986: Provided further, That, the District of Columbia is directed to proceed with the design and construction of a prison facility within the District of Columbia without respect to the availability of Federal funds: Provided further, That a plan that includes the construction of not less than a 700 bed, medium security facility on the South part of Square E-1112 as recorded in Subdivision Book 140, Page 199 in the office of the Surveyor of the District of Columbia is hereby approved: Provided further, That this approval shall satisfy the provisions as enumerated in Public Law 99-190.

DIVISION OF EXPENSES

The following amounts are appropriated for the District of Columbia for the current fiscal year out of the general fund of the District of Columbia, except as otherwise specifically provided.

GOVERNMENTAL DIRECTION AND SUPPORT

Governmental direction and support, **[**$108,407,000**]** *$108,353,000: Provided,* That not to exceed $2,500 for the Mayor, $2,500 for the Chairman of the Council of the District of Columbia, and $2,500 for the City Administrator shall be available from this appropriation for expenditures for official purposes: *Provided further,* That any program fees collected from the issuance of

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pointed Mr. ANDREWS, Mr. COCHRAN, Mr. ABDNOR, Mr. KASTEN, Mr. D'AMATO, Mr. HATFIELD, Mr. CHILES, Mr. STENNIS, Mr. BYRD, and Mr. LAUTENBERG conferees on the part of the Senate.

Mr. DOLE. Mr. President, I thank my distinguished subcommittee chairman, Senator ANDREWS, and also Senator CHILES for their expeditious handling of the transportation appropriations bill.

I must say I was responsible for some delay. They completed action in less than 2 hours. I thank them for their effort.

PRODUCT LIABILITY

Mr. DOLE. Mr. President, I will yield to the distinguished Senator from Alabama in just a minute. But I now would like to turn to S. 2760, Calendar No. 856, product liability.

I ask unanimous consent that the Senate now turn to the consideration of Calendar No. 856, S. 2760, product liability.

Mr. HOLLINGS. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. DOLE. Mr. President, I will move to that later.

I would like to yield now to the distinguished Senator from Alabama who has been trying to make a statement on the Rehnquist nomination for some time.

NOMINATION OF WILLIAM HUBBS REHNQUIST AS CHIEF JUSTICE OF THE UNITED STATES

Mr. HEFLIN. Mr. President, as a U.S. Senator I approach the advise and consent responsibility mandated by the Constitution as a solemn duty. I approached this nomination with an open mind. I came neither to praise nor to condemn. I came not as an advocate, as a detractor nor as a blind supporter. I came to endeavor to do my duty fairly and justly. I came to judge.

I look at the position of Chief Justice of the United States and I see a position of power, a position that makes great demands on an individual, but one that allows an individual to do great things. I see a power that extends over sovereign States and over the humblest of individuals. But I also see a somewhat impossible situation for any nominee to fulfill this role. No one individual is equipped or capable of being the embodiment of all we see in the position of Chief Justice of the United States.

That is not to say we strive for less than excellence in those we nominate to sit on the Supreme Court, or in those we ask to lead that Court, but that we admit and acknowledge that our Supreme Court is made up of individuals just like you and me. Some may be smarter, some may be wiser, some may be more liberal or conservative, some may have had better opportunities, some less, some may be more outspoken, some may be more introspect. But each of the nine in his or her own way are very important to the whole—and each brings to the Court the experiences that shaped their lives.

There are those who fear that Justice Rehnquist through his legal acumen will sway less-entrenched members of the Court. It was once said that "one man plus courage equals a majority."

If confirmed, Justice Rehnquist's tenure as Chief Justice will be judged not by his consensus-building abilities but rather by his devotion to a fair and just interpretation of the Constitution. That will be the standard by which all nine of the members of the Court will be judged.

The next Chief Justice will lead the Court and this Nation into a new generation. He will shape not only our future but more importantly, the future of our children. I wish I could predict what the future holds. I do believe, however, that times will be difficult, and the Supreme Court in the years to come will be faced once again with issues that permeate to the very core of individual beliefs and convictions.

And I look at this Court and the uncertainty of the times ahead and I asked myself, if this nominee is worthy of the task? I have resolved that question in my own mind in the affirmative, but the journey to reach this decision was far from easy.

