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Chief Justice Burger and Judicial Restraint

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Don't look now, but there seems to be a new, unregistered lobbyist in town. His name is Warren Burger and he is Chief Justice of the Supreme Court of the United States. According to a Jack Anderson column published in this newspaper last Thursday and a follow-up story printed on the front page of The New York Times on Friday, Rowland Kirks, the chief administrative officer of the Federal courts—a Burger appointee and long time associate of the Chief Justice—went to the Speaker of the House to express views in opposition to the products safety bill, then pending before the Congress. Moreover, he was accompanied by a Washington lawyer who represents clients in the drug industry, which has mounted strong opposition to that bill.

Little does it matter that the Washington lawyer, Tommy (the Cork) Corcoran, has been one of the most effective and engaging characters in this town for decades. What does matter is that Mr. Corcoran is alleged by Jack Anderson to have told his column, "Kirks, acting for the Chief Justice, asked me to take him to see the Speaker." What does matter is that allegation has been hanging in the air since last Thursday and has not been denied by either the Chief Justice or by Mr. Kirks. What does matter is that the position reportedly taken by Mr. Kirks and Mr. Corcoran in their visit to the Speaker reflect very closely positions taken by the Chief Justices in speeches—questionable in themselves—before the American Bar Association. What does matter is the fact that Mr. Corcoran, apparently acting on behalf of his clients, is alleged by The Times to have "sent key Congressmen a memorandum with his professional card, attacking the sections of the bill broadening the public's right to sue and quoting Chief Justice Burger's critical statements about consumer bills."

What does matter, in other words, is that there have been broadly published and undenied reports that the Chief Justice of the United States, through an intermediary—and with the help of a lawyer for some of the parties directly affected by the legislation—was meddling in the legislative process. In essence, all we have gotten from Mr. Burger and Mr. Kirks is a resounding "no comment." The Chief Justice, even when presented with an opportunity to deny the story, declined to do so.

Well, we have a comment, and an unhappy one it is at that. If the undenied stories are true, then the Chief Justice has shown, at the very least, incredibly bad judgment and a shocking lack of knowledge of or respect for the Judiciary's role in the government in particular and in the processes of government in general.

In our system, it is the role of the legislature to make laws and it is the role of the judiciary to remain as free from involvement in that process and from controversy about matters that may eventually come to the court as men of affairs can possibly be. The judges are meant to be men of probity, learning, disinterest and honor, free of interest or conflict, judging not the wisdom of the laws that Congress passes, but their validity under the Constitution and their meaning, as far as that meaning can be determined from appropriate legal sources. A good judge, in short, is a man of honorable restraint.

That is a stern test, but most men appointed to the Supreme Court throughout our history have managed to hew to it. Mr. Justice Fortas went down because he did not do so.

Now comes the celebrated Nixon Court—the court of judicial restraint that the President is so proud of. Mr. Justice Rehnquist's participation in a number of cases last spring of which he had official cognizance while serving as a principal policy-making figure in the Department of Justice gave us some pause about his proclivities in these matters. His refusal this week to stand aside when directly challenged in an apparently clear conflict is probably a definitive statement about his sensibilities. Now comes the Chief Justice of the United States, apparently caught deep in the legislative process dealing with legislation side by side with a direct party interest. Call it what you will; concern for the caseload of the courts, ignorance, vanity, lack of balance or just plain wrong-headedness. By any of these names, it demeans the office Mr. Burger holds and gives us some measure of the man Mr. Nixon chose to lead the Court back to a more "restrained and responsible path."