JUDGE SILBERMAN, PARTY PRESENTATION, AND THE NON-COURT COURT

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Judge Laurence H. Silberman leaves an extraordinary legacy of public service and contributions to American law, marked most notably by his commitment to the idea of judicial restraint: that the proper role of a judge is limited and that a judge should respect the limitations of that role and not assume powers vested in Congress or the Executive Branch.[1] Judge Silberman summed up his commitment when he said that a judge, in every case, should begin by asking, "What is my role in this case as a judge?"[2]

Judicial restraint takes many forms, and an important but underappreciated one is the idea that the judicial role is limited to resolving legal contentions asserted by the parties in cases and controversies, an idea that the Supreme Court has referred to as the "principle of party presentation."[3] Courts sometimes justify that principle in terms of notice and prejudice: When a court considers an issue that a party did not properly raise, it threatens unfairness to the opposing party by depriving it of a chance to respond.[4] That concern is genuine, but it can be mitigated by measures such as allowing an opportunity for supplemental briefing. The principle's more fundamental justification rests on the nature of our adversarial system. As the Supreme Court has put it, we "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."[5] When courts instead take it upon themselves to shape the litigation by developing arguments for the parties, they depart from their role as neutral

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[1] Judge Silberman defined "judicial activism"—the opposite of restraint—as "policymaking in the guise of interpreting and applying law." Judge Laurence H. Silberman, *Will Lawyering Strangle Democratic Capitalism?: A Retrospective*, 21 HARV. J.L. & PUB. POL'Y 607, 618 (1998).

[2] *See* Justice Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 1–2 (1996) (attributing the phrase to "one of my former colleagues on the United States Court of Appeals for the District of Columbia Circuit").

[3] United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020). I have adopted that phrase because it clearly describes the concept, but as far as I am aware, Judge Silberman himself never used it.

[4] *See, e.g.*, United States v. Yates, 16 F.4th 256, 271 (9th Cir. 2021) (noting "the potential for prejudice to parties who might otherwise find themselves losing a case on the basis of an argument to which they had no chance to respond").

[5] Greenlaw v. United States, 554 U.S. 237, 243 (2008). The principle of party presentation is closely related to waiver and forfeiture, doctrines that prohibit parties from making arguments on appeal that they did not properly make in a lower court. *See* United States v. Olano, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938))). Many courts use the term "waiver" imprecisely to refer to both waiver and forfeiture. *See, e.g.*, In re Mercury Interactive Corp. Sec. Litig., 618 F.3d 988, 992 (9th Cir. 2010) ("[A]n issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it." (internal quotation marks and citation omitted)).

arbiters, and they make it easier to indulge considerations that should have no place in the judicial process. (If a court assumes the role of an advocate and attempts to make arguments for the parties, will it do so for both parties equally, or will it focus on helping the party for whose position it has the greatest sympathy?)

Important as it is, the principle of party presentation is a more subtle form of judicial restraint than, say, adherence to the text of statutes or the original public meaning of the Constitution. Those forms of restraint—which Judge Silberman fully embraced—tend to be obvious in the sense that anyone reading a judicial opinion can easily tell whether the judge is practicing them. By contrast, adherence to the principle of party presentation can be more difficult to assess because judges do not always make clear whether the issues addressed in their opinions were developed by the parties or are instead issues they developed themselves.[6]

For Judge Silberman, however, commitment to the principle of party presentation was anything but subtle. In a forceful dissenting opinion, he argued that the D.C. Circuit should decide a case by applying a statute that might not even have existed; he was willing to ignore the statute's possible nonexistence because no party had raised the issue.

