Justices Must Decide on Own Ethics

By Linda Mathews
Los Angeles Times

When the Supreme Court was asked to decide whether the District of Columbia Transit Co. was violating the constitutional rights of its passengers by piping in radio broadcasts on its trolleys, the late Justice Felix Frankfurter disqualified himself.

Frankfurter, who rode the trolleys to work each day and hated the racket of the radios, said he could not render an impartial decision. "My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate," he explained.

Some lawyers have said Frankfurter was overscrupulous, and perhaps even self-indulgent, but his dilemma in that 1952 case has become even more common for Supreme Court justices in the past decade.

Prodded by a newly enacted code of judicial ethics and the aggressive demands of the parties involved in pending cases, the members of America's highest tribunal have been forced, more and more frequently, to decide whether they are fit to sit in particular cases.

Last term, 19 of the 149 cases in which opinions were handed down were decided with one or more justices disqualified. That is a record, according to statistics maintained by the Harvard Law Review.

The figures do not take into account the numerous occasions on which justices disqualified themselves from votes taken to decide

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whether to hear an appeal, or the fact that half the cases were decided before Justices William H. Rehnquist and Lewis F. Powell Jr. were sworn in.

So far in the court term that began Oct. 2, three justices have been caught up in disqualification controversies and several others have, with less fanfare, taken themselves out of cases.

Justice Byron R. White has considered removing himself and his vote, which could be decisive, from a pending Denver case testing how far Northern school districts must go in desegregating schools. According to his office, he is worried that his involvement could be questioned because he once belonged to a Denver law firm that at one time represented the school board in other litigation.

Powell has declined to participate in at least 15 business cases because of his stock holdings. In one case, growing out of an antitrust suit against the Falstaff Brewing Corp., Powell "refused" himself (the technical term for self-disqualification) only after he was criticized by Washington newspapers. He owns 880 shares, worth about $55,000, in Anheuser-Busch, a competitor of Falstaff which may profit if Falstaff loses.

And, in an unprecedented move, Rehnquist released a 16-page memorandum justifying his participation last term in two 5-to-4 decisions. He had been asked to reconsider on the ground that, while in the Justice Department, he was allegedly involved in the cases and expressed his opinion on the merits of the constitutional arguments.

The reason disqualification questions cause individual justices so much anguish — and create such controversy in the legal community —is that, when it comes to excusing themselves, the justices frequently have only their own consciences to guide them.

They are not legally bound by the ethics code which governs the lower courts and must instead look to one loosely worded federal statute and precedents set by others, none of which may be directly relevant.

"A judge has to weigh conflicting values when he decides whether to excuse himself," says John P. Frank, a Phoenix attorney and former Supreme Court clerk who has written extensively about disqualification. "On the one hand, he wants to be fair. On the other, his job is to decide cases. If you push bias to the point of disqualifying a judge just because he has a firm opinion on some issue or a nodding acquaintance with a party, you make it impossible for him to function as a judge."

"If a district court judge feels uncomfortable sitting in a case, he can disqualify himself without particular anxiety because he knows some other district court judge can replace him," Frank said in a recent interview. "Supreme Court justices don't have the same luxury. They don't have replacements. If one of them sits out a case, the case may be decided differently or the court may split, 4 to 4, thus upholding the lower court ruling without settling the issue."

Rehnquist cited some of these same considerations, as well as Frank's law review articles, in a recent memorandum justifying his participation last spring in cases involving Sen. Mike Gravel (D-Alaska) and Army spying. Motions for rehearings in both cases were filed over the summer, accompanied by specific requests —which are practically unheard of—for Rehnquist to disqualify himself.

The Gravel case involved the senator's claim that a Boston grand jury lacked authority to question him or his aides about arrangements they had made for Beacon Press to publish the Pentagon papers. Gravel said Rehnquist should have excused himself because he had worked on the government's suit to block publication of the same documents by The New York Times and The Washington Post. Instead, Rehnquist cast the deciding vote as the court rejected Gravel's argument that his congressional immunity shielded him and his staff.

In the Army spying case, the American Civil Liberties Union had sued on behalf of several antiwar activists to stop the Pentagon from compiling dossiers on American civilians. As an assistant attorney general, Rehnquist told a Senate subcommittee that he thought the plaintiffs had not stated a legal claim the courts should recognize. Later, he cast the deciding vote as the Supreme Court, for the same reasons Rehnquist had cited in his testimony, rejected the suit.

Rehnquist's participation in both cases was a surprise to many court observers, who had assumed he would disqualify himself. Equally surprising was the memo he

issued in turning down the requests for rehearings. It was the first time a justice had gone to such lengths to defend his actions.

In the memo, he dismissed Gravel's suggestion that he was biased as "frivolous" and insisted that the senator's case and the suits against The New York Times and The Post raised "entirely different constitutional issues."

The justice was harder pressed to explain the Army spying case. He began by citing the federal statute governing the actions of all federal judges, which provides:

"Any justice of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit. . . ."

Renquist implied that the "substantial interest" language was limited to stock holding or financial interest. As to whether he was "so related to or connected with any party . . . as to render it improper, in his opinion, for him to sit," Rehnquist insisted that his association with the Justice Department alone did not call for his disqualification because the government's case was prepared in a section of the department different from the one he headed.

Rehnquist denied that his testimony before Sen. Sam J. Ervin Jr.'s (D-N.C.) judiciary subcommittee required his disqualification, as the ACLU had claimed. "None of the former justices of this court . . . 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," he said.

The ACLU, which had been hesitant to file the rehearing petition, was equally slow in responding to the Rehnquist memo.

"We were reluctant to jump on Justice Rehnquist afterward," John H. F. Shattuck, an ACLU lawyer, said last week. "It's a serious matter to be questioning the ethics of a Supreme Court justice."

But, after some study of the memo, Shattuck said he was convinced that "Rehnquist's values are wrong."

"He seems to think it's more important to reach a decision and settle an issue than to preserve the court's impartiality," Shattuck said. "That's a sort of judicial administration view—you know, get the cases out of the way—but we find it disturbing."

The ACLU was especially disturbed that Rehnquist brushed aside the references in their petition to the Code of Judicial Conduct, which was adopted by the American Bar Association in August. The applicable section of the code—thought by some to be the ABA's indirect rebuke to Rehnquist—says that "A judge formerly employed by a governmental agency should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association."