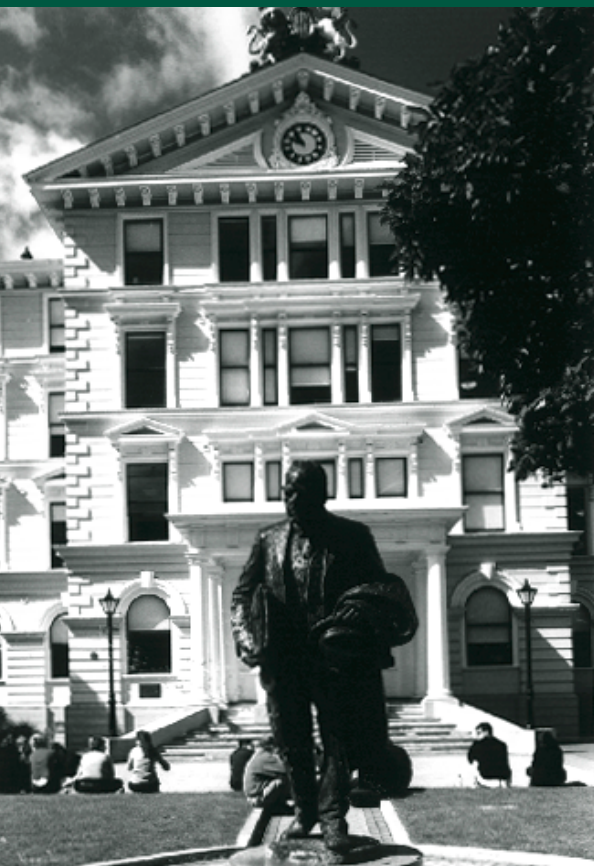


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Workways of the United States Supreme Court

by Justice Ruth Bader
Ginsburg

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WORKWAYS OF THE UNITED STATES SUPREME COURT

*Justice Ruth Bader Ginsburg**

I will speak this evening about my workplace, the Supreme Court of the United States, and specifically, about how the Court does the job the US Constitution and laws assign to it. That job, in the main, is the last instance resolution of questions arising under federal law (as distinguished from state law) — the Constitution itself or, more often, the statutory law of the United States, and sometimes, federal common law. The Court is not an error correction instance; it will not take up cases simply because a lower court reached an arguably wrong decision. For the most part, the Court will consider for review only what we call deep splits — questions on which other courts (federal and state appellate courts) have strongly disagreed. I turn first to the Court's review granting process (how the Court decides what it will decide); next, to oral argument before the Court; and finally, to the way decisions are reached.

I THE REVIEW GRANTING PROCESS

We start each term with a giant conference at which the Court disposes of petitions for review accumulated during the long summer recess — petitions filed from late June until the start of September. No person other

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than the nine justices may enter the room when the Court is conferring — no secretary, law clerk, not even a message deliverer. So the most junior justice — now Justice Breyer, not me, thank goodness — has certain special tasks. Serving coffee or tea, I should say at once, is *not* among those special tasks. We recess mid conference for refreshments that the Chief Justice orders, using a fund to which we all contribute. (The Chief generally selects a standard brand, resistible coffee cake. Once or twice a year, Justice O'Connor livens the fare. She brings in a spicy dried beef treat, called beef jerky, prepared by her brother, Alan Day, who ran the family's Lazy B ranch in Arizona.) But the junior justice does answer the telephone on the rare occasions when it rings during conference, and opens the door to receive messages. Most important, the junior justice, sitting alone, transmits the many orders of the day to the large entourage from the Clerk's office that streams into the conference room just after the other justices repair to lunch in the Court's second floor dining room. (We lunch together every sitting and conference day. That tradition, and the custom of shaking hands, each justice with every other, before we go on the bench, and before each conference, add to the high level of collegiality that prevails among us. Our dining room is elegant, our food comes from the Court's public cafeteria. At the table, we discuss anything and everything, from the performance of counsel in the case just heard, to the new production just opened at the Kennedy Center or the DC Shakespeare Theatre, or the latest exhibition at the National Gallery.)

Occasionally, we invite a lunch guest to vary our intellectual diet. Guests have included the Ambassadors of France and the UK; the Director of the DC Shakespeare Theatre; the Director of the National Zoo; the Chief Justices of Norway and Australia; Alan Greenspan, long tenured head of our Federal Reserve Board; Senator Orrin Hatch, Chairman of the Senate Judiciary Committee; James Wolfensohn, current head of the World Bank; and Mary McAleese, current President of Ireland.

