SUPREME COURT JUSTICES AS STRICT AND NOT-SO-STRICT CONSTRUCTIONISTS: SOME IMPLICATIONS

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I.

In making his televised announcement on the nominations of Lewis Powell and William Rehnquist for seats on the Supreme Court, Richard Nixon observed that he was merely fulfilling a campaign promise. For, he said: ". . . during my campaign for the Presidency, I pledged to nominate to the Supreme Court individuals who shared my judicial philosophy which is basically a conservative philosophy. . . . As a judicial conservative, I believe some Court decisions have gone too far in the past in weakening the peace forces as against the criminal forces in our society" (*New York Times,* 1971: 24C). In 1968, Mr. Nixon said: "We need more strict constructionists on the highest court of the United States. In my view, the duty of a Justice of the Supreme Court is to interpret the law, not to make the law, and the men I support will share that view" (*U.S. News & World Report,* 1968: 42).

These two statements are, to some extent, in conflict — at least by implication. Nixon's emphasis on the strict constructionist who avoids law-making is clearly, however, contingent on the assumption that a strict constructionist will take a less "friendly" stance toward those accused of crime than was evidenced by the Justices of the Warren Court. His approach to each of his Supreme Court nominations suggests a belief that judges make policy and that the way to change policy is to change judges. Justices Burger and Blackmun have now been on the Court sufficiently long to provide a preliminary test of Mr. Nixon's ability to choose the appropriate "policy changer."

In 37 criminal law cases in which Burger participated in the 1969-70 term, he took a position favorable to government in 26 or 70.1%. In 38 such cases in the 1970-71 term, Burger was favorable to government in 31 or 81.6%. In the same term, Harry Blackmun favored government over the individual in 30 of 38 cases, a rate of 78.9%. And Burger and Blackmun were in agreement in 37 of these 38 cases.[1] Earl Warren was able to find for government in only 19% of the criminal law cases

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decided during his 16 year tenure on the Court. During the 32 years covered by the 1937-68 terms, the Supreme Court ruled for government in only 40.5% of the criminal cases decided. And in the same 32 year span, no Supreme Court Justice equaled the Burger-Blackmun government-support rates for the past term.

It now appears likely that President Nixon will be able to "turn the Court around," as far as the criminal law dimension is concerned, if he can get enough seats to fill. Certainly, should he be as "successful" with the appointments of Powell and Rehnquist as with those of Burger and Blackmun, he need add only one additional "conservative" Justice to dominate the Court's making of criminal justice policy. Indeed, given the current makeup of the Court, there is a good chance of a policy turn-around even were no additional appointments to be made until a new President assumes office.[2]

To assume that the President will accomplish his objective of diminishing the rights of criminal defendants, or at least of slowing the expansion of such rights, is not the end of inquiry. One may be concerned about the unanticipated consequences of a shift from a liberal to a conservative Court — as Mr. Nixon defines these terms. If men make the difference in Court policy in one area (*i.e.,* criminal law), will they not also make a difference in other areas of judicial policy making? Certainly that possibility exists if one concedes that the Justices are not unidimensional automatons.[3]

II.

American courts are sometimes distinguished by the number of judges required to staff them. While most trial courts are single judge courts, most appellate courts are collegial in structure. The collegial or collective aspect of decision-making in the United States Supreme Court often has been central to attempts to explain that Court's actions. Less frequently noted is the fact that the Court is a multiple decision maker. Deciding cases "on the merits" (Decision Type I) is only one of its decisional functions. More than two-thirds of the Court's decisions in a given term occur in other than fully argued cases. Decisions must be made on applications for "stays" of various kinds, on requests for extra-ordinary writs, on motions to appear as *amicus curiae,* on applications for review via appeal or certiorari, on requests for rehearings, and so on. Recognizing that most of the Court's judgments are made in cases falling in the "non-merits" category (Decision Type II), it

is remarkable that our attention has usually been focused elsewhere.[4]

A good reason for researching and trying to understand the Type I decision is the obvious significance of the questions raised and answered in that context. For example, in the 1971 term, the Court imposed due process restrictions on the right of a legislature to punish one who interferes with its processes (*Groppi v. Leslie,* 1972); upheld the right of a state to levy certain court costs on one found innocent of the criminal charges against him (*Schilb v. Kuebel,* 1972); decided that, under certain conditions, a state cannot give preference to men over women for appointment as administrators of estates (*Reed v. Reed,* 1971); required a state to furnish to an indigent defendant a trial record of sufficient completeness to permit effective appellate review — even in non-felony cases (*Mayer v. Chicago,* 1971); and denied that a reduction in social security benefits to reflect workmen's compensation payments violated the due process clause of the fifth amendment (*Richardson v. Belcher,* 1971).

In the same term, the Court decided, by declining to review lower court holdings, that an 18-month delay from arrest to trial did not deprive a defendant of his right to a speedy trial (*Blevins v. United States,* 1971); that the admission as evidence of the transcript of a partially unintelligible tape recording in which the voice uttering incriminating statements was never identified as that of the accused, did not violate due process rights (*Tumminello v. Maryland,* 1971); that the admission of testimony that a white female robbery suspect was living with a black man in Texas did not deprive her of a fair trial (*Phelps v. Texas,* 1971); that the first amendment did not protect the right of a male high school student to wear his hair over his collar or his ears (*Swanquist v. Livingston,* 1971); and that the government may delay the seeking of an indictment for five years after the alleged criminal conduct without violating rights to a speedy trial (*Quinn v. United States,* 1971). This latter holding occurred in a case in which three of the defendant's key witnesses had died during the interim.

For those who may think the issues decided "on the merits" more important than the Type II decisions reported above, some of the less significant issues decided after full review may be noted. During the 1971 term, the Court affirmed a number of decisions by the courts immediately below. In the process, the following propositions were established: that an alien registra-

tion card is not a document required for entry into the United States (*United States v. Campos-Serrano,* 1971); that, under federal statutes, the possession of a firearm by a convicted felon is a crime if and only if possession per se affects interstate commerce (*United States v. Bass,* 1971); that the holder of 9.6% of a corporation's stock is not subject to S.E.C. regulations governing "insider trading" (*Reliance Electric Co. v. Emerson Electric Co.,* 1972); that a trucking company adequately stated a cause of action for purposes of suit against another trucking company (*California Motor Transport v. Trucking Unlimited,* 1972); and that damages against a post-merger corporation for violation of a pre-merger labor agreement were correctly awarded by a federal court of appeals (*Norfolk and Western Ry. Co. v. Nemitz,* 1972). In all these cases, the winning litigant at the court of appeals level was also the winning litigant at the Supreme Court level. Given that fact, one may reasonably question whether it was really necessary to review these cases while declining to review the issues raised in the Type II cases we have noted.

