

Perry: Did your chambers act strategically in the cert. process?
Clerk: Oh yes. (C53)

7 Strategy

With the exception of dissents from denial of certiorari, bargaining and attempts at persuasion to obtain a vote on cert. are rare. That is not to say, however, that the cert. process is devoid of strategy, simply that strategy usually occurs within chambers rather than between chambers. Unlike interchamber activity, however, where the behavior of one justice is much like that of any other, justices do differ in their willingness to engage in strategic behavior. The variations are both situational and related to justices' perceptions of their roles.¹ Some justices are more strategic than others, and the ones who are the most strategic are the ones we would expect to be. But as shall be argued later, all of the justices act strategically on cert. at times, and much of the time none of them acts strategically. Strategic behavior can take many forms but only the most obvious are discussed here. Also, of course, there are strategies by players outside the Court, but those efforts are discussed elsewhere.

Defensive Denials

A term I did not use initially—indeed I had never heard of it until I began my interviews—was used over and over again: “There were

1. See Doris Marie Provine, *Case Selection in the United States Supreme Court* (Chicago: University of Chicago Press, 1980), who argues that role perception limits strategic behavior. Also see James L. Gibson, “Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model,” *American Political Science Review* 72 (1978): 911–924.

these things that we called ‘defensive denials’” (C9).² The words are almost self-explanatory. There are areas of law generally, and cases specifically, where a justice believes that if a case is reviewed, he will not like the outcome on the merits. Therefore, even if he believes the case is certworthy, and perhaps even believes that the ruling below is a horrible injustice, he still will vote to deny the case. The reasoning is, why make a bad situation worse? Recall that a denial of cert. has no precedential value, and refusal to take a case in no way signifies that the Supreme Court agrees with the ruling below. Difficult as it may be for a justice to let a ruling stand, by doing so he has let the precedent remain only for its immediate jurisdiction—for example, only the second circuit—rather than for the entire country.

During the informants' tenures on the Court, the “liberals” felt that the “conservative” justices were dedicated to undoing “important gains” achieved during the Warren era. Of course to the conservatives, these were the “evils and excesses” of the Warren era. Whichever, given the basically conservative majority, the “liberals” had more to worry about when a case was reviewed. As one clerk from one of the more liberal chambers noted:

Justice A [a liberal] was more in the position of preserving law that was already made. His particular worry was seeing it step backwards. Whereas Justice C [a conservative] the year before took every Fourth Amendment case that walked in the door. (C59)

Another clerk observed:

Justice A and Justice B [two liberals] didn't seem to want to accept any cases. (C1)

These fears would certainly be abetted by the fact that about two-thirds of all cases accepted for review are reversed. But as many have pointed out, the conservative revolution to overturn the Warren Court precedents never really materialized.³ A few informants said that some

2. Though I had never heard the term “defensive denial,” the concept is central to much of the political science literature that suggests that cert. votes are strategic.

3. For an excellent analysis, see Vincent Blasi, *The Burger Court: The Counter-Revolution That Wasn't* (New Haven: Yale University Press, 1983). For an earlier assessment, see Stephen L. Wasby, *Continuity and Change from the Warren to the Burger Court* (Pacific Palisades, Calif.: Goodyear, 1976). Recall, however, that I interviewed clerks who served during the October terms of 1976–1980, so for some of them, their tenure was before it was obvious that the counterrevolution had fizzled, and for all of them, it was prior to the arrival of O'Connor.

of the conservative justices misjudged votes. Early on, the conservatives aggressively brought up cases only to lose on the merits. This resulted in conservatives as well as liberals having to become more strategic in evaluating outcome on the merits. Reporting the use of defensive denials must be qualified, however. They are not used with wild abandon, contrary to what some of the political science literature suggests. But they do occur, and here I wish to document their use. Chapter 9 will discuss in more detail when and under what circumstances they are employed.

