

Some Reflections and Predictions Based on Yesterday's Supreme Court Arguments in the Stop the Beach Renourishment Case | 1

As reported earlier this week on this site, the U.S. Supreme Court heard oral arguments yesterday in an important property rights/environmental case, *Stop the Beach Renourishment v. Florida Dept. of Environmental Protection*. Here are some observations and (perhaps intemperate) predictions based on those arguments, which I was able to attend at the Supreme Court yesterday:

The first big surprise was when the justices took the bench to hear the case: there were only eight justices, rather than the usual nine. That's because Justice John Paul Stevens recused himself, most likely because his primary residence is on the Florida coast. That recusal is important, for two reasons: first, in recent years Justice Stevens has proven to be the strongest environmental voice on the Court. His absence from the Florida case is therefore bad news for the state and local government respondents defending this takings claim. Second, as the most senior Associate Justice, Stevens has the power to assign majority opinion writing in those cases in which the Chief Justice finds himself in the minority. Since he's recused himself from the case, however, Justice Stevens is unavailable to perform this key function.

Yesterday's arguments were vigorous and wide-ranging, with all the justices (save Justice Clarence Thomas, who almost never asks questions at oral argument) peppering the advocates with questions and hypotheticals.

Surprisingly, on the bench the justices seemed relatively disinterested in what most observers thought to be the key legal issue in the case: whether courts, like regulators and legislators, can "take" private property, thus requiring payment of compensation under the Takings Clause of the Fifth Amendment. Instead, the Court seemed far more focused on the arcane aspects of Florida boundary and property law, and how rights afforded under that law would affect the Florida coastal landowners who have brought this litigation against state and local officials.

Virtually all of the justices appeared at least somewhat sympathetic to the private landowners. Their questions conjured up the prospect of a once idyllic beachfront being overrun with college students on spring break, along with a profusion of shoreline hot dog stands and porta-potties. By contrast, the justices' questions largely ignored the fact that the private plaintiffs and other Florida landowners affected by the publicly funded beach renourishment program at issue in the case actually stand to benefit economically from that program.

Now the predictions: this is going to be a closely divided Supreme Court opinion. I count Chief Justice Roberts and Justices Scalia, Thomas and Alito quite likely to be on the side of the property owners. By contrast, Justices Breyer, Ginsberg and (probably) Sotomayor seem

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inclined to vote for the government respondents.

That leaves Justice Kennedy, who—as in most close cases in recent years—is the critical, swing vote in this case. Kennedy asked probing and difficult questions of both sides in yesterday's arguments, and it's difficult to discern how he's going to vote.

If Justice Kennedy sides with the conservatives on the Court, the Florida property owners are therefore likely to prevail on a 5-3 vote. If he votes the other way, that will produce a 4-4 vote, which translates into a summary affirmance of the earlier Florida Supreme Court's ruling against the private property owners, in a ruling that would lack any precedential effect.

Stay tuned. This one's going down to the wire.