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# THE DECISIONAL PROCESSES OF THE SUPREME COURT*

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The Supreme Court of the United States is distinctly an American institution. It owes little to foreign jurisprudence other than Anglo-Saxon tradition and processes. Its character is due not to wisdom of other ages but to convictions born of the experiences of the American colonists and those who succeeded them. While the common law of England was the basis of the law of the Colonies, it was molded to their use by legislative act and judicial decision. Appeals ran not to appellate courts but to legislative bodies and finally to the King in Council, which, as Justice Story put it, was designed as a protection rather than a grievance.[1] Nowhere in the Colonies was there a supreme tribunal as we know it today.

In establishing their constitutions the States distributed the political power among two branches and found it necessary to have a third one, the judiciary, to insure that the distribution continued. Meanwhile, with the States vying among themselves for the prizes taken by continental vessels, the Articles of Confederation, ratified in 1781, placed the power "of establishing rules . . . appointing courts . . . and establishing appeals" in admiralty, piracies and felonies on the high seas in Congress.[2] Likewise, Congress was to "be the last resort on appeal, in all disputes . . . between . . . States concerning boundary, jurisdiction, or any other cause whatsoever"; also in "All controversies concerning the private right of soil claimed under different grants of two or more States . . . ."[3] These experiences under the Confederation taught the framers of our Constitution the necessity for establishing federal judicial power. Washington himself, in a letter to John Jay, whom he later, as our first president, appointed as the first Chief Justice of the United States, said that "virtue . . . has, in a great degree, taken its departure from us; and the

* Adapted from the annual Stevens Lecture delivered by Mr. Justice Clark at the Cornell Law School on March 18, 1965.

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1 1 Story, The Constitution § 176 (5th ed. 1891).

2 Articles of Confederation art. IX, § 1 (1777).

3 Id. §§ 2-3.

want of disposition to do justice is the source of the national embarrassments . . . ."[4] And later he advised:

> Requisitions are actually little better than a jest and a by-word throughout the land. If you tell the Legislatures they have violated the Treaty of Peace, and invaded the prerogatives of the confederacy they will laugh in your face.[5]

And in a letter to Madison on November 5, 1786, Washington reported, "we are fast verging to anarchy and confusion." And in April 1787, Madison replied that "the national supremacy ought also be extended as I conceive to the Judiciary Departments."[6] It appeared clear, as Alexander Hamilton wrote in the *Federalist* that "the want of a judiciary power" was the crowning defect of the Confederation.[7] Hamilton, Madison, and Washington were joined in this view by John Randolph, who proposed the Virginia Plan to the Constitutional Convention recommending that "a National Judiciary be established to consist of one or more supreme tribunals . . . to be chosen by the National Legislature."[8] The Pinckney Plan called for "the Legislature of the United States" to establish such courts as it deemed necessary, one to be termed "the Supreme Court."[9] The Paterson Plan called only for a "supreme Tribunal."[10] And Hamilton, himself, proposed that "The Supreme Judicial Authority of the United States" be vested in a number of judges.[11]

There were thirty-one lawyers out of a total membership of fifty-five in the Convention. "Four had studied in the Inner Temple, five in the Middle Temple, ten had been State judges, seven had been selected as judges to determine controversies between the States. Thirty-nine members . . . had served in the Continental Congress" and eight had taken part in the drafting of state constitutions.[12] The unanimity of their thoughts is shown by the original report of the Committee on Detail:

> The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.[13]

This draft is substantially in the language finally adopted, save for the substitution of "the Congress" for "the Legislature" of the United States. But how would the judges be appointed: by the Congress as a whole, by

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4 4 Documentary History of the Constitution of the United States 16 (1905).
5 Id. at 20.
6 Id. at 118.
7 The Federalist No. 22 (Hamilton).
8 3 Documentary History of the Constitution of the United States 19 (1900).
9 1 Documentary History of the Constitution of the United States 319 (1894).
10 Id. at 324.
11 Id. at 328.
12 Hughes, The Supreme Court of the United States 11 (1928).
13 3 Documentary History of the Constitution of the United States 454 (1900).

the Senate alone, or by the Executive as was the practice in Massachusetts. The latter was adopted with the addition of "the Advice and Consent of the Senate."[14] Strangely enough, in the light of present-day state practice, all of the proposed plans provided for the tenure of the judges to be during good behavior.

