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Deciding to Decide

Agenda Setting in the United States
Supreme Court

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Another vote that a justice can announce, however, is that he will “join three.” Obviously, it means that if there are three others who are voting to grant, the justice will give them a fourth vote.¹³ There is also a vote calling for a summary disposition. Some justices will say, “I will vote to reverse, but not to hear.” This latter practice has caused controversy, some of which has been aired publicly. Justice Marshall, especially, feels that the Court should not be treating summarily many of the cases that it does. Justice Brennan tended to share that view. Other justices have criticized the Court in specific instances for disposing of a particular case in summary fashion. Nevertheless, as with the “rule of four” to grant cert., an informal operating rule of the Court has developed which says that a case may be treated summarily if six justices agree. The decision is often made at the time of the cert. vote.

Relisting

Not all cases are disposed of the first time they appear on the conference list. For various reasons, cases are sometimes relisted. One of the most common reasons to relist is to “call for a response.” If the winning party below did not file a response brief in opposition to the petition for certiorari—an “opps.” as they are commonly called—then the Court sometimes requests one before making a cert. decision. When that happens, the case is “put over,” or “relisted,” which means that it is put on the agenda for a future conference after the response has been filed. If at the original conference there are only one or two votes to grant, there is probably no reason to call for a response. However, if any justice calls for a response, or asks that a case be relisted, it is done automatically regardless of the initial vote.

One variant of calling for a response is to call for the views of the solicitor general, or the “SG” as he is commonly called. He is the person who represents the United States in the Supreme Court.¹⁴ Until recently, the SG always filed a brief in opposition when a ruling was being appealed against the United States, but that is no longer so. The Court, then, may ask him for a response. Usually, however, calling for the views of the SG refers to a situation where the United States is not a party to the case, but where the case has a potentially significant impact upon the government. Here, the SG is asked to file an amicus brief on cert.¹⁵

13. “Join three” is given extended consideration in Chapter 6.

14. The role of the solicitor general is examined in greater detail in Chapter 5.

15. Many have written on the role of amicus participation in the Supreme Court.

case granted? Why would the following hypothetical “horse trade” be so inappropriate?

———, I know you believe that there is a real problem over this issue in the tax code and that we are being irresponsible for not addressing it. Now you know I don’t believe that tax questions belong in the U.S. Supreme Court. I don’t think we handle them well, and given their complexity, they take up an inordinate amount of time. And I know you think that these water rights issues in the Western states are trivial and do not belong in the Supreme Court. But I happen to think that they are important and we are being irresponsible for not addressing them. I’ll tell you what, I’ll agree to take this @#%& tax case if you will agree to take the water rights case.

Granted, there is something to be said for being wary of the lawyer’s version of Pandora’s Box—the infamous slippery slope. Once one begins trading cert. votes at what seems to be a rather innocuous level, one might start down some lubricious scarp. But surely if anyone can deal with slippery slopes, it is justices of the U.S. Supreme Court.

I am not arguing here that the Court *should* horse-trade votes at cert. I am suggesting that contrary to what informants said, there is something to negotiate if one looks at more than one case; and wholesale reactions of horror and normative indignation to such a notion are probably unjustified.

Join Three

If horse trading does not occur, which we might think of as an explicit *quid pro quo*, perhaps there is a way to gain votes that is less direct. Recall the join three.²⁰ At first blush, this appears to be the consummate logrolling device. If three justices wish to take a case, it seems highly likely that a fourth justice, in a sense of collegiality, or strategy, would be willing to add his vote. Granted, that might not happen on the most contentious cases, but on others, why not go ahead and give a fourth vote? That is usually not the way it works, however. What join three generally means to a justice is simply that he does not feel very strongly one way or the other, but if three others do, he sees enough merit in the case to give it a fourth vote. It is not logrolling as we commonly think of it in legislatures. Not only is it not used to “buy

20. See Chapter 3.

a vote," but it is rarely used for achieving goodwill. According to my informants, there are many times a case will get three votes and not pick up a fourth. Of course, there would be a cost to doing this in terms of increasing workload, but this cost seems rarely to be weighed against the goodwill it might engender.

Again we see why understanding a decision *process* is important. If a justice is going to join three, that is a determination he has made *prior* to conference, and he has already marked "join three" on the petition. If he is a relatively senior justice, he will have cast his join three before hearing most of his colleagues' votes, so his vote cannot be a token of goodwill unless there is communication prior to conference. Any justice may change his vote after he hears discussion, but that is rare.²¹ Now of course, oligopolists can price-fix without talking to one another because they know others' intentions. Political scientists refer to this in terms of anticipated reactions. Obviously that could occur with the join three, but from the interviews, that does not seem to be what it is all about. And in any event, if a justice wanted to do another justice a favor, he would just vote to grant. A join three is risky because, as described in Chapter 3, cases which receive only four votes with a join three are usually relisted.