I have great respect for my colleagues that oppose this nomination. And the issues that have been raised have been troublesome to me. The voter harassment issue, the failure of Justice Rehnquist to recuse himself in Laird versus Tatum, the memorandum written as a Supreme Court clerk in 1953 concerning Brown versus Board of Education, and his alleged insensitivity to the rights and struggles of minorities, women, and disadvantaged citizens. His opponents do not question his legal ability or, in my opinion, his judicial temperment.

□ 1240

But they strike at the heart of what makes a judge judicial—his fairness and above all his credibility. If proven, these allegations would not only taint a man's reputation, they could destroy it. And in the process they would chip away at the very foundation of the institution itself.

I am not saying these are not legitimate questions. They are. I am not saying they should not be asked. They should. But I am saying that after listening to the witnesses, after considering the timeframe in which these incidents occurred, I am not persuaded that Justice Rehnquist is unfit for service as Chief Justice of the United States.

I respect those who testified in opposition to Justice Rehnquist's nomination, for I cannot think of a more difficult position in which to find oneself. I believe the testimony was motivated by nothing more than a deep sense of doing what each personally believed was right. Most were examples of courage and commitment.

In trying to resolve charges and allegations with the answers of Justice Rehnquist and his witnesses, it is inescapable that time is an important element. As the years passed by, the powers of suggestion, the dimness of recollections, the accuracy of identification from photographs alone must be considered with other human frailties in evaluating events, documents, and positions.

But my inquiry did not end in 1960, or 1964, or 1969. Because the story does not end there. There is another chapter—15 years of service on the Supreme Court as an Associate Justice.

We are not talking about a judge with no judicial record. We can't be blind to his record as a jurist, scholar, and writer. Justice Rehnquist has built a judge's career that most judges only dream about. He has achieved a reputation for integrity and honesty among his colleagues on the bench.

I also read the testimony given by the American Bar Association to try and understand how people can reach such different conclusions about one man. The ABA testified that they interviewed Justice Rehnquist's colleagues on the Supreme Court and that the support for Justice Rehnquist was virtually unanimous. This is extremely important because I believe there must be a great sense of family among these nine even though philosophies are divergent and strongly held. But I cannot believe that if one of the members of the Court felt that elevation of William Hubbs Rehnquist to be Chief Justice would be detrimental to the institution itself that he or she would have remained silent. These nine have devoted their lives not just to an institution but to the Constitution, and their commitment to that oath is stronger than any commitment to an individual.

There are liberals on the Court; there are conservatives on the Court; and there are swing individuals on the Court. Those swing individuals are the important ones who will make decisions in the future and have made decisions in the past.

But to me the fact that Justice Rehnquist has earned the respect of those in the community in which he lives, the Supreme Court of the United States, was most persuasive. Within that community where he has earned

the respect for his honesty, for his integrity, for his credibility, there are those with widely divergent views. There are those who we would say are the most liberal members of the Court; there are those who we would say are to the far right of the Court; and we would say there are those who are moderates and in the middle. But from the report as given to us by the American Bar Association, which has interviewed each of them, the support for Justice Rehnquist is virtually unanimous.

I am sure that such respect is not easily won nor easily maintained. He has lived closely with his peers for nearly 15 years. No one could fool or mislead this group during that time with the issues that have confronted this group during that period of time.

Today, we are being asked to elevate William Hubbs Rehnquist to the position of highest honor that can be bestowed on a member of the legal profession.

I know that there are those who question Justice Rehnquist's sensitivity to civil rights of minorities and women. I do not agree with every opinion of Justice Rehnquist. In fact, I find myself in disagreement with many. But I do not believe those opinions are so extreme as to be unreasonable. Every stream has a right bank and a left bank. There is no question that Justice Rehnquist's views are always close to the right boundary of the stream, but they are nevertheless within the mainstream of modern judicial thought.

Chief Justice of the United States is an awesome responsibility and an awesome obligation. It takes an individual with broad shoulders—one with a strong backbone, sensitive perceptive powers, a vibrating heart, and courageous conscience.