In any event, since what we report here is typical of what occurs in any given term of the Court, certain primitive propositions about the Court's behavior can be accepted. The Court gives full review to and decides a number of highly significant issues each term. The Court gives full review to and affirms the judgments of courts below raising less significant issues — cases the outcome of which remains unchanged for the parties to the disputes. The Court decides, by declining to review, a number of issues of considerable significance — without full review or hearing oral argument on the merits of the issues.

III.

To assert that the composition of the Supreme Court influences its policies is to suggest the influence of the *man in the law* rather than the *law in the man.* If such a suggestion is valid, we should be able to observe its consequences in other areas of judicial behavior. More specifically, we may hypothesize that the characteristics of Mr. Nixon's liberal and conservative Justices — which appear related to criminal law policy (Decision Type I) — are also correlated to the policy making which occurs when the Court rules on requests for formal review (Decision Type II). The theoretical linkage is based upon the attitudes, predispositions, or preferences that lead the Justices to expand or contract the scope of institutionalized governmental authority in the first place.

Essentially, the Court's rulings in fully reviewed criminal law cases result in upholding the exercise of institutionalized power or the rights of the individual as against that power. Similarly, when the Court decides whether to grant applications for review submitted by parties who have "lost" to governmental authority in the courts below, it sustains the government's victory (by denying review) or questions the government's victory (by granting review). It is true, of course, that such a conceptualization ignores the law and its requirements as well as the acts of the individual relative to the law. But for purposes of comparing the behavior of judges exposed to the same cases, this is not a fatal concession. Law and facts are the same for all. Thus behavioral variations cannot be attributed to variation in stimuli. A more serious weakness in our model is entailed if we view the Supreme Court across time. Changes in the composition of the Court provide us with justices who sit for varying periods and, consequently, participate in varying subsets of cases. The extent to which this weakness affects one's conclusions, however, is empirically dependent on the results obtained. Behavioral consistency in predicted directions, assuming case participation and tenure of service are randomly distributed, is not to be expected by chance. Such a finding would, therefore, tend to dilute the seriousness of the problem of comparing Justices across disparate data sets.

In summary form, our expectation is that some Supreme Court Justices will take a relatively "unfriendly" stance toward the individual in conflict with his government. We expect, similarly, that some Justices will be reluctant to question the victory of the government in the lower courts by granting review of such court judgments. Moreover, we expect these Justices — conservatives in the Nixon sense of that term — to be one and the same. For the liberal Justices, *i.e.*, in Nixon's terms, those who tilt the criminal justice process too much in the direction of the criminal forces, the opposite finding is anticipated. The liberal Justice will be more inclined to grant review of government "wins" below and to rule for criminal defendants in cases that are fully reviewed.

Rephrased, we expect an association between the behavior of the Justices across two distinct contexts when faced with conflicts between the individual and his government. Such an anticipated result is premised on the assumption that the attitudes of a Justice toward institutionalized authority will govern or heavily influence his behavior in both instances — that

legal, procedural, and contextual differences will not have sufficient impact to cancel the psychological forces which encourage consistency of behavior and belief.

Unfortunately, we cannot test these expectations directly with Burger, Blackmun, Powell or Rehnquist, since we lack necessary data on the access or certiorari decisions for these Justices. We utilize, instead, an indirect approach — *i.e.*, a test of the general hypothesis with data on 15 Justices who sat sometime during the 1947-56 terms of the Court. The data on fully reviewed cases are easily obtained from the *Supreme Court Reporter*. For the access or review decisions, we may utilize the voting data for this decade now available in the Harold H. Burton papers (Manuscript Division, Library of Congress). During his tenure on the Court, Burton recorded the votes of individual Justices on each certiorari application, excepting those applications disposed of via the "special listing" procedure.[5] If these Justices can be viewed as a representative sample of modern Supreme Court Justices, we may generalize our findings beyond our immediate coterie of Justices. If not, this study must be viewed as descriptive. But given the complete paucity of information regarding the queries we pose, such a purely descriptive study of a set of 15 Justices seems clearly justified.

IV.

To conduct a rough test of our hypothesis, we may compare the votes of the Justices in criminal law cases fully reviewed by the Supreme Court with the votes of the same Justices in making a Type II decision — whether to grant requests for review of government victories in the courts below. Support for the hypothesis will be ascribed to a finding that the Justices who tend to support the government in criminal justice cases, as well as those who tend to support claims against government, will do so across both decisional contexts.

As a first step, we need operational definitions of the terms "liberal" and "conservative." Moreover, our definitions should be consistent with the content which President Nixon has given the terms in discussing his judicial philosophy and in filling vacancies in the Court. To distinguish these terms from other meanings attributed to them, we shall use the labels, Strict-Con and Loose-Con. Operationally, a Strict-Con may be defined as a Justice who tends to rule for government in criminal justice cases. A Loose-Con exhibits contrary tendencies. As a quantitative indicator to Strict-Con, we have calculated

the percentage of criminal cases in which each Justice ruled for either state or federal government during that part of the 1947-56 terms in which each sat as a member of the Court. The summary data are presented in Table 1.

