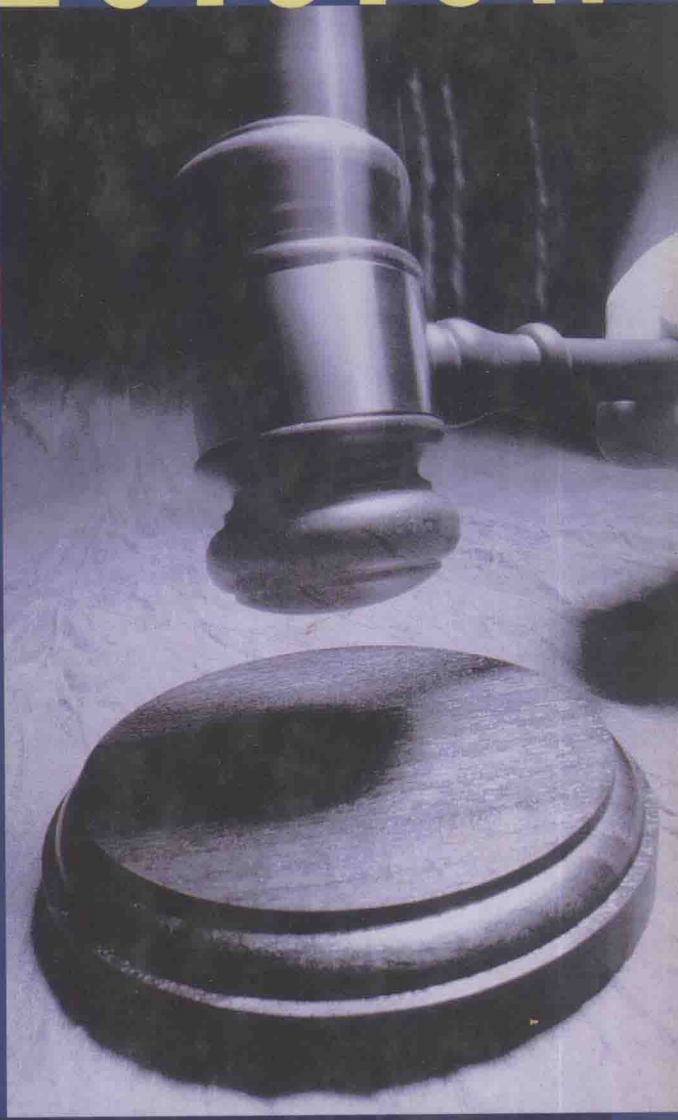
DECISION

HOW THE SUPREME COURT DECIDES CASES



BERNARD SCHWARTZ

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Bernard Schwartz

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For Aileen
and all we have had
together

Preface

During the past decade and a half there have been unprecedented revelations about the Supreme Court's decision process. According to Anthony Lewis in the *New York Times*, they have resulted from a "new genre of books penetrating the Court's secrecy," starting with *The Brethren* by Bob Woodward and Scott Armstrong in 1979. The situation has changed completely from that of only a few years earlier, when Nina Totenberg wrote that there was "no more secret society in America than the Supreme Court." In those days, what went on behind the red velour curtain was as removed from the public gaze as the decision process in Stalin and Brezhnev's Kremlin.

As described by Erwin Griswold, former solicitor general and Harvard Law School dean, the revelatory type of book "tells you just what the justices said in the conference room, as they entered the elevator and to their law clerks—how they pulled, hauled, schemed, battled and traded until somehow or other they got all those cases decided, some of them of supreme importance."

In her 1975 article, Totenberg stated, "It is unheard of for a Justice to reveal anything specific about the Court's case work; law clerks, too, are sworn to secrecy." To the contrary, the recent revelations about the Court's decision process have been based upon information provided by Justices and law clerks, as well as material from Court files provided by them. The present book has been made possible by the willingness of some of the Justices to speak to me, not only generally about the Court's operation, but also about how specific cases were decided. They have given me virtually unlimited access to their files, containing conference notes, draft opinions, letters, and memoranda. Likewise, former law clerks have furnished me with information on the Court's work during their years of service.

