Political Science 417
Deciding to Decide

Overview of Supreme Court Process

• Discretionary jurisdiction
  – writ of certiorari
• Court conference
  – rule of four
• Briefs
  – amicus curiae
  – Solicitor General
• Oral arguments
• Initial vote on the merits and opinion assignment
• Opinion drafted and circulated
  – dissenting or concurring opinions
  – obiter dicta
• Final vote
  – tie vote
  – DIGging: Dismissed as Improvidently Granted

Key Stages

• Deciding to Decide
• Oral argument
• Voting
• Dissent - joining opinions
• Opinion assignment
Supreme Court’s Jurisdiction

• Limited Jurisdiction
• Article 3, Section 2:
The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Federal Jurisdiction

• Cases and controversies
• Federal questions
• Federal party
• Diversity of citizenship
• Between states
• Involving representatives of foreign countries

Analysis of Jurisdiction

“Standing”

• case or controversy
  – actual injury (must be some harm)
  – personal injury (may not sue on behalf of others)
  – may not be moot
• subject matter jurisdiction
• personal jurisdiction—jurisdiction over the parties
• exclusions
  – "political" questions
  – estoppel
    • res judicata
    • collateral estoppel/issue preclusion
**Supreme Court’s Jurisdiction**

- Original
  - involving representatives of foreign countries
  - between states
- Appellate: all else
  - Congress may create exceptions and create regulations
- Additional considerations for Supreme Court jurisdiction
  - finality of action below
  - exhaustion of administrative remedies

**Deciding to Decide**

- 7,000-8,000 requests per year but under 100 decisions (80-90 in last few years)
- Judiciary Act of 1925 ("Judges’ Bill")
  - Some discretion in 1891 with creation of Court of Appeals
  - Almost complete discretion as of 1988
- Writ of appeal
- Original jurisdiction

**Rule 10**

- a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
### The Process

- Cert pool memo
  - "markup" process
- Consideration at conference
  - discuss list and dead list
  - discussion and conference vote
- Denial of certiorari is NOT a decision on the merits of the case
- Special situations
  - capital cases
  - Rule of Five
  - I.F.P.'s *in forma pauperis*  

### Explaining Cert Decisions

- Legal models
- Political models/explanations
- Combined models

### Legalist Image

- Presumption is against a grant
- Uncertworthiness
  - frivolous
  - "clear denies"
  - insufficient percolation
  - bad facts
  - cases in the pipeline
  - intractableness
- Certworthy
  - circuit conflict
  - importance
  - issue areas
  - egregiousness
### Cue Theory

- Catching the Justice’s attention
- Original cues examined
  - federal government as a party
  - Dissension in courts below
- Substantive areas
  - Economics
  - Civil Liberties
- More recent suggestions
  - solicitor general as petitioner
  - conflict in circuits
  - amicus curiae briefs

### Cue Analysis

<table>
<thead>
<tr>
<th>Solicitor General as Petitioner</th>
<th>Actual conflicts in circuits</th>
<th>2 or more amicus briefs supporting</th>
<th>% granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>no</td>
<td>no</td>
<td>no</td>
<td>1%</td>
</tr>
<tr>
<td>no</td>
<td>no</td>
<td>yes</td>
<td>35%</td>
</tr>
<tr>
<td>no</td>
<td>yes</td>
<td>no</td>
<td>33%</td>
</tr>
<tr>
<td>no</td>
<td>yes</td>
<td>yes</td>
<td>88%</td>
</tr>
<tr>
<td>yes</td>
<td>no</td>
<td>no</td>
<td>37%</td>
</tr>
<tr>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>96%</td>
</tr>
<tr>
<td>yes</td>
<td>yes</td>
<td>no</td>
<td>97%</td>
</tr>
<tr>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>(no cases)</td>
</tr>
</tbody>
</table>