All of the justices acknowledged the existence of defensive denials. The first justice I interviewed described a defensive denial before I had heard the term, and before I brought up the issue. Incidentally, he was not a justice from one of the ideological wings of the Court, and he initiated the discussion:

Justice: . . . I might think the Nebraska Supreme Court made a horrible decision, but I wouldn't want to take the case, for if we take the case and affirm it, then it would become a precedent . . .

Perry: Actually this leads to something I wanted to ask later, but let me follow up on that now because I want to be sure I understand you. Do some justices vote strategically on cert.? For example, it is conceivable to me that Justice _____ would see a case that he believes ought to be granted, yet he is afraid that if he votes to grant cert. and brings the case up, that given the . . . personnel on the Court . . . in fact it might make things worse, so he would rather let it lie?

Justice: Oh, I think that does happen. Just as I have said with the Nebraska Supreme Court, some things might be better not to be taken.

When asked about defensive denials, another justice admitted their existence but seemed disdainful of them.

Yes, I think Justice _____ does that. I can't say that I don't do it because there are perhaps things that I am defensively denying and don't realize it. Part of my interest is in the tribunal. I see the Court as a tribunal, and our case selection process should be less result oriented.

A third justice was a bit more blunt.

Justice: Now there are plenty of strategic considerations, but I think those are really made in the individual chambers.

Perry: Would one such strategy be defensive denials?

Justice: Oh certainly that happens.

The next justice had a bit more to say. The topic came up in the context of his fear that certain justices were wanting to weaken the exclusionary rule.

Justice: Take, for example, the policeman where a warrant is issued incorrectly, but he serves the warrant in good faith; he has no idea that he was serving a bad warrant. Is that something that ought to be excluded? In my opinion, whether or not it was intentional has nothing to do with it, I think it is the practice not the intent. My attitude on that is to deny all applications for review.

Perry: That leads me to something else. I've heard many people talk about defensive denials . . .

Justice: [Interrupting] Certainly, it's a standard of the way we behave, and it's a perfectly honorable standard. I think anyone who suggests that this is an objective institution is just wrong; the notion that we are objective is just fallacious.

Perry: . . . One of the things I'd like to ask you since you have been on the Court for a while, and if you will excuse the terminology, you have been on the Warren Court and the Burger Court . . .

Justice: [Interrupting] If you are going to ask me if I have more defensive denials now than when I was on the Warren Court, of course I do. I remember rarely doing it then.⁴

Obviously, he had calculated that taking any exclusionary rule case was dangerous, so he voted to deny them all.

As the preceding quotation suggests, the strategy of defensive denials predates the current Court. Another justice told me:

When I was in law school, Felix Frankfurter once came out to lecture and he said that he knew of cases of where four

4. The conversation with this justice about defensive denials continued and is reported in a later chapter, where he qualifies their use.

wanted cert., but when the vote was taken, cert. was denied, because only three would be in dissent. The reason for this was practicality. The four were convinced that if they went to full argument they would lose, so they would not take this case and would try for another day. He made this as a flat statement in the classroom. I haven't seen that much of it on this Court.⁵

Clerks in all chambers were aware of defensive denials, but they varied in the extent to which they suggested them explicitly in their cert. memos or markups. Different ethics seemed to exist in different chambers, and to some extent, within chambers. In three of the chambers, from both sides of the ideological spectrum, clerks talked about defensive denials unabashedly and saw them as standard operating procedure for cases in certain areas. A rather curious thing happened with clerks from other chambers. Most of the clerks from the other six chambers, while acknowledging that defensive denials occurred, said that they were not a consideration in their chambers. Many of them made statements like, "My justice was not that ideological," or "Justice _____ thought he would be able to persuade the others," or "It was rare for Justice _____ to be in the minority position." And yet, when I interviewed their justices, the justices admitted doing it. Moreover, clerks in all chambers at times were concerned about outcome on the merits when evaluating certain cert. petitions, and such a calculation figured into their recommendation, but they rarely would call this a defensive denial. I suspect the reason for the discrepancy is that while some justices had large, "big issue" areas for which they would defensively deny, for example the exclusionary rule, other justices tended to deny defensively on particular cases. As a result, clerks from the latter chambers did not see what they were doing as the same thing.

