The Logic of High Court Decisions

On December 2, the Supreme Court heard oral argument in Stop the Beach Renourishment v. Florida Department of Environmental Protection. At first glance, the question presented looked like one heard at least four prior occasions by the Court since 1987: whether state law restrictions on private ownership in waterfront property amount to an unconstitutional taking without just compensation. But this case offers a twist, which is why there was a larger audience than normal for a cold December morning at the High Court.

In most takings cases, landowners are challenging the actions of either a state agency or legislature. In Stop the Beach, however, petitioners’ constitutional target was instead a state court. Their claim was that the Florida Supreme Court had so departed from prior state court precedent regarding ownership in beachfront property as to amount to an unconstitutional “judicial” taking.

The surprise of the day occurred, however, when the justices emerged from behind the curtain to take their seats on the bench. Justice John Paul Stevens failed to appear. This was a surprise, because Stevens had not recused himself from any of the Court’s prior procedural rulings in the case. Nor had any of the parties moved for his recusal based on a possible conflict of interest.

Only afterwards did an explanation develop. Reportedly prompted by nonparties to the litigation, the news media had inquired of Justice Stevens’s chambers a few days before oral argument whether his ownership of a Florida condominium in a building near water might create a conflict of interest. Stevens has provided no explanation for his absence, but it seems fair to assume that this media inquiry prompted his decision.

Should Justice Stevens excuse himself, it could profoundly influence the Court’s opinion. To be sure, as a formal matter, a recusal can fairly be considered the equivalent of a vote for respondent. After all, the petitioner is the party that needs to obtain five votes for reversal and that hurdle remains the same whether there are nine or eight justices participating.

But Supreme Court decision-making defies such straightforward algebraic analysis. And, Stevens’s absence may well seriously disadvantage the government respondents rather than merely deprive the landowner petitioners of a possible fifth vote. The reason is simple. It is most often the content of the Court’s opinion and not merely whether the opinion’s final word is “affirmed” or “reversed” that has the longest judicial half-life and greatest legal significance. A Supreme Court “loss” often includes judicial reasoning that is exceedingly beneficial to the losing party in the longer term, even far outweighing any harm from losing the case at hand.

The governmental respondents in Stop the Beach, moreover, have reason to worry that Stevens’s nonparticipation may presage just such a pyrrhic victory. The oral argument made it seem likely that the Court was not persuaded that the landowners in this case had made out a successful judicial takings claim. The significance of the Court’s ruling, accordingly, may well be whether the majority opinion embraces petitioners’ threshold proposition that a judicial takings claim is a viable legal theory and, if so, how the Court articulates that judicial takings test for future cases.

At the Court, the senior justice in the majority decides who writes the Court’s opinion. In approximately 80 to 90 percent of the cases, it is the chief justice, and in the remaining cases, it is almost always 89-year-old Justice Stevens. Chief Justice Roberts, however, seemed to be one of the few members of the Court sympathetic to petitioners’ takings claim in Stop the Beach. If the chief were in fact to dissent in Stop the Beach, Stevens would have been the senior majority justice with the power to assign the opinion, including to himself, which he has been known to do in takings cases.

But, without Stevens, the senior majority justice would be, in this order, Antonin Scalia or Anthony Kennedy, depending on whether Scalia was in dissent. Indeed, such an opportunity for Justice Scalia would provide an added incentive to stay in the majority, because he could then spearhead a Court opinion that offered more promise to property owners in future takings cases. But even if Scalia remained in dissent, and Kennedy became the senior majority justice (which has happened only one time in Kennedy’s more than 20 years on the Court), one could fairly expect an opinion more sympathetic to property plaintiffs than one championed by Stevens.

Of course, Justice Stevens could always decide, after the argument, that he has no conflict and participate without attending oral argument, as former Chief Justice Rehnquist retained the right to do when ill. That seems, however, unlikely and Stevens’s absence may well prove to be the real game-changer in Stop the Beach.

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By Richard Lazarus

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