In dealing with the jurisdiction of the Court there was early agreement in the Convention that the original jurisdiction would extend to all cases affecting ambasadors, other public ministers, consuls, and those in which a State was a party; and the appellate jurisdiction was to be left with the Congress. The first Judiciary Act passed in 1789 made provision for the appellate jurisdiction of the Supreme Court which, by section 25, was expressly extended over state courts. It was Oliver Ellsworth, later the third Chief Justice of the United States, whose genius brought about this "transcendent achievement" as it was later described.[15] It is interesting to note that, despite all of the agitation against the Court and the many proposals to curb its appellate jurisdiction that have cropped up over the years since 1789, "the Congress from the outset to the present day has actually supported the . . . jurisdiction . . . in its characteristic features . . . ."[16]

Thus, the jurisdiction of the Court was established, but what were to be its functions? How was it to exercise this grant of judicial power which was greater than had ever previously been bestowed on a court?

In order "to keep the rules of law in harmony with the enlightened common sense of the nation,"[17] which is, Sir Frederick Pollock says, the purpose for which courts are created, the Supreme Court has created internal self-restraints. First, it has confined itself to justiciable issues. This rule had its inception during Washington's administration when the Genet controversy was at its height. He asked the Court for its interpretation of our treaties with France. The Court answered that it considered the question improper as not growing out of a case before it.[18] The only occasion during the 175 years of the Court's history on which this rule was violated was during Monroe's administration when in reply to a query from the President as to the validity of a proposed internal improvement program, Justice Johnson wrote the President that he had been:

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14 U.S. Const. art. XI, § 2.

15 See Frankfurter & Landis, "The Business of the Supreme Court of the United States," 38 Harv. L. Rev. 1005, 1008 (1925).

16 Hughes, supra note 12, at 27. In 1868, the Congress stripped the Court of its appellate jurisdiction under the Habeas Corpus Act of 1867 because of the McArdle controversy. See Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868).

17 Pollock, "Judicial Caution and Valour," 45 L. Q. Rev. 293, 295 (1929).

18 1 Warren, The Supreme Court in United States History 108-11 (1937).

> [I]nstructed to make the following Report. The Judges are deeply sensible of the mark of Confidence bestowed on them in this Instance and should be unworthy of that Confidence did they attempt to conceal their real Opinion. Indeed to conceal or disavow it would be now impossible as they are all of the opinion that the Decision on the Bank question [McCullouch v. Maryland, 4 U.S. (4 Wheat.) 415 (1819)] commits them on the subject of internal Improvement as applied to Post-roads and Military Roads. On the other Points it is impossible to resist the lucid and conclusive Reasoning contained in the argument.[19]

