How the Supreme Court Arrives at Decisions

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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.

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

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.

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.

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.

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.

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.

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. 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.