The Rehnquist Recuse: Judging Your Own Case

by John MacKenzie

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

—Justinian Code

No man can be a judge in his own cause.

—Lord Coke (1614)

A period of conspicuous change in the Supreme Court puts a heavy strain on judicial ethics. The failure of a jurist to abide by high ethical standards can exacerbate the tensions that already run high when the courts are confronted by highly emotional, somewhat political, and deeply divisive issues, as they have been in recent years.

This article deals with how Justice William H. Rehnquist, an Assistant U.S. Attorney General before President Nixon appointed him to the Court in 1971, responded to the ethical issues raised by his sitting in judgment on matters deeply affecting his former client, the President. The sad conclusion—sad because it must be made of a jurist with intellect, ability, and dedication to the Court—is that Rehnquist's performance was one of the most serious ethical lapses in the Court's history. Sad, too, because his behavior, documented in his own extraordinary memorandum justifying his conduct, came at an ethical watershed for the Court, when the distress of past scandals was supposed to be behind us. The memorandum, the only one ever published by a justice in response to a motion to disqualify himself (such motions are themselves very rare), is itself a monument to both Rehnquist's technical ability and his ethical shortsightedness.

Even before his appointment, Rehnquist had been a witness to much of the recent anguish of the Court. He gave advice to Attorney General John N. Mitchell during the spring of 1969 when Abe Fortas left the Court under a cloud, and later that year he was the Justice Department lawyer who tried to usher the Haynsworth nomination through the Senate. In 1970 he performed similar functions for both the Carswell and Blackmun nominations. Indeed, he appeared to have learned from the Haynsworth fight that whatever might be said in judgment of that unfortunate nominee, the Senate had clearly opted for stricter ethical standards for present and future justices. On the Justice Department's correspondence about Blackmun with the

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Senate Judiciary Committee was attached a notation—that perhaps the old statute on judicial disqualification itself had been given a stricter meaning by the way the Senate interpreted it in the Haynsworth vote.

At Rehnquist's confirmation hearing, senators were anxious to know whether he would consider himself qualified to sit in the forthcoming test of the President's power to wiretap, without court authorization, individuals classified by the executive branch as domestic subversives. Rehnquist assured the Judiciary Committee that since he had given key legal advice in the preparation of the Justice Department's position before the Supreme Court, he would not sit in the case. When the case came up, Justice Rehnquist did indeed "recuse" himself (the technical term for removing oneself from a certain deliberation), and the Court rejected the Justice Department's position by an eight to zero vote.

When Rehnquist joined the Court, the most ethically sensitive cases he faced were the *Branzburg* and *Tatum* cases. *Branzburg* pitched the newspaper industry against the government's claimed power to subpoena unpublished and sometimes confidential information from newsmen—in this case, Paul M. Branzburg of *The Louisville Courier-Journal*, Earl Caldwell of *The New York Times*, and Paul Pappas of television station WTEC-TV in New Bedford, Massachusetts. *Tatum*, which would ultimately produce the famous Rehnquist memorandum, raised the question of whether peace workers and antiwar groups could take the government to court over the army's program of surveillance, infiltration, intelligence-gathering, and dissemination of information about law-abiding civilians to other federal agencies.

Another case with a lurking though less clear-cut ethical question was *Gravel*, which involved the government's attempt to elicit grand jury testimony about the source of the copy of the Pentagon Papers that came into the hands of Senator Mike Gravel. Rehnquist, as Assistant Attorney General, had fired the first volley in the Pentagon Papers fight by telegraphing editors at *The New York Times* and *The Washington Post* and asking them to suspend publication voluntarily. When they refused, the request was converted into a demand and a court complaint to enjoin publication.

