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William J. Brennan, Jr.

How the Supreme Court Arrives at Decisions

Throughout its history the Supreme Court has been called upon to face many of the dominant social, political, economic and even philosophical issues that confront the nation. But Solicitor General Cox only recently reminded us that this does not

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"How the Supreme Court Arrives at Decisions," by William S. Brennan, Jr., *The New York Times*, October 12, 1963.

mean that the Court is charged with making social, political, economic or philosophical decisions.

Quite the contrary, the Court is not a council of Platonic guardians for deciding our most difficult and emotional questions according to the Justices' own notions of what is just or wise or politic. To the extent that this is a government function at all, it is the function of the people's elected representatives.

The Justices are charged with deciding according to law. Because the issues arise in the framework of concrete litigation they must be decided on facts embalmed in a record made by some lower court or administrative agency. And while the Justices may and do consult history and the other disciplines as aids to constitutional decisions, the text of the Constitution and relevant precedents dealing with that text are their primary tools.

It is indeed true, as Judge Learned Hand once said, that the judge's authority

> depends upon the assumption that he speaks with the mouth of others: the momentum of his utterances must be greater than any which his personal reputation and character can command; if it is to do the work assigned to it—if it is to stand against the passionate resentments arising out of the interests he must frustrate—he must preserve his authority by cloaking himself in the majesty of an over-shadowing past, but he must discover some composition with the dominant trends of his times.

Answers Unclear

However, we must keep in mind that, while the words of the Constitution are binding, their application to specific problems is not often easy. The Founding Fathers knew better than to pin down their descendants too closely.

Enduring principles rather than petty details were what they sought.

Thus the Constitution does not take the form of a litany of specifics. There are, therefore, very few cases where the constitutional answers are clear, all one way or all the other, and this is also true of the current cases raising conflicts between the individual and governmental power—an area increasingly requiring the Court's attention.

Ultimately, of course, the Court must resolve the conflicts of competing interests in these cases, but all Americans should keep in mind how intense and troubling these conflicts can be.

Where one man claims a right to speak and the other man claims the right to be protected from abusive or dangerously provocative remarks the conflict is inescapable.

Where the police have ample external evidence of a man's guilt, but to be sure of their case put into evidence a confession obtained through coercion, the conflict arises between his right to a fair prosecution and society's right to protection against his depravity.

Where the orthodox Jew wishes to open his shop and do business on the day which non-Jews have chosen, and the Legislature has sanctioned, as a day of rest, the Court cannot escape a difficult problem of reconciling opposed interests.

Finally, the claims of the Negro citizen, to borrow Solicitor General Cox's words, present a "conflict between the ideal of liberty and equality expressed in the Declaration of Independence, on the one hand, and, on the other hand, a way of life rooted in the customs of many of our people."

Society Is Disturbed

If all segments of our society can be made to appreciate that there are such conflicts, and that cases which involve constitutional rights often require difficult choices, if this alone is accomplished, we will have immeasurably enriched our common understanding of the meaning and significance of our freedoms. And we will have a better appreciation of the Court's function and its difficulties.

How conflicts such as these ought to be resolved constantly troubles our whole society. There should be no surprise, then, that how properly to resolve them often produces sharp division within the Court itself. When problems are so fundamental, the claims of the competing interests are often nicely balanced, and close divisions are almost inevitable.

Supreme Court cases are usually one of three kinds: the "original" action brought directly in the Court by one state against another state or states, or between a state or states and the federal government. Only a handful of such cases arise each year, but they are an important handful.

A recent example was the contest between Arizona and California over the waters of the lower basin of the Colorado River. Another was the contest between the federal government and the newest state of Hawaii over the ownership of lands in Hawaii.

The second kind of case seeks review of the decisions of a federal Court of Appeals—there are eleven such courts—or of a decision of a federal District Court—there is a federal District Court in each of the fifty states.

The third kind of case comes from a state court—the Court may review a state court judgment by the highest court of any of the fifty states, if the judgment rests on the decision of a federal question.

