

Douglas and the Court

Speculation Rises on Justice's Illness And Handling of Cases Without Him

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WASHINGTON, April 24—When the Supreme Court heard the final case of the current term argued yesterday afternoon, the high-backed leather chair at the right of Chief

Justice Warren E. Burger was empty, as it has been virtually all this year.

Associate Justice

William O. Douglas, after two hospital sieges here, had gone to New York in search of specialized treatment for the stroke he suffered on New Year's Eve, a disability that has cast a shadow of uncertainty over the future of both the Justice and the Court.

Reluctantly, the Court, the legal profession and the White House are beginning to consider the possibility that Justice Douglas may not return to the bench before the Justices recess for the summer in mid-June and that he may be absent when the next terms opens in October.

Information about Justice Douglas's health has been difficult to come by. His friends continue to insist that his mental capacity is unimpaired, but the surface evidence as to his continued ability to serve is not encouraging.

Reports of Confusion

Reports have recurred that Justice Douglas, during the three weeks that he was out of the hospital, became confused at times about his surroundings at the Court. Partly paralyzed by the stroke, he was unable to walk or use his left arm.

Asked today if there was any basis for these reports, Barrett McGurn, the high court's public information officer, said, "I can only refer you to the doctors and the hospitals on these medical questions."

At New York University's Institute for Rehabilitation Medicine, Justice Douglas was reported to be facing a minimum stay of three to four weeks, with any discharge then depending on his progress.

One official at the National Institutes of Health here has said privately that a stroke victim suffering the physical impairment that Justice Douglas did would have needed a near-miracle to avoid brain damage.

Even if it lasts only a month, Justice Douglas's absence creates problems for the Court. About half of the 150 cases heard in the current term remain undecided; preliminary votes have been taken and drafts of the opinions are being written and circulated.

When he rejoined the Court for the first time in mid-March after two and a half months in Walter Reed Army Medical Center, Mr. Douglas said that he would participate in deciding all the cases argued during his absence, by reading the record and listening to tapes.

But three weeks later he returned to the hospital missing all of a dozen more cases except last Monday's capital punishment argument.

The high court was handed down two decisions that list Mr. Douglas among those participating, despite the fact that he was hospitalized during the arguments and the initial vote, which is normally taken on the Friday after the arguments.

But those decisions were made public during Mr. Douglas's three weeks back on the bench. It remains to be seen whether his vote will be recorded on decisions that will be handed down over the next three to four weeks, while he is in New York.

Supreme Court decision-making is a secret process, taking place at a series of closed conferences. There are no fixed rules as to whether absent Justices are permitted to cast votes by proxy. In some cases, telephone canvasses have been used.

The possibility that Justice Douglas's vote might not be recorded in some of the cases he has missed raises the prospect of 4-to-4 deadlocks on close questions. When that occurs, the lower court decision is affirmed, but no national legal precedent is set and there are no opinions.

Such ties mean that important legal issues have to be re-litigated, delaying for another year or two a definitive ruling, a situation that both judges and lawyers find unsatisfactory and frustrating.

Ironic Role for Ford

Should Justice Douglas's disability prevent him from resuming his position when the new term opens in October, professional pressure for his resignation would be likely to become compelling, based on the national interest in a fully operative court.

This would raise the ironic prospect that a replacement for Mr. Douglas would be chosen by the man who tried to organize a Congressional campaign to impeach him in 1970, then Representative Gerald R. Ford.

Four of the members of the present Supreme Court are generally regarded as judicial conservatives—Chief Justice Burger and Associate Justices Harry A. Blackmun, Lewis F. Powell Jr. and William H. Rehnquist. All were appointed by President Nixon.

Unlike Mr. Nixon, President Ford has made no public commitment to appoint "strict constructionists." By naming a conservative Republican, however, he could go a long way toward assuring a conservative majority, something that comes and goes now.

The conservative wing of the party, still smarting from the appointment of Nelson A. Rockefeller as Vice President, could be expected to apply heavy political pressure for another conservative judge.

Among names that have circulated in preliminary speculation over the first Ford nomination to the court are Solicitor General Robert H. Bork, on leave from the Yale Law School faculty, and Charles Alan Wright, who teaches at the University of Texas Law School and served briefly as President Nixon's lawyer in the early stages of the Watergate tapes case.

Women's rights organizations, whose campaign for the first female Supreme Court Justice only came to the surface a few years ago, would undoubtedly try to persuade President Ford to break precedent here. One possible candidate would be the new Secretary of Housing and Urban Development, Carla A. Hills.