The following clerks, from chambers that used defensive denials frequently, provide good examples of how defensive denials were seen and used.

5. Prior to this response there was a good lesson for me on interviewing. By the time I interviewed this justice, I had heard the term "defensive denial" many times and assumed that the term was used universally. Other justices knew exactly what I meant when I used the term. However, when I asked this justice about defensive denials, he looked very puzzled and asked me to repeat the question. Then I was puzzled, because I could not understand why he was confused. After I posed the question again, he launched on a long exposition of why it was rare and unnecessary to write in defense of a denial. Obviously, he is aware of the strategy of defensively denying, but evidently he does not use the terminology.

Sure, we have those, called "defensive denials." It was a real worry of whether or not we were likely to win on the merits. (C11)

Justice _____ and Justice _____ often don't vote cert. because they know they can't get the votes to win if the case is granted cert. (C7)

I think in some cases considerations like that have become second nature with some of the justices. (C20)

The fact that certain justices would defensively deny was of course not a secret. As one clerk from a chamber not predisposed to deny defensively noted:

Well, Justice A and Justice B voted to deny a lot of cases my year. Everyone seemed to believe that they were afraid that if the Court took it that a disaster would follow with the new Court. I think that is particularly true on the liberal side. I never really felt that Justice C [his justice] did that, though he was often in the minority on cert. votes. The liberals just felt that the court was against them. (C24)

The best way to effect a defensive denial, of course, is by never having to say anything. Note the implications of the procedure of using a discuss list.

I think if he knew that they had a majority, he might feel it is better not to let them decide and not to let the case go through. One of the things he could do is not let it show up on the discuss list. Then it didn't have a chance of getting mentioned. You just wouldn't want to rock the boat. (C13)

Though defensive denials are clearly used strategically, they are not some powerful secret strategy. Everyone knows that justices may use them, so that limits their effectiveness. A clerk pointed out their limitations.

Perry: In terms of what you just said, I understand that there are things called defensive denials.

Clerk: Oh yeah. Obviously you have heard the term.

Perry: Yes.

Clerk: I didn't attempt to apply them or think about them that way. I never did recommend defensive denials. It was usually obvious he wasn't going to take it. I might say, "you may worry how this would come out." I guess I see the role of the Court as that it has to decide important topics. If you try a defensive denial on the most political cases, the Court was not going to pay attention to your defensive denial anyhow. It's going to be granted so it would be ineffective. If the problem is serious it is also going to get granted. A defensive denial doesn't always work the same way. A defensive denial is inconceivable in a death case, for example. By its very definition the thing you are worried about is people being executed, so to deny cert. is counterproductive. But that's not true with an equally bright line like in an obscenity case. (C40)

And, as another clerk pointed out, sometimes one does not have the luxury of defensively denying without looking suspicious, particularly if a dissent from denial is circulated.

For example, if Justice A and Justice B [moderates] were going to dissent from a denial on a liberal cause, it's awkward if Justice C and Justice D [liberals] are not there to form the four. People are going to ask why C and D are not on. It is easier for the clerk to say, "This is a hot potato, don't take this case," if there is no dissent; but if there is a dissent from someone else, then C and D probably would need to go along.⁶ There is a different dynamic operating. (C47)

Even though everyone knows that justices have the tool of defensive denials, which limits their general effectiveness, it is not always obvious that on a particular case a justice is trying to effect one. That is, sometimes a justice might make jurisprudential arguments against taking a case—for example arguing that there is a messy fact situation—when in fact, it is the potential outcome that motivates his objection. This ploy does not mean that the justice is being disingenuous. There are many reasons to deny cert., and the best strategy to use in getting another justice to go along with his position would be

6. This illustrates nicely Ulmer's argument that justices act strategically at cert. except that they will attempt to hide their bias. S. Sidney Ulmer, "Selecting Caes for Supreme Court Review: An Underdog Model," *American Political Science Review* 72 (September 1978): 902-909.

to make arguments that would appeal to that colleague. Nevertheless, his primary concern is the outcome.