In addition, the papers of many of the Justices are available in collections open to the public or to serious researchers. I have been afforded generous access to the papers of Chief Justice Earl Warren and Justices Hugo L. Black, Harold H. Burton, Tom C. Clark, William O. Douglas, Felix Frankfurter, Robert H. Jackson, John Marshall Harlan, and Thurgood Marshall, as well as to earlier papers in the Library of Congress.

This book's discussion of the Supreme Court's decision process is thus based upon both documentary and oral sources. The documentary sources are of two kinds: (1) the conference lists and notes and the docket books of the Justices. The conferences themselves, at which cases are discussed and the votes taken on decisions, are, of course, completely private — attended only by the Justices themselves. The secrecy of the conference is, indeed, one of the great continuing Court traditions. I have tried to reconstruct the conferences in most of the cases discussed. The conference discussions, which are given in conversational form, are reconstructed from notes made by at least one Justice who was present, including, but not limited to, the notes of Justices William O. Douglas, Felix Frankfurter, Harold H. Burton, Tom C. Clark, John Marshall Harlan, Thurgood Marshall, and Chief Justice Earl Warren; (2) the correspondence, notes, diaries, memoranda, and draft opinions of members of the Court, including, but not limited to, the papers of the same Justices and Justice Hugo L. Black. The documents used and their locations are identified, except where they were made available upon a confidential basis. In the latter case, I have tried to identify the documents, usually by title and date. I have personally examined every document to which reference is made.

The oral sources were, as stated, personal interviews with Justices and law clerks. Every statement not otherwise identified was made to me personally. I have tried to identify the statements made by different people, except where they were made upon a confidential basis. In the latter case, I have given the position of the person involved, but not his name.

In a review of my biography of Chief Justice Warren, Anthony Lewis noted, "Schwartz reconstructed what purported to be verbatim quotations from the justices' conferences. In important instances he did not disclose his sources, making it difficult to judge the fairness of the accounts; might they have come from one side in a hotly disputed case?" The conference discussions in this book, as well as in that reviewed by Lewis, are, as stated, reconstructed from notes made by at least one Justice who was present. It is true, as Lewis points out, that the conference notes used have not normally been identified. That is because they were supplied on a confidential basis. It is also true that the notes may "have come from one side in a hotly disputed case." It should, however, be stressed that these were notes taken during the conference by the Justices concerned for their own use. Their purpose was to provide a summary of what was said to help in their own consideration of the case. It is most unlikely that the Justices' own biases would color notes taken for that purpose — notes that are only a sketchy summary by active participants

in the conference, who are at best amateurs in transcribing each Justice's presentation.

This book may, however, be the last of its kind—for some time at least. The type of access I have had to Justices and their papers may now be a thing of the past. A major reason for the lifting of the Court's curtain of secrecy has been the willingness of Justice William J. Brennan to make his papers available to serious researchers. Most of the published revelations on what goes on during the Justices' deliberative process have been based upon materials obtained from the Brennan files. The members of the Rehnquist Court have, however, been disturbed by Brennan's actions in this respect. Justice Brennan responded to their concern in a December 19, 1990, Memorandum to the Conference circulated both to the other Justices and to retired Chief Justice Warren E. Burger and Justice Lewis F. Powell.

"Sandra and the Chief," began the memo, referring to Justice Sandra Day O'Connor and Chief Justice William H. Rehnquist, "have expressed to me the concern—shared, they tell me, by others of you—that researchers who examine my official papers thereby gain access to memoranda written to me by other Justices. They have suggested that, to avoid embarrassment to any of our colleagues, I should not grant access to files that may include any written material from Justices who are still sitting on the Court." According to Brennan, "As I interpret this suggestion, it would require that I close all of my files for the years following 1962, when Byron [White] joined the Court."