Second, the Court will not decide questions that are purely political. The Dorr Revolution in Rhode Island in 1841 is an example.[20] Until *Baker v. Carr*,[21] another example was apportionment of seats in the Congress and the state legislatures. Third, constitutional questions will not be decided if they can be avoided. Many times the Court has construed statutes admitting of two reasonable constructions so as to avoid serious constitutional issues. Only recently we did this in the *Seeger*, *Jakobson*, and *Peter* conscientious objector cases.[22] Fourth, the Court does not review questions of legislative or executive policy. So long as they work within their constitutional spheres their processes are not subject to judicial scrutiny. In short, there is a wide area of legislative or executive discretion. The Court often sustains legislation which the Justices as legislators would certainly condemn. But we try as best as "fallible creatures" can, as Justice Frankfurter used to say, to keep our private views out of decision making though this is certainly difficult when due process considerations are pressed or equal protection is involved. Fifth, we have established an abstention practice of withholding decision on a state law question that has not been authoritatively decided by the courts of the State until those courts have a reasonable time to decide the point.[23] Sixth, we will not overturn state judgments when the grounds of the decision is state law, such as an established and reasonable state procedural requirement. Seventh, the Court also has built-in controls for its calendar. An example is its obligatory jurisdiction in which litigants come to the Court as a matter of right when a court of appeals has held that a state statute violates the federal constitution or where the highest state court has held a federal statute invalid or upheld a state statute against attack under the federal constitution.[24] While we have on the average slightly

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19 20 Monroe, ms.f. 2568, on file in Library of Congress.

20 See Luther v. Borden, 48 U.S. (7 How.) 1, 43 (1849).

21 369 U.S. 186 (1962). Compare the position taken by the Court in Colegrove v. Green, 328 U.S. 549 (1946), the original apportionment case.

22 United States v. Seeger, decided together with United States v. Jakobson and Peter v. United States, 380 U.S. 163 (1965).

23 Examples of this are Harrison v. NAACP, 360 U.S. 167 (1959), and the cases cited therein.

24 The right of appeal is also granted by statute in specific cases, as from final judgments of three-judge courts, government appeals in antitrust cases, injunction cases in courts of

over a hundred such cases each Term, we have created a procedural device known as a "jurisdictional statement" which must be filed by the appellant and recite the ground for our jurisdiction, the questions involved, and the necessity for plenary consideration. The appellee may then file a motion to dismiss or affirm. Upon these submissions, without argument, the Court will then decide whether it wishes to hear the case or decide it summarily.

Since the Judiciary Act of 1925, the remainder of our jurisdiction, save in original cases, which are largely confined to controversies between States, is discretionary. These cases are handled under a certiorari system in which there are two criteria. First, the review is a matter of discretion, not of right, and will be granted only when there exists special and important reasons for doing so. Second, special reasons for review are usually thought to exist where there is a conflict between courts of appeals; or where the decision appealed from is not in accord with our cases; or where a substantial federal question, not theretofore determined, has been decided by either the highest court of a state or a court of appeals and should be settled by the Court.[25]

It is also worth noting that aside from direct appeals which are for all practical purposes handled in much the same way, a case eannot be argued in the Supreme Court without permission of the Justices. If four of us vote to have an argument, it is scheduled; if not, the appeal is affirmed or dismissed and the petition for certiorari is denied. In short, in the vernacular, you must knock on the door and unless four Justices answer and let you enter, your case cannot be argued. It is denied summarily. Last term there were 2,294 cases filed with our Clerk, of which 175 were appeals and 1,939 petitions for certiorari. Out of this total number we heard arguments only in 144 and handed down full dress opinions in 111 of these. From these statistics you can quickly calculate your chances of arguing a case before the Court.

In the light of these procedures which the Court has long honored, it might be said that the function of the Court is to maintain the necessary balance between the States and the Nation, between the different branches of the federal government, and between individual rights and the preservation of the Government itself. Chief Justice Rutledge put it rather broadly but briefly when he said that our function is "to secure the national rights and uniformity of judgments."[26]

This function is performed, of course, in various ways both in our public

appeals, and final judgments of district courts where a federal statute is declared invalid where the Government or an agency is a party.

[25] For further details on these situations, see Rule 19 of the Court.

[26] 1 Farrand, The Records of the Federal Convention of 1787, at 124 (1911).

sessions and in private conferences. One of the most beneficial, and indeed indispensable, mechanisms is our weekly Conference. We start our term by statute on the first Monday in October. After a week's consideration of cases filed since our adjournment, which is usually by July 1, we then begin argument sessions in open court. They continue for two weeks and are followed by a recess period of the same length of time during which we write opinions, study cases, etc. This procedure continues until we complete all of our arguments for the term.

