The Measure Of A High Court Justice

With Justice Sandra Day O’Connor’s surprise resignation this past summer and the president’s subsequent nomination of D.C. Circuit Judge John Roberts to the Court, there has been much speculation concerning how a “Justice Roberts” might vote differently than a Justice O’Connor on specific issues, including those implicating environmental law. It is certainly true that O’Connor’s vote has been important in the hundreds of cases significant to environmental law decided since she joined the Court in 1981. My own view, however, is that commentators are mistaken when they seek to evaluate justices so exclusively based on their votes in individual cases. A justice’s formal vote is, of course, significant, but it is not the ultimate measure of a justice’s influence. All justices, including the chief, have only one vote. A justice’s most important work is often done behind the scenes, in the conference deliberations and the drafting of opinions. Majority opinions are formally dubbed “opinions of the Court” for a reason. The justice assigned the responsibility for drafting the majority opinion is not charged with simply detailing his or her own views. The justice must craft an opinion expressing the views of a majority. To do so frequently requires that the author of the opinion shed his or her own views on one or more aspect of the case. That is why it is a classic mistake for an oral advocate before the Court to refer to a majority opinion by a specific justice as expressing the justice’s personal opinion.

The ability of a justice to craft majority opinions is the most important and least understood of the skills that distinguish between ordinary and truly extraordinary Supreme Court jurists. The justice able to do so produces opinions that, because of their persuasive force, promote the kind of public respect ultimately necessary for the Court’s authority. A justice less skilled in the crafting of majority opinions, by contrast, is more likely to lose the majority present at conference when the justices initially voted on the case, producing a splintering expressed in a rash of separate concurring and partially dissenting opinions. The justice may have remained very true to deeply held personal convictions, but at the expense of producing opinions of the Court that announce rulings of law that meet the test of time.

For this reason, the addition of a Justice Roberts could be significant in many ways far beyond his single vote. Unlike any of the other current justices, Roberts is a widely acclaimed Supreme Court advocate. No one on either side of the political aisle disputes his extraordinary talents in written and oral advocacy before the Court. Even those who now oppose his nomination freely acknowledge his considerable personal charm and affability. A Justice Roberts may well, like Justice William J. Brennan Jr. before him, become best known for his ability to work behind the scenes to fashion majorities and opinions of the Court.

Thus, based on this same measure, Justice Antonin Scalia may well be considered a disappointment to his ideological allies. Scalia’s arrival on the Court nearly twenty years ago, in September 1986, coincided with a major strategic effort by advocates of stronger constitutional protections of property rights to enlist the Supreme Court in support of their cause. Scalia quickly became their champion. And, with the arrival of Justice Clarence Thomas only five years later, property rights advocates had good reason to believe that Scalia had the makings of a solid majority on the Court that he could use to produce a series of rulings based on the Fifth Amendment’s Takings Clause that limited government’s ability to interfere with private property rights, especially in land and other natural resources.

No such significant legal precedent favoring property rights, however, has resulted. The property rights movement has instead recently suffered several losses in the High Court, culminating in the spring of 2005 with substantial defeats in all three property cases then before the Court: Lingle v. Chevron, U.S.A.; San Remo Hotel v. City and County of San Francisco; and Kelo v. City of New London. Notwithstanding his early efforts in Nollan v. California Coastal Commission and then in Lucas v. South Carolina Coastal Council, Scalia has been unable to craft majority opinions with persuasive staying power.

His loud rhetoric and bright line prose tests favorable to takings plaintiffs have lacked legs with his colleagues. His proffered analytic framework proved too hard to square with any of the other competing themes of judicial conservatism within the Court: originalism and federalism. And his take-no-prisoners style of negotiation splintered what otherwise had the potential to be a working majority within the Court of conservative justices intuitively sympathetic to property rights claims. Almost two decades after Scalia joined the Supreme Court, the state of regulatory taking law before the Court is not more and may even be less favorable to regulatory takings plaintiffs than it was when he was still a virtual unknown on the D.C. Circuit Court of Appeals.

To be a great justice requires more than the ability to vote. It depends on a justice’s ability to discuss and debate legal issues with the others on the Court in a constructive fashion and to be persuasive in both oral presentation and written word within the Court. It is the voice of a justice over time rather than an isolated vote in an individual case that is the true measure of greatness.

EDITOR’S NOTE: This column was filed before the death of Chief Justice Rehnquist and President Bush’s appointment of Judge Roberts to replace him.

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