When I came to the Court seven years ago the aggregate of the cases in the three classes was 1,600. In the term just completed there were 2,800, an increase of 75 percent in seven years. Obviously, the volume will have doubled before I complete ten years of service.

How is it possible to manage such a huge volume of cases? The answer is that we have the authority to screen them and select for argument and decision only those which, in our judgment, guided by pertinent criteria, raise the most important and far-reaching questions. By that device we select annually around 6 percent—between 150 and 170 cases—for decision.

Petition and Response

That screening process works like this: when nine Justices sit, it takes five to decide a case on the merits. But it takes only the votes of four of the nine to put a case on the argument calendar for argument and decision. Those four voters are hard to come by—only an exceptional case raising a significant federal question commands them.

Each application for review is usually in the form of a short petition, attached to which are any opinions of the lower courts in the case. The adversary may file a

response—also, in practice usually short. Both the petition and response identify the federal questions allegedly involved, argue their substantiality, and whether they were properly raised in the lower courts.

Each Justice receives copies of the petition and response and such parts of the record as the parties may submit. Each Justice then, without any consultation at this stage with the others, reaches his own tentative conclusion whether the application should be granted or denied.

The first consultation about the case comes at the Court conference at which the case is listed on the agenda for discussion. We sit in conference almost every Friday during the term. Conferences begin at ten in the morning and often continue until six, except for a half-hour recess for lunch.

Only the Justices are present. There are no law clerks, no stenographers, no secretaries, no pages—just the nine of us. The junior Justice acts as guardian of the door, receiving and delivering any messages that come in or go from the conference.

Order of Seating

The conference room is a beautifully oak-paneled chamber with one side lined with books from floor to ceiling. Over the mantel of the exquisite marble fireplace at one end hangs the only adornment in the chamber—a portrait of Chief Justice John Marshall. In the middle of the room stands a rectangular table, not too large but large enough for the nine of us comfortably to gather around it.

The Chief Justice sits at the south end and Mr. Justice Black, the senior Associate Justice, at the north end. Along the side to the left of the Chief Justice sit Justices Stewart, Goldberg, White and Harlan. On the right side sit Justice Clark, myself and Justice Douglas in that order.

We are summoned to conference by a buzzer which rings in our several chambers five minutes before the hour. Upon entering the conference room each of us shakes hands with his colleagues. The handshake tradition originated when Chief Justice Fuller presided many decades ago. It is a symbol that harmony of aims if not of views is the Court's guiding principle.

Each of us has his copy of the agenda of the day's cases before him. The agenda lists the cases applying for review. Each of us before coming to the conference has noted on his copy his tentative view whether or not review should be granted in each case.

The Chief Justice begins the discussion of each case. He then yields to the senior Associate Justice and discussion proceeds down the line in order of seniority until each Justice has spoken.

Voting goes the other way. The junior Justice votes first and voting then proceeds up the line to the Chief Justice, who votes last.

Each of us has a docket containing a sheet for each case with appropriate places for recording the votes. When any case receives four votes for review, that case is transferred to the oral argument list. Applications in which none of us sees merits may be passed over without discussion.

Now how do we process the decisions we agree to review?

There are rare occasions when the question is so clearly controlled by an earlier decision of the Court that a reversal of the lower court judgment is inevitable. In these rare instances we may summarily reverse without oral argument.

Each Side Gets Hour

The case must very clearly justify summary disposition, however, because our ordinary practice is not to reverse a decision without oral argument. Indeed, oral argument of cases taken for review, whether from the state or federal courts, is the usual practice. We rarely accept submissions of cases on briefs.

Oral argument ordinarily occurs about four months after the application for review is granted. Each party is usually allowed one hour, but in recent years we have limited oral argument to a half-hour in cases thought to involve issues not requiring longer arguments.