I asked the justices about join three's.

Perry: I understand that there is something called joining three. I am not exactly sure what that means.

Justice: All of us use it. Some more than others. Justice _____ doesn't use it very much. He is a real black or white guy. He sees things very much one way or the other. But the way it is generally used is that it is a timid vote to grant. At times maybe there is doubt about something. What someone will say is, "if there are three to join, I'll vote to grant." It is kind of a hardy in-between vote. It is a practice I don't frown on. Sometimes you may have three or four join three's, so there aren't really three to join.

Perry: I've wondered about that. What happens?

Justice: Then it is denied. You have to have pretty much three solid votes. Generally, if a case makes it only with a join three, we will put it over because there is lukewarm interest.

Justice: I'll sometimes say that I join three. It is often on a case that I feel perhaps should be granted cert., but it's also

21. Recall the quotations from the justices in Chapter 3.

a case where I almost feel like why waste the time. We have so many other important things to do. But if someone else feels more strongly about it, I sometimes will join three.

Justice: All nine of us use the term. But I think we each have our own meaning. I can tell you what it means when I am using it. When I was voting ninth, a join three generally meant a grant. Obviously, when voting that late it was the same as a grant. When I use it, it generally means that it is something I would vote to grant, but that I wouldn't put it on the discuss list.

The last justice's response also tells us something about his attitude about putting cases on the discuss list. It suggests that he would only add cases that he felt should be granted, not ones that might be "iffy" and perhaps worth some discussion. Again, he and other justices come to the cert. conference with their minds fairly made up.

Although the first and third justices quoted above said that all nine justices use the join three, one told me that he did not.

Perry: When you were talking about the different things you might mark on the discuss list, for example, G, D, CFR,²² one of the things you didn't mention . . .

Justice: [Interrupting] Join three. That is something I never do. I've never done it. I don't criticize others for doing it . . . But I never do that because I feel more comfortable making my decision on my own appraisal. Some do it more than others. For some it is rare, and for some it is frequent.²³

Once more, note the desire to have the cert. decision be the sum of individual decisions rather than the result of a collective decision process. Were a justice trying to marshal cert. votes, a good strategy might be to convince a colleague to "at least join three." But the fact that at least two justices did not realize that the third justice never joins three adds to the evidence that this vote is not used strategically. It also affirms the notion of little interchamber communication.

One justice did see the join three mechanism in a more political way. Again, not a *quid pro quo*, but at least he was more interested in a

22. Grant; Deny; Call for a Response. These abbreviations are common to all justices and are what one would see written on the discuss list.

23. This was not the justice described earlier as rarely joining three.

collegial process than was the justice last quoted. The following is the response I received after the justice said that they accommodate rather than negotiate:

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

Justice: Yes . . . and you may know this, if three justices feel strongly that cert. should be granted, sometimes I will give a fourth vote. I will say that if you all feel that strongly, I will vote with you on that.

Trying to determine whether or not the justices logroll with a join three depends on what one means by the term. However one defines "logrolling," the point to be made here is its relative absence. Even this last justice is willing to let many cases die with three votes; it is only on a few where feelings are particularly strong that he is willing to accommodate. Contrast this with another collegial decision making body, Congress. Comparing branches is always risky, but the join three is not an example where we should necessarily expect different behavior from a congressman and a justice. No norm of "justice" comes into play. Granting a case review is, if anything, more just. Yet, the behavior of justices differs greatly from congressmen on the norm of reciprocity. We believe that most members of Congress will use opportunities to do favors for their colleagues whenever they can be done relatively costlessly; that is, by not having to sacrifice principle, angering one's constituency, and so on. Indeed, congressmen sometimes do favors even when it is quite costly. Well documented in the literature are the norms of reciprocity and going along with one's fellow congressmen when not constrained to act otherwise.²⁴ A join three situation seems to provide a justice with a perfect vehicle to do the same thing. It encourages reciprocity, but it limits abuse because there must be three solid votes to join. Yet rather than grabbing every opportunity to do so, as we would usually expect in many collegial decision-making bodies, the norm seems to be to resist. Of course increasing the caseload is costly, but workload costs do not seem to stop congressmen.