The case was *Independent Insurance Agents of America v. Clarke*,[7] and the statute was section 92 of the National Bank Act, first enacted in 1916, which authorized any national bank "located and doing business in any place the population of which does not exceed five thousand inhabitants" to sell insurance under rules to be prescribed by the Comptroller of the Currency.[8] The Comptroller interpreted the statute to permit any bank having a branch in such a place to sell insurance to customers nationwide. A trade association of insurance agents challenged that interpretation, arguing that section 92 allows banks to sell insurance only to local customers.[9]

Rather than address that challenge, however, the D.C. Circuit took up a different question: whether section 92 even existed. The insurance agents had expressly declined to question the statute's existence, likely based on their assessment that a decision on that ground would make Supreme Court review more likely and that their best chance of prevailing was to seek a narrower victory in the D.C. Circuit. Nevertheless, considering the issue sua sponte, the court concluded that section 92 was no longer in effect because, in reenacting the National Bank Act in 1918, Congress had (apparently inadvertently) omitted the provision.[10]

Judge Silberman dissented. He recognized that it "might be thought counter-intuitive" to decide a case on the basis of a statute that might not exist.[11] But he argued that a court "owe[s] no abstract duty to Congress (or the President) to enforce or not to enforce laws; all of our power derives from our constitutional duty to decide cases and controversies."[12] And because "the 'case

[6] For a less charitable description of the difficulty, *see* Silberman, *supra* note 1, at 619 ("As a part-time law professor, I tell my classes that the reason it takes so long to teach law students how to recognize the holding of a case is because judges seldom tell the truth.").

[7] 955 F.2d 731 (D.C. Cir. 1992), *rev'd*, United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc., 508 U.S. 439 (1993).

[8] Act of Sept. 7, 1916, ch. 461, 39 Stat. 752, 753 (codified at 12 U.S.C. § 92).

[9] *Independent Ins. Agents of Am.*, 955 F.2d at 732.

[10] *Id.* at 734–37.

[11] *Id.* at 741 (Silberman, J., dissenting).

[12] *Id.* at 742.

or controversy' as it was brought to the district court or on appeal" did not include the question of section 92's continuing validity, "[i]t is quite fair to say that we have added it to the case; we have created a controversy that did not exist."[13] In doing so, he argued, the court had exceeded the proper role of a court. Quoting a D.C. Circuit opinion by then-Judge Scalia, he explained that "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."[14]

Judge Silberman acknowledged that, once the D.C. Circuit invited briefing on the issue, the insurance agents—"no doubt at that point realizing that their chances for success were dependent upon indulging the court—did so and partially switched their position, urging us to decide whether section 92 exists."[15] They did so, he observed, by arguing that the statute's existence was a jurisdictional issue. While rejecting that argument, he noted his agreement with their "implicit premise: that unless we determine the validity question to be jurisdictional, we should not decide it."[16]

The reference to jurisdiction was significant because jurisdictional questions are a well-established exception to the principle of party presentation. A court always has an obligation to consider its subject-matter jurisdiction, even when the parties have not challenged it.[17] That is itself an important rule of judicial restraint because jurisdictional limitations are constraints on a court's adjudicatory power imposed by the Constitution and Congress, and even the parties' agreement cannot expand that power.[18] Judge Silberman took jurisdictional limitations seriously: He had a standing offer to buy lunch for any law clerk who identified a jurisdictional defect the parties had not raised.[19]

In this case, however, the issue was not jurisdictional, so it was subject to waiver by the parties.[20] In a dissent from the denial of rehearing en banc, Judge Silberman elaborated on his view: "Almost any case brought rests on certain uncontested legal assumptions that may be thought to be logical antecedents to the issues in dispute. A court is not free, however, to examine itself any of those legal assumptions (if non-jurisdictional) just by asserting that they are 'essential

[13] *Id.*

[14] *Id.* (quoting Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983)).

[15] *Id.* at 741.

[16] *Id.* at 741–42.

[17] *See, e.g.*, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977) (noting that "we are obliged to inquire sua sponte whenever a doubt arises as to the existence of federal jurisdiction").