Capital cases seemed to be the only category of cases that were off limits to defensive denials per se, at least in terms of attempts to avoid discussion. Recall that all capital cases are put on the discuss list, and that Brennan and Marshall would dissent on all capital cases. Acting truly strategically, Brennan and Marshall might have preferred to pass over some capital cases in order to get a better case for their desired doctrinal outcome, but they did not do this. They dissent on all such cases. Yet several informants said that there were distinctions among capital cases, and that Brennan and Marshall pushed harder on some than on others.

Evidently the justices can defensively deny even when it is tough to do so.

Perry: Does a defensive denial still work in a case even when the justice is outraged? In other words, if he sees a horrible case and it really upsets him, is he still willing to deny defensively?

Clerk: No question, because it is better to have it just in a lower court than having it affirmed by the Supreme Court. (C42)

Defensive denials were talked about in all sorts of areas, but they came up most often on Fourth Amendment concerns and obscenity cases. When asked about defensive denials, one clerk said.

That's absolutely true. Our assumption was that we wouldn't vote on a Fourth Amendment case because we didn't want Justice _____ and Justice _____ to get a hold of it. Justices would be fairly stupid to take a case knowing you would lose. It would be only natural not to take a case unless he thought he could win. I know that was Justice _____ [his justice's] concern. I don't think anyone is like that—where they wouldn't take it into consideration. (C16)

And from two other clerks:

[Cert.] is generally not a vote on the merits. Although, for awhile I do know on some obscenity cases Justice _____ knew that they would lose five to four. [The four] knew they would lose, therefore, they began not voting for cert. (C13)

Criminal cases are an area where he's more likely to have defensive denials. He doesn't have much faith in the Court taking on criminal cases. Although again this is where he judged wrongly because in our year the Court really extended some of the rights of criminals. (C26)

Defensive denials, then, are used selectively but unabashedly in some chambers. As suggested earlier, however, many clerks feel that defensive denials are somehow improper or unseemly, sometimes even by those whose own justices do it.

Clerk: That's basically what we look for and in some ways it was influenced by an estimation of whether or not we had the votes. I mean there are certain risks involved bringing your case up.

Perry: I've heard this referred to as defensive denials.

Clerk: Well, I think Justice A [his justice] was less inclined to do that than others. I mean he is a very principled guy.

Perry: Let me ask you about that. Why would you assume that a defensive denial would not be principled?

Clerk: Formally, if a case should be granted because of an issue, it should be granted without any regard to who would win. Justice B engaged in very few defensive denials. I mean [he] would vote to grant a case even if he thought it was right. (C56)

And from another clerk:

Then there was the matter of defensive denials. I didn't really get into it because I don't believe in them. I believe that if an important case deserves to be heard and decided, that it ought to be decided, and the Supreme Court is too political an institution anyway to get into things like defensive denials, so I tend to resist them. But nevertheless Justice _____ [his justice] believed in them. (C26)

These last two quotations bring to mind the discussion in the preceding chapter about clerks being uncomfortable when behavior was perceived as being "political." But for the same reasons proffered in the evaluation of horse trading, the ethical dilemma about defensive denials also seems unjustified so long as it is neither the role nor the practice of the Court to accept all cases that justices think are wrongly decided. Unquestionably and unapologetically, clerks and justices en-

gage in strategic behavior in opinion writing. That seems perfectly appropriate to them. Yet for some, strategy at the case selection stage does not.

