

unequivocally that the classical jurisprudential understanding of behavior on the Court was incomplete. As a result of their efforts, we do not even blink at the suggestion that the Court is a political institution and that judges exhibit political behavior. Indeed we expect them to. Now, it is those times that justices act in ways that are different from others involved in similar political tasks that the social scientist should find interesting and remarkable.

Should this contextual discussion seem overwrought, there is a reason for it. In much of this work, I am arguing that the Court acts much less strategically than we political scientists might expect. The overwhelming impression I received from my research is that there is little bargaining and strategy on the Court with regard to the cert. process. There is some, however, and it is more than most of the clerks, and perhaps some of the justices, acknowledge. Still, it is only minimal when compared to the potential for its use as demonstrated by Murphy, and there is certainly less than described in *The Brethren*. There is also probably less bargaining and strategy at the opinion writing stage than we commonly imagine, although there is clearly more than at cert.<sup>9</sup> If I am correct, it poses some problems for some of the underpinnings of our empirical work, much of which presumes highly strategic behavior. Lest lawyers take heart that a political scientist has finally seen the light, I suspect that many of my evaluations and conclusions will not sit well with them either. Political behavior is occurring more frequently and in ways different from those lawyers usually take into account when trying to understand the Court. I often saw political behavior in the very situations my informants thought they were describing as apolitical.

### Bargaining

*Perry:* You have said that often you would send around many drafts of an opinion to negotiate—

*Justice:* [Interrupting and smiling, with sarcasm in his voice] We don't negotiate, we accommodate. And this is a perfectly appropriate and good procedure because this is a court of nine people and it is our responsibility to have an opinion of the Court—a unanimous opinion if possible when the

9. I did not systematically examine opinion-writing behavior during my interviews, but naturally I heard many interesting things about it.

Court can come up with one. And so it is good to have this accommodation, and attempts to accommodate.

*Perry:* I understand, and I am wondering if anything like that goes on to facilitate accommodation when making decisions on cert.?

The justice's response to this question is given later, but he saw very little. Discussion with a second justice went as follows:

*Perry:* When you are writing an opinion, you send around drafts and another justice says, drop this section or drop that section—

*Justice:* [Interrupting] Clearly, and that's something we ought to do. In fact in \_\_\_\_\_ v. \_\_\_\_\_,<sup>10</sup> which I wrote, I was checking once and I noticed that there were over twenty circulations, and for many cases there are a half dozen or more circulations. Sometimes when I am looking at [the case] I am utterly amazed at how many I did. But with cert., that never happens.

The question, of course, is why. If justices believe that it is constructive and appropriate at the opinion writing stage to try to persuade, to discuss, to bargain (or accommodate) on dropping a line from an opinion, then conceivably an attempt to persuade at the cert. stage might also be helpful and appropriate. Moreover, when working with a group of nine people, sometimes the best strategy would be to try to persuade one or two colleagues in private. We know that when justices draft an opinion, they do not always send copies of all drafts to all justices. There are certainly times when they communicate one-on-one. In fact, I had just gone into one justice's chambers when a phone call from another justice was put through to him. He said:

\_\_\_\_\_, thank you for making the changes, and I would be delighted to join now. You have done a real nice job with this one.

10. This was a truly landmark case. I regret that I cannot reveal the case without identifying the justice, but I am somewhat surprised that there were twenty circulations. I am sure that this is a case where there was a strong desire to have a unanimous opinion, but given the dissents that were eventually published, it is difficult for me to imagine that there was ever any hope that unanimity could be achieved.

Surely the accommodation going on between these two justices is appropriate, indeed desirable—"an open covenant openly arrived at."<sup>11</sup> Why, then, should not a justice try to call and convince another justice to vote a particular way on cert.? Why would it not be wise and perfectly appropriate for a justice to make the following hypothetical phone call:

Sandra, there is a case coming up this Friday, *Montague v. Capulet*, which I think raises the issue that concerned you in your dissent in *Lear*. Although it wasn't obvious to me at first, I believe *Montague* is a particularly good case to allow us to get to your concern without bringing in the complications we faced in *Lear*. I am sure in this case that Byron would join us on the merits. But I am worried that it may be difficult to get four on this one for cert., because Harry and John don't want the evidence issue raised again, which could come up in this case. But if we can get this case reviewed, I think we can meet your concerns without raising the problems that bother Thurgood, and frankly, I think Harry and John are wrong.

There seems to me to be nothing improper here. In principle it does not seem to differ from trying to persuade another justice for a vote on the merits, or for the inclusion or exclusion of a phrase in an opinion. The fact of the matter is, however, that such a discussion rarely transpires. And for some reason, many of my informants recoiled, or at least cringed, at the suggestion that it might. A few thought it would be a good idea but said it just did not happen. Others, while steadfastly maintaining that no bargaining or maneuvering goes on, would proceed to describe situations that by any other name would still smell like bargaining. It would not, however, resemble the above hypothetical scenario.

One question asked of every informant was whether or not there was any bargaining, or phone calling, or attempts to persuade other justices on cert. I soon learned that this question had to be phrased very carefully. It became necessary to reassure most of the informants that "admitting" the justices act politically at times is not admitting any

11. Witnessing this telephone conversation reminded me of the statement by Senator Alben W. Barkley after an explicit deal had been made on the floor of the U.S. Senate: "The colloquy just had confirms and justifies the Woodrow Wilsonian doctrine of open covenants openly arrived at (Laughter)." *Congressional Record* (Daily Edition), February 16, 1956, pp. 2300-2301, as quoted in Donald R. Matthews, *U.S. Senators and Their World* (New York: Vintage Books, 1960), p. 100.

impropriety. I, of course, would not say this per se. I tried to do it by the way I phrased the question. After my first interview with a justice, who happened to be the one quoted above about "accommodation," I usually prefaced the question by saying something like:

We are aware from historical papers and common knowledge that justices bargain and negotiate over certain passages in opinions, trying to persuade one another. Perhaps they agree to drop a phrase to try to bring a justice on board; or they may call or talk to one another to persuade on a certain issue. And we of course have all those wonderful anecdotes about Frankfurter and his attempts at persuasion. In my interview with a justice, he smiled and said, "we don't negotiate, we accommodate." So we know that accommodation and strategy take place at the opinion writing stage. I want to ask if anything like this goes on at cert.

Over the next several pages, one can see how many of the informants answered this question, and what they said about interchamber bargaining and negotiating generally. First I report what the justices have to say about their own behavior; then what the clerks have to say about the justices; and finally, what clerks say about their fellow clerks.

#### *Justices on Justices*

*Perry:* Are there any calls chamber to chamber, or discussion between chambers on cert.?

*Justice:* Well, not with me. It does not occur, to my knowledge, prior to conference. Never have I had anyone call me or suggest how I ought to vote.

*Perry:* What about after a case has been relisted? Is that somewhat of an invitation to another justice saying "convince me?"

*Justice:* No, I try to convince myself. Now there are times that there may be written memos and further thoughts. There are second looks. That may be on three or four cases per conference. But the arguments are there in the papers so I don't really think it would make much difference.

One can see that this justice seems to think that his time is better spent studying "the papers" (the actual documents, not memos from another

justice) rather than engaging in collegial discussion. Witness what he said in another context.

Chief Justice Warren was credited a lot for having a unanimous Court in *Brown*. The cost was having "all deliberate speed" come in. I think it would have been better to have the dissent spelled out . . . have the dissenters tell their problems, and then have a strong opinion to answer the dissent rather than coming down with a weak opinion so that everyone would sign. I think it is better to acknowledge what argument there is on a controversial issue like that.

I found this statement quite surprising. I had always assumed, and I think the literature does, that the desire for unanimity among the justices is stronger than this justice implies. He, however, is probably an outlier in this regard.

The other justices seemed to suggest that some interchamber communication takes place, but they emphasized that it was rare.<sup>12</sup> Incidentally, it was not because they were giving textbook descriptions—one only need look at what they told me about other strategies to see that they were willing to acknowledge their political nature. But for reasons elaborated by the clerks, reported below, the justices rarely bargain or try to persuade on cert.

A second justice gave what appears to be a very different response from the first.

*Perry:* Is there ever any talking between justices before you go in [to conference] to plan strategy?

*Justice:* That depends on the justice and the case, but that does go on sometime, yes.

This response is somewhat out of context, however, because he suggests later in the interview that such occurrences are rare. The perspective of another justice:

12. Several justices have disclosed that little interchamber communication exists and Justice Powell, in particular, has referred to the Court as nine separate law firms. In a speech to the American Bar Association in the summer of 1976 (quoted in Richard L. Williams, "Supreme Court of the United States," *Smithsonian*, February 1977, p. 89), Powell said: "I had thought of the Court as a collegial body in which the most characteristic activities would be consultation and cooperative deliberation, aided by a strong supporting staff. I was in for more than a little surprise . . . The Court is perhaps one of the last citadels of jealously preserved individualism . . . Indeed, a Justice may go through an entire term without being once in the chambers of all the eight other members of the Court."

*Justice:* At the opinion writing stage we don't have enough of that in my opinion. We are writing too much; too many concurrences and too many dissents. I am as great a violator as anyone. At the cert. stage, the talking is even less, but I don't want to say none . . . There really isn't much intercourse among chambers about picking up a fourth vote. Now there is a good deal of institutional discussion [in conference] over which case to choose to resolve an issue, and many times we don't agree about that.

*Perry:* Some have suggested that circulating dissents from denials facilitates a discussion process between chambers.

*Justice:* Writing does this somewhat, but you don't have the types of visits that one associates with Felix Frankfurter or Justice Stone.

A third justice offered some explanation of why interchamber discussion is rare.

Maybe if we had time to circulate something, you might get better decisions on cert., but there is really not the time. We've got to hear oral arguments, write opinions, and do all these other things. If you go back to [earlier] times where they spent all Saturday in conference and sometimes Monday or Tuesday . . . we just wouldn't have time for that. Now there are plenty of strategic considerations, but I think those are really made in the individual chambers.

Notice three things: the concern with time and concomitantly the idea that the proper way to communicate among justices is through writing. These are flagged here because they are discussed later at some length. Also note the separation of "inter-" from "intra-" chamber strategy. The justice went on to say:

I suppose that for people who debate this in the abstract, they might be more interested in the dynamics. Lawyers break things down into such minute little parts that we may not see the importance of the dynamics as well as a political scientist.

The justice was making one of two points: either, that political scientists can navel gaze and can suggest that interchamber negotiation might be profitable, while the day-to-day reality justices face precludes them from the luxury of engaging in such tactics; or, as lawyers, his brethren are not looking at the bigger picture as perhaps they should.

*Clerks on Justices*

A litany of responses by clerks to my initial question on bargaining and strategy follows. I point out that this was an initial question; often when I probed on specifics in a different context, I would hear things that to me sounded like negotiation or strategy—the informant all the while maintaining that the cert. process was devoid of such activity.

The first quotation is obviously from someone who is not naive politically and has some basis for a comparative evaluation.

Now if you're talking about bargaining in the Machiavellian sense, I saw it occur in other branches of government, for example when I worked in [the executive branch]. It was really amazingly absent from the Court, and I didn't understand quite how free the Court was of it until I did work in other areas of government. There is an integrity about the process almost beyond belief. Now that is not to say that there are not people with strong views and they might try to lure in a compatriot by a certain analysis . . . But, that's how the Court probably should work. There was never to my knowledge a deal such as I'll trade a vote on Case A for a vote on Case B. That goes on in the Congress and the White House all the time. It is routine there. You don't support something, or you threaten not to support something. It doesn't happen that way in the Court. For someone who is standing looking at it, I would think that they would be amazed. It's incredible how it doesn't go on. I think cases are each decided on their merits. Justices vote on Case A and they vote on Case B. When I went to [the executive branch] people would disbelieve me when I would say that. They insisted that political processes work differently. But that just doesn't happen in the cert. process. (C19)

