Rehnquist Challenged on Surveillance Case

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By John P. MacKenzie
Washington Post Staff Writer

The American Civil Liberties Union yesterday asked the Supreme Court to reconsider its June 26 decision on military surveillance and asked Justice William H. Rehnquist to disqualify himself from the case.

"Justice Rehnquist's impartiality is clearly questionable" on the subject and he participated "improperly" in the 5-to-4 decision, the ACLU said in a motion addressed directly to the Justice.

The closely divided court dismissed the ACLU's lawsuit on behalf of peace group leaders and political dissenters on grounds that it failed to charge "specific" personal harm from the Defense Department's system of collecting dossiers on them and other civilians.

Rehnquist joined the majority and thus cast a deciding vote despite his former role as the Justice Department's principal witness in Senate hearings on military spying when he was assistant attorney general. A 4-to-4 vote would have been a victory for the civilian plaintiffs.

Motions to disqualify high court justices raise sensitive ethical questions and are so rare that the ACLU admitted that it could find only one precedent in Supreme Court history.

"This motion is not made lightly," the ACLU said, "but only after cafeful consideration by counsel and their colleagues in full knowledge of its unprecedented nature."

Lawyers for Sen. Mike Gravel (D-Alaska), who also lost a 5-to-4 decision on June 29 with Rehnquist participating, plan to file a similar disqualification petition today. They are expected to complain that Rehnquist played a major part in last year's Pentagon papers controversy, which was involved in Gravel's case, before Rehnquist went on the bench.

In another June 29 decision by a 5-to-4 majority, Rehnquist's participation stirred complaints that he had been a principal Nixon administration spokesman on the issue of grand jury subpoenas to newsmen. However, it was learned that none of the three newsmen who lost the dicision is planning to file rehearing petitions.

The other two rehearing motions probably will not be considered until the justices reconvene in the fall. Such motions are rarely granted because they require a court majority, including the vote of at least one justice who voted with the original majority.

The majority in all three cases consisted of the four appointees of President Nixon — Chief Justice Warren E. Burger and Justices Harry A. Blackmun, Lewis F. Powell Jr. and Rehnquist — and Justice Byron R. White, a 1962 appointee of President Kennedy.

The dissenting justices were William O. Douglas, William J. Brennan Jr., Potter Stewart and Thurgood Marshall.

Two petitions were filed by the ACLU. One was a petition for rehearing which claimed that Burger's majority opinion ignored evidence that the plaintiffs alleged specific personal injury when they sued the Defense Department in U.S. District Court here.

The second petition asked the justices to withdraw the June 26 majority opinion and requested that Rehnquist remove himself from the entire case.

Cited as authority were the latest draft of a proposed American Bar Association code of judicial conduct and a federal law requiring disqualification in any case in which a judge "has a substantial interest, has been of counsel, (of) is or has been a material witness."

The ACLU said Rehnquist testified in Congress about "the very lawsuit" that was before the justices expressing the view that the suit should not be heard.

Rehnquist was described by the ACLU as the administration's "expert witness" and the "custodian" of the Pentagon's top secret computer printout of Army intelligence information on civilian war protest activity.

The former government lawyer also made several public speeches advocating the Justice Department's position, the ACLU said. The petition said Rehnquist's views were so well known that the ACLU had been "convinced that Mr. Justice Rehnquist would not participate" and therefore had not moved to disqualify him.

John P. MacKenzie

Judicial Ethics And Rehnquist

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THE PARTICIPATION of Justice William H. Rehnquist in the Supreme Court's military surveillance decision reopens old wounds for those who have suffered through the court crises of recent years.

Much of the national anguish and the re-examination of judicial ethics associated with the battles over Abe Fortas and Clement Haynesworth are recalled, and the question is raised: How much has the judiciary actually learned about conflict of interest on the bench?

Rehnquist cast a deciding fifth vote on Monday as the court held that antiwar protesters, civil libertarians and their groups had failed to make out a legal claim against the Pentagon's system of collecting and computerizing dossiers on American civilians.

HE DID SO despite his documented role as the Nixon administration's lawyer and prime witness in Senate hearings. He gave testimony that—precisely as the court held on Monday—these very plaintiffs had failed to make out a claim the courts could recognize, even if they proved all their charges about government snooping.

He did so despite the majority's key statement that it was for Congress, where Rehnquist had given his opinion, and not for the courts to gather evidence and take action about Defense Department surveillance.

He took part despite the fact that only through extreme self-restraint did the American Civil Liberties Union refrain from filing formal disqualification motions. Councel feared offending the court and were influenced by the opinion of Sen. Sam J. Ervin r., who argued as a friend of the court, that Rehnquist surely would see the point for himself.