At the term's opening conference in September, currently, close to 1700 petitions for review await disposition. In season, from October through June, we confer generally at one or two week intervals. The number of petitions for review calendared for each standard conference

runs in the 100 to 300 range. In total, the Court nowadays receives between 7000 and 8000 requests for review annually. (The number of review requests filed last term, 1999 2000, was 7374.)

How do we manage those large numbers? Typically, we put less than 15 percent of the petitions for review to a vote. I will describe, a bit later, how we reduce the large conference list down to a relatively slim discussion list. First, I will describe the voting choices we have. Most often, the vote is simply to grant or deny review. (It takes four votes to grant a petition for review.) But we have other options. We may decide to put a case on hold, temporarily, pending the decision in another case presenting a similar issue — a case already granted review. Or the Court may relist a case for a later conference, because one or more of the justices wants to give further thought to his or her vote, or perhaps wants time to prepare a dissent from the Court's decision to deny review. (It happens more than occasionally, indeed, it is the definition of success, that a dissent from a denial of review is never published, because the circulated dissent produces the very effect the writer seeks — it leads other justices to change their minds and supply the vote or votes necessary to grant review.)

The Court sometimes vacates lower court judgments and sends cases back for fresh consideration in light of a recently released Supreme Court decision. Other times, when the Court wants to know more about the importance of a case to the sound development of federal law, the justices may invite the views of the Solicitor General before voting on the review petition. (The Solicitor General is the Department of Justice officer responsible for representing the United States in the Supreme Court. When we invite the Solicitor's views in a case in which the United States is not a party, the Solicitor acts as a true friend of the Court, somewhat like an Advocate General in continental systems, although I would not go so far as to call the Solicitor General a "Tenth Justice", as some writers have). And not more than a few times a year, the Court may find a case important, yet the answer so clear that we vote to decide it summarily, based on the petition for review and the brief in opposition to review, without further briefing or oral argument. (I had that heady experience as a lawyer in the mid 1970s when I petitioned the Supreme Court for review of a Utah Supreme Court decision. Utah in those ancient days denied unemployment

compensation to pregnant women. The Utah Supreme Court said that was clearly constitutional, for once a woman became pregnant she could not be considered ready, willing, and able to work. The US Supreme Court, finding no need for full dress presentation, held Utah's denial of unemployment compensation to pregnant workers clearly unconstitutional. The judgment below was therefore reversed unanimously and summarily. Winning that way — sans brief or oral argument — is like getting a hole in one on the front nine.)

Returning to how we cope with the numbers, a few days before each conference, the Chief Justice circulates a list of the petitions on the conference list he thinks worthy of discussion. Any justice, the next day, may add other cases to the discussion list. Petitions no justice asks to discuss (some 85 percent of all petitions) are denied automatically. Cases on the discussion list will be granted review, as I just mentioned, only if at least four justices so vote.

Considering petitions for review is a large time consumer. It is not the easy work some people outside the Court seem to think it is. Our law clerks (most of us have four clerks) work hard on petitions — every petition, no matter how humble, is summarised and explained in a law clerk's preliminary memorandum. But it is surely not true that the justices simply scan the memoranda, then vote as the law clerks tell them to.

It works this way. All of the current justices, save Justice Stevens, participate in a pooling of resources for consideration of petitions for review. We pool all of our law clerks together and the Chief Justice's assistant divides the review petitions evenly among the eight chambers. My law clerks tell me they spend about one third of their time on petitions for review. The justices, in turn, spend many hours deciding what to decide. Yes, the justices speed read the law clerks' memoranda, but with the judgment one gains from experience with law and life, and with the Court as a collegial body. When in doubt, a justice will personally check the petition and the response — called the brief in opposition — and do whatever other homework she (or he) finds appropriate to determine whether a case is worthy of the Court's review.

