Commending Opinion Announcements by Supreme Court Justices

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The Supreme Court of the United States historically announces its decisions in open court and only then, after its announcement ritual has concluded, does it release the Court's and individual Justices' written opinions on paper (and, in modern times, electronically).

On May 29, 2007, the Supreme Court decided an important case, *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,[1] about the limits of remedies under current federal law for employment discrimination against women. The Court held that the federal law required that Ms. Ledbetter's claim that she was paid less than men solely on that basis should have been filed within 180 days of the discrimination starting, even though management and male silence prevented her from learning until years later that she was being paid less than her male peers. The Court held that her lawsuit was properly dismissed because she filed it after the 180-day period.

In *Ledbetter*, the Court divided 5-4. Justice Samuel Alito first announced his opinion for the majority (himself, Chief Justice John Roberts, and Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas). The Court also announced that Justice Ruth Bader Ginsburg had written (for herself and Justices John Paul Stevens, David Souter and Stephen Breyer) a dissenting opinion. And then Justice Ginsburg herself read, in court, the substance of her dissenting opinion.

Justice Ginsburg's oral presentation of her *Ledbetter* dissent gave extra power and emphasis to the forceful arguments against employment discrimination and for gender equality that she put on paper.[2] Surely that is what the Justice intended—she today is the Supreme Court's only woman, and she was, in her years as a professor and litigator before becoming a

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[1] 550 U.S. ___, 127 S.Ct. ___, 2007 WL 1528298 (2007).

[2] *See* Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice on Court*, N.Y. TIMES, May 31, 2007, at A1, A16.

federal judge almost 30 years ago, the pioneer who led the Supreme Court to recognize the unconstitutionality of gender discrimination.

Justice Ginsburg, who is soft-spoken, scholarly, collegial and temperamentally inclined to go after her colleagues' arguments rather than them personally, had given similar extra emphasis in late April 2007 by reading from the bench her dissenting opinion in *Gonzales v. Carhart*, where the Court, divided into the same 5-4 split, upheld the constitutionality of the federal Partial-Birth Abortion Ban Act.[3]

Justice Ginsburg's Supreme Court colleagues, current and past, have also, on occasion, read dissenting opinions from the bench in cases they regarded as especially important. For example, in 1994, Justice Stevens dissented orally in a case about a government taking of private property to facilitate flood control.[4] In 1997, Justice Sandra Day O'Connor read her dissenting opinion when the Court invalidated a federal statute protecting religious freedom.[5] Justice Scalia has been the most frequent oral dissenter among the current Justices; he announced his contrary views, for example, when the Court struck down Colorado's constitutional bar against legislation protecting gays and lesbians from discrimination,[6] when the Court invalidated a federal law giving the president line item veto authority,[7] when the Court barred execution of the mentally retarded,[8] when the Court struck down Texas's criminalization of same-sex intimacy,[9] and when the Court invalidated a display on government property of the Ten Commandments.[10] Justice Souter dissented orally in 1996 from a Court decision striking down a federal statute creating federal court jurisdiction over States' violations of federal constitutional rights.[11] And Justice Breyer in 2005 read his dissent when the Court reversed a lower court effort to correct its mistake in approving a death sentence.[12]

Should Justices, whether writing only for themselves or for the Court, read opinions from the bench? In fall 1946, newly-appointed Chief

[3] 550 U.S. ___, 127 S.Ct. 1610 (2007).
[4] *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
[5] *City of Boerne v. Flores*, 521 U.S. 507 (1997).
[6] *Romer v. Evans*, 517 U.S. 620 (1996).
[7] *Clinton v. New York*, 524 U.S. 417 (1998).
[8] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[9] *Lawrence v. Texas*, 539 U.S. 558 (2003).
[10] *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005).
[11] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).
[12] *Bell v. Thompson*, 545 U.S. 794 (2005).

Justice Fred Vinson wrestled with that question. Vinson was finalizing his first opinion for the Court (in a Native American land rights case).[13] He knew that he was writing for a Court that was not unanimous, and that Justice Stanley Reed, joined by Justices Wiley Rutledge and Harold Burton, was preparing to dissent strongly. Vinson, sensitive about criticism of the Court and not wanting to encourage more of it, suggested privately to Justice Felix Frankfurter that the Court discontinue announcing opinions orally. Vinson commented that when there is division among the Justices, any opinion-announcer will tend to assume an advocate's tone, and that encourages press speculation about hostilities among the Justices. Within days, however, Vinson announced his opinion orally, continuing what Frankfurter described as the "practice since the beginning of time."[14]

Do announcements of dissenting and other opinions sometimes become intense, even strident? Of course. Justice James McReynolds, for instance, announcing from the bench in 1935 his dissent from Court decisions upholding President Franklin Roosevelt's orders taking the federal government off the gold standard, famously uttered extemporaneously a line not found in his written opinion: "The Constitution, as we have known it, is gone."[15] In 1937, when the Court upheld the constitutionality of the Social Security Act's unemployment compensation tax on employers, Justice McReynolds, again speaking from deep conviction but not a text, announced that the national "Union [of States] was being destroyed."[16]

A more sober, extensive and historically significant announcement of opinions occurred in the Supreme Court chambers exactly fifty-five years ago. On Monday, June 2, 1952, the Court decided, 6-3, that President Truman's seizure of the nation's steel mills to prevent their closure by labor strike during the Korean War, based on claims of national security and expansive theories of presidential power, was unconstitutional.[17] From the bench, Justice Hugo Black read the Court opinion declaring the President's action to be unauthorized and illegal. Justices Frankfurter, William O. Douglas, Robert H. Jackson, Harold Burton and Tom Clark (each a Truman

[13] *See United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (decided Nov. 25, 1946).

[14] *See* JOSEPH LASH, FROM THE DIARIES OF FELIX FRANKFURTER 304-05 & 306 (1975) (entries of November 22, 23 & 25, 1946).

[15] *See* Remarks of Philip B. Perlman, Solicitor General of the United States, at Proceedings in the Supreme Court of the United States in Memory of Mr. Justice McReynolds, 334 U.S. v, x (Mar. 31, 1948).

[16] *See M'Reynolds Dies; Court Dissenter*, N.Y. TIMES, Aug. 26, 1946, at 1, 23.

[17] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

friend, and the last two Truman appointees to the Court) then each read his separate concurring opinion. Chief Justice Vinson then read, for one hour and five minutes (and without stopping for the Court's customary lunch recess), the dissenting opinion that he had written for himself and Justices Stanley Reed and Sherman Minton. An eyewitness, *Washington Post* reporter Chalmers M. Roberts, wrote that Chief Justice Vinson spoke "with sarcasm and considerable scorn for his judicial brethren [that was] quite obvious to those in the crowded courtroom…"[18] The seven Justices who were filing written opinions in the *Steel Seizure Cases* spoke for, all told, two hours and thirty-four minutes.

The Justices have recognized "since the beginning of time" that their decisions are enormously significant, for litigants, for the nation's legal landscape, for citizenry and for our unfolding history. A Supreme Court Justice who chooses to give personal voice to such a view—from the Vinson Court Justices in 1952 or Justice Ginsburg in 2007 following a careful, powerful text, to a more McReynolds-like Justice who simply howls deep disapproval—is engaging in a public-addressing, publicly accountable and thus commendable part of his or her judicial service.

Speak on, voice of justice. Speak up, voice of each Justice.

[18] *See* Chalmers M. Roberts, *Supreme Court Declares Steel Seizure Illegal In 6-3 Decision; 650,000 CIO Steelworkers Launch Nation-Wide Walkout in Basic Plants*, WASH. POST, June 3, 1952, at 1, 6.