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Rehnquist hears 'spy' case he once gave opinion on

By Jack C. Landau
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WASHINGTON — Civil liberties lawyers went through a series of tense deliberations this past week on whether to file a formal request asking Justice William H. Rehnquist to disqualify himself from further participation in a pending Supreme Court case.

The case, which was argued before Rehnquist and the other eight justices on Monday, involves a claim that the Army's surveillance of civilians is so "intimidating" that it discourages political dissenters from freely exercising their First Amendment rights of freedom of speech and association.

Rutgers University law professor Frank Askin, who argued the case, and American Civil Liberties Union director Melvin L. Wulf said they are "seriously disturbed" by Rehnquist's participation, based on the justice's testimony about the Army spying case before a Senate subcommittee two years ago when he was an assistant attorney general.

During that testimony, Rehnquist mentioned the Army spying case now before the Supreme Court — Laird vs. Tatum — and said: "I do not think there is a First Amendment violation".

This is the same argument which Solicitor Gen. Erwin Griswold made before the Supreme Court Monday in asking the high court to rule in favor of the government.

While disqualification motions are fairly common in the lower courts, court officials said there has not been a "serious" motion for disqualification of a Supreme Court justice in at least 20 years, although one said there are frequently "screwball" disqualification motions filed.

Askin and Wulf and their advisers in the civil liberties movement were sharply divided on whether a motion should be filed. Some of the questions they posed in meetings and in telephone calls to as far away as California were:

Does Rehnquist's testimony two years ago give "an appearance of impropriety" or partiality — which is the standard in the current American Bar Association canons of ethics?

Or does the 1971 Senate testimony now place Rehnquist in a position "in which his impartiality might reasonably be questioned" — which is the new ABA standard in the proposed judicial code?

During the testimony, Sen. Sam Ervin (D-N.C.) said he thought that civilians subjected to Army spying had a right to file an action against the government to stop any further Army surveillance.

"My only point of disagreement with you," Rehnquist answered, "is to say ... as in the case of Tatum vs. Laird ... that an action will lie by private citizens to enjoin the gathering of information by the executive branch when there has been no threat of compulsory process and no pending action against any of those individuals ..."

During the Supreme Court arguments, Griswold said that the plaintiffs in the case — 13 anti-war groups and individuals — had no "justifiable controversy," which is another way of saying that they have no constitutional right to file the case.

But even assuming that the civil liberties lawyers have enough evidence to bring Rehnquist's impartiality into question, there was some discussion about whether Rehnquist might eventually disqualify himself — either on his motion or on the persuasion of other justices.

During the arguments on Monday, Rehnquist asked no questions. By tradition, Supreme Court justices who disqualify themselves from hearing cases leave the bench when the case is being argued. Rehnquist's office was asked whether his appearance at the arguments means he is still participating in the case. His office said it had "no comment."

This term, Rehnquist has disqualified himself twice, presumably based on some involvement with the cases when he was assistant attorney general from 1969 to 1971.