Rehnquist Defends His Role in Decision On Spying by Army

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WASHINGTON, Oct. 10—Justice William H. Rehnquist said today that there was no impropriety in his participation in a Supreme Court decision last June although he had previously testified on the matter as a Justice Department official.

In the case, Justice Rehnquist voted with the majority in a 5-to-4 decision against antiwar activists who were seeking to bar the Army's surveillance of civilians. Mr. Rehnquist, a former Assistant Attorney General, had testified that there was no legal basis for the suit.

The Justice's unusual explanation was given in a 15-page memorandum that he issued as he rejected the activists' demand that he disqualify himself

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REHNQUIST BACKS SPYING-CASE ROLE

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from a plea for a rehearing in the case.

The core of his argument was that all judges start on the Supreme Court with views on some matters that will later face them for decision, and the mere fact that they have expressed those views should not disqualify them from judging.

"Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa [clean slate] in the area of constitutional adjudication would be evidence of a lack of qualification, not lack of bias," he said.

He denied the motion of the American Civil Liberties Union, which had handled the case for the activists and had asked him to step aside now on the question of a rehearing. The full court also denied the A.C.L.U.'s motion for a rehearing of the case.

Justice Rehnquist also rejected a similar motion by Senator Mike Gravel, Democrat of Alaska, who charged that the Justice should not have taken part in another 5-to-4 ruling the same day.

Justice Rehnquist had also been in the majority as the Court upheld the Justice Department's contention that Senator Gravel and his aides could be questioned before a grand jury about their role in arranging for the book publication of the secret Pentagon papers.

Senator Gravel argued that Justice Rehnquist should step aside because he had helped prepare the Government's case in its efforts to stop The New York Times and The Washintog Post from publishing the papers.

Justice Rehnquist dismissed that assertion today, saying it "verges on the frivolous" because that suit had nothing to do with the issues in Senator Gravel's case. The court also denied Senator Gravel a rehearing.

In the surveillance case, Laird V. Tatum, the Court hel that citizens who had been put under surveillance but also had not been harmed by it lack standing to stop the surveillance through court action.

The effort to disqualify Justice Rehnquist stemmed primarily from his testimony as an Assistant Attorney General in 1971 before the Senate Subcommittee on Constitutional Rights. He mentioned the Laird case briefly, saying that he disagreed with the contention that citizens could sue to stop army surveillance.

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William H. Rehnquist

On the general subject of surveillance, he said, "I do not think it amounts to a constitutional violation of the First Amendment."

Today he said he had had no detailed information about the case and that he had not worked on it.

Federal law requires judges to step aside if they conclude it would be improper for them to participate in a case. Justice Rehnquist concluded that he should do so only if his expression of opinion about the matter would make his participation improper.

Justice Rehnquist said that the late Justice Huge H. Black ruled on the Fair Labor Standards Act after he helped enact it as a Senator and that the late Justice Felix Frankfurter ruled on labor injunctions, a subject he had written about as a law professor.

He conceded that "fair minded judges might disagree" with his decision to take part in the Laird case, but he said that an extra reason for participating was to avoid a4 -to-4 deadlock, which would have affirmed the lower court rulings against the Government without deciding the constitutional issue

Justice Rehnquist concluded that he was not disqualified and that "a Federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified."