

October 3, 2012

## Justices Press Lawyers for Broad Solutions

By ADAM LIPTAK

WASHINGTON — The Supreme Court heard arguments in two very different cases on Wednesday, [one about flooding](#) and [the other about murder](#). Together, they illuminated a central preoccupation of the justices: how to fashion legal principles that will not only resolve the disputes before them but also work when applied by lower courts in countless other cases.

In both arguments, the lawyers with the better answer to that question seemed poised to come out ahead.

“What I want is the definition of the operable baseline that we can use in order to define whether or not there has been a taking,” Justice Anthony M. Kennedy said, for instance, to a lawyer for the Arkansas Game and Fish Commission. The commission is seeking millions of dollars from the federal government for timber it says was destroyed by intermittent flooding caused by the Army Corps of Engineers.

The lawyer, James F. Goodhart, hedged, proposing a balancing test that would weigh how substantial the government intrusion on private property was. “I guess I must say it may not be a bright line,” Mr. Goodhart said.

He returned to the point unprompted a half-hour later. “I don’t know, Justice Kennedy, where the line should be drawn,” he said.

Justice Ruth Bader Ginsburg asked whether a single flood could ever be a taking.

Mr. Goodhart responded that “it’s going to going to depend on the facts, Your Honor, in the case.”

Justice Sonia Sotomayor pressed him. “Tell me how your rule makes this a manageable situation,” she said, and he repeated his balancing test.

Edwin S. Kneedler, a lawyer for the federal government, took the more promising categorical approach, proposing two different lines. Temporary flooding is never a taking of private property, he said. And harm caused by flooding downstream from a dam, as opposed to flooding from the reservoir it creates, is also not a taking, he said.

The second distinction seemed to strike some of the justices as overreaching. Justice Antonin Scalia said, "That doesn't seem to me particularly fair."

Justice Kennedy said the second distinction reminded him of "the old moral of refuge that the rocket designers take."

"You know," he said. "I make the rockets go up. Where they come down is not my concern."

Justice Elena Kagan was disqualified from the flooding case, *Arkansas Game & Fish Commission v. United States*, No. 11-597, presumably because she had worked on it as United States solicitor general.

The question in the murder case was how to decide when a state court has actually ruled on an issue. The point matters because [a 1996 federal law](#) limits federal court review of state convictions where an argument has been "adjudicated on the merits" by a state court.

But people convicted of serious crimes often make many arguments, and state courts often reject them wholesale in terse decisions. Last year, in *Harrington v. Richter*, the Supreme Court ruled that a state court decision was "on the merits" even though it offered no reasoning at all.

The question in the case argued on Wednesday, *Johnson v. Williams*, No. 11-465, was what to do about a decision that addressed one argument but said nothing about another. (That other argument was over whether the removal of a juror in a murder trial violated the Sixth Amendment's guarantee of an impartial jury.)

Stephanie Brennan, a deputy California attorney general, said judges should be assumed to have considered all arguments presented to them whether they address them directly or not. Kurt D. Hermansen, a lawyer for the inmate, Tara Williams, said federal courts should examine the issue case by case.

Justice Kennedy proposed an alternative. "If you took \$28.52 out of the state's judicial budget and bought them all a stamp which just says, 'We have considered and rejected all constitutional claims,' then there would be no problem," he said.

Ms. Brennan said such language was already implicit in all rulings.

Justice Scalia, who is often attracted to bright line rules, said allowing case-by-case determinations would produce endless litigation. "In many cases, especially capital cases," he said, "one could argue for years over whether, in fact, there was enough indication that the court did not consider it or not, right? And every year is a reduction of sentence, so to speak."