

## Rehnquist's Story

Chief Justice Has History of Siding With 'Big Brother'

BY FRANK ASKIN

For 33 years, William Rehnquist has kept the door open for Big Brother to spy on American political dissidents. Before he ever joined the Supreme Court, Rehnquist was the point man for efforts to expand governmental surveillance of dissidents.

### Points of View

In March 1969, Assistant Attorney General Rehnquist forwarded to Attorney General John Mitchell a memorandum prepared "by members of my staff" proposing a division of labor between the Federal Bureau of Investigation and Army Intelligence in the gathering of surveillance data on the activities of the civil rights and anti-war movements. (*New York Times*, Sept. 11, 1986.)

In 1971, Assistant Attorney General Rehnquist defended the Army's Domestic Intelligence Program at hearings conducted by the Senate Judiciary Subcommittee on Constitutional Rights. When Chairman Sam Ervin asked Rehnquist whether "you feel there are any serious constitutional problems with respect to collecting data on or keeping under surveillance persons who are merely exercising their right of peaceful assembly or petition to redress a grievance," Rehnquist answered no. He further told Ervin that the case ultimately known as *Laird v. Tatum*, which was then challenging the constitutionality of military surveillance of civilian activists, should be dismissed on the procedural ground that the plaintiffs lacked standing to sue.

In 1972, President Richard Nixon appointed Rehnquist to the Supreme Court, just in time for him to cast the deciding vote that June dismissing *Tatum* on the same ground that he had earlier articulated before the Senate. Had Rehnquist recused himself in the case, as legal ethicists almost unanimously agreed he should have, the case would have been remanded to the U.S. District Court for a trial at which

Rehnquist would almost surely have been called as a witness—if not actually named as a defendant.

In 1986, most of the 33 senators who voted against the elevation of Associate Justice Rehnquist to chief justice cited his questionable role in regard to the Army's Domestic Intelligence Program and the case of *Laird v. Tatum*.

Despite Rehnquist's spirited defense of FBI and military surveillance practices, public outrage over the revelations of investigatory abuses by the military and the FBI, as well as the Central Intelligence Agency, forced the Army to discontinue its own program and caused the FBI to adopt voluntary guidelines precluding surveillance of individuals solely because of their political expression and association. Congress adopted the Federal Privacy Act, forbidding government agencies from collecting or maintaining information on citizens' exercise of First Amendment rights, except when pursuant to an authorized law enforcement investigation—a prohibition the FBI finesses by self-authorization.

### OPEN QUESTION

The executive branch and the FBI have now brought us back to square one. Attorney General John Ashcroft's new guidelines repeal the self-imposed FBI restraints on political surveillance. And on May 31, *The New York Times* reported that the new guidelines were perfectly constitutional under the Supreme Court's decision in *Tatum*.

Actually, the *Times*' imprimatur of lawfulness is somewhat exaggerated. The 5-4 majority in *Tatum* did not say that the surveillance program was constitutional. Instead, they decided the case on the disingenuous rationale that the persons who brought the suit had not been injured and, thus, had no standing to complain—a notion derided in Justice William O. Douglas' dissent "as too transparent for serious argument." Indeed, Chief Justice Warren Burger's majority opinion specif-

ically stated that “when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury.”

Before development of the law in this area was aborted by the *Tatum* decision, the one court that had squarely ruled on the constitutionality of police surveillance of political activists had found that it violated the First Amendment. In *Andersen v. Sills*, a New Jersey trial court made the following sweeping observation: “The secret files that would be maintained as a result of this intelligence gathering system are inherently dangerous and by their very existence tend to restrict those who would advocate social and political change.” (The 1969 ruling by the Hudson County Superior Court was later set aside by

the New Jersey Supreme Court as premature.)

Events have now come full circle. Everything old is new again. Maybe some time soon the Supreme Court will get a new chance to examine the constitutionality of practices that, when carried out in other countries, we Americans consider the hallmarks of a police state. If so, the justices will find that there is an enlightened decision by a state trial court to guide them. The bad news is that William Rehnquist still bars the way.

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