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Justice Breyer on Rule of Law

Reported by Hu Shuli, Duan Hongqing, Fang Xuyan of Caixin Century Weekly

Part I Impression: The Invisible Power

A.

Walking through the dimly-lit hallways of the Park Hyatt Hotel Beijing, the 74 year-old Stephen Breyer quietly approached CAIXIN reporters, a black briefcase strapped on his shoulder. He was accompanied by none other than our old friend Professor Paul Gewirtz of Yale Law School. It was hard to believe this man of medium height, slim-build and slightly bald is a sitting Justice of the United States Supreme Court.

The Supreme Court is the highest judicial body of the U.S., consisting of nine Justices nominated by the President and approved by Senate hearings. Supreme Court Justices have life-tenures. Until they pass away or resign, the only possibility of involuntary removal is through impeachment by Congress – something that has never happened in U.S. history.

In the U.S., a “Judge” is a general term reserved for judges whereas a judge on the Supreme Court is referred to as a “Justice”, the same word as “justice” in everyday use.

In the U.S. where law is supreme, Justices are prominent personages. Many events with significant political and social impact ultimately wind up as cases in front of the Supreme Court, the adjudication of which by the Justices plays a decisive role. In the 2000 presidential election, vote-counting flaws led to a major controversy. The election was ultimately decided by the Supreme Court, clearing the way for Republican Presidential Candidate Bush’s successful bid for the White House and the defeat of Democratic Presidential Candidate Gore.

Justice Breyer, who was appointed to the bench in 1994, is one of such most “prominent personages” in the U.S., who also happened to be a member of the Court which decided the 2000 presidential election dispute, even though he casted the dissenting vote along with other liberal Justices. The liberal camp on the Supreme Court lost their vote 4:5 to the conservative Justices, failing to stop Bush from winning the election. Even today, Justice Breyer still regrets the outcome of that decision, which he referred to as a “self-inflicted wound” of the Court.

Justice Breyer is well-known in China’s legal circles, attributable to several of his popular works published in the country, including the latest *Making Our Democracy Work: A Judge’s View* (Law Press China). As a result, China’s internet was recently abuzz with the news that Justice Breyer’s homes were twice burglarized this year. CAIXIN reporters mentioned this before the interview and Breyer confirmed the stories.

“You know I was very brave,” he said light-heartedly. He shouted at the burglars armed with hacking knives, “Here, take the money!”

American Justices do not have bodyguards in their private lives. It is hardly news that Justices have been robbed in recent years. Justice Breyer joked, “The burglar didn’t know I was a Justice. Otherwise he would

have demanded more money.”

Justice Breyer told Caixin reporters that people often think Justices are rich. “In fact, a Justice’s salary is not high by U.S. standards.”

B.

Justice Breyer came to China this time to attend the award ceremony of the Pritzker Architecture Prize, often referred to as the “Nobel Prize for Architecture”. Forty-nine year-old Chinese architect Wang Shu is the winner this year.

“I like beautiful buildings,” Justice Breyer said to Caixin reporters with a smile, “but don’t ask me how got on the jury for the Pritzker Prize because I don’t know the answer.”

In fact, when Mr. Breyer took office as Chief Judge of the U.S. Court of Appeals for the First Circuit in 1990, he helped design the Federal Courthouse of Boston. The building has a grand design, making it famous among architect circles. On the official Pritzker website, Justice Breyer is described as someone with “deep understanding of arts and architecture.”

Justice Breyer maintains wide interests. He has experience in both jurisprudence and the law, with practical experience in the administrative, legislative and judicial domains. Among all sitting Supreme Court Justices, Justice Breyer has the richest experiences.

Justice Breyer was born in San Francisco in August 1938. He graduated from Stanford, Oxford and Harvard Law School. He taught law for many years at Harvard Law School, focusing on constitutional law, administrative law and government regulation. He was a law clerk to a Supreme Court Justice and later worked as a lawyer at the Justice Department’s anti-trust division. He was an assistant special prosecutor during the Watergate Investigation and was Chief Legal Counsel to the U.S. Senate Judiciary Committee. In 1980, Breyer was appointed by President Carter to the U.S. Court of Appeals for the First Circuit. In 1994, Breyer was appointed to the U.S. Supreme Court by President Clinton.