Although it was not a surprise to see Justice Rehnquist on the bench taking part in the *Gravel* hearing (he had little to do with the Pentagon Papers after the prior restraint dispute in June, 1971), it was a shock to see him there when the *Branzburg* and *Tatum* cases were called for oral argu-

ment. As Assistant Attorney General, Rehnquist had been the Justice Department's chief public spokesman, second only to the Attorney General himself, for the Justice Department's controversial policy of subpoenaing newsmen during investigations of Black Panthers and other groups. On one occasion Rehnquist had appeared on a panel with news commentators to defend the Justice Department's 1970 subpoena guidelines, which his Office of Legal Counsel had helped to prepare. The guidelines were instructions to United States attorneys' offices across the land, and they served as "litigating" material that the government cited in every court case to show the reasonableness of Mitchell's policy.

During the *Branzburg* argument, Justice Rehnquist, typically an active questioner from the bench, showed no consciousness of impropriety in his frequent give-and-take discussions with counsel for the three newsmen. He said nothing, however, during the entire oral argument in the *Tatum* case, perhaps signaling his awareness that it did involve an ethical question on which he was reserving judgment. This unaccustomed reticence only added to the confusion of counsel for Arlo Tatum (director of the Central Committee for Conscientious Objectors) and the other political dissenters who were trying to maintain their suit against the Army. Did Rehnquist actually intend to vote in the case or was he merely sitting to hear the case out of interest? Was he there on some sort of provisional basis to determine for himself whether his previous involvement was disqualifying? Unlikely as this possibility was, it counseled caution to anyone who might have been tempted to ask that Rehnquist be removed from the case, lest they offend not only him but perhaps others on the Court as well. Senator Sam Ervin was more sensitive than most to why Justice Rehnquist should not sit; but sitting alongside lawyers from the American Civil Liberties Union in the Court's hearing room, he quietly counseled the cautious approach. Ervin, who joined the argument as a friend of the court on the side of the civilian plaintiffs, was unwilling to assume the worst. He recalled that when he argued in the *Darlington* labor cases, Justice Potter Stewart sat on the bench but dropped out when something said at the hearing reminded him of a close association with a textile official.

The argument against Rehnquist was based on his role as principal

Administration defender and witness at extensive hearings on military surveillance held before Ervin's Subcommittee on Constitutional Rights. There Rehnquist stated that the Pentagon surveillance program, however unwise or regrettable, did not violate anyone's constitutional rights. More crucially, he testified that the *Tatum* lawsuit, which was pending in lower courts while the Ervin hearings were under way, was not "justiciable"; that is, he said that courts should and would dismiss the lawsuit

because the issues it raised were not appropriate for judicial consideration. This question of "justiciability" was, as it turned out, the heart of the case Then it reached the Supreme Court.

Furthermore, Rehnquist, in his prior role as advocate, had made clear to Ervin the Justice Department's determined resistance to any legislation attempting to control the military surveillance practices—which he said had stopped anyway—or to any attempt to impose a judicial remedy by statute. The problem, he said, was best left to the "self-discipline" of the executive branch.

Central to the Administration's position on *Tatum* was its contention that nobody had been hurt by the surveillance. The program could not be considered "unconstitutional," in this view, just because there was no congressional authorization for it, or even because the military exceeded its constitutional bounds by intruding into the civilian sector of American life. The program would have been unconstitutional only if it actually infringed on the rights of specific plaintiffs who went to court. The *Tatum* plaintiffs claimed that the surveillance did just that, by threatening the privacy of political dissidents and hindering their exercise of the rights of free speech, assembly, and political association. The Justice Department replied that Tatum and his friends were not hindered; they continued meeting, marching, protesting the war, and they even went to court to assert their rights to do so. Tatum countered by pointing out that other, less hardy souls were indeed inhibited from associating with the Tatums and other protesters.

In large measure the case came down to how one viewed First Amendment rights and the measures necessary to safeguard them. To civil libertarians, First Amendment rights are not only basic, they are also very fragile. They need the solicitude of courts—what Justice William J. Brennan, Jr., calls "breathing space"—to survive. Government conduct that discourages free expression may defy precise measurement, since the identities of those discouraged are often unknowable. The ethical propriety of Rehnquist's participation in the decision was also an issue. The plaintiffs questioned the impartiality of a jurist who had publicly stated his opinion that they had no case.