The memo confirmed that the Justice had, indeed, given researchers access to "my collection of official papers in the Manuscript Division of the Library of Congress. . . . These papers consist primarily of case files from previous Terms." The memo stated, "About a decade ago, I began to grant permission to study these files to certain academic researchers, and that practice has continued. . . . Virtually all of the researchers who received permission have been affiliated with an institution of higher learning (typically, a law school or political science department)."

Though, as will be seen, Justice Brennan defended the opening of his files, the concern expressed by Chief Justice Rehnquist and his colleagues led Brennan to modify his practice. "When I became aware of your concerns," Brennan wrote, "I reviewed with the Library of Congress the procedures governing access to my papers." Applicants would be screened more carefully and "I have also imposed a time limit on such research."

More important, Justice Brennan has refused requests for access to his files on cases decided since Chief Justice Rehnquist has headed the Court. This has not, however, prevented me from including substantial unpublished material on the decision process in the Rehnquist Court. The material thus disclosed was obtained from the Thurgood Marshall papers in the Library of Congress, which contain files on the cases decided through June 1991 (the end of the 1990 Term). In view of the opposition of the present Justices, however, it is unlikely

that comparable files will be made available for later terms—at least in the foreseeable future.

This is underscored by Justice O'Connor's statement, in a letter to me, that she "removed a number of items in [her] files in the aftermath of the Library of Congress' handling of Justice Marshall's files." Nor has Justice O'Connor been alone. She told a Drake law faculty luncheon that, because of the controversy over the Marshall papers' release, other Justices, too, "stripped" their files of provocative material—exactly the kind of material needed for a book such as this. A more significant question is whether any confidential Court files should be made public. "One wonders," wrote Erwin Griswold about one of my books describing the inside workings of the Warren Court, "what effect this sort of presentation of documents, interviews and so on, so soon after the events, has on freedom of exchange, frankness, trust, common understanding, even bonhomie, among present and future justices." Griswold then posed the question: "Is there not an appreciable risk that there may be a . . . chilling effect in interchange even among Supreme Court justices? Sunshine can be carcinogenic as well as antiseptic." Griswold concluded, "Many people think we are confronted with more knowledge about the U.S. Supreme Court than is good or really useful."

Needless to say, I do not agree with the Griswold critique. In an age of open government and sunshine laws, it has been anomalous that almost nothing was known about the internal functioning of the fulcrum on which the entire constitutional system turns. This book is an attempt to help change that situation—to lift the Court's curtain of secrecy somewhat so that the Justices and their work may be better understood.

But what about the effect of revealing the Court's internal operations on the Justices themselves and the freedom of their deliberations? In his already-quoted review, Anthony Lewis voiced a concern similar to that expressed by Griswold: "Will the justices be able to argue among one another with the candor that may change minds if they think their words will soon be retailed to the public? Or will their conferences degenerate into posturing, like most Congressional debates?"

The Griswold-Lewis criticisms are based on an a priori assumption that may or may not be consistent with the facts of judicial life. Is it proved that the Justices will be less candid if their decision process is no longer completely sealed? Will a conscientious judge really be affected by the possibility that the position he takes in a conference or a draft may someday see the light of day? The nine Justices, after all, are not mere friends exchanging gossip at a social gathering. They are deciding the most vital questions that arise in our society and they are deciding them conclusively, because there is no way that the Court's decisions can be overruled except by constitutional amendment. One is reminded of Justice Jackson's famous statement some years ago, "There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final."

It is important that we know as much as possible about how people placed in such a position of infallibility exercise their awesome power. Lord Acton's dictum that great men are almost always bad men does not necessarily apply to Supreme Court Justices. But our attitude toward them should still be based on some such assumption. Today, we must not judge those in possession of public power by the maxim that the king can do no wrong. On the contrary, if there is any presumption it should be the other way, against the holders of power, and it should increase as the power increases.