C.

Breyer’s appointment to the U.S. Supreme Court was an interesting story.

In the spring of 1993, then Supreme Court Justice Byron White announced his retirement. A vacancy appeared. Breyer came under President Clinton’s radar screen for nomination and was invited to meet Clinton in Washington. Unfortunately, Breyer had broken a rib in a bike accident. When he met Clinton, he was still in pain and short of breath, making it hard to concentrate on the talk. After the meeting, President Clinton did not nominate Breyer. Clinton told his staff, “I want a judge with soul”.

In the same year, Clinton nominated Ruth Bader Ginsburg who ultimately became a Supreme Court Justice. Breyer attended her swearing-in ceremony and observed the event attentively with a smile, a detail which impressed Clinton who now regarded Breyer as a person with a “big heart”.

In April 1994, Justice Harry Blackmun retired. Breyer again made the short-list. This time the person who recommended him mailed a video to Clinton, in which Breyer talked wittily with a group of visiting Russian judges. Breyer received Clinton’s nomination this time. On June 29, the U.S. Senate approved Breyer’s nomination in an 87-9 vote. Before taking the oath, Breyer jokingly said, “I’m glad I didn’t fall off my bike this time.”

After 18 years on the high court's bench, Breyer is regarded as the most liked Justice, even by conservative Justices who have diverging views.

A 2007 bestseller, *The Nine: Inside the Secret World of the Supreme Court* depicts Breyer as "resourceful", not a derogatory term but a nod to his pragmatism and flexibility.

Justice Breyer is open-minded and favors solutions of real-life problems. He is not bound by conventional legal doctrines or rigid judicial views. As a liberal Justice, he is not as eager as many of his well-known predecessors to use decisions in important cases as means for promoting social changes. In his view, most issues should be handled by legislators who are elected by the public; the Court should not overreach its authority. By Professor Gewirtz's estimation, Justice Breyer voted in favor of 28% of the Supreme Court decisions in which the Court used its right of judicial review to overturn Congressional legislations, making him the least willing Justice to overturn Congressional legislations.

D.

At first impression, Justice Breyer may be mistaken for someone nerdy and too scholarly. The truth couldn't be further. During his interview with Caixin reporters, Justice Breyer was sharp, witty and his face animated with expressions. Both his appearance and demeanor suggest a much younger person than a person of his age.

Justice Breyer continued to conduct research and write books after he took the bench at the high court. His latest work *Making Our Democracy Work: A Judge's View* has been translated by Judge He Fan of the Supreme People's Court of China.

Judge He Fan told reporters that translating Breyer's book was a "joyous, challenging and inspiring experience." He recognizes the major differences between the Chinese and the U.S. supreme courts. Nonetheless, Justice Breyer's views are helpful when thinking about "China's problems".

"I don't really understand China," Justice Breyer admitted to Caixin reporters. When asked about questions related to rule of law and government regulation, he focused on the U.S. experience and the thinking behind it. Nevertheless, Justice Breyer's humorous and philosophical words are inspiring on a wide range of issues.

The Caixin interview lasted almost 100 minutes, during which Justice Breyer took a small booklet from his pocket. It was the United States Constitution, from which he constantly quoted as he spoke. After the interview, he gave a signed copy to the reporters.

Part II Q & A: The Road to Rule of Law

Rule of Law has no magic

“Rule of law is present in the U.S. for 200 years. What is the secret? My answer: None.”

CAIXIN: Let us start with a basic question. Why is rule of law important?

Justice Breyer: This is an interesting question for everybody. Not all 308 million people in the U.S. are lawyers. Why do they need rule of law? It is important that when they go to the market and see a great variety of merchandize, they remember that someone invested in and supplied these goods. Manufacturers will supply goods and invest more easily if they believe contracts can be enforced. The key to rule of law is to make people believe that no one can steal things that don't belong to them, and that anyone who harms others will be put in jail. Or course, people should be jailed after going through the appropriate judicial process.