It is interesting that every justice denounced and denied any logrolling on cert., but they all admitted that defensive denials occur. Most justices view defensive denials as an acceptable strategy; logrolling is an unacceptable strategy to them all. Yet both activities could be seen as efforts that sacrifice a short-term outcome in order to achieve a more desirable long-term goal. The primary distinction is that logrolling involves two justices whereas a defensive denial involves one. The different normative assessments of these behaviors—one acceptable, the other despicable—is probably the result of socialization and role perception by the justices. Judges are strongly socialized not to allow outside influence. Of course persuasion is acceptable (though its forms are highly constrained), but influence is not. One should make up one's own mind. Horse trading may be seen in terms of influence, whereas a defensive denial comes about as a result of an individual judge's evaluation of a situation. In terms of principle, I smell roses, but justices obviously see the two forms of strategic behavior as very different.

In any event, defensive denials are the exception. That is a very important point and bears emphasizing. Nevertheless, they are significant, because when they occur, it is often in the most contentious areas. Moreover, defensive denials help explain some of the "contradictions" in the decision process that are discussed later.

Aggressive Grants

If justices attempt to keep cases from being decided for strategic reasons, do they also reach out and take cases based on strategic calculations? The expression "defensive denial" came from my informants. No common term emerged to describe the opposite phenomenon, so I invented one—"aggressive grants."⁷ I would ask my informants something to the effect:

You have described denying defensively. Does the opposite happen? Are there aggressive grants? That is, do justices sometimes reach out to take a case that is not the best candi-

7. A more precise term might have been "offensive grants," but I did not use that term for various reasons. One was that I feared it would strongly suggest calculating behavior, an implication that might engender defensive, textbook responses.

Sometimes the Court says now is the time to deal with an issue. I'm thinking of *Miranda* . . . I don't mean *Miranda*, I mean *Gideon*. Now Abe Fortas is a friend of mine, and a lot of people gave him credit for the victory, but the Court was ready for that case, and a third-rate lawyer from Yonkers could have won it. To a degree, the Court was ready for *Brown*—same way with one man, one vote. The Court had a hard time approaching this issue, then all of a sudden, it became something else for the states to say that the Constitution didn't say anything about these voting procedures. Maybe that was true somewhat in the abortion case.

If this justice's assessments are correct, his account differs from those that suggest that the Court had to wrestle with these cases with much anxiety and intense deliberation over the correct outcome. This justice seems to argue that the outcomes were foregone conclusions, and everyone on the Court knew it at the time the case was selected; indeed, the case was selected to reach the desired outcome. From what one can glean from history and doctrinal development, this probably was true for *Gideon* and perhaps *Brown*, too. The records on the apportionment and abortion cases seem less obvious in support of his assertion. In any event, there are probably few times when the Court as a whole aggressively grants.

Gideon type cases notwithstanding, the relative ease of defensive denials compared to the difficulty of aggressive grants has interesting implications. It suggests that it will be far easier to maintain the status quo than it will be to change, particularly on a closely divided court. This might help explain the failure of the conservative counterrevolution. The traditional explanation sees two of the Nixon appointees, Powell and Blackmun, unwilling to go along with Burger and Rehnquist on some of the most divisive cases. That is observable and is undoubtedly a partial explanation for the failure of the counterrevolution. There may be other factors that also played a role. Perhaps even the most conservative justices were not as committed to overturning as much of the Warren Court's legacy as politicians and the media believed. And perhaps some of the justices have a stronger affinity for *stare decisis* than was commonly assumed, regardless of the implications for their own philosophy. In addition to these traditional explanations, however, there may also be a systemic one. The failure of the counterrevolution may have something to do with the bias in the cert. process against change, particularly when there is a divided Court. All justices can see, and are probably fairly resistant to, attempts to manipulate the agenda strategically. This resistance would be par-

