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U.S.

U.S. in Odd Spot in Case on Protester Rights

By ADAM LIPTAK MARCH 26, 2014

WASHINGTON — A government lawyer who seemed poised to win his case by a lopsided margin at a Supreme Court argument on Wednesday found himself in an odd position. He was repeatedly attacked for making halfhearted arguments when bolder ones were available.

"It seems to me you want to win this case, but not too big," Justice Antonin Scalia told the lawyer, Ian H. Gershengorn, a deputy solicitor general. "You want us to find for you, but on the narrowest possible ground."

Mr. Gershengorn was defending two Secret Service agents accused of violating the First Amendment rights of people who were protesting against President George W. Bush during a 2004 campaign stop in Jacksonville, Ore.

The agents forced the protesters to move after Mr. Bush made an impromptu decision to have dinner at a restaurant's outdoor patio. Those supporting Mr. Bush were allowed to stay where they were.

Mr. Gershengorn's main argument was a modest one. He said the agents were immune from suit because their conduct was not governed by clearly established law. He said broader arguments were not before the court.

Justice Scalia seemed eager to reach those larger questions, including whether the protesters had a right to sue at all and whether the agents' motives mattered, given the security concerns.

"I really don't understand what the government is doing here," he said.

Steven M. Wilker, a lawyer for the protesters, was in a more familiar position. The hostile questions directed to him came from justices most likely to vote against his clients.

Chief Justice John G. Roberts Jr. asked Mr. Wilker to put himself in the agents' shoes.

"You're the head of the Secret Service detail," the chief justice said. "You've got to evacuate the president right away. Do you go through the anti-Bush crowd or through the pro-Bush crowd? You've got to decide right now, quickly."

Mr. Wilker hesitated. Chief Justice Roberts said: "It's too late. You've taken too long to decide."

Mr. Wilker said he was the wrong person to ask. "I truly don't know the answer to your question," he said, "because I'm not a security expert."

Justice Scalia said that much was true. "You're the farthest thing from a security expert if you don't know the answer to that one," he said, to laughter.

The Supreme Court has recently been notably unsympathetic to protesters said to pose a security risk.

Last month, the court unanimously ruled against an antiwar protester at Vandenberg Air Force Base in California. Two years ago, the court unanimously rejected a First Amendment suit from a protester arrested in 2006 after confronting Vice President Dick Cheney at a mall in Beaver Creek, Colo.

But Justice Stephen G. Breyer said Wednesday's case, Wood v. Moss, No. 13-115, was a close one.

"Everyone understands the importance of guarding the president in this country," he said. "Everyone understands the danger. You can't run a risk. At the same time, no one wants a Praetorian Guard that is above the law."

The First Amendment ordinarily prohibits discrimination by the government based on the speaker's viewpoint. But Chief Justice Roberts suggested that there may be an exception when "the viewpoint itself constitutes a security consideration."

The case reached the justices at an early stage in the litigation, before the parties exchanged information. Some justices seemed inclined to reinforce earlier decisions allowing early dismissals of suits based merely on whether the allegations in them seemed plausible. Others appeared conflicted.

"It seems to me that if this complaint doesn't survive, nothing will," said Justice Anthony M. Kennedy, who in 2009 wrote the majority opinion in the leading case on early dismissals, Ashcroft v. Iqbal.

Justice Elena Kagan said the case before the justices turned on whether there was "a valid security interest" in moving the protesters. In response, Mr. Wilker acknowledged that the "proximity alone of a peaceful group of protesters" might create a security risk.

"In hindsight," he said, "you could look at that, and you could conclude that."

Mr. Gershengorn seized on that statement during a brief rebuttal.

"The concession that in hindsight there may have been a valid security rationale ends this case," he said, "because if it was true in hindsight, it was certainly true at the time in the kind of rapid decision-making that was called for."

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