TABLE 1: VOTING PATTERNS OF 15 SUPREME COURT JUSTICES IN CRIMINAL CASES: VARYING PERIODS (1947-56 TERMS)

Justice	Period (Terms)	Number of Cases	Percentage Decided for State or Federal Government
Minton	1949-55	133	77.44
Vinson	1947-52	136	69.85
Reed	1947-56	214	67.28
Burton	1947-56	238	64.54
Clark	1949-56	174	59.19
Jackson	1947-53	149	56.37
Whittaker	1956	16	56.25
Court	1947-56	241	51.86
Harlan	1955-56	62	50.00
Frankfurter	1947-56	239	39.33
Warren	1953-56	94	32.97
Brennan	1956	38	23 68
Rutledge	1947-48	58	22.41
Black	1947-56	237	21.94
Murphy	1947-48	58	20.68
Douglas	1947-56	217	19.81

The Justices ranked in that table range from Minton, who gave the highest support to government, down through Douglas, who gave government the least support. Minton, clearly, may be classed as a Strict-Con while Douglas fits our definition of a Loose-Con. The remaining Justices relate in varying degrees to these polar extremes. If the "support for government" rates in Table 1 reflect basic attitudes toward public authority, then rates of support for government at the certiorari application stage should assume a similar pattern. Support for government at the level of the access decision may be indicated by isolating those applications for review of government victories in the lower courts. In such instances, to grant certiorari is to question the "win" of institutionalized authority, while to deny certiorari is to uphold the government's initial triumph. If attitudes toward institutionalized power, when in conflict with claims of individual rights, are influencing the patterns in Table 1, then the same attitudes may operate in the same time span to influence the voting patterns on the certiorari applications. In short, we expect, consistent with our hypothesis, that the Strict-Con will show high support for the government and the Loose-Con low support for government in both instances.

In Table 2, we summarize the voting percentages on appli-

cations for review of government victories below. We notice immediately that Minton tops the scale while Douglas is only one position removed from the last rank occupied in Table 1. In fact, the positions of all the Justices are quite similar in the two tables. The rank order correlation coefficient is .932.

TABLE 2: VOTING PATTERNS OF 15 SUPREME COURT JUSTICES IN DENYING CERTIORARI APPLICATIONS: VARYING PERIODS (1947-56 TERMS)

Justice	Period	Number of Applications to Review Government Victory Below	Percentage of Decisions Favorable to Government (Cert. denied)
Minton	1949-55	795	84.15
Clark	1949-56	865	79.65
Vinson	1947-52	497	79.47
Burton	1947-56	1016	77.26
Reed	1947-56	971	76.93
Jackson	1947-53	557	75.22
Harlan	1955-56	372	74.46
Frankfurter	1947-56	1010	73.36
Warren	1953-56	500	72.40
Court	1947-56	962	72.24
Brennan	1956	76	69.73
Whittaker	1956	29	62.06
Black	1947-56	1005	59.60
Rutledge	1947-48	117	56.41
Douglas	1947-56	971	55.50
Murphy	1947-48	119	52.94

The linearity of the relationship can be seen clearly in Figure 1 which plots the percentages from the two tables against each other. The outlier in this array is clearly Whittaker, though Brennan also deviates considerably from the least squares estimate.[6] These two Justices are the only ones with participation in less than 100 cases in Table 2 and 50 cases in Table 1. Consequently, their outlier status could be an artifact of the small n's. On the other hand, Brennan's participation rate is more than double that of Whittaker in Table 1 and more than three times that of Whittaker in Table 2. Therefore, for further analysis, we retained Brennan but removed Whittaker from consideration.

In Figure 2, we plot the two relevant percentages omitting Whittaker. The relative position of the remaining 14 Justices, of course, remains unchanged. But the slope of the least squares line is slightly steeper in Figure 2. The rank order correlation for the Justices in two decisional contexts increases from .932 to .962. The Pearson product moment correlation (Blalock, 1960: 285-292) also jumped from .833 to .895. Thus we have found a strong association between the rates at which 15 Justices re-

sponded toward government in two decisional settings and that the association is improved upon by the elimination of Whittaker from the calculations.

Our concept is not that in this association, one variable is dependent and the other independent. Instead, we view both variables as dependent on the attitudinal structure of the Justices. The reasoning here is inductive. It asks essentially this question: If a given theory of decision-making in criminal cases by Supreme Court Justices is postulated and the theory is valid, what decision-making patterns would be expected on other dimensions? The longer the list of expectations that can be empirically validated, given this approach, the firmer the support for the suggested theory. Here we are working with a "rough and ready" theory implied by President Nixon's approach to the nomination of Supreme Court Justices and a single expectation given the soundness of Nixon's reasoning. Our initial finding is that the data arrays itself on the dimension examined in a manner quite consistent with the theories imputed to Nixon.

Our initial result is derived from cases involving state and federal governments respectively as litigants. In Tables 1 and 2 and Figures 1 and 2, no attention is paid to level of government. This is perfectly appropriate if the response of the Justices is to institutionalized power — undifferentiated as to level of authority. However, Justices have frequently argued a distinction between federal and state power. Some Justices have been particularly sensitive to "State's Rights."

The way in which such considerations can affect the behavior of a Justice, can be seen in the conferences dealing with the segregation cases (*Brown v. Board of Education,* 1954; *Bolling v. Sharpe,* 1954). Four of these cases involved state litigants, but one was appealed against the District of Columbia. Although Justice Frankfurter eventually found for the plaintiffs in all cases, his initial stance differentiated the state cases from the federal case. The records show a quick conclusion that school segregation in the District of Columbia was unconstitutional but he expressed serious doubts regarding the same question in the state cases (Ulmer, 1971: 689-702). Examples along this line could be multiplied quite easily.[7] Consequently, we need to ask whether level of government or institutionalized authority affects the first order correlations reported above. Figures 3 and 4 provide plots identical to those of Figure 2 with the distinction that federal and state governments as liti-

FIGURE 1

Percentage of Decisions Favorable to Federal and State Governments Combined in Fully Reviewed Criminal Cases, by Individual Justices, 1947-56 Terms