Rehnquist stayed in the case while his fellow freshman, Justice Lewis F. Powell Jr., was showing far greater sensitivity in another case. Powell listened to arguments in the baseball antitrust case and then decided he should step aside. No reason was stated but it's understood he was worried because he owned stock in the beer company that owned the ball club that once owned plaintiff Curt Flood.

Perhaps topping all ironies, it was during another Senate appearance — his confirmation hearing last fall—that Rehnquist invoked the "attorney-client privilege" as a basis for not answering questions about positions on privacy and dissent he had espoused as assistant attorney general when he was President Nixon's "lawyer's lawyer."

Federal law provides: "Any justice or judge 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, to sit on the trial, appeal or other procedure therein.

Proposed new American Bar Association canons call for disqualification of a judge "in a proceeding in which his impartiality might reasonably be questioned," including cases in which the jurist has a bias or has "personal knowledge of disputed evidentiary facts."

The proposed ethical code contains the added commentary that "a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be question because of such association."

NONE CAN DOUBT that Rehnquist sincerely believed, when he testified at Ervin's inquiry in March, 1971, that the surveillance — however unwise — was constitutional and violated no one's rights.

Indeed, Rehnquist's view that the civilian plaintiffs suffered no injury had been the basis of fears that he took too narrow a view of the rights of free speech, association and privacy which were at issue in the lawsuit.

The trouble seems to be that Rehnquist, who must have given the matter considerable thought, sincerely believed that he was not disqualified. Many of the ethical questions are strictly discretionary and there is no higher court. Thus Congress, which has long conferred action on tightening the judicial disqualification law, must move to make the rules perfectly clear.

John P. MacKenzie Post 5-13-72

Rehnquist: Court Radical

THE SENATE Democrats who tried to drive a wedge between Supreme Court nominees Lewis F. Powell Jr. and William H. Rehnquist can relax now. The two new justices have accomplished a split of their own now that they are both on the high bench.

In the court's latest decision, Rehnquist carved out a position of conservatism that made even the soft-spoken former Virginia corporation lawyer look like a liberal. Indeed, on the entire court only Rehnquist held firmly that there was no help in the Constitution for illegitimate children.

It was Powell who delivered the opinion of the court that it was not only unequal, it was "illogical and unjust" to penalize a child for the sins of his parent by denying him rights enjoyed by a child who was born in wedlock.

It was Rehnquist who in lonely dissent called into question at least a generation of Supreme Court precedents applying the equal protection clause of the 14th Amendment beyond the realm of race to other forms of discrimination.

THE CASE, which is more important for its legal principles than for its poignant facts, involved the children of a fatally injured Louisiana workman, four legitimate and two born of another woman while his wife was in a mental institution. All the children were part of the man's household.

Under oft-attacked Louisiana laws, the worker's legitimate offspring had priority when it came to collecting death benefits. The other dependent children could share in the compensation only if there were enough to go around, and in this case there was not.

Critics out of court have condemned such laws as a species of racism but in court they are handicapped by the fact that on paper the law applies to black and white alike. The Aetna Casualty & Surety Co., defending the state's law, made much of the fact that all the workman's children, legitimate or not, were black.

All nine justices agreed with Powell that it would depart from a 1968 ruling and violate the principle of *state decisis* — adherence to precedent—to uphold the Louisiana law. Rehnquist simply disagreed with that precedent and many others —exactly how many will not emerge until future cases are decided—as "an extraordinary departure from what I conceive to be the intent of the framers of the 14th Amendment."

ist, also by himself, dis-

A month earlier Rehnqu- sented as the court ruled that a Texas prisoner's suit for equal religious privileges should not have been dismissed out of hand. Condemning prison "writ-writers," Rehnquist said that while the 14th Amendment treated racial distinctions as suspect, many of the amendment's framers "would doubtless be surprised to know that convicts came within its ambit."

Both utterances were foreshadowed by Rehnquist's testimony back on Nov. 4 before the Senate Judiciary Committee. Sen. Birch Bayh (D-Ind.), reading a question prepared by the temporarily absent Sen. Philip A. Hart (D-Mich.), asked Rehnquist:

"One thing that has troubled me is whether your record can fairly be said to reflect the dedication 'to the great principles of civil rights' of which President Nuxon spoke. What have you ever done or said that could help me on that concern?"

Among Rehnquist's answers was the statement that "Mr. Justice Miller, I think, made the statement in the (1883) Slaughterhouse Cases that in his opinion the principal import of the post-Civil War amendments was to benefit the Negro race."