But an individual can only shoulder so much responsibility without help from those he seeks to lead—one of my colleagues suggested that it would be better if Justice Rehnquist remained one of nine instead of "first among equals." I would respectfully offer different advice. I look at proverbs, and as I remember—and I am paraphrasing—there is this verse which says: "He who would become chief must first learn to serve."

The Chief Justice is not really first among equals. Maybe in his own community, perhaps on the Court, but really he is one among many. Our Government consists of four branches: The President, the Congress, the courts and the forgotten branch—the American people.

It must never matter that an individual is black or white, rich or poor, male or female. Equal justice is only just if equally applied.

In the words of a former Vice President:

> No man can be fully free while his neighbor is not. To go forward at all is to go forward together.
>
> This means black and white together, as one nation, not two. The laws have caught up with our conscience. What remains is to give life to what is in the law: to insure, at last, that as all are born equal in dignity before God, all are born equal in dignity before man * * *.
>
> Our destiny offers not the cup of despair, but the chalice of opportunity. So let us seize it, not in fear, but in gladness * * * let us go forward, firm in our faith, steadfast in our purpose, cautious of the dangers; but sustained by our confidence in the will of God and the promise of man.

Justice Rehnquist, let me make a few suggestions. You have had little control, if any, over your future during this confirmation process. But if confirmed only you can control your destiny. The position of Chief Justice is one of strength but it is also one of humility. In effect, you are a servant to many masters—the Supreme Court, the Federal courts, the State courts, and the American public. Serve them all well, all equally, all fairly. And your legacy will not only be compelling but complete.

NOMINATION OF JUSTICE WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

Mr. GRASSLEY. Mr. President, the consideration of a nominee to be Chief Justice of the United States is one of the most important and solemn responsibilities that we as U.S. Senators take on. As the "first among equals," the Chief Justice symbolizes the Supreme Court itself, and its duty to preserve and protect our cherished Constitution. By preserving and protecting the Constitution, the Supreme Court is the ultimate guardian of the people and the Republic.

In light of the fact that today, September 17, we are observing the 199th anniversary of the signing of our Constitution, it is extraordinarily appropriate, indeed, to be considering the nomination of the Chief Justice who must lead in preserving and protecting the framework that binds our Nation together, and sets us apart in the annals of history.

Therefore, in considering and confirming a Chief Justice-designate, the lifeblood, and continuing existence of our Nation is at stake. So, we have an obligation to conduct an extremely thorough examination into the capabilities and qualifications of the nominee.

The Judiciary Committee, of which I am a member, has met this obligation by conducting an exhaustive examination of Justice Rehnquist, involving more than 40 witnesses over a 4-day period.

During my examination of this nominee, I considered whether Justice Rehnquist had the qualities required of the most important jurist in the Nation. For instance, is Justice Rehnquist a person of integrity? Is he a person of great intellectual capacity and knowledge of our Constitution? Will he render his opinions based on the Constitution and the relevant statutes—without regard to personal views when those views conflict with the law? Does he possess an even judicial temperment that resists judicial legislating and is not swayed by the mere breeze of public opinion? And finally, will he be a true leader and consensus builder on the Court instead of one who will attempt to force his agenda on the Court and the Nation?

After participating in the hearings, there is no doubt in my mind that the answer to all of these questions is an affirmative one, and that Justice Rehnquist fulfills all of the requirements to be an outstanding Chief Justice of the United States.

There are some who have made allegations and innuendoes about Mr. Rehnquist and his ability to lead the Court. However, it is important to emphasize that none of these charges has been proven, and they appear to represent a very calculated, desperate attempt to undermine Mr. Rehnquist because of his conservative judicial philosophy.

The nominee certainly has the initial burden of proving that he is capable of serving the office, but when attacks are made on the nominee, the burden of proof switches, and those who have made such attacks must prove they are true. Anyone who looks beyond the mere charges will know that this burden has not been met by Justice Rehnquist's detractors.

