The Justices' Comments: Few Clues

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WASHINGTON, July 9 — Every lawyer or reporter exposed to the Supreme Court for the first time gets the same sage counsel: Anyone who tries to predict the outcome of a case by interpreting the Justices' questions and comments from the bench does so at his own peril.

News Analysis

But that sound principle is widely ignored when a case of great political and legal significance comes before the high court, as two Watergate issues did yesterday, and the Justices demonstrate intense interest in the arguments on both sides.

More than 150 times during the three-hour hearing—almost once a minute—one of the eight sitting justices interrupted James D. St. Clair, the President's lawyer; Leon Jaworski, the special Watergate Prosecutor, or Philip Lacovara, his assistant, with a question or a comment.

Different Approaches

But, faced with this surfeit of potential clues, a Court watcher could rarely be sure whether a given Justice on a specific occasion was advancing his own views, concealing his own views or merely trying to get enough information to form his own views.

Some of the Justices obviously believe that the appearance of impartiality is an essential of judicial behavior.

They tend to balance their questions carefully, bringing out alternatively the strengths and weaknesses of an arguing attorney's case.

Others like to adopt the devil's advocate approach, questioning with asperity a lawyer with whom they basically agree, pressing him to make the fullest and strongest statement of his client's position.

Predicting Outcome of a Case Is Often a Perilous Task

Still others, most notably William O. Douglas, who holds the record for Supreme Court service, are not troubled by any appearance of bias and focus sharply on the weak points in an argument, often revealing in the process how they will vote on the case.

On occasion, a Justice will come to the rescue of a foundering attorney, asking him a leading question that forces him to make a major point in his own favor or feeding him a valuable precedent that he has overlooked.

In the last category, for example, Chief Justice Warren E. Burger thoughtfully provided President Nixon's lawyer with an illustration of his contention that an absolute privilege may exist for certain kinds of public officials — such as a Presidential privilege to withhold information — even though it is not mentioned in the Constitution at all.

"Mr. St. Clair," the Chief Justcie observed, "you have not mentioned in your argument the holding of this Court in Pierson v. Ray, where the Court had no diffculty in concluding that it did not require an express constitutional provision to spell out an absolute privilege for judges."

"That's right," the lawyer replied gratefully.

Associate Justice Lewis F. Powell, a Nixon appointee who could cast a deciding vote in the Watergate cases, asked one set of questions indicating doubt about the basic White House position, then indicated sympathy with the President on another issue.

Conceding that the executive privilege claimed by Mr. Nixon was based on "the preservation of candor in discussions between the President and his closest aides," Justice Powell asked Mr. St. Clair, "What public interest is there in preserving secrecy with respect to a criminal conspiracy?"

The White House lawyer replied that a conspiracy had been charged by the Watergate grand jury's cover-up indictment but not yet proved.

But at another point Justice Powell seriously questioned whether permitting a grand jury to name any President as an unindicted co-conspirator might not tend to shackle a Government official with responsibilities unlike anyone else's.

"The thing I was wondering about," Justice Powell observed, "is that there is only one President, and executive power is vested in him: With grand juries sitting all over the United States, and occasionally you find a politically motivated prosecutor—that's a rather far-reaching power if it exists."

Associate Justice William J. Brennan, like others in the Court's liberal bloc, is rarely reluctant to tell a lawyer he does not agree with him. When Mr. St. Clair charged that leaving the President's name on the indictment would involve the Court in the impeachment process. Mr. Brennan said:

"You have not convinced me that we are drawn into it by deciding this case. How are we drawn into the impeachment proceedings by deciding this case?"

"The impact of a decision in this case," Mr. St. Clair replied, "will not be overlooked."

"Any decision of this Court has ripples," Justice Brennan observed.

Associate Justice Potter Stewart left little doubt of his lack of sympathy for the White House contention that the courts have no power to referee a dispute between the President and his direct governmental subordinate, Mr. Jaworski.

"Hasn't your client dealt himself out of that argument by what has been done in the creation of the special prosecutor?" he inquired, referring to the independence of the office.

Justice Douglas also took outspoken exception to the St. Clair argument that by ruling on the Watergate cases the high court would be intervening in the legislative process of impeachment and thus violating the principle of separation of powers.

"Well, if we are just adjunct of the House Judiciary Committee," Mr. Douglas said, "this case should be dismissed, shouldn't it?"

Mr. St. Clair at first agreed with Justice Douglas. Then, being informed that dismissal would leave standing the Federal District Court order requiring the President to surrender the White House tapes, he reversed himself.

Associate Justice Thurgood Marshall went so far on one occasion as to press the President's lawyer into conceding that he could lose part of his case. The questioning involved the existence of an absolute executive privilege shielding Presidential communications.

"If we can't find it in the Constitution," Mr. Marshall inquired, "what happens to your argument?"

"Well, I would suggest you should find it in the Cosntitution," Mr. St. Clair responded, "and it need not be explicit. It can well be implied."

"My question is," Justice Marshall continued, "if we can't find it, what happens to your argument?"

"If you cannot find it?" the lawyer asked.

"Yes, sir," the Justice said.

"Then, if your honor please," Mr. St. Clair concluded, "that portion of the argument is lost as far as this court is concerned."