[18] *See* Ochoa v. Garland, 71 F.4th 717, 721 (9th Cir. 2023) ("[O]ur jurisdiction is limited to that conferred upon us by Congress consistent with Article III, and the parties cannot enlarge it by their agreement.").

[19] *See* Paul Clement, Opinion, *America Loses a Judicial Giant*, WALL ST. J. (Oct. 2, 2022), https://www.wsj.com/articles/america-loses-a-judicial-giant-laurence-silberman-restraint-dc-circuit-constitution-judge-legacy-scalia-clerks-second-amendment-11664750990 [https://perma.cc/LW66-J3E4]; Viet D. Dinh, Letter to the Editor, *Blame Congress, Blame the Supreme Court*, WASH. POST, Aug. 14, 1998, at A24.

[20] *Independent Ins. Agents of Am.*, 955 F.2d at 741 n.1 (Silberman, J., dissenting) ("Although the repeal of a statute moots controversies over the law's validity, . . . here the parties *agree* that section 92 is valid, and they have a continuing controversy over the Comptroller's authority to permit national banks to sell insurance nationwide. And the case obviously arises under federal law for purposes of 28 U.S.C. § 1331, because, *inter alia,* the parties have stated a cause of action under the Administrative Procedure Act, 5 U.S.C. §§ 701–06.").

to the determination.' That would mean that a lawsuit is framed by a court's notion of the logical way to think about a legal problem, and not by the parties' controversy."[21]

The Supreme Court did not agree with Judge Silberman. It granted certiorari and reversed the D.C. Circuit on the merits of the section 92 issue, holding that the statute was still in effect.[22] But it said that the D.C. Circuit had not erred in reaching the question: "We need not decide whether the Court of Appeals had, as it concluded, a 'duty' to address the status of section 92 (which would imply error in declining to do so), for the court's decision to consider the issue was certainly no abuse of its discretion."[23]

Although Judge Silberman's position did not prevail in *Independent Insurance Agents*, he could claim partial vindication nearly 30 years later when the Supreme Court decided *United States v. Sineneng-Smith.*[24] That case involved 8 U.S.C. § 1324, which makes it a federal felony to "encourag[e] or induc[e] an alien to come to, enter, or reside in the United States" unlawfully. Following a jury trial, Sineneng-Smith was convicted of violating section 1324. She appealed to the Ninth Circuit, arguing that her conduct did not constitute "encouragement" or "inducement" and, in the alternative, that the statute violated the First Amendment as applied to her conduct.[25] The Ninth Circuit appointed amici to make a different argument—that the statute was facially overbroad or void for vagueness—and it then invalidated the statute as overbroad.[26]

The Supreme Court vacated the judgment. It did not reach the merits of the Ninth Circuit's overbreadth holding. Instead, it held that the Ninth Circuit had abused its discretion by "drastically" departing from the principle of party presentation.[27] In a stinging rebuke, the Supreme Court referred disparagingly to the Ninth Circuit's "takeover of the appeal" and its "radical transformation of this case," and it remanded "for reconsideration shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties."[28]

Although the Court did not cite Judge Silberman, its articulation of the principle of party presentation echoed much of his reasoning from 30 years before. It tied the principle to "our adversarial system of adjudication."[29] And it recognized the relationship between that principle and the limited role of courts: "[C]ourts are essentially passive instruments of government" that "do not, or should not, sally forth each day looking for wrongs to right" but instead "normally decide only questions presented by the parties" to cases that have been brought before them.[30]

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[21] Independent Ins. Agents of Am. v. Clarke, 965 F.2d 1077, 1079 (D.C. Cir. 1992) (Silberman, J., dissenting from the denial of rehearing en banc) (citation omitted).

[22] *United States Nat'l Bank of Or.*, 508 U.S. at 462–63.

[23] *Id.* at 448.

[24] 140 S. Ct. 1575 (2020).

[25] *Id.* at 1578.

[26] *Id.*; *see* United States v. Sineneng-Smith, 910 F.3d 461, 485 (9th Cir. 2018), *vacated*, 140 S. Ct. 1575 (2020).