If you are a defendant in a court proceeding, do you want the decision to be based on facts or on the judge's whim? You want a fair judge and fair enforcement. You don't want the society to alternate between anarchy and dictatorship, or even tyranny.

In 1215 AD, King John of England was forced by the nobles to sign the *Magna Carta*, which marked the beginning of rule of law in England. Why sign this document? Because until then, King John could put anyone into jail by saying “I don't like this guy”. No one wanted to be jailed for some fabricated crimes.

CAIXIN: China wants to build a country “ruled by law”. In your view, what is a country ruled by law like? How long will it take for a developing country to reach that goal?

Justice Breyer: Many people asked me this question, law students in the U.S., a newly appointed female judge from the supreme court of Ghana, and others from many countries. Rule of law has been in the U.S. for 200 years. What is the secret? My answer: None.

I carry the U.S. Constitution with me at all times. The Constitution says the Supreme Court makes the final decision. But there was a famous case in U.S. history: the 1832 case of *Cherokee Nation vs. Georgia*. At that time, the Supreme Court decided that Cherokee Indians residing in Georgia should have their own lands. President Andrew Jackson infamously said, “John Marshall has made his decision, now let him enforce it!” Later Jackson sent out the army and forced the Indians onto the “Trail of Tears”. Why was it called the “Trail of Tears”? Because the Indians were pushed out to Oklahoma and over 4,000 Cherokees died on the way. That was 180 years ago. It will not happen in the U.S., today. But many other things happened in the interim: the Civil War and 80 years of racial segregation. Rule of law is not as simple as having a Constitution.

CAIXIN: What are the fundamental pre-conditions for a country to achieve rule by law? How long will it take from setting up the goal to accomplishing results?

Justice Breyer: Very, very long. In the U.S., the Supreme Court ruled against racial segregation in *Brown vs. the Board of Education*. The Constitution states that each person is entitled to equal protection by the law. But in reality, white people were treated differently from the blacks. Do you know what happened to racial segregation one year after the ruling? Nothing! And the year after that? Still nothing.

In 1957, a judge in Arkansas ruled that black kids could go to white schools. Governor Faubus thought nothing of the ruling. He had the National Guards. What is a judge with a piece of paper? Ultimately, President Eisenhower sent troops from the 101st Airborne Division and they escorted black students to white schools. It

was a moment of victory for the rule of law, and one of the most memorable moments in U.S. history.

After many years, the U.S. abolished racial segregation. Escorting black students to white schools was just the beginning. The ruling of the Supreme Court must be followed by the President. It was a long journey for rule of law for the U.S.

So to your question, my answer is: Getting accustomed to it, education and mutual understanding. I watched a movie about Chinese 5th graders electing their class president. It was a competitive process. There was jealousy. But the children understood more about election. It was related to the rule of law. To have respect for the law, people must be taught. This is a process.

CAIXIN: What if judges make wrong decisions?

Justice Breyer: The law is supreme. Let's look at the 2000 presidential election case of *Bush vs. Gore*, a typical case in my mind. Five Justices voted for Bush. I voted for Gore. The decision was not popular – at least half of the population was against it. The decision itself maybe wrong, at least I personally believe so. Nonetheless the decision was enforced. I discussed the case with some students. They suggested we should have ignored the legal process. I said absolutely no.

In many countries, conflicts are resolved through wars, with guns, sticks and stones, and not by law. Which way do you prefer? Rule of law means sometimes you have to accept decisions that upset you. Therefore, it is critical to respect the rule of law.

It takes a long time for rule of law to take roots. It depends on each country's own conditions. The U.S. experienced many ups and downs. So did many other countries. Rule of law does not guarantee that everything will be all right. But it helps to organize people, prevent tyranny, advocate prosperity, human rights and democracy. It also encourages people to take control of their own lives.

Judicial Power

“Rule of law is enforced by judges. Judges must be independent.”