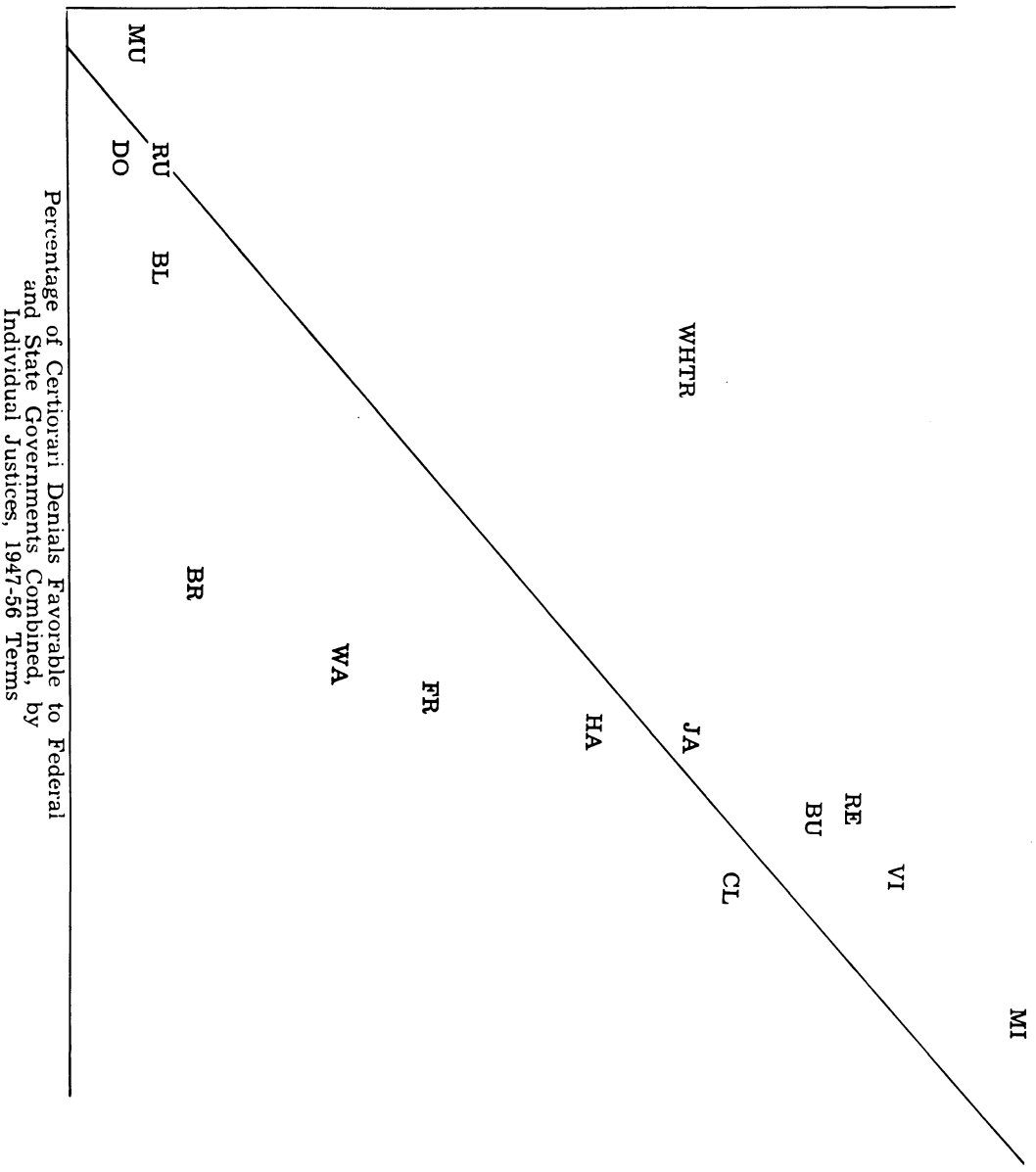

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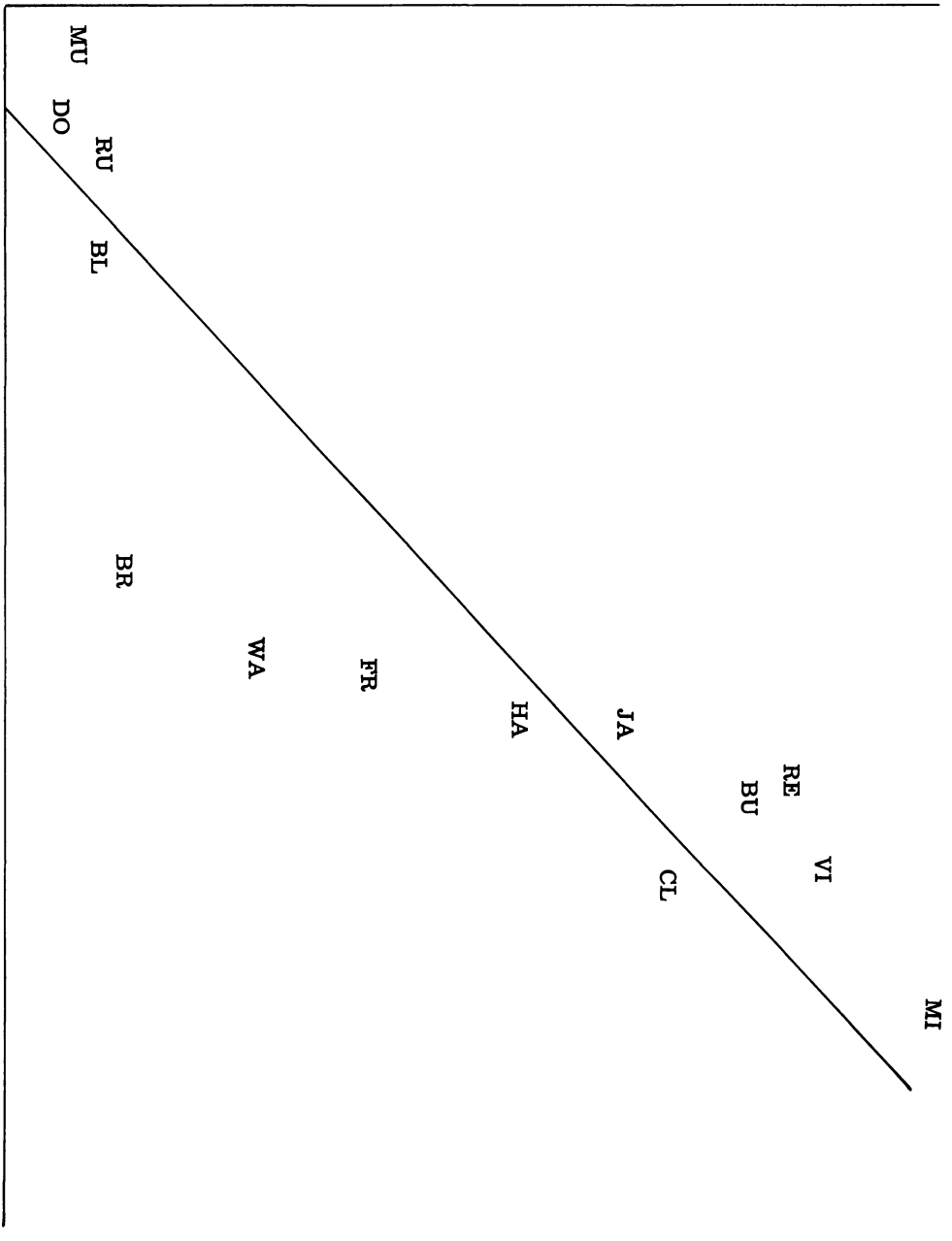
FIGURE 2

Percentage of Decisions Favorable to Federal and State Governments Combined in Fully Reviewed Criminal Cases, by Individual Justices, 1947-56 Terms



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gants are each treated separately. Figure 3 arrays the responses to federal cases. The measures for this array are given in Appendices A and B.