In specifically reviewing the allegations that Justice Rehnquist is a racist and is insensitive to women's rights, I was particularly persuaded by the testimony before the Judiciary Committee of Dr. James Freedman, who is the president of the University of Iowa at Iowa City, and former dean of the University of Pennsylvania Law School. Dr. Freedman, who is a former law clerk for Justice Thurgood Marshall, has also had the opportunity to work closely with Justice Rehnquist at a 4-week seminar in Europe whose students were men and women of different nationalities from around the world. Dr. Freedman was able to observe Justice Rehnquist's personal interactions with others on a daily basis. If Justice Rehnquist harbored any prejudice toward women or different races, it would have surely been detectable as he closely intermingled with others in this situation.

However, in his testimony in support of Justice Rehnquist, Dr. Freedman emphasized that Justice Rehnquist treated people of all nationalities and gender as equals, and that he "was a

humane and decent presence" wherever he was observed.

In addition, Dr. Freedman was highly impressed with the fact that Justice Rehnquist recognized the importance of "cultivating a private self dedicated to the development of his powers of creativity, of humane understanding, and of cultural appreciation."

I agree with Dr. Freedman that these qualities will lead Justice Rehnquist to bring distinction to the office of Chief Justice, and will assist him in preserving and protecting the ideals and principles our forefathers embodied within the Constitution. I pray that God will be with him as he carries out this extraordinarily difficult task which I hope he is able to perform as Chief Justice of the United States.

NOMINATION OF WILLIAM REHNQUIST TO BE CHIEF JUSTICE

Mr. MATHIAS. Mr. President, on August 14, I voted with the majority of the Judiciary Committee to report favorably to the Senate the nomination of William Rehnquist to be Chief Justice of the United States. Today, with the benefit of a more complete record than that available to the Judiciary Committee on August 14, and with the benefit of further reflection on the issues presented by this nomination, I have decided that when the Senate votes on whether to confirm this nomination, I will vote "no."

Since the committee voted, several memorandums written by the nominee when he was Assistant Attorney General for the Office of Legal Counsel have been made public. These memorandums help to underscore the point that Justice Rehnquist's views are at the periphery of the current Court. In the case of the memorandum on the equal rights amendment, they provide a glimpse of his views—at least, the views he held 16 years ago—on an issue as to which he had not expressed a view in his capacity as Associate Justice. But while the publication of these memorandums have not made it any easier for me to support this nomination, they also do not, by themselves, provide any basis for withdrawing that support.

My decision is based primarily on my concerns about Justice Rehnquist's decision not to recuse himself from consideration of the case of Laird versus Tatum when it was before the Supreme Court in 1972, and about the way in which Justice Rehnquist has explained that decision. This issue has troubled me throughout the Senate's consideration of the nomination. After the hearing ended, I submitted further questions to Justice Rehnquist on this issue. His answers failed to put my doubt to rest. I ask unanimous consent that my written questions to Justice Rehnquist on this issue, and his responses to me, be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. MATHIAS. The facts about Mr. Rehnquist's statements before a Senate subcommittee on the facts and the legal issue presented by Laird versus Tatum have long been a matter of public record. The new ingredient is the question of his participation in fashioning the very policy attacked in that litigation: The role of military intelligence operatives in conducting surveillance of organizations of American civilians.

Justice Rehnquist's answer to my question to him on this subject is that he had no recollection of any participation in formulating policy on this issue. It is plausible that, after 17 eventful years, Justice Rehnquist's present recollection on this subject is faint. But what is at issue here is his recollection when Laird versus Tatum was argued in 1972, just 3 years after the Office of Legal Policy, which Mr. Rehnquist headed, struggled with its counterpart in the Department of the Army over just this question.

I also asked Justice Rehnquist what consideration he gave to his participation in policymaking when he decided not to recuse himself from Laird versus Tatum. He answered that his memorandum opinion addressed "all considerations that in my judgment bore on the issue of recusal." Since the opinion is silent on this question, I can only assume that Justice Rehnquist concluded that his involvement in fashioning military surveillance policy, whether intimate or consequential, was irrelevant to whether or not he should sit on the case. This conclusion is hard to accept.

