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Memo of Explanation

By William H. Rehnquist

WASHINGTON—My recollection is that the first time I learned of the existence of the case of *Laird v. Tatum*, other than having probably seen press accounts of it, was at the time I was preparing to testify as a witness before the subcommittee [on constitutional rights] in March, 1971. I believe the case was then being appealed to the Court of Appeals by respondents. The office of the Deputy Attorney General, which is customarily responsible for collecting material from the various divisions to be used in preparing the department's statement, advised me or one of my staff as to the arrangement with respect to the computer print-out from the Army data bank, and it was incorporated into the prepared statement which I read to the subcommittee. I had then and have now no personal knowledge of the arrangement, nor so far as I know have I ever seen or been apprised of the contents of this particular print-out. Since the print-out had been lodged with the Justice Department by the Department of the Army, I later authorized its transmittal to the staff of the subcommittee at the request of the latter.

Respondents in their motion do not explicitly relate their factual contentions to the applicable provisions of 28 U. S. C. § 455. The so-called "mandatory" provisions of that section require disqualification of a justice or judge "in any case in which he has a substantial interest, has been of counsel. [or] is a material witness. . . ."

Since I have neither been of counsel nor have I been a material witness in *Laird v. Tatum*, these provisions are not applicable. . . . Since I did not have even an advisory role in the conduct of the case of *Laird v. Tatum*, the application of such a rule would not require or authorize disqualification here.

This leaves remaining the so-called discretionary portion of the section, requiring disqualification where the judge "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 interpretation and application of this section by the various justices who have sat on this Court seem to have varied widely.

I have no hesitation in concluding that my total lack of connection while in the Department of Justice with the defense of the case of *Laird v. Tatum* does not suggest discretionary disqualification here because of my previous relationship with the Justice Department.

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However, respondents also contend that I should disqualify myself because I have previously expressed in public an understanding of the law on the question of the constitutionality of governmental surveillance. While no provision of the statute sets out such a provision for disqualification in so many words, it could conceivably be embraced within the general language of the discretionary clause. Such a contention raises rather squarely the question of whether a member of this Court, who prior to his taking that office has expressed a public view as to what the law is or ought to be, should later sit as a judge in a case raising that particular question. The present disqualification statute applying to justices of the Supreme Court has been on the books only since 1948, but its predecessor, applying by its terms only to district court judges, was enacted in 1911.

My impression is that none of the former justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.

Since most justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. 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.

Based upon the foregoing analysis, I conclude that the applicable statute does not warrant my disqualification in this case. Having so said, I would certainly concede that fair-minded judges might disagree about the matter. If all doubts were to be resolved in favor of disqualification, it may be that I should disqualify myself simply because I do regard the question as a fairly debatable one,

Every litigant is entitled to have his case heard by a judge mindful of this oath. But neither the oath, the disqualification statute, nor the practice of the former justices of this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law.

These excerpts are from U.S. Supreme Court Justice Rehnquist's memorandum explaining why he did not disqualify himself in a decision although he had testified in the same matter while an Assistant Attorney General. Justice Rehnquist voted with the majority in the 5-to-4 decision (Laird v. Tatum) against antiwar activists who were seeking to bar the Army's surveillance of civilians.