How Not to Write a Syllabus

Frank D. Wagner

Besides doing the editorial work necessary to publish the Supreme Court's opinions, the Reporter of Decisions writes the summary — i.e., the "syllabus" or "headnote" — that appears at the beginning of every case printed in the *United States Reports*. I say "write" advisedly here because, in this modern age, preparing a syllabus largely involves taking a digital copy of the principal opinion and boiling it down and down and down until all that remains is the opinion's essence, its bare bones.

Comprehensiveness, of course, is not a requirement for syllabuses. (I say "syllabuses," rather than "syllabi," because I believe that once a Latin word has made the transition to English, it should take an English plural.) Indeed, length is antithetical to the syllabus's purpose. If a syllabus reflected every point made in the case it covered, it would be almost as long as the opinion itself.

Perhaps the primary factor in determining the length of a syllabus is the preference of the Justice who wrote the majority opinion. During my time as the Court's 15th Reporter of Decisions, most of the Justices preferred syllabuses to be as short as possible. In particular, Justices John Paul Stevens and Antonin Scalia were acutely attuned to the length of syllabuses and would often suggest shortening measures. Justice Ruth Bader Ginsburg, on the other hand, often preferred more complete summaries of her opinions and actually added facts and reasoning to the syllabuses I prepared. She believed that the syllabus is often the only information about a case

that busy judges and lawyers have time to read.[1] In 2004, Thomas R. Bruce, Director of Cornell University's Legal Information Institute, told a gathering of Reporters of Decisions that the Institute's statistics on reader views of Supreme Court cases tended to support Justice Ginsburg's view.[2]

Rather than comprehensiveness, the *sine qua non* of syllabus-writing is accuracy. The syllabus must exactly and precisely reflect the salient points of the case it covers — no less, but no more. On several occasions during my time as Reporter, I received questions or comments from readers that caused me grave concern. A few times, attorneys queried whether they could cite the syllabus as authority, in preference to the opinion itself. A simple question, but it indicated to me a belief that the syllabus said something different from the case it summarized.

On other occasions, correspondents baldly asserted that the syllabus had misinterpreted the opinion. Each time, I replied that I stood by my syllabus because the chambers of the majority opinion's author had approved it shortly before publication. Nevertheless, I presented the inquiries to chambers just to be sure that I, and they, hadn't been mistaken. Fortunately, each syllabus came back re-approved without changes.

The impetus for the strict-accuracy requirement and chambers review of syllabuses was undoubtedly the Court's 1906 decision in *United States v. Detroit Timber & Lumber Co.*[3] In that case, the

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[1] Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 Geo. L.J. 2119, 2120 (1995); Ruth Bader Ginsburg, *Informing the Public About the U.S. Supreme Court's Work*, 29 Loy. U. Chi. L.J. 275, 276 (1998).

[2] Thomas R. Bruce, symposium presentation, *Additional Partnership Models* (Roosevelt Hotel, New York City, July 30, 2004), in Proceedings of the Second International Symposium on Official Law Reporting 85, http://arjd.washlaw.edu/images/symposium04.pdf.

[3] 200 U.S. 321.

Court rejected the federal government's reliance on an earlier syllabus, explaining that the syllabus had "misinterpret[ed] the scope"[4] of the decision that it purported to summarize, *Hawley v. Diller*.[5] As a result, the following statement now appears at the top of every syllabus in its slip-opinion version, followed by a citation to *Detroit Timber*: "The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader." That statement has prompted Justice Ginsburg to declare that *Detroit Timber* is "the most frequently cited of all Supreme Court cases."[6]

The Reporter of Decisions who wrote the wayward *Hawley* syllabus was John Chandler Bancroft Davis (1822–1907), the ninth of only sixteen people to hold the position since 1790. Davis was the scion of an influential Massachusetts political family. During his career, he held a number of prestigious positions in federal and state government, and in the private sector. Unfortunately, he is probably best known today for his intriguing, not to say fanciful, syllabuses in *Hawley* and in *Santa Clara County v. Southern Pacific R.R. Co.*[7]

In 2004, I received a letter from an irate reader, declaring that in *Santa Clara County*, Davis's syllabus had misrepresented the Court's opinion and that this "illegal" misrepresentation had to be corrected to restore public trust in the Court. The reader did not state his specific concern with the *Santa Clara County* syllabus, but it undoubtedly related to one of the most fascinating episodes in the annals of Supreme Court Reporters. I was already aware of the incident

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[4] *Id.* at 337.