[27] *Sineneng-Smith*, 140 S. Ct. at 1578.

[28] *Id.* at 1581–82. On remand, the panel rejected the as-applied challenge. United States v. Sineneng-Smith, 982 F.3d 766, 776 (9th Cir. 2020). But the Ninth Circuit was not done with section 1324. In a later case where the overbreadth challenge was properly presented, the court held that the statute was facially overbroad; the Supreme Court again granted certiorari, this time reversing on the merits. United States v. Hansen, 25 F.4th 1103 (9th Cir. 2022), *rev'd*, 143 S. Ct. 1932 (2023).

[29] *Sineneng-Smith*, 140 S. Ct. at 1579.

[30] *Id.* (alteration in original) (quoting United States v. Samuels, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in the denial of rehearing en banc)).

Why, then, is *Sineneng-Smith* only a partial vindication of Judge Silberman? Because despite what the Court *said* in that case, what the Court *does*, at least some of the time, continues to reflect a lack of respect for the principle of party presentation. It is not necessary to look far to find examples. One is the disposition of *Sineneng-Smith* itself. Although the government's brief in the Supreme Court mentioned that "[i]n reaching out to address" overbreadth, the Ninth Circuit had "deviated from . . . the normal course of party-driven litigation," it did not elaborate on that objection, let alone advance it as a basis for reversal.[31] So, in invoking the principle of party presentation, the Supreme Court was itself departing from that principle.

Another example is the Supreme Court's practice of inviting supplemental briefing on issues the parties have not addressed or, alternatively, appointing amici to brief and argue those issues—a practice that is so routine that the opinion in *Sineneng-Smith* contained a lengthy addendum listing examples. The Court asserted that none of the examples "bear any resemblance to the redirection ordered by the Ninth Circuit panel."[32] Perhaps that is true, or perhaps the Court doth protest too much; the length of the list is enough to make one suspect that the Court has been less than scrupulous in its adherence to the principles it articulated. And even when the Court has not itself departed from the principle of party presentation, it has sometimes been willing to countenance violations of that principle by lower courts.[33]

Of course, the Supreme Court hears a limited number of cases each year, and it understandably wishes to use those cases to clarify important issues in American law. Performing that law-clarification function would be more challenging if the Court were constrained to consider only the issues presented by the parties in the particular cases in which it happens to have granted certiorari. Judge Silberman recognized that concern in *Independent Insurance Agents*, writing that "[t]he Supreme Court, I gather, weighs docket management factors that the lower federal courts do not encounter. If the Court wants us to adopt a more relaxed stance than I think appropriate, this case may well offer a suitable vehicle to so instruct us."[34]

As we have seen, the Supreme Court in *Independent Insurance Agents* did not acknowledge the role of those docket-management considerations in its decision. But neither did it provide the

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[31] Brief for Petitioner at 37, United States v. Sineneng-Smith, 140 S. Ct. 1575 (No. 19-67).

[32] 140 S. Ct. at 1579 n.4.

[33] Consider, for example, Dickerson v. United States, 530 U.S. 428 (2000), which involved the constitutionality of 18 U.S.C. § 3501, a statute purporting to overrule Miranda v. Arizona, 384 U.S. 436 (1966), in federal cases. That statute had been largely ignored since its enactment in 1968, and the Department of Justice had a policy of not invoking it, but the Fourth Circuit took it up sua sponte and applied it to reject Dickerson's challenge under *Miranda* to the introduction of certain statements in his federal prosecution for bank robbery. 166 F.3d 667 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000). In his petition for a writ of certiorari, Dickerson challenged the propriety of the Fourth Circuit's decision to consider section 3501 sua sponte, but the Supreme Court declined to grant certiorari on that question and instead ruled on only the merits of the constitutional issue, thus implicitly validating the Fourth Circuit's decision to ignore the government's waiver. 528 U.S. 1045 (1999); Petition for Writ of Certiorari at i, Dickerson v. United States, 530 U.S. 428 (No. 99-5525).