The Velvet Blackjack

On June 26, 1972, the Supreme Court ruled against the newsmen in *Branzburg*. Three days later the Court ruled that the *Tatum* lawsuit should be dismissed without a trial. In each case the vote was five to four, and each time Justice White joined the four Nixon appointees—Chief Justice Burger and Justices Blackmun, Rehnquist, and Powell—to make the majority. In each case the dissenters were Justices Douglas, Brennan, Stewart, and Marshall. By the same margin and by the same lineup the Court rejected Senator Gravel's contention that the Senator and his aide were constitutionally immune from inquiry into their acquisition of the Pentagon Papers. On these highly contested issues at least, the Supreme Court had indeed been turned around.

With little hesitation, both the American Civil Liberties Union on behalf of the *Tatum* plaintiffs and Senator Gravel decided to seek a rehearing and disqualification of Justice Rehnquist.* Some lawyers privately expressed reluctance to appear to join a cabal in making such a personal move against Justice Rehnquist. Unquestionably, moving to disqualify a justice would be a disagreeable, abrasive process, but the ACLU con-

*Although the newsmen and their lawyers appeared to have a stronger claim than Gravel to an ethical challenge, it was not in their strategic interest to file a protest and they did not. For two of the three newsmen, the withdrawal of Justice Rehnquist would not have made a difference, since a four to four vote would only affirm their contempt convictions for refusing to cooperate with grand juries; the third, Caldwell, was by this time no longer sought by the grand jury.

sidered the legal issue clear enough. If they had been silenced by a Velvet Blackjack, they would remain silent no longer.

The motion to remove, or recuse, Justice Rehnquist was based in part on the same federal disqualification statute that opponents of the Haynsworth nomination had cited in accusing him of impropriety: "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit. . . ."

The ACLU motion said Rehnquist had been a self-styled Justice Department "spokesman" on the broad question of the constitutionality of surveillance and had appeared twice as a witness before Ervin's subcommittee. Rehnquist had not limited himself to general statements affirming the constitutionality of the program, the petition said; rather, "the concrete factual setting which he chose to discuss was the surveillance of civilians by the United States Army as depicted in the pleadings and the District Court decision in *Tatum v. Laird*, the very lawsuit" he voted on as a justice. Besides speaking publicly in the same vein, Rehnquist also complied with a request from Senator Roman L. Hruska for a legal memorandum supporting his constitutional thesis. The memorandum denied that the program of surveillance had caused any interruption in vigorous public debate.

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

Under the circumstances, said the ACLU,

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

The ACLU complaint took a second tack, referring to the new American Bar Association Code of Judicial Conduct. Canon 2 of the Code admonished that a judge "should avoid impropriety and the appearance of impropriety in all his activities" and Canon 3C required disqualification when "his impartiality might reasonably be questioned."

Doing His "Duty"

The answer came from the Court and the justice on October 10, 1972, the first decision day of the new term: "Motion to withdraw opinion of this Court denied. Motion to recuse. . . presented to Mr. Justice Rehnquist, by him denied." There followed a 16-page memorandum by Justice Rehnquist which was as unusual for its content as it was unprecedented.

First Rehnquist disposed of the ABA code as a separate and distinct basis for decision on the motion:

"Since I do not read these particular provisions as being materially different from the standards enunciated in the congressional statute, there is no occasion for me to give them separate consideration." This was a startling statement, because the ABA canons were generally acknowledged to set a much stricter disqualification standard than the existing federal statute. The new canons applied an "appearance of justice" test—which would disqualify a judge in a doubtful case—rather than the familiar "duty to sit" concept, which federal judges had developed to permit themselves to sit in the doubtful cases. As legal authority in support of this remarkable conclusion, the justice cited none other than the 1969 majority report of the Senate Judiciary Committee majority on the Haynsworth nomination. It argued that the ABA canons then in effect should be read to harmonize with the federal statute on ethical conduct. As applied to his own case, this was dubious authority, indeed. Rehnquist underscored just how dubious it was by testimony at his confirmation hearing. He said then that the full Senate's vote against Judge Haynsworth—which indicated, of course, a rejection of the Judiciary Committee's views—inclined him toward a strict view of judicial ethics. He intended, he said, when applying the federal disqualification law, "to try to follow that sort of stricter standards that I think the Senate, by its vote, indicated should prevail."