I explored this gnawing question with Prof. Geoffrey Hazard of Yale Law School, the principal draftsman of the 1972 ABA Code of Judicial Ethics, and a nationally recognized expert on judicial ethics. I ask unanimous consent that Professor Hazard's letter to me dated September 8, 1986, be printed in the RECORD at the conclusion of my remarks. Professor Hazard concludes that it was "implausible" that Assistant Attorney General Rehnquist was not involved in formulating the surveillance policy. In reaching that conclusion, Professor Hazard draws inferences that I believe are reasonable. Mr. Rehnquist had just received an appointment that would mark a very respectable culmination to one's professional career. One of the most significant responsibilities entrusted to his small office was that of negotiating with the Army on behalf of the Justice Department. The issue, of course, was of great significance. These factors suggest that this was not an assignment that one would entirely delegate, nor that one would soon forget. Given his familiarity with the case, he should not have addressed it when it came before the Court.

Professor Hazard also noted that Justice Rehnquist should have been sensitive to the fact that he was a potential witness in the discovery phase of the case. Instead, Justice Rehnquist's vote broke a deadlock, resulting in dismissal of the case, and thus ensuring that there would be no opportunity for discovery.

Finally, Professor Hazard discussed the 1972 memorandum opinion in which Justice Rehnquist explained his decision to participate in the case. He pointed out that the memorandum opinion addressed only the facts of public record. It makes no reference to his role in developing military surveillance policy, a role that had not yet been made public.

Professor Hazard's conclusion on this point is strong, and bears quotation:

> Justice Rehnquist's addressing the publicly known grounds of recusal, but omitting reference to the confidential ones, would have been proper only if he had forgotten that this office in the Justice Department had handled the surveillance policy negotiations and that he himself was involved to a substantial extent. If when writing his opinion in Laird versus Tatum, Justice Rehnquist had not forgotten his involvement in the surveillance policy ngotiations, then his opinion constituted a misrepresentation to the parties and to his colleagues on the Supreme Court. In such a matter, a lawyer or judge is expected to give the whole truth.

The accusation that Justice Rehnquist was less than candid with the Supreme Court of the United States—the institution he has been nominated to head—is a serious one, and I am not prepared to make it. But I am sufficiently troubled by the real possibility that he acted improperly in failing to recuse himself from the case of Laird versus Tatum that I can no longer cast my vote in favor of his confirmation as Chief Justice.

EXHIBIT 1

JUSTICE REHNQUIST'S ANSWERS TO QUESTIONS SUBMITTED BY SENATOR MATHIAS

Question:

1. Document I(1) transmits a draft memo from the Secretary of Defense and Attorney General to the President on a plan for response to civil disturbances.

A. What was your personal role in the preparation of this document?

B. With particular regard to the portion of the document concerning civil disturbance planning and intelligence operations prior to outbreak, what was your personal role in its preparation?

C. What was your role in arriving at the recommendation contained in the document that (i) the FBI will be charged with the task of collecting raw intelligence data bearing upon the probability of a serious civil disturbance; (ii) at the request of the Attorney General, the Department of the Army, through the U.S. Army Intelligence Command, may assist in this effort; and (iii) the U.S. Army Intelligence Command should

not ordinarily be used to collect intelligence of this sort?

D. In 1974, Mr. Robert Jordan, General Counsel of the Army during early 1969, testified before the Senate Judiciary Committee that the Department of Defense wanted to "disengage military intelligence organizations from the collection of information dealing with civil disturbance matters," and that the language (referred to above) authorizing a domestic role for military intelligence first appeared in the March 25 draft prepared by your office and transmitted over your signature. Does this accord with your recoliection? If not, how does your recollection about the drafting of this portion of the document differ?

E. At the time that you considered the motion to recuse yourself from hearing *Laird* v. *Tatum*, what consideration, if any, did you give to your participation in the preparation of Document I(1), and in discussions leading up to it, or in development of policy on domestic use of military intelligence, in considering whether or not you should recuse yourself? Since no reference to this participation appeared in your memorandum, did you conclude that it was irrelevant, or did you omit reference to it for some other reason?

F. While you were in the Justice Department, what was your knowledge of, and your participation in the formulation of policy on, use of the military to conduct surveillance of or collect intelligence concerning domestic civilian activities?

Answer:

A. I have no recollection of my personal role in the preparation of this document. From the text of the transmittal memo I assume that the plan was primarily drafted by staff members in my office and in the Office of the General Counsel of the Army, and was reviewed by me.