Counsel submit their briefs and record in sufficient time for the distribution of one set to each Justice two or three weeks before the oral argument. Most of the members of the present Court follow the practice of reading the briefs before the argument. Some of us often have a bench memorandum prepared before the argument. This memorandum digests the facts and the arguments of both sides, highlighting the matters about which we may want to question counsel at the argument.

Often I have independent research done in advance of argument and incorporate the results in the bench memorandum.

We follow a schedule of two weeks of argument from Monday through Thursday, followed by two weeks of recess for opinion writing and the study of petitions for review. The argued cases are listed on the conference agenda on the Friday following argument. Conference discussions follow the same procedure I have described for the discussions of certiorari petitions.

Opinion Assigned

Of course, it is much more extended. Not infrequently discussion of particular cases may be spread over two or more conferences.

Not until the discussion is completed and a vote taken is the opinion assigned. The assignment is not made at the conference but formally in writing some few days after the conference.

The Chief Justice assigns the opinions in those cases in which he has voted with the majority. The senior Associate Justice voting with the majority assigns the opinion in the other cases. The dissenters agree among themselves who shall write the dissenting opinion. Of course, each Justice is free to write his own opinion, concurring or dissenting.

The writing of an opinion always takes weeks and sometimes months. The most painstaking research and care are involved.

Research, of course, concentrates on relevant legal materials—precedents particularly. But Supreme Court cases often require some familiarity with history, eco-

nomics, the social and other sciences, and authorities in these areas, too, are consulted when necessary.

When the author of an opinion feels he has an unanswerable document he sends it to a print shop, which we maintain in our building. The printed draft may be revised several times before his proposed opinion is circulated among the other Justices. Copies are sent to each member of the Court, those in the dissent as well as those in the majority.

Some Change Minds

Now the author often discovers that his work has only begun. He receives a return, ordinarily in writing, from each Justice who voted with him and sometimes also from the Justices who voted the other way. He learns who will write the dissent if one is to be written. But his particular concern is whether those who voted with him are still of his view and what they have to say about his proposed opinion.

Often some who voted with him at conference will advise that they reserve final judgment pending the circulation of the dissent. It is a common experience that dissents change votes, even enough votes to become the majority.

I have had to convert more than one of my proposed majority opinions into a dissent before the final decision was announced. I have also, however, had the more satisfying experience of rewriting a dissent as a majority opinion for the Court.

Before everyone has finally made up his mind a constant interchange by memoranda, by telephone, at the lunch table continues while we hammer out the final form of the opinion. I had one case during the past term in which I circulated ten printed drafts before one was approved as the Court opinion.

Uniform Rule

The point of this procedure is that each Justice, unless he disqualifies himself in a particular case, passes on every piece of business coming to the Court. The Court does not function by means of committees or panels. Each Justice passes on each petition, each time, no matter how drawn, in long hand, by typewriter, or on a press. Our Constitution vests the judicial power in only one Supreme Court. This does not permit Supreme Court action by committees, panels, or sections.

The method that the Justices use in meeting an enormous caseload varies. There is one uniform rule: Judging is not delegated. Each Justice studies each case in sufficient detail to resolve the question for himself. In a very real sense, each decision is an individual decision of every Justice.

The process can be a lonely, troubling experience for fallible human beings conscious that their best may not be adequate to the challenge.

"We are not unaware," the late Justice Jackson said, "that we are not final because we are infallible; we know that we are infallible only because we are final."

One does not forget how much may depend on his decision. He knows that usually more than the litigants may be affected, that the course of vital social, economic and political currents may be directed.

This then is the decisional process in the Supreme Court. It is not without its tensions, of course—indeed, quite agonizing tensions at times.

I would particularly emphasize that, unlike the case of a Congressional or White House decision, Americans demand of their Supreme Court judges that they produce a written opinion, the collective expression of the judges subscribing to it, setting forth the reason which led them to the decision.

These opinions are the exposition, not just to lawyers, legal scholars and other judges, but to our whole society, of the bases upon which a particular result rests—why a problem, looked at as disinterestedly and dispassionately as nine human beings trained in a tradition of the disinterested and dispassionate approach can look at it, is answered as it is.

