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Restraining the Lawyers

A becoming modesty characterizes the spirit of the Supreme Court as it reaches the end of another term. Special arrangements have apparently been made to remove public doubts that the uncertain health of Justice William Douglas may be playing a decisive role in the work of the court.

The major decisions have been dominated by a sense that the legal process is an exceedingly imperfect instrument for settling acute social problems. It is entirely fitting that the last day of this term saw a decision to uphold the right of defendants not to have a lawyer.

The arrangements made with respect to Justice Douglas are a matter of surmise. It is known that he suffered a stroke and has been receiving therapy in New York. It is also known that he has participated in many decisions since his illness.

But there has been no 5 to 4 decision in which Justice Douglas voted with the majority. An unusually large number of cases, including one testing the death penalty, have been held over for reargument next term. It seems clear that the Justices have an understanding whereby they will postpone any decisions in which Justice Douglas would be the swing vote.

The philosophical tone of the court is in keeping with that commonsensical, collegial decision. In the term now ending significant decisions were rendered in two areas of acute social conflict — the environment and civil rights.

The environmental issue came to the surface in the Alyeska case. The wilderness Society and some other environmental groups won an injunction against the consortium known as the Alyeska Service Co., which is building the Alaska Pipeline. The consortium was required to get an environmental permit before proceeding with construction.

The environmental groups then sought, and were granted in the lower courts, a ruling which obliged Alyeska to pay their legal fees. The basis for that claim, which goes against a general rule that does not accord legal fees to winning parties, was that the environmentalists were acting as lawyers for the public interest.

The Supreme Court rejected that argument in a 5-2 decision. The majority felt that the claim of the environmentalists to represent the public interest had to be validated by the Congress, not the courts. "It appears to us that the rule suggested here," Justice Bryon White wrote in the majority opinion, "would make major inroads on a policy matter that Congress has reserved for itself."

The civil rights issue came to the surface in the Richmond annexation case. In 1970, the city of Richmond, Va., annexed the adjacent town of Chesterfield. As one result, the proportion of blacks in Richmond was reduced 52 per cent to 42 per cent.

The annexation was questioned by civil rights groups on the grounds that it was designed to dilute the black majority in Richmond and was therefore an infringement of the right to vote. The Supreme Court sent that case back to the lower courts for further hearings on the facts.

But the majority strongly questioned the plaintiff's argument that denial of majority status in the city was denial of the right to vote. The 5-3 decision, against written by Justice White, stipulated that "a reduction of a racial group's relative political strength in the community does not always deny or abridge the right to vote."

The upshot of the decisions is to apply a gentle braking action against a development which has been accelerating for the past few years. Reform groups egged on by activist lawyers have been using the courts to enforce social actions which they could not push past duly elected bodies.

But the fact is that the court system does not offer a good way to settle basic social issues. Judges and lawyers are poorly equipped to draw school districts and figure out the right trade-off between the interest in cheap power and the interest in clean air.

Not only because they lack the technical knowledge. The true disqualification is that lawyers are highly mobile individuals who tend to work in very small groups, if not in isolation. They are the last people to try to figure out arrangements whereby large groups bound together in collegial relations live together. So it is fine to have the Supreme Court applying some restraints, and it would be better still if the lawyers restrained themselves.