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Operations and Practice, A Comparison--The United States Supreme Court

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Operations and Practice, A Comparison The United States Supreme Court

*by Justice Potter Stewart**

PROFESSOR TRIBE, MR. Justice Dickson, ladies and gentlemen: When I became the junior Member of the Supreme Court of the United States in 1958 the Chief Justice was Earl Warren, and the other Justices were Hugo Black, Felix Frankfurter, William Douglas, Tom Clark, John Harlan, William Brennan and Charles Whittaker. Today only Bill Brennan and I are left. He is the senior Member of the court and I am next. The present Chief Justice is Warren Burger, and the other Members of the Court are Byron White, Thurgood Marshall, Harry Blackmun, Lewis Powell, William Rehnquist and John Stevens. Two others have come and gone during that period, Arthur Goldberg and Abe Fortus.

It is certainly accurate to say with such a change in its membership that the institutional personality of the Supreme Court of the United States has greatly changed in twenty-one years, but I think it is also accurate to say that the institutional character of the Court has changed remarkably little in the past twenty-one years or even the past fifty years. There has been a basic continuity, at least since the Judiciary Act of 1925, in the way the Supreme Court does its work and the work itself.

I came to the Court at the beginning of the 1958 Term and in that Term the aggregate of cases on the Court's calendar numbered about 1800. In the Term that ended last July we had to deal with over 4500 cases. That is an increase of 150 percent if my mathematics are correct.

The question that immediately presents itself is how does the Court manage such a huge volume of cases. The answer is, as Professor Gressman pointed out this morning, that since 1925 the Court has had the authority in most cases on our docket to screen the cases and select for argument and decision only those which in our judgment raise the most important and far-reaching questions. By that device we select annually for decision on the merits only a small fraction of the total, something approximating 200 cases in all.

Each Justice receives copies of every certiorari petition and every response to that petition. Each Justice without any consultation with his colleagues reaches his own tentative conclusion whether the petition should be granted or denied. The first consultation with his colleagues about each petition comes at the weekly Court conference during which that case is listed for discussion on the agenda.

We sit in conference almost every Friday during the term. Those Friday conferences begin at 9:30 in the morning and continue through the day except for a half hour recess for lunch. Only Members of the Court

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are present at the conference. There are no law clerks, no stenographers and no pages, only the nine of us. The junior Justice acts as guardian of the door. Our conferences are held in a rather small oak-paneled room with one of its walls lined with books from floor to ceiling, and over the mantle of the marble fireplace hangs the only picture in the room, a portrait of Chief Justice John Marshall. In the middle of the room stands a rectangular table large enough for the nine of us comfortably to be seated. Upon entering the conference room each of us shakes hands with each one of his colleagues.

Each of us brings to the conference his own copy of the agenda of the cases to be considered, some eighty or ninety cases each week, and each of us before coming to the conference has done his homework and noted on his copy his own tentative view as to whether review on the merits should be granted or denied. The Chief Justice begins the discussion of each case. Discussion then proceeds down the line by seniority until each Justice has spoken. The voting goes in reverse order if there is any need for a formal vote following the discussion.

Each of us has a docket book containing a sheet for each case with appropriate places for recording his vote and the votes of his colleagues. When any case receives four votes for review, certiorari is granted and that case is then transferred to the argument calendar.

This so-called rule of four is not written down anywhere so far as I know, but it is an absolutely inflexible rule, so that even if a majority of five believes strongly that a case should not be reviewed on the merits, certiorari is nevertheless granted for a minority of four. Oral argument ordinarily takes place about three or four months after the petition for certiorari is granted.

Each party was originally allowed an hour per side for argument, but in recent years we have limited oral argument to half an hour a side. Counsel submit their briefs and record in sufficient time for the distribution of one set to each Justice two or three weeks before the argument, and all of the Members of the present Court follow the practice of reading the briefs before the argument. We follow a schedule of two weeks of argument followed by two weeks of recess. During the recess is when we try to get our opinions written and continue deciding the constantly incoming certiorari petitions.

