Memorandum

Subject	Date
Judicial Activism Q & A's: Specific Examples	November 25, 1981

To: The Attorney General

From: John Roberts

Q. Could you give us a specific example of a case in which you think a court went too far in permitting standing?

A. This isn't just a question of what courts permit, but also involves what arguments we will be making as litigants. As you may know, certain parts of the Justice Department previously followed a policy of not raising standing challenges in the most vigorous fashion. This was particularly true in the environmental area. It will be our policy to raise standing and other justiciability challenges to the fullest extent possible.

If you insist on a specific example where we think a court reached out beyond the proper bounds of standing to bring a dispute within its purview, I can cite you to a case which the Solicitor General just recently urged the Supreme Court to reverse. The case, Valley Forge Community College v. Americans United for the Separation of Church and State, from the Third Circuit, involved the transfer by the government of certain property to a religious school. The lower court ruled that any citizen had standing to challenge the transaction, even in the absence of any specific injury to him personally. In urging the Supreme Court to reverse this decision, Solicitor General Rex Lee argued that granting standing to citizens who do not suffer distinct, particularized injury blurs the line between court and legislature.

Q. Can you give us an example where you think courts have erred in applying "fundamental rights" or "suspect classes" analysis?

A. Here, as in the other areas, I want to emphasize that our concern is with the role of the courts and approaches to problems in general, rather than with particular results on the merits. We are also more interested in urging proper approaches upon the courts in the future rather than simply criiticizing what we may perceive to be errors of the past.

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If you insist on an example, the case of Shapiro v. Thomspon may serve to illustrate our concerns in this area. In that case the Supreme Court relied upon the so-called "fundamental right to travel" to strike down state laws imposing a one-year residency requirement before individuals could apply for welfare benefits. The court conceded that there was no explicit "right to travel" in the Constitution, fundamental or otherwise, and blandly stated that "we have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision." As you might recall, Justice Harlan wrote an incisive dissent in that case raising many of the same concerns which I addressed in my Federal Legal Council speech. He argued that the Shapiro decision reflected a notion that the court "possesses a peculiar wisdom all its own whose capacity to lead this Nation out of its present troubles is contained only by the limits of judicial ingenuity in contriving new constitutional principles to meet each problem as it arises." Its that very attitude which we are trying to resist.

Q. Do you have any examples of cases in which courts went too far in fashioning remedial decrees?

A. In this area the Supreme Court itself has given us two recent examples by reversing lower court decisions precisely because judges went beyond their proper bounds. In the case of Rhodes v. Chapman, the Supreme Court reversed a district court judge who required single celling of inmates, no matter what conditions were like in the rest of the prison. The Supreme Court specifically criticized the district judge for following his own ideas about how to run a prison rather than the "cruel and unusual punishment" standard of the Constitution, and criticized him for examining factors which "properly are weighed by the legislature and prison administration rather than a court."

[Our position in the Texas prison case, Ruiz, is not inconsistent, since we are not arguing in that case that single celling is always required, only on the particular facts involved there, and we also argue that double celling will be permissible if certain other changes are made.]

In another case, Milwaukee v. Illinois, the Supreme Court reversed a district court judge who, relying upon federal common law, imposed detailed and massive construction

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requirements and other specific obligations on a local sewer system. In the course of its opinion, the Supreme Court noted that that the problems involved were too complicated for judicial resolution, and that they were not suited to the case-by-case development necessary whenever courts address problems.

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