CAIXIN: You just said it took the U.S. a long time to establish the courts' authority. How to effectively assure such authority?

Justice Breyer: In this regard, Chief Justice John Marshall was a genius. He knew what could be done. He gradually advocated for the Court's authority and people gradually accepted it. We all know the classic case of *Marbury vs. Madison*, which established the power of the Supreme Court as the ultimate interpreter of the Constitution. Any law student knows that we are talking about the power of constitutional review by the Court.

Court rulings must be consistent with the legal framework and must be unbiased. This is critical to the courts and the whole country. A correct ruling makes a country great because it is seen by all. People know that the court did the right thing. It helps to boost confidence in the court.

If you look for the magic pills to quickly establish the court's authority, I don't have them.

CAIXIN: How should courts deal with public opinion?

Justice Breyer: In the U.S., we do not make decisions by following public opinion. But we face pressure from

the public. That is one of the reasons why I have said that establishing rule of law is difficult. First, judges are not elected. The public have to accept this system. Second, anything decided under this system is important to everyone. Third, some decisions by the judges are not popular. Fourth, some decisions may be wrong. Then why should people continue to accept the system? Because the society needs an independent judiciary to solve disputes. People didn't want to accept it at first. That is why it took us 200 years to establish power of the judiciary.

CAIXIN: Does judicial independence guarantee absolute fairness in trials?

Justice Breyer: Of course not. But rule of law must be enforced by judges. Judges must be independent. Like Alexander Hamilton said, judges need job security. Even if they are not assured lifelong tenures, they must be insulated from outside influences. More importantly, judges should not be influenced by any groups, including the government.

It is extremely difficult to build and develop an independent judiciary. My colleague Tony Kennedy made a good point: All judges have one thing in common, i.e. when you try to make a right decision, only you know if you are honest. It is a difficult journey.

CAIXIN: China has been talking about judicial independence for quite some time. But some people argue that corruption is common in the judicial system. If we have judicial independence, how shall we avoid corruption?

Justice Breyer: Corruption is a big problem in many places. If a judge takes bribes, he should be sent to jail. Judges must have integrity. You need to investigate their background before they are appointed.

In addition, disclosure of personal assets helps. Every year I must submit an asset disclosure document, with information on my annual income and all of my assets. I cannot take gifts, not even five dollars. My wife is subject to the same requirements even though her job has nothing to do with mine. If I have children, they must do the same. Some of the things I do may seem unnecessary but I do not want others to say that I use the Court's stationery, cars or any other things for personal use. This is quite cumbersome. No matter where I go, all expenses are declared, including my trip to China. Of course, all congressmen, the President and government officials must declare their personal assets.

CAIXIN: Is "legal community" important for the rule of law? China has lawyers, judges, prosecutors and legal scholars. But they don't seem to belong to the same "community".

Justice Breyer: A society with rule of law needs lawyers, judges, prosecutors and scholars. Lawyers are not popular in the U.S. I had said to lawyers, "You are not popular". Judges are not always loved either. Sometimes they seem boring. If you tell someone "this is a judge" in a conversation, he may fall asleep. But society needs lawyers because judges are not the ones who spread legal knowledge. It is up to lawyers. During a trial, the judge won't know all the details of the case. It is the lawyers' job to provide information and present the whole case to the judge through arguments with the opposing counsel.

Legal professionals of all kinds, who go through law schools or professional training, have reached certain basic common ground. In the U.S., legal professionals don't see eye to eye on all issues, but they agree on the fundamental values provided in the Constitution. They agree that the U.S. is built on boring but extremely important principles. This is called the Administrative Procedure Act. I often tell people this is the most critical component of any legal system, in the U.S. or Europe.

Checks and Balances

“Checks and balances is a complicated process which involves everybody. There is no better way.”

CAIXIN: The U.S. has a federal system. How to deal with the relationship between the federal government and the states?