In comparing Figures 2 and 3, several disparities are noticeable. The product moment correlation level drops a bit, but the coefficient of .807 continues to reflect a high level of association between the decisional patterns, controlling for federal government involvement. The only striking change of position by a Justice is that of Murphy. While in Figures 1 and 2 Murphy is located in the lower left hand corner of the two-dimensional space, in association with Black, Douglas and Rutledge — in Figure 3 he has shifted to the right so as to occupy a position previously (and in Figure 3) occupied by Justice Brennan. This shows that Murphy's rate of certiorari denials was much higher in the case of requests to review federal victories below than in the case of state "wins" in the lower courts. Thus Murphy, unlike most of the Justices, apparently allowed level of institutional authority to influence his willingness to question the use of such authority.[8]

The inference is supported by the observations of Figure 4 which controls for state litigants. The measures for this array are given in Appendices C and D. In Figure 4, Murphy is again found in the lower left hand corner of the space. Reference to Appendices B and D shows that Murphy's 33 percentage point spread in the rates at which he decided certiorari requests favorable to federal and state governments respectively far exceed the differences that can be attributed to any other Justice.

In Figure 4, other differences may be seen. Rutledge is considerably more favorable to federal claims on the merits than to such state claims. But most striking in that regard is Earl Warren, who found merit in the federal claims 39.43% of the time while finding for the state in only 13.04% of the cases reviewed. At the same time we may note that Minton is in the upper right hand corner of all the Figures. Vinson, Burton, Reed, and Clark hover consistently in the vicinity of Minton. Harlan, Jackson and Frankfurter consistently occupy a more central position. Black, Douglas, Murphy and Rutledge, with the exceptions noted tend toward the lower left corner of the space. Brennan and Warren are consistently close to each other. In fact, all arrays show a clustering of Justices that is quite consistent with previous generalizations concerning "liberals," "conservatives" and "centrists" in the Court. This suggests

FIGURE 3

Percentage of Decisions Favorable to the Federal Government in Fully Reviewed Criminal Cases, by Individual Justices, 1947-56 Terms