Are the Court and the country harmed by learning what a sitting Justice reveals in conference—for example, that had he been on the Court in 1954 Justice White would not have agreed with *Brown v. Board of Education*'s famous footnote 11 because he feels modern sociological and psychological data do not support the notion of stigma relied on by Chief Justice Warren's *Brown* opinion? Or if a letter of Chief Justice Burger is published which contains an animadversion on "women's lib"? Or even if it is made known that Justice Frankfurter wrote about Justice Frank Murphy, "you would no more heed [his] tripe than you would be seen naked at Dupont Circle at high noon tomorrow"?

Is the public interest really served if such things are kept behind a veil of secrecy? If possible disclosure may lead to more restraint by the Justices, that is not necessarily undesirable. It is hard to see how the work of the Court will be hurt if the decision process is purged of the intemperate type of comment that Court revelations sometimes bring to light.

I have always seen my role in writing about the Court's decision process as that of a reporter who describes what went on in the cases under scrutiny. My function is to tell what happened, not to shield the Court's inner processes from public view. I have been fortunate in having documents made available to me, such as those used throughout this book. But the decision to make them available, as well as to discuss the cases involved, was not made by me but by people within the Court community—particularly by Justices who believed that the claims of history were more important than those of judicial secrecy.

The documents published in this book—the drafts and internal memoranda, the extracts from letters and conference notes—these all help to explain the workings of the Court: how the Justices vote and change their votes and how opinions are drafted and redrafted before they are finally issued. The Court's decision process is made clearer by this sort of material than it possibly can be by analysis, acute though it may be, of only the opinions published in the *United States Reports*.

The bottom line, however, is ultimately to be found in the claims of history—even vis-à-vis the highest court. The right of the people to know does not degenerate into a mere slogan where the work of the Justices is concerned. The country has the same right to information on how the Supreme Court operates that it has with regard to other governmental institutions. As Justice Brennan put it in his 1990 memo, "My decision to allow selective access to my

papers was not taken lightly, but I ultimately concluded that scholarly examination of the Court's workings would serve the public interest."

It should not be forgotten that the Court is, to quote Alexander Hamilton, "the weakest of the three departments." The Justices themselves have recognized this. In Justice Frankfurter's words, "The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction." The authority of the Court is moral, not physical. It operates by its influence, not by its power alone. The Justices must depend on public support for the ultimate efficacy of their judgments.

Public support depends on an informed public opinion. "What strikes me increasingly, in writings on the work of the Court," Justice Frankfurter once complained, "is their unrelatedness to actuality." For the country to find out how the highest bench actually operates can only increase understanding of the Court's crucial role in guarding "the ark of the Constitution." It must be admitted that my intention was not to solidify popular support for the Court, but to tell what actually happened in these cases and let the chips fall where they may. In fact, they do fall in a way that reflects favorably on the Court. One is constantly impressed by the willingness of Justices to change their views owing to the intellectual arguments made by their colleagues. No other governmental institution could be subjected to comparable scrutiny of its internal processes and come out so well.

The public may conclude from this book that the Court does not work at all in the cold, purely logical way that most people think it does, but that it does work—through the constant give and take between the Justices—in a way that ultimately serves the best interests of the country. Surely, it is better for Court and country that this be made known by what the Brennan memo termed "responsible scholarship about the Court" than for it to be kept concealed behind the red velour curtain.

Tulsa B. S.
September 1995

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Introduction

In 1788, an opponent of ratification of the Constitution, who wrote under the pseudonym of Brutus, asserted, "I question whether the world ever saw . . . a court of justice invested with such immense powers" as the Supreme Court. In such a tribunal, Brutus declared, the Justices would "feel themselves independent of Heaven itself."

The power peremptorily to define the Constitution makes the Supreme Court unique among governmental institutions. To it alone is assigned the function of guarding the ark of the Constitution. Through the exercise of its constitutional role, the Court has wielded power far beyond that assumed by any other judicial tribunal. "In no other nation on earth," caustically commented a critic, "does a group of judges hold the sweeping political power—the privilege in practice, not just in theory, of saying the last governmental word—that is held by the nine U.S. Supreme Court Justices."

