



REPLY

REHNQUIST'S RECUSALS

Tuan Samahon

I READ WITH INTEREST Ross Davies's article *The Reluctant Recusants* debunking the persistent claim that Thurgood Marshall espoused a "blanket disqualification rule" whenever the NAACP was a party or an intervenor.¹ It may be that Marshall was not so saintly in his recusal practice as widely thought, but a document I happened across in Harry Blackmun's papers may also suggest that William Rehnquist was not so diabolical, or at least unprincipled, in his recusal practice.

The May 1981 memorandum from William Rehnquist to the Court in *Kissinger v. Halperin*² – reprinted immediately after this short essay – concerned one of several cases arising from wiretapping and domestic surveillance undertaken by the Nixon administration.³ It indicates that Rehnquist recused in *Halperin* because of "the

Tuan Samahon is an associate professor at the William S. Boyd School of Law, University of Nevada, Las Vegas.

¹ 10 GREEN BAG 2D 79 (2006).

² 452 U.S. 713 (1981).

³ Memorandum from William H. Rehnquist to the Conference, Re: No. 79-880 *Kissinger v. Halperin* (May 27, 1981); see also Memorandum from Lewis F. Powell to the Conference, Re: No. 79-880, both in THE HARRY A. BLACKMUN

fact that John Mitchell [was] a party individually, and not simply as an attorney for a client.”⁴

Rehnquist’s explanation is interesting because it accounts for an apparent inconsistency in his recusals. Rehnquist recused himself in the *Nixon Tapes Case*,⁵ *Kissinger v. Halperin*,⁶ and *Mitchell v. Forsyth*⁷ — all cases where Mitchell was a party in his individual capacity. But Rehnquist did not recuse in *Laird v. Tatum*⁸ or *Nixon v. Administrator of General Services*,⁹ even though Rehnquist’s Office of Legal Counsel had advised on domestic surveillance and executive privilege. The apparent inconsistency results from assuming the animating principle for recusal in the *Nixon Tapes Case*, *Halperin*, and *Mitchell* was Rehnquist’s possible prior involvement with domestic surveillance or wiretapping issues at OLC. Instead, Rehnquist recused in these cases not because of prior involvement with the issues but because John Mitchell was a party in his individual capacity. In contrast, Mitchell did not appear in his individual capacity in *Laird* or *Administrator of General Services* and, accordingly, Rehnquist did not recuse. Thus, Rehnquist’s pattern of recusal was consistent, if we identify correctly the principle he followed when recusing.

The Rehnquist memo may be additional evidence that the justices take recusal seriously, even if informally and behind closed doors. Rehnquist, after all, did feel compelled to explain his recusal decision to his colleagues. Whether his principle was the correct one is a separate question that I won’t attempt to answer.



PAPERS, Supreme Court File, 1918-1999, Box 323, Folder 1, No. 79-880 (Library of Congress).

⁴ *Id.*

⁵ 418 U.S. 683 (1974).

⁶ 452 U.S. 713 (1981).

⁷ 472 U.S. 511 (1985).

⁸ 408 U.S. 1 (1972).

⁹ 433 U.S. 425 (1977).

Reply: Rehnquist's Recusals

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 27, 1981

MEMORANDUM TO THE CONFERENCE

Re: No. 79-880 Kissinger v. Halperin

I have been a bystander in this case for the reason that Lewis has stated in his memorandum of May 26th -- the fact that John Mitchell is a party individually, and not simply as an attorney for a client. I would not really know how to draw any "time" line the way the rest of us have done with clients served by firms, and so I do not see any possibility of ever participating in this case. Certainly, not having heard oral argument or participated in the Conference discussion, I would feel totally disqualified from casting any vote either on the merits of the case or on its disposition at the close of this Term.

As to Nos. 79-1738, Nixon v. Fitzgerald, and 80-945, Harlow v. Fitzgerald, I do not regard myself as having any similar disqualification. I have not followed the voluminous exchanges between Lewis and Byron with respect to the disposition of Kissinger with anything like the closeness one would follow exchanges in a case in which he were expected to cast a vote, although I have received copies of circulations from both of them. The only thing remotely similar to a four-four affirmance in which I did not participate since I have been here was a case in which I as hospitalized during the October Term of 1976 and therefore did not participate in either the oral arguments or the Conference discussion. When I returned to work, I was advised that the Conference vote had been four-four (I believe it was a sex discrimination case involving a Philadelphia high school) and several of the "brethren" discussed at Conference whether or not the case should be set down for argument before a full Court or whether it should be left as affirmed by an equally divided Court. As I recall, I was present during the discussion, may have contributed to it in some way, but did not vote on the

- 2 -

question of whether it should be set down for reargument or whether it should simply be affirmed by an equally divided Court. As I recall, the decision of the Conference was to affirm by an equally divided Court.

Sincerely,

