PODIUM

CIVIL LIBERTIES *By Harvey A. Silverglate*

Is Summary Disposition Cowardly Avoidance?

THE SUPREME Court's procedure for summary disposition—the grant of certiorari and simultaneous decision, with neither briefing nor oral argument—is designed for cases in which the issue is clear and the result dictated by precedent. Sometimes, however, it seems that the court uses this tactic to dispose of a potentially controversial case before we notice it and take sides. This appears to be what happened in early January when, over only two dissents, the court summarily reversed the 9th U.S. Circuit Court of Appeals' prohibition, in *U.S. v. Watts*, 95-1906, against using acquitted conduct to enhance a sentence under the federal sentencing guidelines.

In *Watts*, police recovered cocaine and guns in the defendant's home. The jury convicted on the cocaine charge but acquitted Mr. Watts of using a firearm in connection with the drug offense. Nevertheless, the sentencing judge lengthened the sentence on the cocaine conviction, finding, by a preponderance of evidence, the gun possession connected with the drug offense—a conclusion the jury had refused to draw beyond a reasonable doubt. This added four years to what would have been a 14-year sentence.

Mr. Silverglate is a bimonthly NLJ columnist and a partner at the Boston firm of Silverglate & Good.

The 9th Circuit held that acquitted conduct could not be a basis for increasing a sentence. In vacating that ruling, the Supreme Court noted that all other courts of appeal had insisted judges consider acquitted conduct if they determine it was proven by a preponderance. Perhaps this near-unanimity led the court's majority to proceed summarily.

There are indications of other motives, however, for avoiding plenary briefing and oral argument and the attendant public attention. In dissent, Justice John Paul Stevens noted that, while the other circuits disagreed with the 9th, "respected jurists all over the country have been critical" of the procedure that had just received such casual approval.

Justice Stevens made no mention of a 1st Circuit appeal decided a month before. Writing for the panel, in *U.S. v. Lombard*, 72 F.3d 170, 186-87 (1st Cir. 1995), Judge Michael Boudin, a conservative Bush appointee, noted that, while the 1st Circuit deemed sentencing on the basis of acquitted conduct constitutional and "certainly accorded with the [sentencing] guidelines," it was troubling that the guidelines "draw no distinction between relevant conduct that is uncharged and relevant conduct of which the defendant has actually been acquitted."

The explanation, wrote Judge Boudin, "has the usual charm of lawyer's logic...Yet, many judges think that the guidelines are manifestly unwise, as a matter of policy, in requiring the use of acquitted conduct in calculating the guideline range."

"A lawyer can explain the distinction logically," he added, "but, as a matter of public perception and acceptance, the result can often invite disrespect for the sentencing process." A month later, the high court summarily decided *Watts*.

Dodging Bullets?

In his dissent, Justice Stevens said such a sentencing procedure produces a "perverse result" and is "repugnant." Linda Greenhouse, of the New York Times, wrote that this summary procedure was used in a controversial case even though "the court...closed out its argument schedule for March with only eight cases, on a calendar that could have accommodated 24."

It was not the first time recently that the court had summarily disposed of a controversial case, leading to suspicions that it wished to avoid controversy. In 1980 the court summarily decided *U.S. v. Snepp*, 444 U.S. 507, reinstating a judgment against Frank Snepp, a former CIA agent who, according to the court, had breached a contractual fiduciary obligation by failing to submit his book about CIA activities for prepublication review.

One justice vigorously protested the use of a summary procedure to impose for the first time in American history what amounted to a prior restraint on publication. It was "most inappropriate for the court to dispose of this novel issue summarily," he said, "just as unprecedented as its disposition of the merits." The dissenting justice in *Snepp* (joined by William J. Brennan Jr. and Thurgood Marshall) was none other than Justice Stevens, who was supported in *Watts* only by Justice Anthony M. Kennedy.

The major difference between Justice Stevens' objection to the inappropriate use of summary disposition in *Snepp* and his objection in *Watts* was that by now, the use of this procedural tool for burying potentially embarrassing cases was no longer "unprecedented."