It is inevitable, however, that Supreme Court decisions—and the Justices themselves—should be caught up in public debate and be the subjects of bitter controversy.

An editorial in *The Washington Post* did not miss the mark by much in saying that this was so because

> one of the primary functions of the Supreme Court is to keep the people of the country from doing what they would like to do—at times when what they would like to do runs counter to the Constitution. . . . The function of the Supreme Court is not to count constituents; it is to interpret a fundamental charter which imposes restraints on constituents. Independence and integrity, not popularity, must be its standards.

Freund's View

Certainly controversy over its work has attended the Court throughout its history. As Professor Paul A. Freund of Harvard remarked, this has been true almost since the Court's first decision:

> When the Court held, in 1793, that the state of Georgia could be sued on a contract in the federal courts, the outraged Assembly of that state passed a bill declaring that any federal marshal who should try to collect the judgment would be guilty of a felony and would suffer death, without benefit of clergy, by being hanged. When the Court decided that state criminal convictions could be reviewed in the Supreme Court, Chief Justice Roane of Virginia exploded, calling it a "most monstrous and unexampled decision. It can only be accounted for by that love of power which history informs us infects and corrupts all who possess it, and from which even the eminent and upright judges are not exempt."

But public understanding has not always been lacking in the past. Perhaps it exists today. But surely a more informed knowledge of the decisional process should aid a better understanding.

It is not agreement with the court's decisions that I urge. Our law is the richer and the wiser because academic and informed lay criticism is part of the stream of development.

Consensus Needed

It is only a greater awareness of the nature and limits of the Supreme Court's function that I seek.

The ultimate resolution of questions fundamental to the whole community must be based on a common consensus of understanding of the unique responsibility assigned to the Supreme Court in our society.

The lack of that understanding led Mr. Justice Holmes to say fifty years ago:

> We are very quiet there, but it is the quiet of a storm center, as we all know. Science has taught the world skepticism and has made it legitimate to put everything to the test of proof. Many beautiful and noble reverences are impaired, but in these days no one can complain if any institution, system, or belief is called on to justify its continuance in life. Of course we are not excepted and have not escaped.

Painful Accusation

> Doubts are expressed that go to our very being. Not only are we told that when Marshall pronounced an Act of Congress unconstitutional he usurped a power that the Constitution did not give, but we are told that we are the representatives of a class—a tool of the money power.
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> I get letters, not always anonymous, intimating that we are corrupt. Well, gentlemen, I admit that it makes my heart ache. It is very painful, when one spends all the energies of one's soul in trying to do good work, with no thought but that of solving a problem according to the rules by which one is bound, to know that many see sinister motives and would be glad of evidence that one was consciously bad.
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> But we must take such things philosophically and try to see what we can learn from hatred and distrust and whether behind them there may not be a germ of inarticulate truth.
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> The attacks upon the Court are merely an expression of the unrest that seems to wonder vaguely whether law and order pay. When the ignorant are taught to doubt they do not know what they safely may believe. And it seems to me that at this time we need education in the obvious more than investigation of the obscure.

❖❖ Interpreting the Constitution

Justice William J. Brennan, Jr., in his discussion of how the Supreme Court arrives at decisions in the preceding selection, points out that inevitably Supreme Court decisions and the justices are the subjects of public debate and often bitter controversy. It is not surprising that when Supreme Court justices and lower-court judges as well follow the early dictum of Chief Justice John Marshall, which he stated in *Marbury* v. *Madison* in 1803, that "It is emphatically the province and duty of the judicial department to say what the law is," they will become the center of political storms stirred up by those who feel the Court has overstepped its bounds.

