

# The Burger Court Opinion Writing Database

*Laird v. Tatum*

408 U.S. 1 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States  
Memorandum

August 14, 1922

Dear Mr. Bell:

I am inclined to agree with  
Bryson on this. Your assurance  
of such a memorandum would, I  
think, put no pressure on others,  
now or in the future, to give  
a reason for their classification  
but you. Certainly I would feel  
no such obligation. And I  
think publication of the names  
would be basically healthy —  
it is informative, thought-provoking,  
persuasive, and educational. On  
the other hand, I am aware

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Supreme Court of the United States  
Memorandum

You are right in maintaining that  
Hence that the memo will satisfy  
the Wash. Times, Washington Post, &  
other critics. It will probably  
just further irritate them, and  
they do have the last word.  
I suppose as comes down to  
your own instinctive feeling. If  
you would feel more comfortable  
publishing it, I'd do so if  
I were you.

I've noted a couple of  
very minor verbal suggestions  
(pp. 2, 5, 10). Re your discussion



Supreme Court of the United States

Memorandum

on pp. 8-10, two other <sup>more</sup> dramatic examples occurred to me as I read it: (1) If my recollection is correct, Felix Frankfurter wrote (maybe <sup>more than one</sup>) an article ~~describing~~ <sup>expressing</sup> the constitutional view that federal judges <sup>should</sup> ~~should~~ be subject to federal income tax, and <sup>very</sup> soon after he came to the Court wrote an opinion so holding (overruling <sup>preceding</sup> long-settled <sup>precedents</sup>). (2) Of memory also seems, Bill Blackmun's Madison Lecture was almost an exact preview of the opinion he wrote for the Court in Fay v. Noia. I may be mistaken about one



Supreme Court of the United States  
Memorandum

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In both of the above, I am of the  
conviction you may not want to  
refer to those descriptions. But they  
would be kind, and so I thought  
I'd mention them.

Best wishes,

Sincerely yours,  
Potter

P.S. The three days after you  
left New Hampshire is White Mountain  
where the most beautiful of the  
entire summer.

71-288

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

October 6, 1972

Dear Bill:

I think your splendid memorandum on "disqualification" constitutes a conclusive answer to the motion.

Sincerely,

Lewis

Mr. Justice Rehnquist

LFP, Jr.:pls

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71-286

August 3, 1972

The Honorable Potter Stewart  
Bowen Brook Farm  
Franconia, New Hampshire 03580

Dear Potter:

As you may know from press accounts or from your own perusal of moving papers before the Court, the respondents in Laird v. Tatum addressed a motion to me individually to disqualify myself from consideration of that case. Senator Gravel's motion for rehearing in his case likewise requests the Court (not me individually) to disqualify me from participating in the case. The Gravel motion, I thought, was quite snide, and insofar as it might ultimately depend on my personal judgment, I would have had no hesitation in denying it without opinion. The Laird motion, however, seemed to me to be a fairly serious, responsible presentation; because of this, and because the New York Times and Washington Post tend to feature the matter at every opportunity, I drafted a chambers opinion in connection with the Laird motion to accompany my denial of it. I enclose a copy of that opinion.

Because the Chief and Byron were the only two Justices here at the time I drafted it, I sent a copy of it to each of them, with a request for their comments. The Chief feels that I ought not to issue it, since the issue will inevitably become unnewsworthy if nothing is done, and because issuing it might create some sort of a precedent whereby in the future



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others to whom such motions were addressed would feel obligated to give a statement of their reasons for denial. Byron, on the other hand, felt that since these matters are individual ones, the practice of any one Justice would not place others under compulsion, and he thought it was a good idea to state reasons in a case such as this.

I definitely do not want to circulate the opinion to all members of the Court, because I think that ties each of them in too much with what is and must remain my own responsibility. On the other hand, having received conflicting advice, I would greatly value your opinion as to whether a memorandum of this nature should be issued by me to accompany the denial of the motion addressed to me as an individual Justice.

No hurry.

Sincerely,

WHR

ZW

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

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September 27, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 71-288 - Laird v. Tatum

There is presently pending before the Court a petition for rehearing in this case, asserting inter alia that I should have disqualified myself from participating. There is also pending before me a separate motion of the respondents in the case, addressed to me as an individual Justice, requesting that I disqualify myself.

It is my present intention to file with the Clerk, on the day on which the first Order List is released, the attached Chambers opinion denying the motion of respondents in this case addressed to me as an individual Justice. The proposed Chambers opinion refers in a footnote on its last page to the petition for rehearing in Gravel v. United States, in which it is likewise asserted that I should have disqualified myself. In Gravel, however, no motion has been addressed to me individually.

W.H.R.

Att.

## 2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

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No. 71-288

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Melvin R. Laird, Secretary  
of Defense, et al.,  
Petitioners,  
*v.*  
Arlo Tatum et al.

On Writ of Certiorari to the  
United States Court of  
Appeals for the District of  
Columbia Circuit.

[October —, 1972]

## Memorandum of MR. JUSTICE REHNQUIST.

Respondents in this case have moved that I disqualify myself from participation. While neither the Court nor any Justice individually appears ever to have done so, I have determined that it would be appropriate for me to state the reasons which have led to my decision with respect to respondents' motion. In so doing, I do not wish to suggest that I believe such a course would be desirable or even appropriate in any but the peculiar circumstances present here.<sup>1</sup>

Respondents contend that because of testimony which I gave on behalf of the Department of Justice before the Subcommittee on Constitutional Rights of the Judiciary Committee of the United States Senate at its

<sup>1</sup> In a motion of this kind, there is not apt to be anything akin to the "record" which supplies the factual basis for adjudication in most litigated matters. The judge will presumably know more about the factual background of his involvement in matters which form the basis of the motion than do the movants, but with the passage of any time at all his recollection will fade except to the extent it is refreshed by transcripts such as those available here. If the motion before me turned only on disputed factual inferences, no purpose would be served by my detailing my own recollection of the relevant facts. Since, however, the main thrust of respondents' motion is based on what seems to me an incorrect interpretation of the applicable statute, I believe that this is the exceptional case where an opinion is warranted.

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell

## FINAL DRAFT

SUPREME COURT OF THE UNITED STATES ~~from: Rehnquist, J.~~

No. 71-288

Circulated: \_\_\_\_\_

Recirculated: 10/5/72

Melvin R. Laird, Secretary  
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Re: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell

From: Rehnquist, J.

SUPREME COURT OF THE UNITED STATES

Recirculated:

No. 71-288

Recirculated: 10/10/72

Melvin R. Laird, Secretary  
of Defense, et al.,  
Petitioners,  
*v.*  
Arlo Tatum et al.

On Writ of Certiorari to the  
United States Court of  
Appeals for the District of  
Columbia Circuit.

[October 10, 1972]

Memorandum of MR. JUSTICE REHNQUIST.

Respondents in this case have moved that I disqualify myself from participation. While neither the Court nor any Justice individually appears ever to have done so, I have determined that it would be appropriate for me to state the reasons which have led to my decision with respect to respondents' motion. In so doing, I do not wish to suggest that I believe such a course would be desirable or even appropriate in any but the peculiar circumstances present here.<sup>1</sup>

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