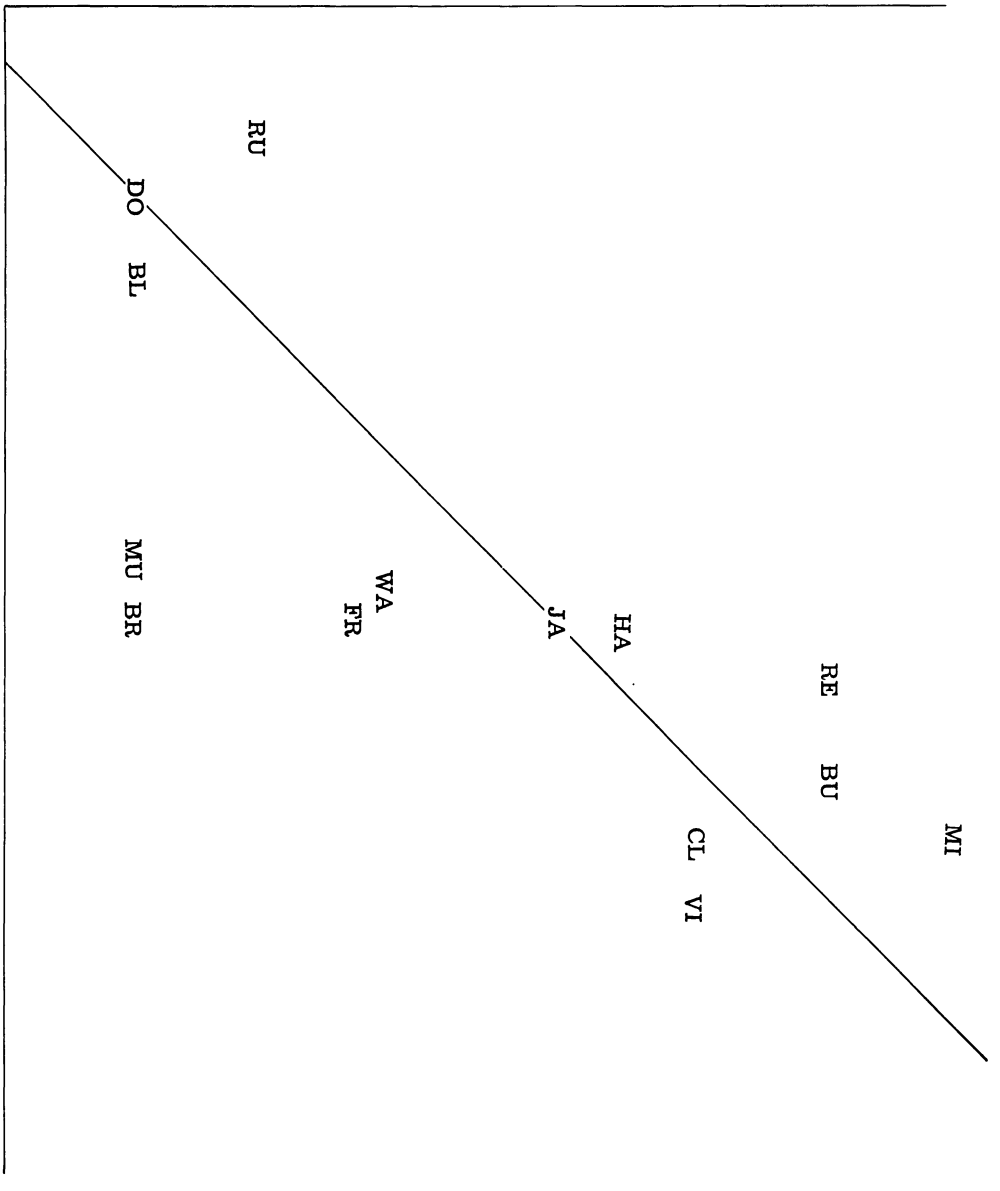

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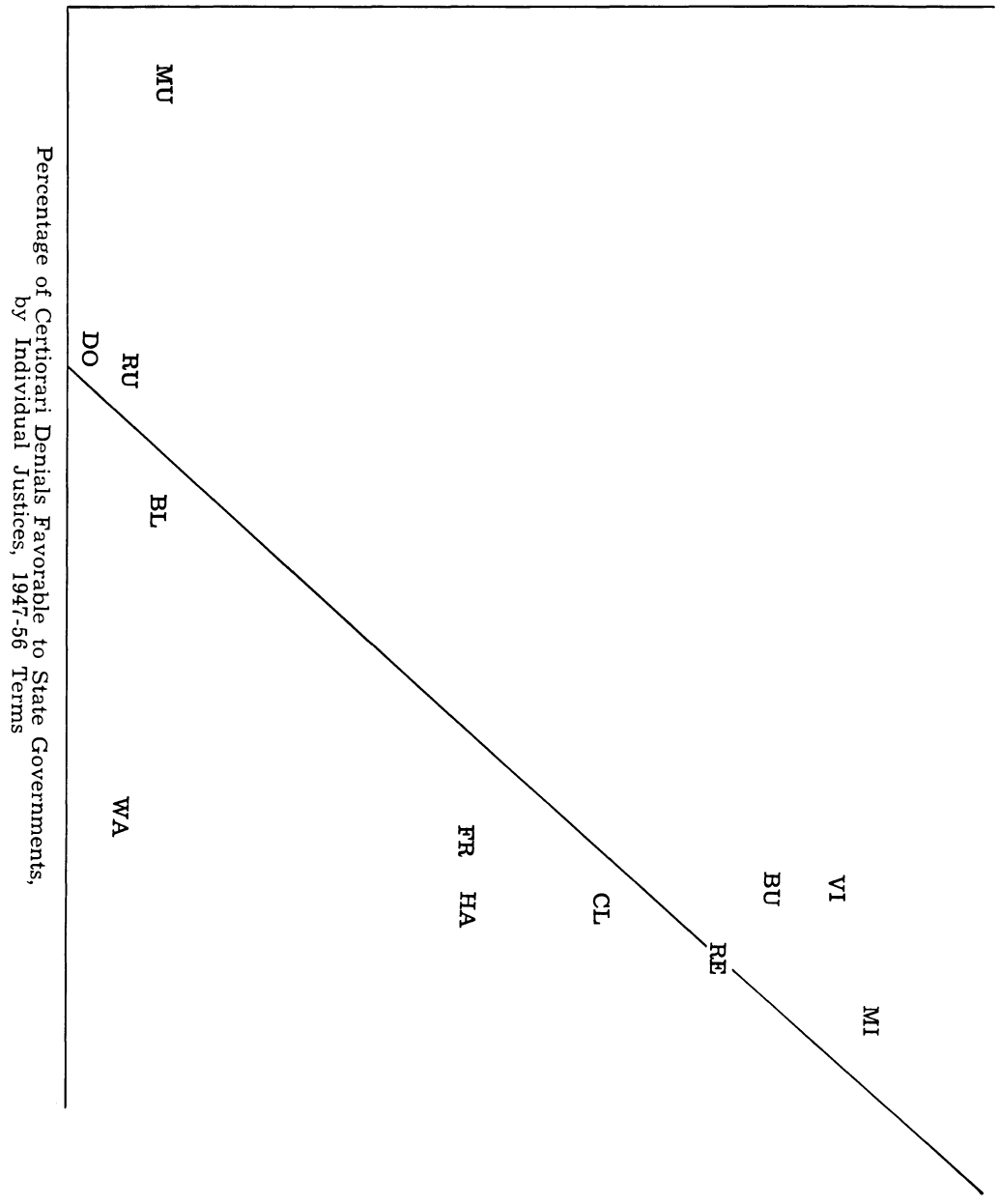
FIGURE 4

Percentage of Decisions Favorable to State Governments in Fully Reviewed Criminal Cases, by Individual Justices, 1947-56 Terms



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that meaningful relationships are being portrayed here rather than some transient artifacts of this particular data.

In general, for the purposes of our hypothesis, the most significant finding is the relative stability of position of the individual Justices in the two dimensional space across all arrays. In spite of the apparent tendencies of Warren and Murphy to differentiate federal and state cases for certain purposes, the same basic relationships found in federal and state cases combined are maintained in federal and state cases considered separately. In the state cases, the product moment correlation coefficient drops to .779. But this again shows a high level of association. Thus we find that the original first order correlation (.895) is weakened a bit in two controlled situations, but not enough to destroy our confidence in the association initially portrayed.

V.

We suggest that, in general, the behavior of the judge in criminal cases will be influenced by his basic attitudinal posture toward institutionalized authority and those in conflict with it. Therefore, a president might rationally pursue the course followed by President Nixon, *i.e.*, establish the attitude of the prospective nominee toward "law and order," proceeding to appoint him if the appropriate attitude is manifested,[9] on the assumption that predictable behavior will follow (Goldman, 1967: 186-214). But, we have suggested, if the key to a president's success in playing this "game" is the nominees' attitude toward institutionalized authority, consequences on other dimensions may be expected.

Specifically, we hypothesize that decisions to review the lower court victories of state and federal governments across all types of cases will be affected by the same attitudinal factors. Our analysis has shown that those Justices who are favorably disposed toward institutionalized power when ruling in fully reviewed criminal cases, are equally predisposed not to question the use of governmental authority across all litigation involving government. Thus it appears that as Strict-Cons replace Loose-Cons in the Supreme Court, decisions on the merits in those criminal cases subject to review by certiorari only will be "pushed down" or concentrated to a greater extent in the lower courts.