While the Supreme Court may not enter unequal political combat, as John Roche contends in selection 63, it has made many highly controversial decisions since Roche wrote his article in 1955. (For example, see selections 18–22.) One conservative law scholar has gone so far as to state, "In the years since *Brown* v. *Board of Education* (1954) nearly every fundamental change in domestic social policy has been brought about not by the decentralized democratic (or, more accurately, republican) process contemplated by the Constitution, but simply by the Court's decree."[1]

Conservatives, clearly unhappy with the trend in Supreme Court decision making not only during the Warren era (1953–1969) but under the chief justiceship of Warren Burger (1969–1986), charged that the Court's "loose" constitutional interpretations have been contrary to the wishes of the majority of the people and have made a mockery of the Constitution itself. Responding to their conservative constituencies, Republican presidential candidates Richard M. Nixon in 1968 and Ronald Reagan in 1980 promised to take action to reverse the Supreme Court's alleged liberalism by appointing conservative justices.

Ironically, one of Nixon's appointees, Harry Blackmun, authored the Court's controversial abortion decision in 1973 (see selection 19). Another Nixon appointee, Lewis Powell, joined the more liberal justices in the *Bakke* case (see selection 21) to allow universities and the colleges to take race into account in their admissions processes, a tacit although far from direct support for the affirmative action programs conservatives so strongly opposed. Nixon found, as had Dwight D. Eisenhower who appointed Earl Warren to be chief justice in 1953, that presidents have no control over their appointees once they are on the Court.

For his part in the conservative cause, President Ronald Reagan, while choosing Sandra Day O'Connor as the first woman Supreme Court justice, tried to make certain beforehand that she would support conservative positions on such issues as abortion. Reagan added three conservative Supreme Court justices and had an even greater impact upon the lower federal judiciary, which he "stacked" with conservative judges.

Debate over the role of the Supreme Court intensified during Reagan's second term. His attorney general, Edwin Meese, in a speech given before the American Bar Association, attacked the Supreme Court for interpreting the Constitution according to its own values rather than the intent of the Founding Fathers. In response, Associate Justice William J. Brennan, speaking to a Georgetown University audience, called the attorney general "arrogant" and "doctrinaire," stating that it is impossible to "gauge accurately the intent of the framers on the application of principle to specific, contemporary questions." Another Supreme Court justice, John Paul Stevens, joined the attack on Meese.

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[1]Lino A. Graglia, "How the Constitution Disappeared," *Commentary*, February 1986, p. 19.

The arguments in the 1980s over the proper role of the Supreme Court recalled the debate in the early days of the Republic between proponents of "strict" construction of the Constitution on the one hand and "loose" construction on the other. No less an intellectual and political giant than Thomas Jefferson favored the former approach, arguing that judges should not interpret the Constitution to reflect their own political values. He particularly opposed Chief Justice John Marshall's "loose" construction of congressional authority under Article I and the implied powers clause, which supported an expansion of national power over the states. Prior to Marshall's historic decisions in *McCulloch* v. *Maryland* (1819) and *Gibbons* v. *Ogden* that flexibly interpreted the Constitution to support broad congressional powers over the states (see selection 9), Alexander Hamilton had provided the rationale for loose construction in *The Federalist.* He suggested that Congress should be able to carry out its enumerated powers by whatever means it considered to be necessary and proper.

An old adage states that where one stands on political issues depends upon whose ox is being gored. Liberal supporters of Franklin D. Roosevelt attacked the conservative Supreme Court during the early New Deal when it was systematically declaring the core of FDR's program to be unconstitutional. After his overwhelming 1936 electoral victory Roosevelt attempted to "pack" the Court by seeking congressional approval of legislation that would give him the authority to appoint one new justice for each justice over 70 years of age. The legislation would have given him at the time the authority to appoint a Supreme Court majority because there were seven septuagenarian justices on the Court. Conservatives attacked Roosevelt's plan, charging that it was an unconstitutional and even un-American attempt to undermine the Supreme Court's independence. They wanted the Court to continue acting as a superlegislature as long as it advocated conservative views. However, when the tables were turned, and the Court became the advocate of "liberal" views during the Warren era, conservatives were quick to attack it for acting as a superlegislature against the will of the majority, which was the same argument liberals had used against the Court in the 1930s.