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T-r-u-t-h or T-r-i-a-l?

By Robert M. Smith

NEW HAVEN—Judge John J. Sirica's recent statement in the Watergate trial that he is not trying to follow "strict" rules of evidence but is interested in the discovery of the t-r-u-t-h (he spelled it out in court) raises two central questions of American law: the function of the trial and the role of the judge.

It also suggests that in some cases, perhaps the most important cases, American legal theory places an unbearable burden on the judge.

Our legal system wants the judge to be more than an umpire, but not too much more.

The judge was apparently first cast in this role of umpire in the fifth or fourth century B.C. He was called on not to determine the truth but to judge who had the best of a contest —the trial. Rather than actively eliciting the truth, the judge arbitrated between the state and the individual, or between litigating parties.

As one legal scholar has pointed out, one of the factors that made this narrow role appealing was that it was easier: The judge had only to discern relative truth—which of two stories presented to him was more probable.

But the United States Supreme Court has declared that in a jury trial in a Federal court "the judge is not a mere moderator." In a similar vein, the United States Court of Appeals for the Ninth Circuit has said the trial judge is no "mere presiding officer" but must conduct the trial "with a view to eliciting the truth, and to attaining justice between the parties."

There is the rub. As in the Watergate trial, there may be a tension between "eliciting the truth" and "attaining justice between the parties" under rules designed to keep the courtroom combat in certain defined channels. The question in its starkest form is this: Which of those two imperatives should carry the day?

Even in trials more run-of-the-mill than Watergate, the judge often has to do a high-wire act. For example, he is free in Federal courts to "comment" on the evidence, so long as he does not "add" to it. The tightrope is snapped on review if the appeals court finds that he biased the jury rather than enlightened it.

The judge may also summon witnesses—as Judge Sirica has indicated he may do with respect to Richard M. Nixon. Indeed, it can be argued that he has a *duty* to call or examine witnesses. That was Justice Felix Frankfurter's opinion in a 1948 dissent: "Federal judges are not referees at prize fights but functionaries of justice. . . . As such they have a duty of initiative to see that the issues are determined within the scope of the pleadings, not left to counsel's chosen argument."

In the ordinary Federal trial, then, the judge has the power—and sometimes the duty—to call and examine witnesses. But he must use the power with great care lest he influence the susceptible minds of the jurors by indicating, or seeming to indicate, his own views. Thus, American legal theory recognizes the judge's right to intervene, and American practice lets him wield the power in certain circumstances.

Let's look at the broad circumstances of the Watergate trial.

Initially, the trial raised the possibility of political power intervening to make the already imperfect adversary system even more imperfect in its capacity to produce the facts. Hence, the call for a special prosecutor—followed by concern about the true independence of the prosecutor chosen.

The problem was how the truth could be produced if an important element of the political leadership—the leadership that controlled the Justice Department—wanted to keep it bottled up.

Secondly, the Watergate trial involves a most sensitive kind of truth. Like the Dreyfus trial and the trial of Julius and Ethel Rosenberg, it touches the adversary system at its rawest nerve, for its importance ranges beyond the guilt or innocence of those at the bar.

For the public, what happened may be more important than who did it. The "truth" function may outweigh the "fight." It can even be argued that such trials rise to the First Amendment level of the public's right to know; they contain exactly the kind of political information that the amendment has a basic justification in protecting.

To ask Judge Sirica, then, to get off the high wire, to stop intervening, to stop probing, is to demand that he abdicate the ticklish duty he has been given.

If the defendants are found guilty and an appeals court decides Judge Sirica was too intrusive, the defendants will get another trial. (It is true that defending themselves a second time will cost them still more money.)

If he doesn't push for the truth, we may never learn what it is. In the meantime, we can listen to the complaints of law-and-order conservatives who have had a sudden seizure of sympathy for (these particular) defendants. And we can think about the delicate acrobatics our adversary system sometimes forces on diligent judges presiding at criminal trials.

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