Justice Weighs Desire v. Duty (Duty Prevails)

by Linda Greenhouse
New York Times August 25, 2005

WASHINGTON, Aug. 24 - It is not every day that a Supreme Court justice calls his own decisions unwise. But with unusual candor, Justice John Paul Stevens did that last week in a speech in which he explored the gap that sometimes lies between a judge's desire and duty.

Addressing a bar association meeting in Las Vegas, Justice Stevens dissected several of the recent term's decisions, including his own majority opinions in two of the term's most prominent cases. The outcomes were "unwise," he said, but "in each I was convinced that the law compelled a result that I would have opposed if I were a legislator."

In one, the eminent domain case that became the term's most controversial decision, he said that his majority opinion that upheld the government's "taking" of private homes for a commercial development in New London, Conn., brought about a result "entirely divorced from my judgment concerning the wisdom of the program" that was under constitutional attack.

His own view, Justice Stevens told the Clark County Bar Association, was that "the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials." But he said that the planned development fit the definition of "public use" that, in his view, the Constitution permitted for the exercise of eminent domain.

Justice Stevens said he also regretted having to rule in favor of the federal government's ability to enforce its narcotics laws and thus trump California's medical marijuana initiative. "I have no hesitation in telling you that I agree with the policy choice made by the millions of California voters," he said. But given the broader stakes for the power of Congress to regulate commerce, he added, "our duty to uphold the application of the federal statute was pellucidly clear."

The court's press office made the text of his speech available.

While the substance of his remarks was interesting, so was the timing. The 85-year-old Justice Stevens, who will observe his 30th anniversary on the court this fall, is a savvy observer of the political landscape. It certainly did not escape his notice that Supreme Court confirmation hearings were looming and that a microscopic examination of the views of the nominee, Judge John G. Roberts Jr., was under way.

Perhaps Justice Stevens intended a gentle reminder that no matter what views Judge Roberts held as a young lawyer in the Reagan White House, the real question was one that only the nominee could answer: not what views he holds today, but the impact he would permit those views to have on his work as a Supreme Court justice.

While Justice Stevens is the only member of the court to have addressed the issue in a speech, others have used their written opinions to acknowledge the conflict between a judge's policy preferences and decisions the judge may feel forced to render because of legal precedent or judicial philosophy.

In March, for example, Justice Sandra Day O'Connor, whom Judge Roberts would succeed, dissented from the court's opinion that declared unconstitutional the execution of those who commit capital murder before the age of 18.

"Were my office that of a legislator, rather than a judge, then I, too, would be inclined to support legislation setting a minimum age of 18," Justice O'Connor wrote in her dissenting opinion in *Roper v. Simmons* in the course of explaining why, in her view, the Constitution did not support that outcome.

Justice Anthony M. Kennedy, in providing a fifth vote for the court's 1989 decision that burning an American flag as a political protest is protected by the First Amendment, noted that the decision "exacts its personal toll." In his concurring opinion in the case, *Texas v. Johnson*, Justice Kennedy wrote: "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision."

For a justice on the speaking circuit, Justice Stevens gives unusually good value. Rather than retreating to the safety of historical anecdotes or constitutional platitudes, as some others do, he often talks about what is actually on his mind. This month, he went to the American Bar Association's annual meeting in his home city, Chicago, and offered some pointed criticism of the death penalty.

Sometimes, of course, justices and other judges express themselves at their peril, as Justice Antonin Scalia learned after criticizing an appeals court decision that barred the recitation of the Pledge of Allegiance in public school classrooms. He was obliged to recuse himself a few months later when the case reached the Supreme Court. On the other hand, Justice Scalia's more abstract discussion of his jurisprudence, in a book titled "A Matter of Interpretation," has proved a steady seller since its publication in 1997.

Next month, his colleague and occasional debating partner, Justice Stephen G. Breyer, will offer his own very different views of constitutional interpretation in a new book titled "Active Liberty: Interpreting Our Democratic Constitution."

Justice Breyer's book is based on the Tanner Lectures on Human Values, which he delivered last year at Harvard. Justice Scalia's book was based on his lectures in the same series, which he delivered at Princeton in 1995.

http://www.nytimes.com/2005/08/25/politics/25memo.html?ei=5070&en=125f2fc46c0be2b0&ex=1125979200&adxnnl=1&emc=eta1&adxnnlx=1125347555-zrtoyGaYr5Tj1oTrfhQbDg