Justice Breyer: This is a difficult question. Let’s come back to source of the most fundamental principles, the U.S. Constitution. Almost every American has a copy of the Constitution. It unites people and brings them together. It is full of wisdom. There are five basic principles in the Constitution: democratic election, protection of human rights, the principle of fairness, rule of law and federalism.

In the US, not all power is held by the federal government. Many powerful federal positions are created through state elections. These officials are very careful and will not overreach their authority. They must obey the Constitution. Let’s take Senator Ted Kennedy as an example. If the U.S. Secretary of State and the mayor of Brockton, Massachusetts both want to see him at 2 p.m. Wednesday, which one would he meet? He will meet the mayor who travelled all the way from Brockton because the mayor is his constituent. Political careers in the U.S. start from local to state level and up. This bottom up approach is very effective in preventing concentration of power.

CAIXIN: Do checks and balances get in the way of efficiency? How to balance efficiency and fairness?

Justice Breyer: I don’t have a formula. The U.S. system is not very efficient, mainly due to the separation of powers. We have state power and federal power. Every political organization has power. Every person has the right to express a different opinion. The French thinker Torcqueville once said “I only hear shrills and noise” when he visited America. It was true because people were debating.

When Americans find a problem, everyone will talk about it. Teachers will talk about it in the classroom. Reporters will talk about it in the newspaper. Police associations and civic groups will both talk about it. Candidates talk about it during local campaigns. Officials must talk about it when they explain draft laws and regulations to solve the problem. We judges must talk about it when we study whether the laws and regulations are constitutional. This is a complicated process which involves everybody. My view on this process: Good! There is no better way.

Rule of the Market

“The economic model I like: A free and competitive economy but with appropriate government regulation.”

CAIXIN: You are an expert on government regulation. From an economic viewpoint, what is the best relation between government and market?

Justice Breyer: I believe free market is the right model. But – this “but” is equally important – market needs rules to ensure competition, which is the job of anti-trust laws. Market does not function without competition.

Competition may fail and that is when the government comes in. First, if only one company provides the service, market cannot function. This is called monopoly. Second, if your product harms others, we call it negative externalities, such as pollution. Automakers do not think about pollution when they make cars but the government has to regulate pollution. Third, health and safety. Government must regulate anything related to health, safety and the environment.

CAIXIN: Since the global financial crisis, western countries are discussing strengthening government

regulation of the financial industry.

Justice Breyer: There are three views on this issue. The first view is that the crisis was like an earthquake. It happens every few decades and there is nothing that government can do about it. The second view is that the government should do something. At least there should be more transparency. The third view is that the government should strengthen regulation and enact more laws and regulations. These laws and regulations may solve last year's problems, but will they be able to solve problems next year that nobody has anticipated?

CAIXIN: You said government regulation ensures competition. Then how to avoid too much government intervention?

Justice Breyer: I think APA may help. One way to enforce anti-trust laws is to let courts try cases. The government may sue and the companies can defend themselves. It is up to judges to decide. Europe and the U.S. follow this model. Because of this, the government will be careful and will not intervene too much; otherwise it may lose the case.

The second way is through administrative agencies, such as the Federal Trade Commission. But they must comply with APA, which requires disclosure of all the facts. For example, the U.S. government once regulated airlines and set prices. We studied the situation and believed that price would be lower if airlines were allowed to compete. This was proven later. Prices dropped more than 60%.

CAIXIN: We say if market fails, government should come in. But if the market fails in health and environment area, and the government also fails, what should be done?

Justice Breyer: Then you have a big problem. The market itself cannot solve environmental issues. The good news is that the government can collect taxes and it can impose heavy taxes on polluting products. If it is done this way, companies will pay attention to pollution.

The economic model I like: A free and competitive economy but with appropriate government regulation. We must value free market but at the same time give equal attention to our natural, urban and national environment. Whatever we do, our kids must be able to run around in parks.

How do we give people this opportunity? The Declaration of Independence says: "All men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness."

Part III Mission and Authority of the Supreme Court

Ji Weidong

In a country well known for its rule of law, Justices on the U.S. Supreme Court are held in the highest regard among all of the most prestigious professions, higher than congressmen, mayors, CEOs of large companies and bankers. It is clear that the position of judges is critical to building a country ruled by law. Without the authority of the Justices, there is no respect for the legal system.

