

# 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, 1972

Dear Bill -

I'm inclined to agree with  
Byron on this. Your issuance  
of such a memorandum would, I  
think, put no pressure on others,  
now or in the future, to give  
assurances for their dignification  
but now. Certainly I would feel  
no such obligation. And I  
think publication of the memo  
would be basically healthy —  
it is informative, thoughtful,  
persuasive, and educational. On  
the other hand, I am sure



Supreme Court of the United States  
Memorandum

you are not so dangerous as to  
think that the memo will satisfy  
the N.Y. Times, Washington Post, or  
other critics. It will probably  
just further irritate them, and  
they do have the last word.  
I suppose it 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 quite  
dramatic examples occurred to me  
as I read it: ① If my recollection  
is correct, Felix Frankfurter wrote  
an <sup>(maybe more than one)</sup> article espousing the constitutional  
view that federal judges should  
abstain he subject to federal income  
tax, and <sup>was</sup> ~~was~~ <sup>soon</sup> after he came  
to the Court wrote an opinion so  
holding (overruling previously long-  
settled precedents). ② If memory  
also serves, Bill Brennan'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

re both of the above. Even if I  
correct, you may not want to  
refer to those examples. But they  
arouse my mind, and so I thought

I'd mention them.

Best wishes,

Stanley J.  
Potter

P.S. The three days after you  
left New Hampshire's White Mountain  
were 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



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





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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

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.

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U.S. SUPREME COURT RECORDS

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-288

|  |   |  |
|--|---|--|
| Melvin R. Laird, Secretary<br>of Defense, et al.,<br>Petitioners,<br>v.<br>Arlo Tatum et al. | } | On Writ of Certiorari to the<br>United States Court of<br>Appeals for the District of<br>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

No. 71-288

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

Recirculated: 10/5/72

Melvin R. Laird, Secretary  
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Petitioners,  
v.  
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On Writ of Certiorari to the  
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[October —, 1972]

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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

From: Rehnquist, J.

SUPREME COURT OF THE UNITED STATES

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

No. 71-288

Recirculated: 10/10/72

|  |   |  |
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[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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