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Issue of Propriety for Rehnquist

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WASHINGTON, Feb. 27.—Justice William H. Rehnquist, a former Assistant Attorney General who vigorously advocated many of the law-and-order policies of the Nixon Administration, is now facing some sensitive questions of judicial propriety as some of those same issues are coming before the Supreme Court. At issue is when a Justice should disqualify himself from ruling on a case—a murky legal area that has produced several controversies in recent years over alleged conflicts between judges' financial holdings and their role on the bench.

News Analysis

But last week a series of incidents occurred involving Justice Rehnquist that presented this problem in an even more elusive context. Here the question was when a Justice should decline to rule on a case because of the appearance that he has been too close to one side.

A Leading Advocate

AT the heart of the matter is the fact that Justice Rehnquist, until last month, was chief of the Justice Department's Office of Legal Counsel, a "book lawyer's" job that had been an obscure post until he used it to become of the leading public advocates and legal theoreticians of the Justice Department's controversial prosecution policies.

He became so closely identified with some Justice Department positions tha it was widely thought he would disqualify himself when cases raising the constitutionality of those positions came before the Court.

One of these issues appeared to be the subpoenaing of newsmen to disclose confidential information. When the issue arose in 1970 over the Justice Department's subpoenaing of Earl Waldwell, a reporter of The New York Times, Assistant Attorney General Rehnquist spoke out publicly in support of the Justice Department's position, although he refrained from discussing the Caldwell case specifically.

At a panel discussion in Washington on Oct. 29, 1970, Mr. Rehnquist defended the power of the courts to compel testimony as "the cornerstone of civil and criminal litigation." In reply to journalists' argument that compelling newsmen to disclose confidences would violate the First Amendment by damaging journalists' capacity to gather news, he said that "the core of this freedom is the right to print" and that it did not apply with the same force to "restraints on the gathering of news."

United Press International
William H. Rehnquist

Mr. Rehnquist also reportedly helped prepare the Justice Department's press subpoena guidelines, issued in August, 1970.

One hint that he may have played a further behind-the-scenes role on the press subpoena issue is the existence of a memorandum on the subject that his staff prepared for him on Feb. 10, 1970, long before the guidelines were contemplated.

Detriment to Public Seen

The memorandum surveyed the law on the subject, concluded that the legal precedents did not support Mr. Caldwell's refusal to obey the subpoena, and declared that to recognize a First Amendment privilege on bhealf of reporters "opens the door to undue extensions of freedom of the press to accomplish the aims of an economic group, to the detriment of the public generally."

Thus, when Mr. Caldwell's case came up for argument last Tuesday, eyebrows were raised in the courtroom as Justice Rehnquist, by remaining behind the bench, indicated that he would take part in the case.

Earlier that day, the Court issued an order announcing that it would review Senator Mike Gravel's suit to block the Justice Department from investigating his role in the publication of the Pentagon papers. As an Assistant Attorney General, Mr. Rehnquist had helped prepare the Justice Department's suit to block The New York Times's publication of material from the Pentagon papers. He did not disqualify himself from the Gravel case.

Disqualified Twice

There have been two cases so far in which Justice Rehnquist has disqualified himself.

In one, involving the immunity granted persons who are compelled to testify before grand juries, he had been scheduled to argue the Government's case before the Supreme Court. In the other, concerning governmental wiretapping without court orders, he had helped prepare the Justice Department's brief.

In making these decisions to take part in certain cases and abstain from others, Justice Rehnquist has had some precedents and principles to follow, but there are no black-and-white rules to guide Justice Department officials who become Justices.

On one occasion, Justice Robert H. Jackson disqualified himself from a case because of his former role as Solicitor General and then publicly chided Justice Frank Murphy, who had been Attorney General at the same time but took part in the case.

At Senate hearings on his confirmation, Mr. Rehnquist said that he would be guided by a brief that was prepared at the time Byron R. White left the Justice Department to join the high court.

Advises Stepping Aside

According to Mr. Rehnquist, this brief advised that a Justice should step aside from any case in which he had personally participated as a Justice Department lawyer, or involving legislation he had helped draft. But it would not have a Justice disqualify himself from a case involving a Justice Department policy he helped shape.

The proposed Code of Judicial Conduct being prepared by a special committee of the American Bar Association suggests that mere close proximity of a case to a lawyer can be grounds for him not to rule on it if he later becomes a judge.

Under the general rule that "a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned," the code says that a judge should not rule on a case in which "a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter."

This rule suggests that sensitivities are most acute when a judge who is new to the bench decides issues with which he was associated, even remotely, as an advocate. This is particularly so when the issues are emotionally charged ones with heavy political and ideological overtones.