It is intriguing that Justice Breyer carries the U.S. Constitution when he was interviewed by CAIXIN reporters. Yet many years ago, Liu Shaoqi carried the Chinese Constitution when he was publically vilified by the Red Guards. One is a Justice whose duty is to safeguard the Constitution of the Federation and the other was the President of the Republic trying to use the Constitution for his personal protection. One constitution is alive and powerful in court proceedings and the other is an empty piece of paper, not enforceable... This is a profound metaphor.

Justice Breyer tells us the Constitution is the corner stone of a country ruled by law. It is a fundamental understanding shared by individuals, the society and the government. When citizens deliberate public affairs, it is always within the framework of the Constitution. It is the Constitution which brings together citizens of different races, social and educational backgrounds, political affiliation and religious beliefs. A good constitution which promotes the rule of law, protects human rights, implements democracy and upholds justice has tremendous drawing power and must be enforced.

Breyer also points out that it is the attitude towards the enforcement of the Constitution that makes or breaks judicial power. Obviously, constitutional review of laws and government actions by courts is crucial. In other words, it is difficult to attain judicial independence and establish judicial authority without the power of constitutional review. Breyer's wisdom lies in his recognition that even when the Court holds the ultimate authority in interpreting the Constitution, it should be modest and exercise self-restraint. The Court should not overturn Congressional legislations lightly and should not blur the line between making the law and enforcing the law. When Breyer raises the question of "how judges help to make our democracy work", he not only focuses on the proper foundation for decisions by the courts, but also maintains a deep appreciation for the source of power of the judiciary.

In Breyer's view, public opinion is not democracy. Laws made by Congress represent the institutionalization of public opinion and the basis for the courts' decisions. As such, courts must rule in accordance with the law, even in the face of tremendous pressure from public opinion. They should never give in. As long as the Constitution and the law are strictly followed, judges should be exempt from liabilities whatever the public outcry or consequences. Judges should only be held liable if their judgments violate the Constitution or the law. In this sense, judges only need to abide by the law and uphold the principle of "constitutional supremacy". In this sense, courts must first be independent. In addition, as Justice Breyer points out, "if rule of law is enforced by judges, then judges must be independent...judges should not be subject to the influence of other organizations, including the government." Of course, judges should not and must not be influenced by public opinion. Public opinion may be manipulated. The transient nature of public opinion will lead to extreme uncertainty.

In the arena of public opinion, it is extremely difficult to make decisions based on forecasts and computations. Professional know-how is of little help and therefore people are more inclined to form opinions based on what suits them and act according to changing circumstances. Behavior of the masses shifts from knowledge and reason-based to emotion-driven and illogical mutual imitation. This vicious cycle of uncertainty leads to social turmoil and destruction. Because of this, the state must pay special attention to reducing uncertainties and promoting rational thinking. The state should utilize professional know-how to forecast, calculate,

harness and control complicated and fluid situations. An independent judiciary and legal community can play an importance role in this space. However, if the authorities encourage or participate in mass hysteria, social uncertainty will spin out of control until crisis breaks out. At this moment, we need to listen to the thought-provoking words of Justice Breyer.

I cannot help but notice that Justice Breyer repeatedly emphasized on the long journey to a country ruled by law. Nothing happens overnight so that there can be a sudden change of order. There are no magic pills for quick fixes. Indeed, it takes decades or longer to make rule of law a way of life. However, judges and lawyers as a group need to take actions right now. Step by step, the incremental efforts will lead change in the system. In the process of building rule of law, the needs of the market constitute the most basic precondition. The government must take the lead in respecting and complying with the constitution and the law. The “Trail of Tears” and the 101st Airborne Division escorting black students to white schools are best examples. History tells us the same story: A judgment is no more than a piece of paper. If there is no judgment on the constitutionality of the government’s exercise of its coercive power, the true meaning of rule of law cannot be determined.

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