It is well to remind the reader that I am generalizing only about one task of the Court—case selection. Nevertheless, my impression

24. See, e.g., John W. Kingdon, *Congressmen's Voting Decisions*, 2d ed. (New York: Harper and Row, 1981); Matthews, *U.S. Senators and Their World*; Nelson W. Polsby, "The Institutionalization in the U.S. House of Representatives," *American Political Science Review* (March 1968).

based on numerous comments from the interviews, is that efforts at logrolling or accommodation are relatively absent from opinion writing as well. So, while there is no horse trading, and a device which could be used extensively for logrolling—the join three—is basically not used that way, does that mean that there is no interchamber maneuvering on cert.? No. Although my informants would not like the word “maneuvering,” there is a behavior that is employed that is frequently persuasive in getting a grant when the conference is otherwise disposed to deny.

Dissents from Denial of Certiorari: Tools of Negotiation

The only sense of lobbying was if there was a circulated dissent from denial.

U. S. Supreme Court clerk

As described in Chapter 3, a few cases each conference are relisted. This is usually done to call for a response, but sometimes a justice will relist a case by saying, “I want to think about it more because I am considering writing.” What he means is that he is thinking about writing a dissent from denial of certiorari. If a justice wishes to make his dissent public, he does one of two things. Either he notes a dissent, or he writes an opinion explaining why he dissents from denial. If a dissent is simply noted, the *Journal of Proceedings* usually says the following: “The petition for a writ of certiorari is denied. Justice White would grant certiorari.” For an appeal: “The judgment is affirmed. Justice White would note probable jurisdiction and set the case for oral argument.” Written dissents take various forms. Some are fairly brief, others quite long. Some concentrate on why the case is certworthy, and others actually go to the merits. With appeals, things are a bit different. An appeal, when disposed of summarily, is a ruling on the merits. Hence, written dissenting opinions on appeals often address the merits per se; however, even on an appeal, these written opinions are usually statements chastising the Court for summary disposition rather than for the ruling.

Dissents from denial are the one method of persuasion outside conference that is perceived to “follow the rules”; and there is reason to believe that they are used strategically. Threatening to dissent is often sufficient to achieve a grant. One phrase was uttered time and again: “Many dissents never see the light of day.”

Perry: Even though you say that there is no vote trading, are there times when a justice tries to convince another justice to reconsider a cert. vote?

Justice: The way it happens is this. A case must be put on the discuss list first, and if it picks up one or two votes, the person who put it on the list may say, "let's please relist," and then someone will write a dissent from denial. I have an unpublished stack of dissents from denials this high [he held his hands up showing a stack of about two feet] because many dissents never see the light of day. But I don't recall any colleague, at least I don't think I remember, trying to get me to change my mind except by sending around a memo.

Another justice said, "Many times a dissent from denial will pick up a fourth vote."

Justice Stevens has been quite vocal in opposing public dissents from denial of certiorari. In a rare move, he wrote an opinion in response to a dissent from denial. From the portion quoted here, it can be seen that one of a dissent's purposes is to try to pick up votes.

Admittedly these dissenting opinions may have some beneficial effects. Occasionally a written statement of reasons for granting certiorari is more persuasive than the Justice's oral contribution to the Conference. For that reason the written document sometimes persuades other Justices to change their votes, and a case is granted that would otherwise have been denied. That effect, however, merely justifies the writing and circulating of these memoranda within the Court; it does not explain why a dissent which has not accomplished its primary mission should be published.²⁵

According to Justice Stevens, then, the *primary* mission of a dissent is to pick up votes.

One clerk said the following about his justice and another regarding dissents:

Clerk: [His justice] did them occasionally, but he didn't really do them unless he was prepared to publish them. Of course, Justice _____ was the big dissenter-from-denial man by a clear majority. He was really trying to pull votes.

Perry: Was he successful?

25. *Singleton v. Commissioner of Internal Revenue*, cert. denied, docket no. 78-78, 47 *Law Week* 3299.

Clerk: Oh, yeah.

Perry: Did he generally go in to the merits on these?

Clerk: Yes. This is also the time that you'd get personal comments about things, like a crime wave—ranting and raving about crime and so forth. He may have done this in a stay opinion. Perhaps that is what I'm thinking about. But one time he wrote that we just ought to summarily reverse all death cases. (C57)

Another clerk had this to say about his justice:

He did do it. But generally his dissents were short and concise and directed at one or two justices. (C37)

The interesting thing about the last quotation is that the dissents were aimed, clearly implying some strategy. Once again, one wonders why not just phone the target justice rather than go to the trouble of writing a dissent, particularly if time is so constrained.

