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## Rehnquist Memorandum

Justice William H. Rehnquist has gone to extraordinary lengths to justify his participation in cases which, had been within his jurisdiction as a Justice Department official prior to his appointment to the Supreme Court. The cases involved a challenge by a group of war resisters of the Army's surveillance of civilians and a similar challenge by Senator Mike Gravel of the Justice Department's right to question his aides about his intent to publish the Pentagon Papers. In both instances, Justice Rehnquist's participation resulted in 5-to-4 rulings in favor of the Government.

Justice Rehnquist has argued in a fifteen-page memorandum that it would be impossible to require "proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication." This, however, is clearly a misrepresentation of the issue at hand. It is obviously absurd to suggest that new members must join the Court with blank minds. The question is not the Justice's prior views or opinions on matters before the Court; it is rather his prior active involvement in a case itself or in others closely related to it in principle or impact. The issue is, in plain language, his personal action as one of the Government's chief defenders of electronic surveillance and prior restraint.

Justice Rehnquist cited the example of the late Justice Frankfurter, who ruled on labor injunctions even though he had written about the subject as a professor of law. The difference ought to be self-evident: as a Government official, Mr. Rehnquist was not engaged in merely writing about the Government's powers—whether in the matter of political surveillance or in the effort to prevent publication of certain classified documents; he was actively engaged in upholding the Government's powers and in challenging the rights of certain groups and individuals to take issue with those powers.

The crux of the matter thus is whether a Government official should, after his appointment to the Supreme Court, participate in rulings concerning the rights or claims of anyone whose cause he had directly or indirectly opposed or supported before his ascent to the highest tribunal.

Justice Rehnquist insisted that it was his duty to participate because the Court would otherwise have been evenly divided, with the result that the Government would, in effect, have lost its case. But to argue thus seems only to underscore the impropriety of a former representative of Government to continue the Government's case on the Supreme Court—the court of last resort.