B. Answer same as to A.

C. Answer same as to A.

D. I have no recollection of how the language referred to in question C first appeared in the draft.

E. *Laird* v. *Tatum* is a case in which I wrote a memorandum opinion, explaining my reasons for declining to recuse myself. The memorandum opinion describes my reasoning at that time regarding all considerations that in my judgment bore on the issue of recusal.

F. I have no recollection of any participation in the formulation of policy on use of the military to conduct surveillance or collect intelligence concerning domestic civilian activities. I do not think I had any firsthand knowledge as to the use of the military to conduct such surveillance or collect intelligence, though I may have been briefed with such information as was necessary to enable me to testify before congressional committees or to publicly discuss legal questions.

YALE LAW SCHOOL,
New Haven, CT, September 8, 1986.

Senator CHARLES MATHIAS,
U.S. Senate, Senate Russell Office Building, Washington, DC

DEAR SENATOR MATHIAS: You have asked my opinion about the propriety of the conduct of Justice William Rehnquist in regard to *Laird v. Tatum.*

The essential facts as I have been given them are as follows: *Laird v. Tatum* was a suit to enjoin a certain Government information gathering and surveillance program that was adopted in 1969. The case was brought to the Supreme Court by the Government's appeal from a decision of the Court of Appeals, which had held that the lawsuit was maintainable. The effect of the Court of Appeals' decision was that the plaintiffs could have proceeded to the discovery stage and perhaps then on to the merits. The Supreme Court reversed, holding that the plaintiffs' lacked standing and hence that the suit should be dismissed without going into the merits. Justice Rehnquist participated in that decision and, since the decision was 5-4, cast a vote necessary to the result.

When *Laird v. Tatum* came before the Supreme Court, a motion to recuse Justice Rehnquist was filed by the plaintiffs. They argued that Justice Rehnquist was disqualified by reason of his prior relationship to the case, in that he had expressed opinions on issues in the case and that he had presented the Justice Department's position before a Senate Committee hearing. Responding to the motion, Justice Rehnquist rejected these contentions as insufficient to require his disqualification. In doing so he relied extensively on the analysis in Frank, *Disqualification of Judges: In Support of the Bayh Bill,* 35 Law & Contemp. Prob. 43 (1970), which in my opinion correctly summarized the law of disqualification as it then stood.

In recent testimony before the Senate concerning his participation in the transaction out of which *Laird v. Tatum* arose, Justice Rehnquist stated, "I have no recoliection of any participation in the formulation of policy on use of the military to conduct surveillance or collect intelligence concerning domestic civilian activities." From other evidence, chiefly the testimony of Mr. Robert Jordan, General Counsel of the Army at the time that the surveillance policy was formulated, it appears that Mr. Rehnquist, as he then was, had a relationship to the surveillance program beyond that disclosed in his opinion in *Laird v. Tatum* or revealed in his testimony before the Senate last month. According to this evidence, the surveillance policy was formulated in the early months of 1969. At that time Mr. Rehnquist was Assistant Attorney General in charge of the Office of Legal Counsel. On behalf of the Justice Department that Office negotiated with the Army in formulating the surveillance policy. The negotiations were extensive. The circumstances strongly suggest that Mr. Rehnquist was personally and substantially involved in them. These circumstances are that the subject was highly important, the Office is small in size, and Mr. Rehnquist himself sent a key transmittal memorandum. The negotiations resulted in a policy statement that was then adopted by President Nixon, and which in turn was the basis of the Government action complained of the litigation in *Laird v. Tatum.*

First, in my opinion Justice Rehnquist's position as head of the Office of Legal Counsel constituted grounds of disqualification from participating in *Laird v. Tatum.* unless the significance of that relationship were overcome by additional evidence showing that he in fact was not involved in the matter while it was in the office. In a matter of such substance and complexity as the surveillance policy, it is implausible that the head of the government law office responsible for development of its legal aspects would not be personally involved in considerable detail concerning the facts and issues going into the policy and its formulation. On that basis, Mr. Rehnquist was the responsible counsel in the matter in question, and as well a potential witness concerning any factual issues regarding the policy. Each of these two relationships is independently a ground for disqualification.