A personal observation on *Dickerson*: In deciding to consider section 3501 sua sponte, the Fourth Circuit had relied on my student comment from the *University of Chicago Law Review*. 166 F.3d at 683 (citing Eric D. Miller, Comment, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029 (1998) (answering the question in the affirmative)). As should be apparent, I now think the argument advanced in that comment was seriously mistaken. I used the comment as my writing sample when I applied to serve as one of Judge Silberman's law clerks; that he hired me anyway may be regarded as a testament to his magnanimity.

[34] *Independent Ins. Agents of Am.*, 955 F.2d at 742 n.3 (Silberman, J., dissenting).

instruction that Judge Silberman hoped for. Instead, as he wrote a few years later, the Supreme Court "ducked the question of whether," as the D.C. Circuit believed, it "was *obliged* to reach the anterior question" of the existence of section 92, "stating only that the court's decision to do so was not an abuse of discretion. That meant that federal courts were free, without standards to follow, to decide such an issue or not depending on whether it pleased the judges to do so."[35] In an effort to explain the Court's behavior, Judge Silberman said, "I suspect . . . that the justices did not wish to restrict their *own* ability to reach out to issues not presented in cases brought to the Court, nor did they wish to justify that practice by openly acknowledging the Supreme Court as not subject to normal judicial constraints."[36]

The Supreme Court's approach led Judge Silberman—drawing on an analogy to the banking-law concept of "non-bank banks"[37]—to suggest that the Supreme Court should be regarded as a "non-court court,"[38] that is, one that "sees itself primarily as a tribunal for issue determination rather than resolution of cases and controversies."[39] Lest anyone miss the point, he made clear that he did not mean "non-court court" as a compliment. Observing that "the lower federal courts are even more influenced by the *manner* in which the Supreme Court decides cases than by the particular substantive results," he lamented that *Independent Insurance Agents*—which he described as "a particularly egregious example of the Supreme Court's cutting of traditional judicial corners"—had "had a broad impact" by making "[j]udges, even disciplined judges, . . . more willing than they were prior to that case, if convinced by a legal theory, to seek to fit the controversy before them to that theory, rather than vice versa."[40]

Being less bold than Judge Silberman, I will leave it to others to assess whether his view of the Supreme Court was justified. But I think—or at least I hope—that his view of the lower federal courts was overly pessimistic. Even if the Supreme Court does not always adhere to the principles it articulated in *Sineneng-Smith*, it is a sign of progress that the Court is willing to tell lower courts to adhere to them. And regardless of what the Supreme Court does, it remains the duty of lower federal courts to apply those principles faithfully.[41] In performing that duty, courts would be well served to draw inspiration from the example of restraint that Judge Silberman provided.

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[35] United States v. Moore, 110 F.3d 99, 102 (D.C. Cir. 1997) (Silberman, J., dissenting from the denial of rehearing en banc).

[36] *Id.*

[37] Bd. of Governors of the Fed. Rsrv. Sys. v. Dimension Fin. Corp., 474 U.S. 361, 363 (1986) (defining "nonbank banks" as "institutions that offer services similar to those of banks but which until recently were not under [Federal Reserve] Board regulation because they conducted their business so as to place themselves arguably outside the narrow [statutory] definition of 'bank'").

[38] *Moore*, 110 F.3d at 102 (Silberman, J., dissenting from the denial of rehearing en banc).

[39] United States v. Simpson, 430 F.3d 1177, 1195 (D.C. Cir. 2005) (Silberman, J., concurring).

[40] *Moore*, 110 F.3d at 102 (Silberman, J., dissenting from the denial of rehearing en banc).

[41] *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls."); *accord* Tenet v. Doe, 544 U.S. 1, 10–11 (2005); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).