Solicitor Drives Hard in Water Act Cases

February 21 was a big day for both the Supreme Court and for environmental law. It was Justice Samuel Alito’s first day on the bench, and his replacing Justice Sandra Day O’Connor required a reshuffling. The justices sit along the bench based on seniority, fanning out from the chief justice in the middle. Because O’Connor had the third most senior seat and Alito was taking the most junior seat — which Justice Stephen Breyer had warmed for more than eleven years — Alito’s arrival triggered a massive reshuffling. Everyone but Chief Justice Roberts and Justice John Paul Stevens changed seats. The reason for the packed courtroom, however, was not the new seating arrangements, but the three significant Clean Water Act cases to be argued that morning. Members of the public hopes for a seat arrived at the Court at 6:30 a.m., and they were not the first in line.

But it was the Tenth Justice, Solicitor General Paul Clement, who stole the show. General Clement was arguing on behalf of the United States and the Army Corps of Engineers in the two cases, Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers, concerning whether the Clean Water Act’s jurisdictional scope extends to wetlands “adjacent” to nonnavigable waters. The federal government had reason to be hopeful that at least four justices — Stevens, David Souter, Ruth Bader Ginsburg, and Breyer — would be favorably inclined based on their votes in prior related cases. Four votes, however, is no better than no votes, which is why the question on everyone’s mind at the argument was whether there was a fifth vote anywhere to be found.

By the end of the argument, two things were clear. The first was that the outcome was not both Rapanos and Carabell are too close to call. The second is that if the government wins, the solicitor general’s oral advocacy will likely have played a significant role in achieving that end. His was a spectacular oral argument — easily the best I have seen since Solicitor General Seth Waxman’s oral argument in the 2001 Clean Air Act case American Trucking Association v. Whitman. And, in fact, significantly better than even Waxman’s in Olympic terms, based on level of difficulty. Waxman had a slam dunk winner of a case. Clement most certainly does not.

Justice Scalia is more than a formidable questioner at oral argument and he pulled no punches in questioning his former law clerk, Clement. Scalia repeatedly belittled the government’s expansive view of the Clean Water Act’s jurisdictional scope, especially its expansive notion of nonnavigable tributary. Scalia offered that it amounted to jurisdiction over every puddle, trickle, and man-made ditch and would, in effect, cover the entire land mass of the United States.

General Clement parried well each of Justice Scalia’s rhetorical jabs. Even more impressive than his mastery of the complexities of the Clean Water Act, however, was his ability to answer questions by describing the workings of the hydrologic system and the history of government regulation leading up to congressional passage of the act in 1972. Clement took pains to explain why the nation’s waterways resisted any meaningful distinction based on natural versus nonnatural waterways in light of the massive amount and significant degree of human modification of those waterways. And he described how Congress had in 1972 deliberately decided not to base federal regulation on the very kind of cause and effect showing of adverse harm on navigable waters that the landowners (and Justice Scalia) were now professing as the jurisdictional touchstone. Clement also reminded the Court that the 1899 Rivers and Harbors Act extended federal jurisdiction beyond traditional navigable waters to include nonnavigable tributaries and their banks, making it unlikely that Congress in 1972 had, as the landowners were suggesting, contracted federal jurisdiction in a law designed to be comprehensive.

The single most impressive part of Clement’s presentation, however, was how quickly and strategically he adapted to the chief’s apparent concern that there had to be a limiting principle to jurisdiction with the definition of nonnavigable tributary. The federal government case, of course, win the case without the chief’s vote, but that would be a hard vote to lose and a likely bellwether for Justices Kennedy and Alito.

Clement’s effort was two-fold in nature. First, he sought to stress that difficulties presented were the judiciary to take on the task of defining the meaning of a technical term such as tributary and the concomitant propriety of deferring instead to the expert agency. Second, he contends that the parties in these cases had not explored that distinct question and therefore the Court would be well advised to await a case that truly “teed up” that issue before trying to reach it. Both arguments potentially appealed to the chief’s (and Alito’s) relatively strong views on deference to the agency of a judicial function that is more conservative from an institutional rather than political perspective. And, as General Clement knows, the chief is also a bit of a golfer.

By the end of the argument, even Justice Scalia was visibly enjoying his former charge’s performance. Scalia plainly has strong views on the case, which were just as plainly at odds with those being advanced by the solicitor general. But he, like the other members of the Court, appreciated and admired a good advocate, and the former chief justice was quite a show.

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