They may not believe it in the executive branch, and political scientists might be skeptical, but most clerks gave initial answers along the same lines. Two clerks from different chambers offer another comparative perspective:

I saw a lot more bargaining and stuff going on when I was on the Circuit Court than on the Supreme Court. (C14)

Very little of that went on in the Supreme Court compared to the \_\_\_\_th Circuit where I clerked. The justices didn't do

enough of it in my opinion . . . I can only remember one or two times where anyone ever even went down to another chamber. (C45)

One clerk described the situation as only a young lawyer could: "I'm not really aware of any *ex parte* contacts" (C49). Another clerk, who would not object to such contacts, said:

I think there is nothing wrong with that. I think informal communication should occur. But they seem to make up their minds on cert. independently . . . There is a real press of cases, so this kind of discussion tends not to happen even if it would be helpful. (C63)

One clerk suggested that his justice, though a collegial person, made his decisions absent collegial discussion.

He had a lot of contact and was friendly with the justices, some to a greater extent than others, but he really wasn't willing to accommodate very much, and a lot of his separate opinions really hinge on some rather minor distinctions. I would be surprised if the justice never called on an issue, but I don't think there was much of that that went on. He wrote on the memo "deny," "grant," or "question mark." I don't really ever remember him changing his vote after conference. At some time he may have said, "Justice \_\_\_\_\_ had a persuasive speech," and he might have changed a vote, but I don't really remember it. (C52)

One clerk indicated that there was some interchamber phone calling between justices, but it did not seem to be frequent or to be an attempt at persuasion.

There was some phone calling. Someone would call Justice \_\_\_\_\_ and ask if he had seen a certain case and what do you think; that is, is there really an issue here, should we do something? Or when they had lunch together, he might come back and say Justice \_\_\_\_\_ wants me to take a look at this. (C53)

The remaining responses to the general bargaining question are grouped under common reasons that emerged to explain the lack of bargaining. An evaluation of these reasons follows.

## TIME

The prominent explanation for such little preconference contact had to do with time.

One might well expect that of a group and I don't think that it would be inappropriate; it would make sense. But the truth of it is there is so little time that I think most of what goes on, goes on in conference. (C21)

There really isn't that much time, but I wouldn't be surprised if they communicated some, maybe at lunch. But there is not real politics. (C28)

Time pressures militate against using the cert. process [to bargain]. (C58)

I rarely saw that . . . Before conference, there was very little. For one reason, justices got ready at different times for going into conference . . . but basically there's not the time and there is really not that much of an opportunity. (C8)

## NOTHING TO NEGOTIATE

Several felt that on cert., unlike an opinion, there is nothing really to negotiate. They presume that negotiation would never involve more than one case at a time.<sup>13</sup>

There is no real way to bargain on cert. as there is with opinions, because the cert. vote is up or down, so there is no real room to bargain. (C11)

Two informants qualified this notion, but their comments deal with discussion in conference, not between chambers before conference.

There's not really much to bargain with. Your options are pretty limited. It's basically to grant or not. Not like the writing of an opinion. There were times there would be a series of cases which all raised the same issue and there was some discussion over which one of the cases they should take. So, there's that type of give-and-take. (C8)

13. This presumption is explored in greater detail later in this chapter.

There is nothing really to bargain with. Well, with the exception that two think the case should be granted and summarily reversed, and two others think that there should be argument on the merits. There may be some bargaining on that. (C6)

## CASE FUNGIBILITY

A third frequently heard explanation for the lack of bargaining is that no individual case is seen as that important, so there is no need to waste time negotiating for a particular case. If the issue is important, it will come up again in another case, and the latter case may well have attributes that will cause recalcitrant justices to vote to grant. This sentiment that a given case is not particularly important was heard frequently in many different contexts. I have dubbed it the "fungibility of cases" and will return to it later.