A lawyer directly involved in a transaction cannot properly later sit as a judge in a case in which that transaction is in dispute. As stated in the article by Mr. Frank which Justice Rehnquist cited: "Justices disqualify in government cases when they have been directly involved in some fashion in the particular matter, and not otherwise."

Mr. Rehnquist's relationship to the transaction was essentially the same as if he had been involved as legal counsel for the Internal Revenue Service in working up a tax investigating program and then sat as judge in a case challenging the program, or while in the Justice Department passed upon corporate merger or electoral districting policy and then sat in a case involving the policy

In his opinion in *Laird* v. *Tatum*, Justice Rehnquist stated that "I never participated, either of record or in any advisory capacity . . . in the government's conduct of the case of *Laird* v. *Tatum.*" But that statement is irrelevant if he was counsel in the transaction out of which the case arose, a basis of disqualification that was well recognized then as now.

Justice Rehnquist appears also disqualified because he was a potential witness, at least at the discovery stage in *Laird* v. *Tatum.* In his testimony before the Senate, he denied having knowledge of "evidentiary facts." The standard relevant to the question is not "evidentiary facts" but facts relating to the "subject matter" of the litigation.

Second, when the case of *Laird* v. *Tatum* was before the Supreme Court it was Justice Rehnquist's responsibility on his own initiative to address and resolve all issues concerning his disqualification. It was not the parties' responsibility to raise such matters, although they had a right to do so if they had access to the necessary facts. In his opinion in *Laird* v. *Tatus*, Justice Rehnquist referred, first, to the fact that he had not been counsel in the "case," i.e., the litigation that ensured after his involvement in the transaction, and, second, to his statements in public and as spokesman for the Justice Department before the Senate. Thus, Justice Rehnquist addressed only his publicly known involvements and omitted any reference to an involvement, as counsel in the transaction, that was at least as significant but which was not publicly known. It was his duty to resolve both the publicly known possible bases of disqualification and those arising from an involvement that was confidential. Inded, it is even more vital to fairnes in adjudication that a judge resolve grounds of recusal which arise from confidential facts, for the parties ordinarily are helpless to raise such grounds.

Justice Rehnquist's addressing the publicly known grounds of recusal, but omitting reference to the confidential ones, would have been proper only if he had forgotten that his office in the Justice Department had handled the surveillance policy negotiations and that he himself was involved to a substantial extent. If when writing his opinion in *Laird* v. *Tatum*, Justice Rehnquist had not forgotten his involvement in the surveillance policy negotiations, then his opinion constituted a misrepresentation to the parties and to his colleagues on the Supreme Court. In such a matter, a lawyer or judge is expected to give the whole truth.

Finally, Justice Rehnquist had a duty of candor to the Senate in answering questions

concerning *Laird* v. *Tatum*. The Senate hearing was an evidentiary inquiry into his qualifications for the office of Chief Justice. In making statements before such a tribunal, whether sworn or not, a lawyer or judge has an obligation to be fully truthful. Justice Rehnquist complied with duty only if his statement is accepted that he had "no recollection of any participation in the formulation of policy on the use of the military to conduct surveillance." Whether that statement should be accepted is a matter of judgment. It was made by a lawyer of the highest intelligence concerning sensitive state policy over which his office had direct responsibility early in his service in government, and about which he had been asked to search his recollection on three official occasions.

Sincerely,

GEOFFREY C. HAZARD, Jr.

□ 1250

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

□ 1300

Mr. KASTEN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. (Mr. DANFORTH). Without objection, it is so ordered.

PRODUCT LIABILITY REFORM ACT

Mr. KASTEN. Mr. President, I move to proceed to S. 2760, the Product Liability Reform Act.

The PRESIDING OFFICER. The question is on agreeing on the motion to proceed.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. KASTEN. Mr. President, I am recognized for the purpose of debate?

The PRESIDING OFFICER. The Senator from Wisconsin is recognized.

Mr. KASTEN. I thank the Chair.

Mr. President, since our Consumer Subcommittee began hearings on this issue 5½ years ago, the product liability crisis has intensified, and the consensus for Federal action on this issue is now overwhelming.

