Law

Rehnquist

Determined Not to 'Bend Over Backward'

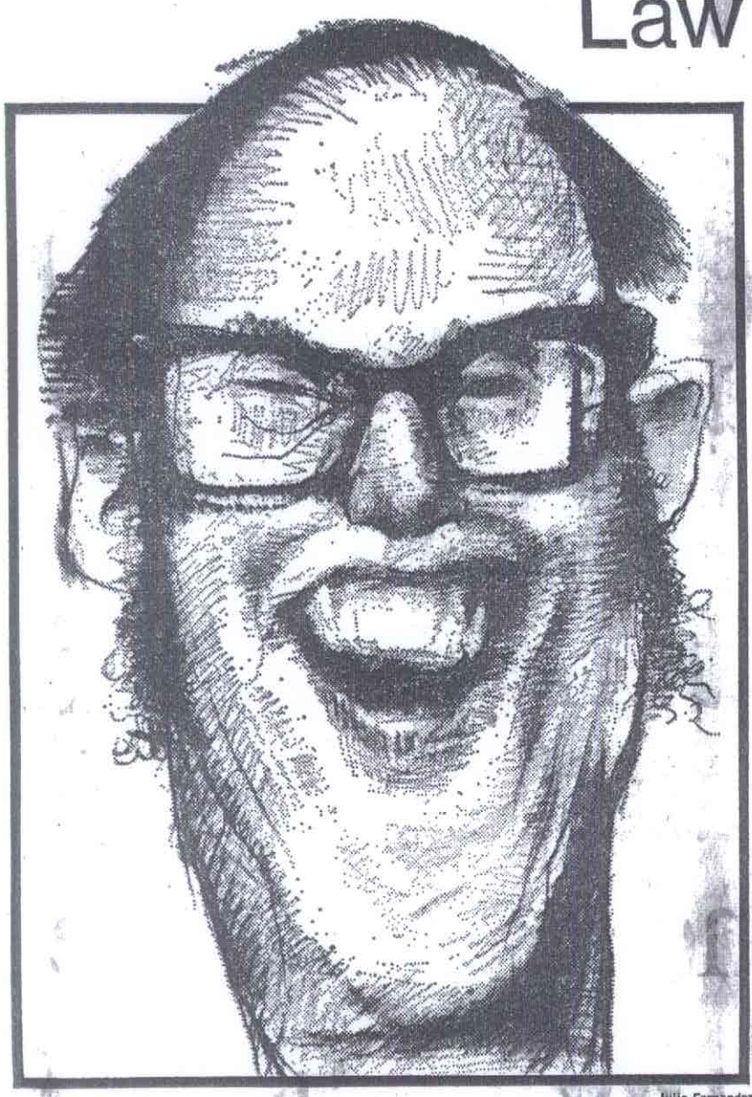
WASHINGTON—"A judge formerly employed by a governmental agency," declares the new Code of Judicial Conduct approved last August by the American Bar Association, "should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association."

The principle had been raised in three cases in which decisions were announced on the final week of the last Supreme Court term. And it came up again last week when Justice William H. Rehnquist rejected demands by the losing parties in emotionally charged 5-4 decisions in two of those cases that he disqualify himself and permit a rehearing.

The cases:

● A group of antiwar activists sued to stop the Army from surveilling their political activities. An an Assistant Attorney General, Mr. Rehnquist had told a Senate subcommittee he disagreed with the protesters' claim that as targets of the surveillance they had a right to sue to stop it. Later, he cast the deciding vote as the Supreme Court rejected their suit.

● Senator Mike Gravel of Alaska challenged the authority of the Justice Department to question him or his aides in a grand jury investigation of the book publication of The Pentagon Papers. Mr. Rehnquist had been the Justice Department official who worked out the basis of the Government's suit to block publication of the Pentagon Papers by The New York Times, and he had telephoned The Washington Post to warn it against a similar publication. He later cast the deciding vote as the Supreme Court ruled that Senator Gravel's Congressional immunity did not shield him from grand jury questioning.



Julio Fernandez

Justice William H. Rehnquist: A question of ethics.

● Earl Caldwell, a New York Times reporter, had refused on First Amendment grounds to appear before a grand jury to answer the Justice Department's questions about articles he had written about the Black Panther party. Mr. Caldwell was charged with contempt. And, as a Justice Department official while the case against Mr. Caldwell was being prepared, Mr. Rehnquist had argued the department's side of the press subpoena issue at a public meeting and had helped formulate the Government's press subpoena guidelines. He later cast the deciding vote as the Supreme Court ruled, 5-4, for the Government and against Mr. Caldwell.

In the weeks following the three decisions, the antiwar activists and Senator Gravel demanded rehearings and called upon Justice Rehnquist to disqualify himself from the cases. Mr. Caldwell, who will not be called again to testify, took no legal action but wrote an article in The Saturday Review complaining about Justice Rehnquist's key role in his case.

So far as anyone could remember, never before had a lawyer asked a Supreme Court justice to disqualify himself. So when Justice Rehnquist announced last Tuesday that he would not do so, he issued a 16-page memorandum that appears to be the first time a justice had publicly explained himself on such a question of propriety.

Justice Rehnquist argued that every justice comes to the Court with views on some issues, and that only the "random circumstance" of his prior office exposed certain of his beliefs to public view. He cited examples of earlier jurists who had publicly supported certain measures before joining the Court, and had voted to uphold them afterwards.

Justice Rehnquist said that the late Justice Hugo 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, however, that "fair minded judges might disagree" with his decision to take part in the surveillance case.

"It is not a ground for disqualification," he concluded, "that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provisions of the Constitution." He added that when a justice is not disqualified he has a strong "duty to sit," so that the Court will not be deadlocked on vital questions.

Critics were quick to point out that at least in the antiwar activists' case, Mr. Rehnquist had commented adversely on the case itself—not just the legal issues. Also, his opinion did not take into consideration the A.B.A.'s new ethical rule that a judge formerly employed by a governmental agency should disqualify himself if the connection shouuld call his impartiality in question. He declared that it did not substantially add to the Federal law on the subject that requires a lawyer to step aside if he has a connection with a party or a lawyer in a case.

Justice Rehnquist's argument turned on the proposition that Supreme Court justices' essential role is to settle issues, not cases—and that they should avoid disqualifications that affirm lower court decisions by 4 to 4 votes, without settling the legal issues involved.

Yet the ethical rules and customs have generally been based on a "Caesar's wife" principle, designed to assure the losing party that his case was not decided by a hostile judge.

Thus on the same day that Justice Rehnquist refused to disqualify himself from the two controversial cases, Justice Lewis F. Powell Jr. routinely took himself out of 13 cases involving businesses in which he owned stock. Justice William O. Douglas has declined to rule on cases involving ecology and Nationalist China, because he has made strong speeches on both subjects.

Thurgood Marshall and Byron R. White stayed out of most Government cases for several years after they left the Justice Department to become Supreme Court justices.

In restrospect, Justice Rehnquist's effort to explain himself seemed to have heightened the controversy over his participation, and to have suggested a fallacy in his conclusion that justices should avoid "bending over backward" to disqualify themselves when their impartiality might be questioned.

—FRED P. GRAHAM