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

Tatum. . . ."

Turning to the statements he made before the Ervin subcommittee, Rehnquist said he had made two which were relevant to the case. One, which he quoted in his memorandum, was simply that the government had retained one print-out from the army's computer for inspection by the court in the *Tatum* case. He did not quote the second statement. If he had, he might have been forced to face the disqualification issue more squarely. This was his remark to Senator Ervin about whether "an action will lie" in the case of *Tatum v. Laird*; the remark meant, in effect, that Rehnquist opposed the case. In his memo, Rehnquist called this exchange "a discussion of the applicable law." But this, as all lawyers will recognize and most lawyers will freely state, is not a mere discussion of the "applicable law." It is a statement of how the law should be applied in a particular case. Time after time throughout the memorandum's 16 pages, Justice Rehnquist repeated that characterization of his Senate testimony. Time after time he refused to deal with the ACLU charge that he had commented on the merits —or, as witness Rehnquist had testified, lack of merits—of the lawsuit itself.

Re-Interpreting the Past

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

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

Rehnquist's memo also subtly reinterpreted other parts of the ACLU case. In that portion of its argument based on the federal statute, the ACLU relied on the so-called mandatory clauses of Section 455—those that require disqualification if a judge has a substantial interest, has been of counsel, or is or has been a material witness. But Justice Rehnquist devoted most of his reply to the so-called discretionary clause—"so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit." Much of his argument here had to do with the historic practices of different justices, some of whom sat in close cases. He noted that Justice Black had been criticized for sitting in Fair Labor Standards Act cases but not, to Rehnquist's knowledge, because he had been the law's manager while a senator from Alabama. Frankfurter wrote about the evils of the anti-labor injunction and helped sire the 1933 federal law against it, then wrote the Court's opinion in a major 1941 case involving the law. Justice Jackson voted in a 1950 case based on an issue he had decided as Attorney General before he joined the Court in 1941. Charles Evans Hughes criticized a decision in a law lecture a few years before becoming chief justice and nine years later wrote the Court's opinion in another case overruling the decision. Justice Harlan felt free in 1961 to join with the Court in rejecting a view he had expressed while a judge on the Second U. S. Circuit Court of Appeals. And Justice Holmes sat on no fewer than eight cases in which he had taken part while chief justice of the Massachusetts Supreme Judicial Court (this at a time when the federal law on such matters, enacted in 1891, did not apply to members of the U. S. Supreme Court). But all of these

examples, except possibly the Holmes cases, were irrelevant, since they did not involve a justice sitting in a particular *case* about which he had already publicly commented while it was pending.

Justice Rehnquist's final reason for refusing to withdraw was based on the supposed hazards of an equally split Court (that is, the four to four vote his withdrawal would produce) and on the doctrine that a jurist had a "duty to sit" unless clearly disqualified. He deemed it undesirable that a case heard by the Supreme Court lead to a deadlocked vote. It should not be left "unsettled" in that fashion. This concern, which is valid as a general proposition, scarcely applied in the *Tatum* case, which might have been quite effectively resolved by a four to four affirmance. A tie vote would have sustained the court of appeals and required a trial on the complaint. How much preferable such a result, rather than having it decided by the vote of a disqualified justice, fresh from the ranks of the Nixon Administration where he had made something of a cause out of defending the challenged surveillance practice from legal attack.