Given such a "pushing down," what difference will it make for the judicial system? First of all, by leaving criminal cases to lower courts, the Supreme Court opens more time for other

types of cases. But, if the litigants most frequently in conflict with government (civil libertarians, criminal suspects, young people, etc.) are skewed by class or group, a new form of discrimination (possibly invidious) is introduced. Predictably, a Court dominated by Strict-Cons will give greater attention to civil cases, an area of law of more pronounced interest to the affluent elements of society than to the resident of the ghetto who frequently finds himself being tried by government. A reduction in the rate at which disadvantaged or underprivileged litigants "win" their cases when in conflict with governmental authority may also be expected. Lower courts are more subject to local influence than the Supreme Court,[10] *i.e.,* the Supreme Court is freer of such extraneous influences as popular passions, waves of patriotism, etc. Particularly, in a period in which popular majorities shout "law and order," those in conflict with public power may expect shorter shrift in the lower than in our higher courts (Richardson and Vines, 1970: 129, 159).

Upon reflection, then, it appears that replacing Loose-Cons with Strict-Cons has implications substantially beyond the simple proposition that "now we can expect fewer Supreme Court victories for the criminal forces and more Court victories for the peace forces." Inherent in such a development are serious consequences for all those in actual or potential conflict with established authority. For if the Supreme Court possesses, when compared with lower courts, the strengths we have attributed to it, enlarging the role of lower courts in criminal cases seems likely to enhance the influence of parochialism, if not hysteria and irrationality, on system outputs.

APPENDIX A: VOTING PATTERNS OF 15 SUPREME COURT JUSTICES IN CRIMINAL CASES INVOLVING FEDERAL GOVERNMENT ONLY: VARYING PERIODS (1947-56 TERMS)

Justice	Period (Terms)	Number of Cases	Percentage Decided for Federal Government
Minton	1949-55	84	77.38
Reed	1947-56	129	68.99
Burton	1947-56	149	67.11
Vinson	1947-52	82	67.07
Clark	1949-56	114	61.40
Court	1947-56	152	53 94
Whittaker	1956	13	53.84
Jackson	1947-53	83	53.01
Harlan	1955-56	44	52.27
Warren	1953-56	71	39.43
Frankfurter	1947-56	150	36.66
Rutledge	1947-48	29	31.03
Douglas	1947-56	133	24.81
Black	1947-56	150	24.66
Brennan	1956	29	24.14
Murphy	1947-48	29	24.13

APPENDIX B: VOTING PATTERNS OF 15 SUPREME COURT JUSTICES IN DENYING CERTIORARI APPLICATIONS TO REVIEW FEDERAL GOVERNMENT VICTORIES BELOW: VARYING PERIODS (1947-56 TERMS)

Justice	Period (Terms)	Number of Applications	Percentage of Decisions Favorable to Government
Minton	1949-55	534	81.83
Vinson	1947-52	299	79.26
Clark	1949-56	570	78.24
Burton	1947-56	663	76.01
Reed	1947-56	637	73.46
Harlan	1955-56	257	72.37
Whittaker	1956	14	71.42
Brennan	1956	45	71.11
Jackson	1947-53	350	70.85
Warren	1953-56	353	70.25
Frankfurter	1947-56	657	70.16
Court	1947-56	630	69.36
Murphy	1947-48	65	67.69
Rutledge	1947-48	62	59.67
Black	1947-56	657	59.66
Douglas	1947-56	639	57.27

APPENDIX C: VOTING PATTERNS OF 15 SUPREME COURT JUSTICES IN CRIMINAL CASES INVOLVING STATE GOVERNMENT ONLY: VARYING PERIODS (1947-56 TERMS)

Justice	Period (Terms)	Number of Cases	Percentage Decided for State Government
Minton	1949-55	49	77.55
Vinson	1947-52	54	74.07
Whittaker	1956	3	66 66
Reed	1947-56	85	63.52
Burton	1947-56	89	62.92
Jackson	1947-53	66	60.60
Clark	1949-56	60	55.00
Court	1947-56	89	48.31
Harlan	1955-56	18	44.44
Frankfurter	1947-56	89	43.82
Brennan	1956	9	22.22
Black	1947-56	87	17.25
Murphy	1947-48	29	17.24
Rutledge	1947-48	29	13.79
Warren	1953-56	23	13.04
Douglas	1947-56	84	11.90

APPENDIX D: VOTING PATTERNS OF 15 SUPREME COURT JUSTICES IN DENYING CERTIORARI APPLICATIONS TO REVIEW STATE GOVERNMENT VICTORIES BELOW: VARYING PERIODS (1947-56 TERMS)

Justice	Period (Terms)	Number of Applications	Percentage of Decisions Favorable to Government
Minton	1949-55	261	88.88
Reed	1947-56	334	83.53
Jackson	1947-53	207	82.60
Clark	1949-56	295	82.37
Vinson	1947-52	198	79 79
Burton	1947-56	353	79.60
Frankfurter	1947-56	353	79.32
Harlan	1955-56	115	79.13
Court	1947-56	332	77.71
Warren	1953-56	147	77.55
Brennan	1956	31	67.74
Black	1947-56	348	59.48
Whittaker	1956	15	53.33
Rutledge	1947-48	55	52.72
Douglas	1947-56	332	52.10
Murphy	1947-48	54	35.18

FOOTNOTES

[1] These figures are calculated from data collected by the author. The American Jewish Congress has compiled comparable data (1969-70, 1970-71 editions: 88, 119). Calculations using these data show that Burger supported the government in 73.7% and 79.3% of the criminal cases decided by the Court in the 1969 and 1970 terms respectively. Blackmun favored the government's position in 82.6% of such cases in the 1970 term. In the 1970 term, Blackmun and Burger agreed in 28 of the 29 cases. Since Blackmun joined the Court, and as of May 25, 1972, he is repcrted to have voted with Burger in 184 of the 198 in which they have participated together (Graham, *The Louisville Courier-Journal*, 1972: A7).

[2] This is plainly indicated by the voting patterns, particularly of Justice White who on May 22, 1972, joined the four Nixon appointees of Burger, Blackmun, Powell and Rehnquist to uphold the less-than-unanimous jury system used in Oregon and Louisiana against the four dissenting holdovers from the Warren Court.

[3] It has been suggested that "one justice in four has turned out to be quite different from what his appointer wanted" (Scigliano, 1971: 157).

[4] For exceptions *see* Joseph Tanenhaus, Marvin Schick, Matthew Muraskin, and Daniel Rosen, 1963: 111-132, and references cited. *Also see* Schubert, 1962: 284; and S. Sidney Ulmer, William Hintze and Louise Kirklosky, 1972: 637.

[5] The sample used in this paper consisted of all the cases recorded by Burton in the 1951 and 1955 terms, plus one-third of the cases in the remaining terms of the decade covered by the 1947-56 terms. For a fuller discussion of this sample, *see* Ulmer, 1972: 429-447.

[6] For lawyers who are unfamiliar with this concept, a good reference is Blalock, 1960: 279-285.

[7] Relevant here are discussions in the "White Primary Cases," the "Reapportionment Cases," and in cases dealing with the relationship of federal power to state criminal justice systems such as *Screws v. United States,* 1945.

[8] According to Howard, criminal justice was Murphy's earliest governmental interest. "Having campaigned to 'modernize and humanize' the machinery of criminal justice since 1923 . . . he brought to the bench a well-developed philosophy of the criminal process and a practical experience with the problems of assembly-line trials in city courts that only Justice Black . . . could match. Murphy, as a proponent of rehabilitation as the goal of criminal justice, was perhaps the first champion to reach the high court of what law enforcement interests often regard as a 'flabby' and 'sentimental' outlook on crime and punishment" (Howard, 1968: 427). But our data suggests that Murphy was less sympathetic to federal defendants than to state defendants while Black's pattern suggests the opposite.

[9] In the case of the 14 Roosevelt, Truman and Eisenhower appointees surveyed here, only two — Minton and Harlan — were appointed directly from a federal court of appeals. A third — Brennan — was nominated while sitting on the New Jersey Supreme Court. Of course, Whittaker, an Eisenhower appointee, was also taken from a federal circuit court. But the presidents following — Eisenhower, Kennedy and Johnson — failed to appoint a single sitting judge to the Supreme Court. The infrequency of the appointment of sitting judges to the Supreme Court underscores the inference regarding Nixon's preference not only for sitting judges, but for judges from courts which require written and signed judicial opinions in considerable numbers from each court member.

[10] For evidence that judges at each level of the federal judiciary (and by implication the state-federal judicial system) respond to different sets of "supports" and "demands," *see* Goldman, 1966: 374-383; Vines, 1964: 337 and 1963: 311-314; Dolbeare, 1969: 373-404. For the judicial role at the state level, *cf.* Vines, 1969: 461-485.

CASES

Blevins v. United States, 404 U.S. 823 (1971).
Bolling v. Sharpe, 374 U.S. 497 (1954).
Brown v. Board of Educ., 347 U.S. 483 (1954).
California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).
Groppi v. Leslie, 404 U.S. 496 (1972).
Mayer v. Chicago, 404 U.S. 189 (1971).
Norfolk and Western Ry. v. Nemitz, 404 U.S. 37 (1971).
Phelps v. Texas, 404 U.S. 983 (1971).
Quinn v. United States, 404 U.S. 850 (1971).
"Reapportionment Cases"
    Baker v. Carr, 369 U.S. 186 (1962).
    Reynolds v. Sims, 377 U.S. 533 (1964).
Reed v. Reed, 404 U.S. 71 (1971).
Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418 (1972).
Richardson v. Belcher, 404 U.S. 78 (1971).
Schlib v. Kuebel, 404 U.S. 357 (1972).

Screws v. United States, 325 U.S. 91 (1945).
Swanquist v. Livingston, 404 U.S. 983 (1971).
Tumminello v. Maryland, 404 U.S. 948 (1971).
United States v. Bass, 404 U.S. 336 (1971).
United States v. Campos-Serrano, 404 U.S. 293 (1971).
"White Primary Cases (Texas)"
Nixon v. Condon, 286 U.S. 73 (1932).
Grovey v. Townsend, 295 U.S. 45 (1935).
Smith v. Allwright, 321 U.S. 649 (1944).

REFERENCES

AMERICAN JEWISH CONGRESS (1969-70) (1970-71) The Civil Rights and Civil Liberty Decisions of the U.S. Supreme Court. New York.

BLALOCK, H.M. (1960) Social Statistics. New York: McGraw Hill.

DOLBEARE, Kenneth (1969) "The Federal District Courts and Urban Public Policy: An Exploratory Study (1960-1967)," in Joel GROSSMAN and Joseph TANENHAUS (eds.) Frontiers of Judicial Research. New York: John Wiley and Sons, at 373.

GOLDMAN, Sheldon (1966) "Voting Behavior on the U.S. Courts of Appeals, 1961-1964," 60 American Political Science Review 374.

..... (1967) "Judicial Appointments to the United States Courts of Appeals," 1967 Wisconsin Law Review 186.

GRAHAM, Fred P. (1972) "The Emerging 'Nixon Court'," The Louisville Courier-Journal, at A7.

HOWARD, J. Woodford, Jr. (1968) Mr. Justice Murphy. Princeton, New Jersey: Princeton University Press.

NEW YORK TIMES, October 22, 1971: 24C.

RICHARDSON, Richard J. and Kenneth N. VINES (1970) The Politics of Federal Courts. Boston: Little, Brown and Company.

SCHUBERT, Glendon (1962) "Policy Without Law: An Extension of the Certiorari Game," 14 Stanford Law Review 284.

SCIGLIANO, Robert (1971) The Supreme Court and the Presidency. New York: The Free Press.

TANENHAUS, Joseph, *et al.* (1963) "The Supreme Court's Certiorari Jurisdiction: Cue Theory," in Glendon SCHUBERT (ed.) Judicial Decision-Making. New York: The Free Press of Glencoe.

ULMER, S. Sidney (1971) "Earl Warren and the Brown Decision," 33 Journal of Politics 689.

..... (1972) "The Decision on Certiorari as an Indicator to Decision on the Merits," 4 Polity 429.

....., William HINTZE and Louise KIRKLOSKY (1972) "The Decision to Grant Certiorari: Further Consideration of Cue Theory," 6 Law and Society Review 637.

U.S. NEWS & WORLD REPORT, December 2, 1968: 42.

VINES, Kenneth N. (1963) "The Role of the Circuit Courts of Appeals in the Federal Judicial Process: A Case Study," 7 Midwest Journal of Political Science 311.

..... (1964) "Federal District Judges and Race Relations Cases in the South," 26 Journal of Politics 337.

..... (1969) "The Judicial Role in the American States: An Exploration," in Joel GROSSMAN and Joseph TANENHAUS (eds.) Frontiers of Judicial Research. New York: John Wiley and Sons.