The Conference is held on Friday after four days of argument sessions. We begin the Conference at 10:00 a.m. and often do not conclude until 6:00 p.m. The Conference is opened with an old ritual, the shaking of hands. Chief Justice Fuller started this practice believing that it might prove helpful in bringing more light and less heat to our deliberations. We sit at a large rectangular table, the Chief Justice at one end and Mr. Justice Black, the senior Justice, at the other. The remaining Justices sit at the sides of the table in the order of their seniority. Each of us has a copy and has studied the list of cases to be discussed. The Chief Justice presides and first calls for a discussion of opinions then circulating or ready to be handed down. He then brings up the list of appeals and petitions for certiorari. He takes up the first case, discusses it and then yields to Justice Black for his views. This continues on down the hierarchy of Justices, seniority-wise, until it reaches the youngest in service, now Justice Goldberg. After his discussion, we vote on whether we will hear the appeal or grant the petition. Justice Goldberg votes first. This is because the senior Justices in John Marshall's day thought that if *they* voted first they might influence their juniors. This "fear" is, of course, unfounded. The voting continues up the line of Justices to the Chief Justice, who votes last. The votes are cast orally and are recorded in the personal docket book of each Justice. Indeed, each docket book has a lock on it so as to better protect the integrity of the vote from disclosure to outsiders.

Finally, we take up the decisions on their merits of the cases argued that week. The procedure is much the same; however the Justices also address themselves to the theory on which they believe the case should be decided. On the following Monday the case is assigned to a Justice to write the opinion. This assignment is made by the Chief Justice, if he is on the majority side; if not, by the senior Justice who is in the majority.

Then begins the meticulous task of opinion writing. When one starts to write an opinion for the Supreme Court of the United States he learns full well the meaning of the statement of Rufus Choate that one cannot drop the Greek alphabet to the ground and pick up the *Iliad*.[27] It takes

[27] Clark, Great Sayings by Great Lawyers 156 (1922).

painstaking research and meticulous care to write such an opinion. Indeed, as Mr. Justice Cardozo said, "one must be historian and prophet all in one."[28] Personally, after studying the briefs and the necessary record citations, I outline the opinion in longhand. Then I compile the authorities that I will use and the quotations that appear helpful. I then dictate the opinion or write it out in longhand. It is then typed and given to the law clerks. We go over it together with a view to making such changes as appear helpful. A final draft emerges in a few days and is sent to the printing office in the Court building. It is printed up on letter size paper with wide margins after which it is circulated to the Justices. Some return their approval promptly, others make suggested changes, while some may hold up awaiting the dissent. The writing of the dissent is not assigned but gravitates to the Justice who carries the most "flaming torch of indignation." In a week or so the dissent is circulated and the author of the opinion for the Court makes such changes in it as he deems necessary. When all views are settled the Conference directs that the opinion be handed down. The author of the opinion then announces it on the next opinion day. Announcements vary among the Justices. Ordinarily, the Justice merely makes a short statement of the case and its result. The author of the dissent then announces it. This procedure is unique with the Court and has been followed ever since its organization.

Despite all of our procedures, our deliberations, and our continuous study and application, the law is not made by the Court alone. It is made by the "Court and company." And the company is the profession and the law schools. It is from them with their intellectual disciplines and high standards rooted in tradition that the courts must depend. The process of the law lives by testing and retesting ideas and principles in the light of experience. Only in this way may our legal horizons be enlarged and new principles developed to meet the ever-changing necessities of our society. It is the lawyer, the professor, the student who makes his everyday legal work an adventure into the unknown of juridical science that contributes most to the effectiveness of justice. Rather than asking "why?" he says "why not?" As the late President Kennedy put it: "It is . . . the remarkable contribution of hope, confidence and imagination—that is needed more than ever today. The problems of the world cannot be solved by skeptics or cynics, whose horizons are limited by the obvious realities. We need people who can dream of things that never were and ask 'why not?' "[29] All of the great advances of the law have been made by advocates who dreamed "of things that never were" and then brought those dreams to reality. A consideration of any of the landmark cases in

[28] Cardozo, Law and Literature 166 (1931).
[29] N.Y. Times, June 29, 1963, p. 2, col. 7.

the constitutional field will disclose that the counsel who argued them had as much to do with their decision as did the Court.

