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Letters to the Editor

Self-Disqualification of Justices

Controversy continues to smoulder over the refusal of Justice William Rehnquist to disqualify himself in three recent cases decided last term. Legislation on the general question of judicial disqualification is sure to be introduced in the next Congress, yet there seems to be a curious pattern to Justice Rehnquist's behavior that has received no attention.

The Justice disqualified himself in two other cases. The first decided that the Government is not free to ignore Fourth Amendment restrictions on the use of wiretap evidence if it claims the wiretaps were done to protect "national security." The second held that the Government is not required to grant complete or "transactional" immunity to a witness called before a grand jury, but may compel testimony upon an offer of a less protective "use" immunity.

Justice Rehnquist had been accused to argue the Government's position in the immunity case before his appointment to the Court, but his involvement in the national security wiretap issue appears to have been limited to earlier statements in support of the practice. This was barely mentioned in his dissent in *United States v. Gravel*, and perhaps in his dissent with the three cases on which he disqualifies himself.

In 1970 Justice Rehnquist represented the Justice Department in a debate on the issue of a newsman's privilege to refrain from giving grand jury testimony about persons whose activities he had reported, and had

lines for an amendment to the Code, but he did not disqualify himself from participating in the Supreme Court's decision. Justice Rehnquist also disqualifies himself in a separate suit against the Federal Attorney General on the issue of Army surveillance of dissidents, expressing his opinion that a challenge to that activity, then before the Court of Appeals, had been moot. When that very suit came before the Supreme Court he voted to uphold the plaintiff's claim.

While he had not disqualify himself directly in the specific case brought by Mike Gravel against the Government over whether his name and his aide could be used to answer certain questions about his version of the Pentagon Papers before a grand jury, Justice Rehnquist played an active role in the Government's suit against various witnesses to prevent publication of those documents. When Senator Gravel's case reached the Supreme Court, he voted to uphold the Government's efforts to compel testimony.

Because of the pattern among his colleagues in the two cases in which he disqualified himself, Justice Rehnquist's participation could in no way have affected the outcome. In all three cases in which he participated, Justice Rehnquist cast the deciding vote. The results may be coincidental, but they raise grave questions, not merely about his judgment, but about his integrity.

LAURENCE LUSTGARTEN
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