NO cue: 1%          ONE cue 33-37%        TWO cues: 88-97%

### Getting on the Discuss List

<table>
<thead>
<tr>
<th></th>
<th>Proportion discussed</th>
<th>Proportion granted of those discussed</th>
<th>Overall proportion granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOTAL</td>
<td>32</td>
<td>31</td>
<td>36</td>
</tr>
<tr>
<td>U.S. as Petitioner</td>
<td>34</td>
<td>33</td>
<td>64</td>
</tr>
<tr>
<td>Disagreement among low courts</td>
<td>47</td>
<td>36</td>
<td>17</td>
</tr>
<tr>
<td>Alleged conflicts</td>
<td>35</td>
<td>33</td>
<td>17</td>
</tr>
<tr>
<td>Actual conflicts</td>
<td>33</td>
<td>63</td>
<td>69</td>
</tr>
<tr>
<td>Civil liberties cases</td>
<td>27</td>
<td>28</td>
<td>58</td>
</tr>
<tr>
<td>Liberal outcome in lower court</td>
<td>45</td>
<td>36</td>
<td>16</td>
</tr>
<tr>
<td>One amicus brief in support of cert</td>
<td>65</td>
<td>46</td>
<td>20</td>
</tr>
<tr>
<td>Two or three amicus briefs in support of cert</td>
<td>33</td>
<td>63</td>
<td>46</td>
</tr>
<tr>
<td>Four or more amicus briefs in support of cert</td>
<td>50</td>
<td>71</td>
<td>63</td>
</tr>
<tr>
<td>One or more amicus briefs in opposition</td>
<td>65</td>
<td>50</td>
<td>24</td>
</tr>
<tr>
<td>Dissent in lower court</td>
<td>52</td>
<td>34</td>
<td>20</td>
</tr>
</tbody>
</table>
Signals and Indices

- signals can be manipulated
- indices are clear characteristics of a case
- universal vs. particularistic

Indices

- universal
  - vote, panel, authors of opinion below
  - capital cases
- particularistic
  - subject area
  - particular judge below in dissent
  - particular judge authoring opinion below
  - counsel or litigant

Signals

- universal
  - circuit conflict
  - better case likely
  - action by Solicitor General
- particularistic
  - nature of issue
  - egregiousness
  - amicus
**Strategic Considerations**

Justice wants to overturn lower court ruling

<table>
<thead>
<tr>
<th>“majority” strategy</th>
<th>Grant Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>In majority bloc</td>
<td>76%</td>
</tr>
<tr>
<td>In minority bloc</td>
<td>60%</td>
</tr>
</tbody>
</table>

error correcting/“proximity theory”

<table>
<thead>
<tr>
<th>Final vote</th>
<th>Grant Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reverse</td>
<td>78%</td>
</tr>
<tr>
<td>Affirm</td>
<td>59%</td>
</tr>
</tbody>
</table>

prediction strategy

<table>
<thead>
<tr>
<th>Final vote</th>
<th>Grant Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Win</td>
<td>76%</td>
</tr>
<tr>
<td>Lose</td>
<td>54%</td>
</tr>
</tbody>
</table>

**Combined Strategies**

<table>
<thead>
<tr>
<th>Error Correcting &amp; Prediction</th>
<th>Condition</th>
<th>Grant Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Reverse-Win</td>
<td>77%</td>
</tr>
<tr>
<td></td>
<td>Affirm-Lose</td>
<td>39%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Error Correcting &amp; Majority</th>
<th>Condition</th>
<th>Grant Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Reverse-Majority</td>
<td>87%</td>
</tr>
<tr>
<td></td>
<td>Affirm-Minority</td>
<td>47%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Prediction &amp; Majority</th>
<th>Condition</th>
<th>Grant Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Win-Majority</td>
<td>78%</td>
</tr>
<tr>
<td></td>
<td>Lose-Minority</td>
<td>50%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Error Correcting &amp; Prediction &amp; Majority</th>
<th>Condition</th>
<th>Grant Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Reverse-Win-Majority</td>
<td>87%</td>
</tr>
<tr>
<td></td>
<td>Affirm-Lose-Minority</td>
<td>30%</td>
</tr>
</tbody>
</table>

**Process Model**

- H.W. Perry
- Combines legal and political approaches
- Two modes of decision-making on Cert
  - outcome mode
  - jurisprudential mode
The Supreme Court's Changing Agenda