[5] 178 U.S. 476 (1900).

[6] Memo. from Justice Ruth Bader Ginsburg to Frank Wagner, Reporter of Decisions (July 12, 1996) (copy on file with author).

[7] 118 U.S. 394 (1886).

because California's Reporter of Decisions, Edward W. Jessen, had brought it to my attention several years earlier.

In his *Santa Clara County* syllabus, Davis wrote: "The defendant Corporations are persons within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws."[8] Davis's statement of facts then declared:

> One of the points made and discussed at length in the brief of counsel . . . was that "Corporations are persons within the meaning of the Fourteenth Amendment . . . ." Before argument, MR. CHIEF JUSTICE WAITE said: The court does not wish to hear argument on the question whether . . . the Fourteenth Amendment . . . applies to these corporations. We are all of the opinion that it does.[9]

Even though the ensuing unanimous opinion (authored by the first Justice Harlan) was wholly silent on the question, later decisions have cited *Santa Clara County* as authority for the rule that corporations are persons within the meaning of the Fourteenth Amendment. See, for example, the Court's 1889 decision in *Minneapolis & St. Louis Ry. Co. v. Beckwith*[10] and its 1978 decision in *First Nat. Bank of Boston v. Bellotti.*[11]

Generations of commentators have considered the *Santa Clara County* syllabus to be evidence that Davis simply made up, out of whole cloth, the important rule that corporations enjoy the same rights to sue and be sued in court as natural persons. The debate over this "corporate personhood" doctrine rages to this day, espe-

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[8] *Id.* at 394–95.

[9] *Id.* at 396.

[10] 129 U.S. 26, 28 (1889).

[11] 435 U.S. 765, 780 n. 15 (1978).

cially in light of *Citizens United v. Federal Election Commission*,[12] in which the Court upheld the right of corporations to make political contributions under the First Amendment.

But further delving into the historical record reveals that Davis may not have been totally out in left field when he wrote the *Santa Clara County* syllabus. One of the Supreme Court's wonderful research librarians, Linda C. Corbelli, unearthed a discussion of this matter in the biography of Morrison R. Waite, the seventh Chief Justice of the United States.[13] There, the author, C. Peter Magrath, recounted that Davis had written the *Santa Clara County* syllabus after first asking the Chief Justice "whether I correctly caught your words." Chief Justice Waite replied to Davis: "I think your memo expresses with sufficient accuracy what was said before the argument began. I leave it with you to determine whether anything need be said about it in the report inasmuch as we avoided meeting the constitutional question in the decision." Magrath observed that this exchange left Davis with a choice that transcended the typical editorial dilemma:

> In other words, to the Reporter fell the decision which enshrined the declaration in the United States Reports. Had Davis left it out, [the case] would have been lost to history .... With the announcement the case became an apparently significant indication that the Waite Court was now ready to confer on corporations special immunity from economic regulation.[14]

Magrath also noted, however, that "Waite assumed the existence of corporate personality," given that "corporations had been

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[12] 558 U.S. 310 (2010).

[13] C. Peter Magrath, *Morrison R. Waite: The Triumph of Character* 222–24 (Macmillan 1963).

[14] *Id.*

regarded as natural persons under the common law since [Edward] Coke's day" and that "a number of significant decisions preceding [*Santa Clara County*] implicitly assumed" the same. It therefore appears that although the *Santa Clara County* syllabus may have stated new law not set forth in the opinion itself, Reporter Davis did so on the authority of the Chief Justice. And the Court later ratified this authorization in a number of decisions.

Accordingly, I told my angry correspondent that there was nothing I could do about his complaint. Each Supreme Court slip opinion is preceded by the legend: "Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press." But again, the complained-of syllabus for *Santa Clara County* contained no "typographical or other formal errors." And the Court simply has no other procedure for correcting possible substantive misstatements in a 119-year-old syllabus. Indeed, there was no need to do so, given the other slip-opinion notice that "[t]he syllabus constitutes no part of the opinion of the Court."

Thus, while Davis assuredly erred in constructing his *Hawley* syllabus, his mistake in *Santa Clara County* was not one of reasoning, but simply of forgetting the syllabus-writer's cardinal duty: summarize accurately the case decision you're reporting, but don't venture beyond the four corners of that decision. If nothing else, Davis's colorful headnoting has proved instructive to later Reporters determined to learn how *not* to write a syllabus.