Frankly, they don't care enough about any individual case to spend a lot of time politicking . . . Another case may come up with the issue. (C2)

I think one of the reasons you don't have more lobbying is that it just isn't that important to anybody. Almost any important issue will come up again. I would be very astonished if the justice would call and try to convince someone on a cert. (C31)

No, I don't think they see any one case as being that important. Oh, maybe Justice \_\_\_\_\_ or Justice \_\_\_\_\_ did, but I don't think [his justice] ever did. (C36)

There is no bargaining before the cert. process to my knowledge. They certainly didn't have any horse trading of votes. It is hard to imagine that. Largely because it is hard to imagine that an important issue they are interested in wouldn't come up again. There is really even very little interplay among the clerks on the cert. process. (C48)

It is very rare that taking one case would be particularly important . . . Cases are not that important in and of themselves, and if they did do any bargaining, it would have to be a pretty rare case. I once heard that Justice Harlan made a great plea to take *Cohen v. California*. (C46)

## NORMS

Another set of responses seemed to suggest that preconference discussion was somehow "against the rules."

*Clerk:* They do play by the rules. Look, judges have more business-like attitudes than one might think are possible with such great issues. I mean they treat it in a business way, they don't get all that emotionally involved in most of these . . . I want to emphasize that Justice E and Justice F and Justice G still think of themselves as lawyers deciding issues. They just don't spend much time in collegiate little discussion. They just vote. I think there is very little politicking before a conference.

*Perry:* What about Justices H and J?

*Clerk:* I think there was probably surprisingly little politicking there too. (C2)

*Clerk:* I think when I was there, agenda setting went pretty much according to the rules. This is the way I think that the Court ought to be—following the rules. Maybe it was quite different on the Warren Court. (C55)

Of course, there are no such rules, yet many seem to believe there is an unwritten rule prohibiting bargaining and attempts at persuasion.

## AVOIDANCE

Finally, several clerks suggested that some justices did not like to deal with other justices in face-to-face situations.

In some ways, this working like nine separate law firms is one of the things I think is a problem with this Court. They don't talk to each other when a controversial issue comes up. It seems like you would want to get together and talk because new approaches would develop, but instead when controversy arises they seem to all go into their own different little worlds, and I think the reason for that is that there are no real politicians . . . They find it somewhat uncomfortable to talk to one another. (C63)

I'd say there's little to none [interchamber discussion]. The only time there may be some of that is when occasionally Justice \_\_\_\_\_ put a case on the discuss list. There may be some at that stage, but the justices don't talk that much to each

other. It was a big event whenever anyone from the other chambers came by. And some almost never came by. They really worked by memo. In fact, there was not as much bargaining on an opinion as one might think. I think they have kind of a respect for each other's individual egos, and they don't enjoy treading on it too much. (C51)

They have to live with each other too long and at too close quarters to go about lobbying. (C34)

The Supreme Court is really not a very collegial body in a lot of ways. I can only remember Justice \_\_\_\_\_ talking to about half the other justices when they weren't in conference. (C26)

Phone calls exist to some extent, although they're very worried about talking to each other too much. In a sense it's really difficult to live with each other. They've got to be congenial and be with each other for a long time, and they're facing very tough issues and it's kind of difficult to live with each other in some ways. And so rather than confront each other face to face, they often put it in writing . . . It's like being in a fraternity or a sorority, or any group. You get to the point that when they leave their socks out it really starts driving you crazy. You've got to learn to live with it. They feel very strongly about the organization. In an organizational sense, by writing and not doing this type of stuff it gives rules to abide by, and if you bend the rules too much and go around discussing things ad hoc, you'll have real problems with an organization. (C27)

Tempting as it is, I shall resist cheap metaphorical comparisons between the Court and fraternities. I will suggest that the last informant has a rather simplified understanding of organizational dynamics. But if his view is widely shared, then that may be all that is important.