Authority such as that exercised by our highest court is not inherent in judicial power. On the contrary, as the experience in other countries amply demonstrates, the judiciary is normally the weakest branch of government. "The judiciary," wrote Alexander Hamilton in *The Federalist*, "is beyond comparison the weakest of the three departments of power. . . . [It] has no influence over either the sword or the purse; no direction either of the strength or the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment."

Despite the inherent weakness of its original position, the Supreme Court has managed successfully to assert its power as authoritative expounder of the Constitution. Though it possesses neither the sword of the executive nor the purse of the legislature, its judgments are normally adhered to without question by those who direct the strength and the wealth of the society.

The Supreme Court is far more than the usual law court. It is primarily a political institution whose decrees mark the boundaries between the great departments of government. Upon its action depend the proper functioning of federalism and the scope to be given to the rights of the individual. A judge on such a tribunal has an opportunity to leave an imprint upon the life of the nation as no mere master of the common law possibly could.

Only a handful of men in all our history have made so manifest a mark on their own age and on ages still to come as did Justices such as Oliver Wendell Holmes and William J. Brennan. The same cannot be said of even the greatest of modern English judges. To be a judge, endowed with all the omnipotence of justice, is certainly among life's noblest callings; but the mere common-law judge, even in a preeminently legal polity like that in Britain, cannot begin to compare in power and prestige with a Justice of our Supreme Court. A judge who is regent over what is done in the legislative and executive branches—the *deus ex machina* who has the final word in the constitutional system—has attained one of the ultimates of human authority.

HISTORICAL PERSPECTIVE

One who is familiar with the manner in which the highest court has operated is struck with the generally successful way in which it has exercised its awesome authority. The Court's jurisprudence has illustrated the antinomy inherent in every system of law: the law must be stable and yet it cannot stand still. The essential outlines of the constitutional system are still those laid down in 1787; there is here a continuity in governmental structure that is all but unique in an ever changing world. But the system still proves workable only because it has been continually reshaped to meet two centuries' changing needs.

There have been aberrations, but in the main the Supreme Court in operation has reflected the history of the nation: the main thrust has been to meet what Justice Holmes called the "felt necessities" of each period in the nation's history.

At the outset, the primary needs of establishing national power on a firm basis and vindicating property rights against excesses of state power were met in the now classic decisions of the Marshall Court. A generation later, the needs of society had changed. If the Court under Chief Justice Roger B. Taney was to translate the doctrines of Jacksonian Democracy, and particularly its emphasis on society's rights, into constitutional law, that was true because those doctrines were deemed necessary to the proper development of the polity. In addition, they furthered the growth of corporate enterprise and prevented its restriction by the deadening hand of established monopoly.

If in the latter part of the nineteenth century the Court was to elevate the rights of property to the plane of constitutional immunity, its due-process decisions were the necessary legal accompaniment of the industrial conquest of a continent. The excesses of a laissez-faire-stimulated industrialism should not

lead us to overlook the vital part it played in American development. Nor should it be forgotten that the decisions exalting property rights may have been a necessary accompaniment of the post–Civil War economic expansion.

The picture has been completely altered during the present century. The Court has come to recognize that property rights must be restricted to an extent never before permitted in American law. At the same time, unless the rights of the person are correlatively expanded, the individual will virtually be shorn of constitutional protection — hence the Court's shift in emphasis to the protection of personal rights. The Justices, like the rest of us, have been disturbed by the growth of governmental authority and have sought to preserve a sphere for individuality even in a society in which the individual stands dwarfed by power concentrations.

One must, however, concede that despite the Court's efforts the concentration of governmental power has continued unabated. The second half of the century has, if anything, seen an acceleration in the growth of such power. Indeed, the outstanding feature of the late twentieth century is the power concentrations that increasingly confront the individual. Even a more conservative Court may find it necessary to preserve a sphere for individuality in such a society.