Nothing Subtle About It

Justice Rehnquist said the "duty to sit" doctrine impelled him to sit even though "I would certainly concede that fair-minded judges might disagree about the matter." The new ABA code not only repudiated the doctrine, but also contained another provision that seemed to apply with special relevance to this situation: the section which recommended that a judge formerly employed by a governmental agency "should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association." But of course Justice Rehnquist needed not to deal with that provision since he had already dismissed all argument based on the new code, which was not "materially different" from the standards he was applying.

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

Even when the Supreme Court has been taken over and reconstituted by a series of new appointments, justice is not administered by lining up the Court's members and simply polling them on controversial questions. The Court sits to decide cases, and unless its work is done judicially and judiciously, it is not a court, it is only supreme, and that not for long if its credibility erodes. The civil libertarians who were so heavily engaged in the *Tatum* case could not expect to win on the issue in the long run, given the High Court's makeup. But they had a right to expect the decision against them to be made by qualified justices. ■

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Public affairs books to be published in May.

All the President's Men. Bob Woodward, Carl Bernstein. Simon & Schuster, $7.95.

Captive Capital: Colonial Life in Modern Washington. Sam Smith. Indiana, $8.50. Smith, editor of the *D. C. Gazette*, writes in a strident and at times off-putting style, but the facts he presents make a thorough and persuasive case against congressional control of the District's affairs.

The Chasm: The Life and Death of a Great Experiment in Ghetto Education. Robert Campbell. Houghton Mifflin, $5.95.

Confrontation: The Middle East and World Politics. Walter Laqueur. Quadrangle/The New York Times, $8.95; Bantam, $1.95.

The Curve of Binding Energy. John McPhee. Farrar Straus & Giroux, $7.95. McPhee is a talented staff writer for *The New Yorker* who has unfortunately devoted most of his career to the trivial. This book is an exception. The story of Theodore Taylor's lonely effort to alert the world to the dangers of nuclear accident or theft has been largely ignored by intellectuals, who resist any truth that might suggest a need for more rather than the less policing that we all prefer.

Democracy and Its Discontents: Reflections on Everyday America. Daniel J. Boorstin. Random House, $5.95. The 10 essays that make up this slim book are based on a lecture series Boorstin gave in 1972. Although there is good sense in much of what he writes, the prose retains an oral, rhetorical style that leads to over-simplification and cliched writing ("A bewildered America still hasn't found its bearings. For television has brought us Too Much Too Soon.")

The Dynamics of Nuclear Balance. Albert Legault, George Lindsey. Cornell, $14.50.

Fights, Games and Debates. Anatol Rapoport. Univ. of Michigan, $4.95.

Freedom for Sale: A National Study of Pretrial Release. Paul B. Wice. Lexington.

The Future of Technological Civilization. Victor Ferkiss. Braziller, $12.50.

How Family Members Perceive Each Other: Political and Social Attitudes in Two Generations. Richard G. Niemi. Yale, $10.

How True: A Skeptic's Guide to Believing the News. Thomas Griffith. Atlantic-Little Brown, $6.95. The author was for many years an editor at *Time* and *Life*, and his recollections of life inside the Luce publications are fascinating. His commentary on the state of the news business, which alternates chapter by chapter with his memoirs, is sensible but rarely enlightening.

In Search of Light: The Broadcasts of Edward R. Murrow 1938-1961. Edward Bliss, Jr. Avon, $1.95.

The IRS Conspiracy. Henry Hohenstein. Nash, $7.95.

Journey Among the Economists. Arrigo Levi. Open Court, $8.95. Levi, a writer for the Italian daily, *La Stampa*, visited leading economists in Europe, Russia, and America (Heller, Friedman, Ackley, and a dozen more) and wrote a series of profile-interviews for his paper. The idea was far better suited to serial publication than to re-publication in one volume, for the style of the profiles becomes repetitious, and there is no coherent theme to tie them together. Still the book is quite informative, especially about the lesser-known figures.

Our Invaded Universities: Form, Reform,