One justice circulates many dissents, particularly when he perceives a circuit split, and many of his efforts are apparently effective. Some are not, of course, and many of his dissents that are published do in fact deal with the need to resolve a circuit split. Use of dissents for internal leverage is apparently not new.

Hugo Black used to write these awful dissents from denial. He would say, "if you deny hearing this," and essentially say something that suggested that no decent person who loved the law could deny hearing this case. It was kind of rare, but Black used them as a real bludgeon. I think today dissents are used more subtly than by Black, but one gets the idea out on the table. A dissent may or may not see the light of day. (C60)

As a matter of principle, Brennan dissented, as Marshall does, from denial on all capital cases using the same short statement.²⁶ On some capital cases, however, they write substantially more than their "canned" dissent. A Brennan clerk chose to classify the effort as one of persuasion rather than a threat.

26. "Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Grigg v. Georgia*, 428 U.S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases."

Clerk: Of course, we had our stock dissents from denials.

They weren't exactly canned but you effectively knew what to say.

Perry: I know of the death penalty ones, but were there some others?

Clerk: There are some dreary little issues of _____. Brennan disagrees with the Court. I really didn't see threatening to write a dissent from denial used as a threat to try to get someone to go along. I think you generally wrote them to persuade, to record one's vote, or to pontificate.

Threat or persuasion, the intended outcome is the same.

Increased attention to a case brought about by a circulated dissent apparently does not always yield a better decision.

Prior to conference, there was a little communication. Occasionally I might talk to another clerk or someone might say that there's an interesting case that came in. But after conference, if a case was held over there were certainly attempts at persuasion; maybe "persuasion" is the word, not "bargaining." The major vehicle for this was a dissent from denial; I mean, those were addressed to the Court as much as they are to the public. The justices get a little more vituperative if it's something where they want to see people swayed . . . Sometimes because these dissents tend to be a little more impassioned the conference would get misled; I mean, a justice would say something was in there but he may not have spent a lot of time on it; or he really didn't know what was in the record. These dissents tended to be pretty powerful, and no one else would take a closer look and they'd wind up getting involved with a mess of a case. (C57)

A justice agreed:

Dissents from denial can be quite persuasive. In fact, sometimes you have such advocacy that it rides roughshod over the facts. We would then speed over it, and grant the case and then have to dig it. In fact it seems to me that some [pause] well . . . [he refused to finish his thought].

Tactical use of dissents to pick up a vote must be put into perspective. When asked how often circulated dissents picked up additional votes, the numbers ranged from ten to thirty per term. Nevertheless, the

justices do use dissents as a negotiating tool within the Court. Indeed dissents from denial seem to be the primary arena for negotiation on cert. outside the conference. Surely, however, this is not a very efficient tool. The dissent might be considered a form of communication, but it is oration rather than discussion. As one informant said:

Maybe one or two will respond to a certain dissent, but that is rare. There is no real mechanical way to answer. A justice's silence is his answer. (C11)

Dissents from Denial That See the Light of Day

One might well ask why the justices would care if some justice goes public with a dissent from denial. Publishing dissents from denial airs disputes on certiorari, and this is generally regarded as not a good thing by the justices, although some feel more strongly than others. In an opinion, the Court sometimes will explain why a case was granted cert., but usually the reasons for granting or denying most cases are never known. As mentioned in Chapter 2, the justices do not really want the bar to know precisely why cases are granted or denied. And while justices complain that many worthless petitions are filed, there is an advantage to having some vagueness surround what makes a case certworthy.

Published infrequently in the past, dissents from denial are becoming more commonplace, and this has led to controversy. Chapter 2 recounts Justice Frankfurter's well-known opposition to such opinions. Justice Stevens is the modern-day Frankfurter in this regard. He does not publicly dissent from the denial of cert. and is bothered by the fact that others do. Justice Stevens argues:

One characteristic of all opinions dissenting from the denial of certiorari is manifest. They are totally unnecessary. They are examples of the purest form of dicta . . .

Another attribute of the opinions is that they are potentially misleading. Since the Court provides no explanation of the reasons for denying certiorari, the dissenter's arguments in favor of a grant are not answered and therefore typically appear to be more persuasive than most other opinions. Moreover since they often omit any reference to valid reasons for denying certiorari, they tend to imply that the Court has been unfaithful to its responsibilities or has implicitly reached a decision on the merits when, in fact, there is no basis for such an inference.

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