NINE LITTLE LAW FIRMS

This book will examine the way in which the Supreme Court decides cases.

The decision process begins after the oral arguments when the Justices meet in conference to discuss the cases. The conference is led by the Chief Justice, in what is perhaps his most important function as Court head. How a great Chief Justice can lead the Court is shown by the experience under Earl Warren. As we will see in Chapter 4, Warren led both the conference and the Court as effectively as any Chief Justice in our history. When we speak of the Warren Court, we speak of a Court led to most of its important decisions by the Chief Justice in its center chair.

We will, however, also see that a Chief Justice can lead the Supreme Court but cannot dominate it. The most effective Court leader was, of course, our greatest Chief Justice, John Marshall. Marshall's preeminence rests upon two things. The first, we will see in Chapter 3, is the quality we call leadership. Whatever that elusive quality may mean, we know leadership when we see it; and we know that Marshall was the most effective leader any court has ever had.

Just as important, however, was that the principal Marshall decisions corresponded to Justice Oliver Wendell Holmes's "felt necessities" of the developing nation. The other Justices came to see this as clearly as Marshall himself. In a day when, to most Americans, one's state was still one's country, all the Justices understood the need to assert national power and the need for a powerful Union.

Even the strongest Chief Justice, however, cannot lead the Justices to decisions that do not, in their view, meet the Holmes criterion. The following

chapters will show that the Chief Justice is unable to secure a decision with which the others do not agree. The Court head may be primus inter pares (first among equals), but in the decision process it is the *pares* that should be emphasized. Aside from his designation as Chief of the Court and the attribution of a slightly higher salary, the Chief Justice's position is not superior to that of his colleagues. As Justice Felix Frankfurter strikingly put it in a letter to another Justice, "He is not the head of a Department; not even a quarterback."

A story is told at the Supreme Court that Justice James C. McReynolds was once late to conference. Chief Justice Charles Evans Hughes told a messenger, "Go tell him we're waiting." The testy McReynolds sent word back: "Go tell the C.J. I don't work for him."

The key thing to remember about how the Supreme Court operates is that the Justices operate, as a number of them have said, as "nine little law firms." To this, one commentator adds, "Little is right: two secretaries (the Chief needs and gets three), a messenger and three to four law clerks."

The nine little law firms are completely autonomous. "The Court," said Justice Lewis F. Powell, "is perhaps one of the last citadels of jealously preserved individualism." Their individual independence is underscored by the fact that it is the votes of the individual Justices, not the will of the Chief Justice, that are decisive in the Court's operation. Coming out of a heated conference, Justice William J. Brennan was once heard to mutter, "Five votes can do anything around here." Five votes could change even long established procedures at the Court: the Rule of Four which governs the grant of certiorari (the Court's decision to hear a case), the rule that only the Justices are present during conferences, and even the practice that the Chief Justice leads the conference and assigns opinions.

In fact, of course, the established practices and procedures are unlikely to be altered by the Justices, though some of them have advocated changing the Rule of Four to require five votes for the granting of certiorari. But the Justices do use their voting power to resist decisions with which they do not agree.

Nevertheless, the Court's decision process works because it is essentially a cooperative process. The nine little law firms are wholly independent of each other, yet they must work together for the Court to be able to decide a case and, more important, to explain the decision that has been reached.

The cooperative process begins after the oral argument, when the Justices meet to discuss the case in conference. There the Justices learn how each of the others believes that the given case should be decided and why. Even though the discussions now are less freewheeling than they once were, the conferences do reveal how each Justice stands on the cases discussed.

After the conference discussion shows the Court's consensus on the case, the opinion is assigned to an individual Justice. Here, too, however, the opinion-writing process is anything but an individual performance. "Of course," Justice Frankfurter once wrote to Justice Stanley Reed, "the writer of the Court's opinion . . . is not singing a solo, but leads the orchestra to wit, the Court." The