ticularly true when several justices are known to be less ideological, less result-oriented, and more "judge-like." Whether this is a good or bad thing depends on whom one is talking to. Some admire these justices for their lack of an agenda and their less ideological, less result-oriented approach. Others criticize them for not having a consistent ideology or vision of the constitutional order—something that should differentiate a justice from a judge. The merits of that debate aside, the point is that the presence of "judge-like" justices, whatever their ideological leanings, makes strategic manipulation at cert. more difficult. Once a case is given plenary consideration, conservative but "judge-like" justices may indeed vote with conservative ideologues on the merits. But the primary factor governing their cert. behavior is usually certworthiness in some jurisprudential sense rather than a strategy for outcome on the merits and some ultimate doctrinal stance. From the perspective of the justices who do have an agenda and are willing to act strategically on cert., the attitude of the "judge-like" justices is bad news, because the cases that can muster a grant are not necessarily the best ones strategically to achieve a desired outcome. For example, they might not be the cases most likely to pick up a swing justice.

There is an irony here. The rule of four was developed to make agenda access relatively easy and to assure that there would not be a tyranny of the majority when it comes to setting the agenda. "Relatively easy" does not mean that a case should have easy access. It means that making it onto the agenda should be easier than trying to command a majority opinion. For a case to have its day in court, the requirement is less stringent than in institutions that require majority consent for setting the agenda, or that concentrate agenda power in the hands of a few. Yet practically speaking, other norms have developed on the Court so that the process makes access extraordinarily difficult. The irony is that implicit in the rule of four is the notion that a "policy minority" should at least be able to get a case argued with the hope that a fifth justice could be persuaded on the merits. Yet the presumption against granting, which results in resistance to strategic manipulation of the agenda, works against a "policy minority" getting the chance to put their best case forward, which might enable them to pick up the swing justice. The formal rules, then, allow for a freer access to the decision agenda than in other institutions, and much is frequently made of this, particularly in textbooks and sometimes by the justices. But the reality is that other norms mitigate against access, making it extraordinarily difficult, and easier access does not lead to a substantially improved ability for a minority to structure the agenda to its favor. The point should not be overstated. Obviously requiring

only four votes is better than requiring five, and one need only observe the current Court to realize that the importance of one justice is frequently dispositive. Nevertheless, we cannot assume that significantly greater access to the Court's decision agenda is achieved simply because a formal rule allows less than a majority to set the agenda.

Whether this inability to "manipulate the agenda strategically" is a good thing or a bad thing turns largely on one's concept of the role of the Supreme Court. Whatever one's position, however, "strategic manipulation" need not connote something sinister. It can mean something as simple as putting one's best case forward. Still, such a concept was seen as unseemly by many of the informants. There is a fairly strong normative presumption by many that the case selection process should be nonteleological. If a case "deserves" or "does not deserve" to be heard, it should be granted or denied without respect to outcome. Nevertheless, all justices and clerks engage in strategic behavior on cert. sometimes. When and how often this occurs are discussed later.

Invitations and RSVP's

One strategy is related to aggressive grants, though it is not the same thing. The Court need not simply wait for cases to knock at its door. As is well known, justices often send out signals; they invite cases. When asked, justices acknowledged that they do this. Though in response to a different question, one justice's comments are apropos here.

Perry: If we read a textbook account of the Supreme Court, it is described as a reactive rather than proactive institution.

By that I mean the classical explanation is that the Supreme Court has to wait for cases to come to it. And yet by what you've just said, it sounds as if in some ways you have some freedom in setting the agenda.

Justice: The Supreme Court really does have to wait for cases to come to it—it is basically reactive. But to be honest, that may exist more in theory than in practice. Some justices, I think, wait eagerly for cases to come. That was particularly true in the earlier days that I was on the Court, and less true of the current Court. In fact, I am not really sure that anyone currently has agendas as when I was first on the Court.

Perry: Well some people have suggested that Justice _____ has an agenda and that he is actively seeking certain cases.

Justice: [He sat back in his chair and looked up at the ceiling, paused for a moment, then smiled and said] Justice _____ is a very competent, agreeable justice. He does have a very strong view of _____ . . . Perhaps he does encourage cases and wait for them. I must say that my view is that the Court ought to be a more passive institution—perhaps naively and wrongly—but I think it is basically there to facilitate justice. But I think there are some justices who may have more of an agenda.