Just a few weeks ago, the delegates to the White House Conference on Small Business ranked the liability crisis as the No. 1 problem for small business today. The delegates, in an unprecedented action, passed a resolution calling on Congress to pass the specific legislation under consideration here today.

Only 2 weeks ago, the National Governors' Association overturned a longstanding policy against Federal preemption of product liability laws and voted to support a Federal resolution to the product liability crisis.

Mr. President, our product liability system has been in need of reform for many, many years.

When I introduced the first Federal product liability bill in the Senate in 1981, the American people were largely unaware of how severe the product liability crisis had become.

Today, however, because of the overall liability crisis, the lives of everyone in our society have been adversely affected by our tort system. All over the country, the liability crisis is changing the way we live, and the product liability crisis is the No. 1 problem for consumers in America.

Small businesses across the country are shutting down because they cannot get liability insurance coverage, and manufacturers of everything from football helmets to child-safety seats are halting production because of high liability insurance costs.

Society pays a high price for this situation.

A few years ago there were four U.S. companies manufacturing a measles vaccine. Today, because of the high cost of liability insurance, there is only one.

A Milwaukee company has designed a new safety braking device for lawnmowers, but they cannot afford to market it. If they did, their product liability insurance will go from $18,000 to $200,000 a year. That is their product liability insurance by making a decision to market a new product which would be a safety product for lawnmowers.

Researchers at Stanford University have pioneered the development of a miraculous new artificial skin, which can save the lives of thousands of burn victims in our country each year. Yet they cannot get insurance for their life-saving innovation—no conventional insurance company will touch them because of the product liability risks.

Under the current, crazy system, the liability crisis threatens to deprive us of vaccines, anesthesiology equipment, and hundreds of other products that are, on balance, very good for society as a whole.

Unless changes are made, these products will no longer be available, or they will be available only at a much higher cost, or they will be made only by foreign manufacturers and thousands of American businesses and jobs will be lost. A recent survey in my home State of Wisconsin revealed that a full 10 percent of small businesses in our State must close their doors if something is not done about the current liability crisis. This 10 percent of business was either unable to get insurance at all or unable to get insurance at affordable rates.

That is why I say that the product liability crisis is the No. 1 consumer issue of our times.

We have had 4½ years of hearings and I think if one point comes out in hearing after hearing, testimony after testimony, there is widespread agreement that the current system of product liability tort law is a national disgrace. The exorbitant costs of this system, where more money goes to the attorneys than to injured victims, are passed along to the consumer in the form of higher prices for American goods. We have reached the point where over one-third of the cost of an ordinary stepladder goes solely for liability insurance. The American people are fed up with this hidden attorney's fee tax on every product they buy.

In addition to driving up product prices for consumers, the product liability explosion is closing businesses, destroying jobs, crippling American manufacturers' ability to compete with foreigners, discouraging product innovation and improvement, and driving a wide variety of good and beneficial products—from life saving vaccines to football helmets—off the market.

The product liability explosion threatens everyone in America who uses, sells, or manufacturers products.

Most of S. 2760 is the product of an overwhelming, bipartisan consensus on the product liability issue. A core proposal, encompassing most of the key aspects of S. 2760, passed by a 16-to-1 vote in the Commerce Committee. Only one member of our committee still believes that a Federal solution to the product liability explosion is inappropriate.

We achieved this consensus on such complicated issues as the statute of repose, the statute of limitations, a uniform fault standard for product sellers, subrogation lien elimination, penalties for attorneys who bring frivolous suits and cause undue delays, punitive damage clarification, and provisions relating to admissible evidence and to proper situs for claims arising in foreign countries.

All of these provisions will provide uniformity, clarity, and certainty in the law which will reduce transaction costs and provide a fairer system for product users, sellers, and manufacturers.

I believe that S. 2760 is a good, sound bill which will go a long way toward alleviating the liability crisis. However, I believe a return to the concept of fault in our tort law is absolutely essential to restore fairness and predictability in the law.

□ 1310

Recent cases have held manufacturers liable when they were totally innocent. Several courts have held manufacturers liable for failing to warn about dangers which were unknowable at the time. One court held a manufacturer liable where there was no injury to the plaintiff—only a fear of future injury. Other courts have held manufacturers liable for injuries to the plaintiff where the plaintiff has