THAT MUCH was generally agreed, and no senator asked the nominee whether his answer signalled disagreement with the widely accepted notion that the 14th Amendment's guarantees extended to other forms of discrimination.

The reference to the Slaughterhouse Cases was repeated in Rehnquist's dissent along with the lament that Justice Samuel F. Miller had proved "a bad prophet" on the limitations of the amendment.

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STATES-ITEM
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Record shows Rehnquist is a tough idealogue

NEW YORK—In 1964, Sen. Barry Goldwater won the Republican presidential nomination. Gov. George Wallace abandoned his putative candidacy. The stage was thus cleared for a united bid for power by the most regressive factions in national politics —the Southern racists and the right wing of the Republican party.

The issues were cleanly drawn. Goldwater had voted against the 1964 Civil Rights Act and opposed the whole thrust of the Negro drive for equality. Ten years earlier he had voted against censure for Joe McCarthy and fully endorsed the McCarthyite assault on the civil liberties of government employes and private persons. Goldwater stood squarely for a "war on crime" and against procedural safeguards that hobbled the police.

'I would remind you'

"I would remind you that extremism in the defense of liberty is no vice. And let me remind you that moderation in the pursuit of justice is no virtue," said Goldwater, accepting his nomination.

The nation overwhelmingly rejected this reactionary fanaticism. People in 44 of the 50 states voted "no" to Goldwater. He was, in Nelson Rockefeller's famous phrase, outside "the mainstream" of modern America.

Four years later, as a consequence of the Nixon victory, the Justice Department was delivered into the hands of the Goldwaterites. Two of his Arizona proteges—Richard Kleindienst and William Rehnquist—became deputy attorney general and assistant attorney general, respectively.

As a further consequence, Rehnquist has now been proposed for one of the two vacancies on the Supreme Court. His bleak record on racial equality, civil liberties and the overwhelming power of government to coerce private individuals in the name of order and security is wholly consistent with that of his political sponsor.

Publicly opposed passage

Rehnquist publicly opposed the passage of the Phoenix municipal ordinance and the Arizona state law requiring nondiscriminatory racial policies on the part of bus stations, restaurants and other places of public accommodation. That was in 1964-65, extraordinarily late for anyone to refuse to recognize the legitimate claims of Negroes to equal treatment.

Wherever the convenience of the police and the rights of the citizen conflict, Rehnquist wants to enlarge the power of the police and circumscribe the citizen. He would alter the "exclusionary rule" that prevents prosecutors from making use of illegally obtained evidence. He has argued for the government's right to tap the phones and electronically "bug" the homes of individuals whom it suspects of "national security" offenses and to do so without a court order. Rather than restrict such dangerous

William V. Shannon

power to cases involving spies for foreign countries, he would apply it to any American citizen without restraint.

'A dangerous mistake'

Warning against his confirmation as "a dangerous mistake," the Ripon Society made up of progressive younger Republicans declared in the latest issue of its magazine: "Approval of William Rehnquist's nomination will for the first time give credence to what has until recently seemed an alarmist fear: that we are moving into an era of repression. The entire scenario of repression consists of measures that Rehnquist, on the record, has strongly and explicitly invited."

A man's opinions can change but a mature man's habits of mind rarely change. Ominously, Rehnquist has a zealot style that borders upon intellectual McCarthyism. After serving as a law clerk to the late Justice Robert Jackson, he gave an unusual interview in which he attacked other Supreme Court law clerks as "left wing" and said that "unconscious slanting of material" influenced the cases on which the court granted certiorari.

Rehnquist's first political speech in Arizona in 1957 was a scathing attack on the Supreme Court which included derogatory personal remarks about Chief Justice Earl Warren's professional competence.

The following year he began a bar association journal article with this sentence: "Communists, former Communists, and others of like political philosophy scored significant victories during the October, 1956 term of the Supreme Court, culminating in the historic decisions of June 17, 1957."

Landmark decisions

Those were landmark civil liberties decisions involving a loyalty-security firing in the State Department, the rights of witnesses before congressional and state legislative committees, and a free speech case. Two of them were written by Justice Harlan, a distinguished conservative. Was Harlan "soft on communism"?

The Rehnquist record is not that of a true conservative. It is the record of an aggressive idealogue with combative impulses and strong commitment to a harsh, narrow doctrine concerning government and individual. It would be an ironic turn of events if this Goldwaterite doctrine so overwhelmingly rejected by the voters should be legitimized on the Supreme Court.