At the Friday conference discussion of the dozen or so cases that have been argued earlier that week we follow the same procedures I have described for the discussion of the certiorari petitions except, of course, the discussion of the argued cases is generally much more extended. The discussion of the case may be spread over two or more conferences, and not until the discussion is completed and a tentative vote is taken is the opinion assigned. The assignment is made a few days after the conference in which the decision has been reached.

The senior Member of the majority designates one of his colleagues or sometimes himself to write the opinion of the Court. This means that the Chief Justice assigns the opinions in those cases in which he has voted with the majority, and that the senior Associate Justice in the ma-

jority assigns the opinions if the Chief Justice is in the minority. The others agree among themselves in somewhat of a less formal way who will write the dissenting opinion. Each Justice is free to write his own individual opinion concurring or dissenting.

The writing of an opinion is not easy work as I have learned in these past twenty-one years. It always takes weeks and sometimes it takes months to write an opinion. When the author of an opinion for the Court has completed his work he sends it to the print shop in the basement of the building. Once typeset, the author sends a printed copy to each member of the Court, those dissenting as well as those in the majority. Often some of those who voted with him at the conference will say they want to reserve final judgment pending the circulation of the dissenting opinion. It is a common experience that dissenting opinions attract new votes, even enough votes sometimes to become the majority opinion. I have converted more than one of my proposed court opinions into a dissent before the final decision was announced. Prior to a final decision, a constant interchange goes on among us by written memoranda, by telephone and in lunch table conversation while we work out the final form of the Court opinion. There was one case this past term in which I circulated ten printed drafts before one was finally approved as the opinion of the Court.

This briefly sketches our procedure. The point is that each Justice, unless he disqualifies himself in a particular case, passes on every piece of business coming to the Court. Our Court does not function by means of committees or panels. Each Justice passes on each petition. The precise method that a Justice may follow in meeting the enormous case load varies, but there is one uniform rule. A subject is not delegated. Each Member of the Court decides each case in sufficient detail to resolve the question for himself, so that in a very real sense each Court decision reflects an individual decision of every Justice.

The process can be and often is a lonely troubling experience for fallible human beings conscious that their best may not be adequate to the challenge. A Justice does not forget how much may depend upon his decision. He knows it may affect the course of important social, economic and political currents in our national life. But the fact that Justices of the Supreme Court of the United States have always been called upon to face and to decide issues that may involve some of the dominant social, political, economic and even moral and philosophical problems generated by their times does not mean that the Court is charged with making social, political, economic or philosophical or moral decisions. It is quite the contrary. The Court is not a council of platonic guardians whose job it is to decide difficult and delicate questions according to the Justices' notions of what is just or wise or politic. To the extent that this function is a governmental function at all, it lies with the people's elected representatives, the legislative and executive branches.

The judicial branch is charged with deciding controversies according to the Constitution and the laws of the United States. The issues arise in

the framework of concrete litigation, cases or controversies. They may be decided on particularized facts bound in the record made in a trial court or in an administrative agency. This is not to say that it is often easy to resolve these controversies by simply referring to the words of the statute or the Constitution.

So far as the Constitution is concerned the founding fathers knew better than to pin down details too closely. They drafted principles rather than precise details. Thus it is that the Constitution does not take the form of a litany of specifics. There are not many cases where the answers are clear one way or the other. Particularly difficult are the cases which involve conflicts between individual human beings and governmental power, whether in the form of state or federal government.

The field, which in my time has primarily absorbed the Court's attention, is constitutional law. In those situations where the Constitution or statutes do not clearly decide the case, a Justice must rely upon his own basic understanding of the Constitution and the law, bringing to bear his own intellect, his own learning, his own experience and his own conscience. For him the complex phenomenon that lawyers know as law is always an unfinished tapestry the weaving of which is never done.