When asked specifically about inviting cases, one justice had the following to say:

Perry: How do you invite cases?

Justice: What do you mean?

Perry: If a justice wants to hear a case in a certain area, doesn't he sometimes make that known?

Justice: Yes. He says something [in an opinion] that might indicate that the Court would be willing to hear a case which brought up certain issues. We say this is something that we are not deciding here, but that it is something that the Court might want to resolve . . . I think generally that people are sometimes aware of what the Court or a justice might be interested in.

The first part of the justice's response confirms something that has always been assumed, but his latter statement was interesting and deserves some comment. Most of the bar are probably not aware of what the Court or individual justices might be interested in. Granted, there are some issues that any casual observer knows will be taken up sooner or later, though one cannot predict which particular case will be selected to resolve the issue. And, perhaps, one can guess the interest of certain justices in certain issues. Or when the Court practically issues a printed invitation, one learns of the Court's interest. Undoubtedly some people, such as the solicitor general, a few New York and D.C. attorneys who argue with some frequency in the Court, and some Court watchers, have a sense of the Court's, or an individual justice's, interest. But most of the nation's best attorneys are not likely to be aware of the types of cases that might interest many of the justices. And if they guessed, they would often be wrong. Several clerks suggested that when they began clerking for their justice, they assumed they knew some of his interests, either from knowing something about the justice's background, or from having observed him from the per-

spective of clerking on a court of appeals. Many times they turned out to be wrong. Not only was their justice not predisposed to taking the cases that they thought he would, but they also found that he was interested in things they would never have imagined. If the invitation is not clear, there may not be the desired RSVP's.

Having said all this, one often does not have to guess at the justice's interests because signals are sent. The trick is simply to find the signals. This usually requires watching the Court more closely than most attorneys have time to do, but some signals are pretty evident. Cases are invited through written opinions, as the justice suggested above; and our old friends, dissents from denials of certiorari, serve as an excellent place to find invitations. Obviously, the fact that a case was denied is discouraging, but often the dissent signals what it might take for a similar case to get a grant.⁹

Deciding whether or not justices bargain, influence, or act strategically is an issue of perspective. The cert. process is political, and odd as it may seem, that is a point that needs to be made. The process is quite often characterized, particularly by lawyers, as routine and relatively free of strategy. But by any other name, much of the behavior that occurs is still political. Equally important, however, is the fact that just because there are sometimes attempts to achieve certain ends, these attempts differ in many ways from the ones we are used to and might expect from observations of other political institutions. Other times, they look much the same. Horse trading and logrolling do not occur. Persuasion and threats do, although they occur in a limited and particular form. Agenda coalitions are not formed and nourished explicitly, but coalitions are sometimes assumed based on anticipated reactions. There is strategy involved in some cert. decisions, but depending on one's perspective, it looks very much, or very little, like strategy in other political institutions.

Undoubtedly the boundaries and forms of acceptable political behavior on the Court result from perceptions of what is and is not proper behavior for justices.¹⁰ Inevitably, it seems to me, constraints on political behavior in a political institution, real or imagined, exogenous or endogenous, are going to bring about behavior that appears suboptimal, peculiar, and contradictory. This is not necessarily a crit-

9. See Peter Linzer, "The Meaning of Certiorari Denials," *Columbia Law Review* 79 (November 1979): 1227-1305.

10. Again, others have made this point. It is best articulated by Provine, *Case Selection*. See also Harold Spaeth and Gregory Rathjen, "Denying Access in Plenary Cases: The Burger Court," in S. Sidney Ulmer, ed., *Courts, Law, and Judicial Process* (New York: Free Press, 1981), p. 265.

icism, nor is it unique to the Court. We probably want our presidents and members of Congress to be both political and above politics. Likewise our justices. Nevertheless, constraints lead to behavior that is nonconstant. In this instance, as shall be argued later, it leads to an almost dichotomized pattern of decision making.