And, you will learn also that those counsel make up a galaxy of distinguished names running from Daniel Webster to John W. Davis, with Lee, Lincoln, Martin, Hopkinson, Pinckney, Wirt, Crittenden, Barbour, Henry Clay, Field, Sergeant, Black, Trumbull, Evarts, James Garfield, Campbell, Carpenter, Thomas Hart Benton, and a score of other greats in between.[30] I venture to say that the argument of these stalwarts had great weight with the Court in the adjudicatory process; indeed, as it is today, a good argument often is the decisive factor in decision making.

Regrettably, we on the Court have too often experienced the ineffectiveness of counsel—sometimes because of lack of preparation or their inability to grasp the underlying issue; or, frankly, because of a lack of training and experience. This is sad in this day of law school training, but it is an increasingly recurring situation. So many lawyers anxiously knock on our door for an argument in their case and yet, less than seven per cent gain admittance. Earlier this term counsel for petitioner in a case failed to appear for argument though duly notified. His default appeared deliberate—an unheard of situation. It but points to a further breakdown in training as well as legal ethics.

Ineffective counsel causes us more difficulty than the determination of cases on their merits. This is true because of two factors. First, at the trial level the records reveal that most of the cases brought to us go off on some technical point which counsel could have but did not avoid on trial. They reach us solely because of the ineffectiveness of counsel below. Second, over two thousand of the cases filed with us last Term should never have been docketed. We only granted 144 out of almost 2,300 filings. Still each of us was obliged to study each of the 2,300 cases—a tremendous amount of time wasted. Good advocacy would have eliminated at least some of this congestion.

Invariably the ineffective counsel has had little or no experience at *nisi prius*. It is unfortunate that recent law graduates have been discouraged from entering the trial forum, especially in the criminal field. Only in civil and criminal litigation is counsel confronted not only with the court, the opposing party and his attorney, but also with elusive facts, elusive witnesses, an elusive jury, and often elusive principles of law. Beyond doubt the greatest challenge of our profession is to try a hotly contested lawsuit. Those who master it have a store of knowledge that will stand them in good stead both in court and in the office. They will

30 Twiss, Lawyers and the Constitution (1942).

have a tremendous advantage over their less experienced brothers both in prestige and in know-how. Lawsuits make the law, and bad advocacy often makes bad law which later suffers reversal. As Judge Irving Kaufman said in a recent article:

> For the young lawyer, never has the opportunity been so great nor the responsibility so enormous. The field is wide; there is no shortage of spiritually remunerative and exciting work. If an attorney's life takes on the aspects of stare decisis—yesterday and today, both alike—or worse, res judicata, it is no one's fault but his own. A handwritten, proofread trust indenture may be a monument to the lawyer's technical *expertise*, but the pursuit of justice in the courts is a monument to his mind, his imagination, his interest in the ultimate goal of a free society governed by reasonable and enlightened rules of law.[31]

## CONCLUSION

Though the decisional processes of the Supreme Court are rooted in the early history of our Republic, we have also recognized the crucial importance of internally developed theories and procedures of judicial self-restraint and the necessity for good advocacy before the Court. It is this interplay between historically developed institutions, the Court and company, which shape the decisional processes of the Supreme Court.

[31] Kaufman, "In Defense of the Advocate," 12 U.C.L.A.L. Rev. 351, 360 (1965).