The vast majority of responses showed little or no interchamber communication prior to conference. This assessment was not universal, however, so I report some of the contradictions. The exceptions were heard rarely, and they even more rarely dealt with cert. considerations. Moreover, they usually did not imply that the justices tried one-on-one persuasion, but simply indicated that some justices were more gregarious than others. The most dramatic description to counter the picture I have painted was from a clerk about his own justice.

Sometimes you would look out and see Justice A in the hall, and he'd have one arm around the shoulder of Justice B and his other hand holding his elbow. You may have heard other people refer to him as a . . . ward boss. He acted that way sometimes. He was probably effective in a lot of instances. (C59)

This was the only clerk who even came close to suggesting such overt political behavior between justices, and therefore I am skeptical of his interpretation of the behavior he observed. Even so, all this clerk is suggesting is that the justice tried to persuade people outside conference. Undoubtedly some justices may think more politically than others, and some may have a personal style that is more like a politician. Some people are just more outgoing than others.

Most observers would assume that if "politicking" did go on, its instigation would most probably come from the ideological wings of the Court. Some justices do tend to be more strategic than others, as I shall discuss in the next chapter, but when it comes to attempts at persuasion, the more ideological justices did not sound much different from the "judges' judges."

Of the few clerks who did see some justice as a wheeler dealer, it was usually never their own. One clerk's musings were amusing:

Justice \_\_\_\_\_ did very little of that; though we often wondered if justices in the middle bloc plotted and tried to decide where people were going to come out and were planning cert. decisions with a sense of the strategy. (C21)

And of course, there were some contradictory assessments.

Justice A of course was all over the court lobbying as were his clerks and to a large extent so were B and C and their clerks. Justice D [his justice] really didn't do that much. I never really remember him going around lobbying to grant a case. I never really remember us going around lobbying to grant a case. Of course when you write a pool memo you have some stake in it hoping that the Court will accept your recommendation. (C24)

To my knowledge, Justice A never lobbied for a particular cert. decision with other justices. I'm not so sure that that was the case with all of the justices. What he did do is, sometimes he'd write something and circulate it but there was little of this telephoning and little Machiavellian maneuvering from

Justice A. *The Brethren* was very misleading, all this talking and discussion going back and forth. It just really didn't happen that way. (C9)

Justice C didn't really form alliances. I suspect A and B did, and E and some of the others. I suspect they talk a lot because sometimes it's a lot of trouble to have to write something, but Justice C was a fast writer and wrote a lot. When I had to draft an opinion, he always gave me something to write from, and as you know he writes a lot of separate opinions. He writes very fast. (C41)

But most clerks saw none of the justices as bargaining types, especially not their own. The following quotation is typical of responses I received about every justice.

Justice \_\_\_\_\_ . . . never really played politics. I don't think he knew how; he wasn't particularly good at counting noses and this type of thing.

No doubt from time to time one justice will try to persuade another on some issue outside conference. And, of course, such behavior is entirely appropriate. But most attempts at persuading and strategy take some form other than a one-on-one lobbying effort.

#### *Clerks on Clerks*

Though most informants agreed that there was little discussion among justices on cert., there was a wider range of opinion over the extent to which clerks engaged in interchamber conversations. Indeed, the preceding set of quotations demonstrate an inexorable tendency to imagine palace intrigue. Some of what follows has already been said in the previous chapters, but it bears additional examination in the present context. Clerks vary as to how they see their role generally, and as one might expect, that affects their behavior at cert.

*Clerk:* There's a fair amount of talk at lunch, like "I read your cert. memo and I can't possibly believe you came out with that decision"; or "your boss really let us down on this one." But I don't ever remember anyone saying, "could you try and talk your boss into voting to grant cert. on that." There's just not a lot of time to focus on cert. petitions, even for the clerks. And you are just less likely to get