Since 1988, the Court has had almost complete control over its docket. Prior to that year, the Court was obliged to take up cases falling into certain categories — it had little choice, pre 1988, in close to 20 percent of the cases set for full briefing and oral argument. Congress, with the Court’s enthusiastic endorsement, eliminated most of the “must decide” cases, commencing with the 1988 term. Cases we are nowadays obliged to hear are rare. They are mainly certain Voting Rights Act cases, dominantly redistricting cases, and original jurisdiction cases in which the Court serves as the tribunal of first and last instance. (In the main, these cases involve two States — or a State and the United States in a dispute over boundaries or land ownership. An example from a few years ago, the contest between New Jersey and New York over ownership of the land filled portions of Ellis Island, the Island that once was the admissions station for immigrants from Europe to the New Land. New Jersey prevailed in that fray.)

With the elimination of the sizable mandatory jurisdiction (the “must decide”) category of cases in 1988, the controversies the Court takes up for decision have diminished in number from about 140 per term to between 70 and 100 per term. (The number of argued cases last term, 1999 2000, was 81.) (With more time, the hope is, one can write better — or at least more comprehensible and hopefully shorter — opinions, and also achieve less division among the justices. In recent terms, the Court has ruled unanimously in some 40 percent of the argued cases. That is a point the press little notes — the fact that we agree, sans dissent, on such a large percentage of the cases we take up. Last term, of the 73 decisions released, 29 were unanimous (39.7%) in contrast to 19 in which we divided 5 4 (26%). As our rules inform lawyers, the press, and the public, we take cases primarily to keep federal law fairly uniform, to resolve strong disagreements — splits not likely to heal — among federal or state tribunals over the meaning of a federal statute or regulation, or constitutional provision. Currently, about 70 percent of the cases we agree to hear involve deep divisions of opinion among either federal courts of appeals or state high courts. Press reports on the Supreme Court’s actions now and then exaggerate the significance of an order denying review. I read from time to time that the Court affirmed or upheld Decision X, when the

case didn't even show up on the discussion list for a conference. And I know from personal experience, as an advocate before the Court in the 1970s, the disappointment petitioning lawyers feel when the Court declines to take up a case presenting an important question of federal law.

We generally await a deep lower court “split” — one unlikely to repair without Supreme Court intervention — not simply to keep our caseload down. Awaiting decisions from several courts can advance our understanding of the importance of an issue, by giving us a sense of the diverse settings in which it arises and the range of opinions on the proper resolution.

Perhaps the major reason for resisting early grants of review is the genuine respect we have for the able judges on state benches and in the federal judiciary the district courts and courts of appeals. Those judges are fallible, as all mortals are, but they strive to “get it right” and they generally do. And the Justices of the Supreme Court possess no greater wisdom than judges on other federal benches. Luck plays a large part in our selection. On the Supreme Court's place in the system, Justice Robert H Jackson (who served from 1941 until his death in 1954) said it best: “We are not final because we are infallible”, he commented, “but we are infallible only because we are final”.

I turn now from how we decide what cases to take up for review to “the day in court”.

II THE DAY IN COURT

The US Supreme Court, as I have just said, labours long in selecting the cases it will take up for review but, unlike courts of appeals where litigants arrive as of right, the Court spends no energy deciding which cases will be set for oral argument (rather than resolved summarily on the briefs) or the length of argument time. Dispositions without oral argument are rare in the Supreme Court, and cases calendared for argument ordinarily get exactly half hour per side. (Our Chief Justice is a scrupulous time keeper. There is a five minute warning light coloured white, then a red light. When the red light appears on the lectern, that's it — lawyer and justice alike must stop talking.)

A keen observer of the Court, journalist Anthony Lewis, offered this description of the current day in Court:

Oral argument does not play the part in the work of the Supreme Court that it did in the nineteenth century, when Daniel Webster [and other Bar luminaries] would argue a case for days The modern Supreme Court limits argument severely ... to half an hour [per side]. But argument still has an important function. It is the one chance the justices have to ... grapple directly with the lawyers who represent the clashing interests before them. It is also a rare opportunity for the public to gain insights into the minds of those who actually make the decisions.

More than any other officials in Washington, the justices still do their own work, assisted only by a handful of young law clerks. To observe them as they question counsel in the courtroom is to see an extraordinarily open process, unaffected, human. In a capital puffed up with bureaucracy and public relations, the Court seems old fashioned, small, personal. For the lawyers, oral argument is a direct opportunity to reach those nine minds — with an idea, a phrase, a fact. Not many cases are won at argument, but they can be lost if a lawyer is unable or unwilling to answer a justice's question [honestly and persuasively].

I agree in full with Anthony Lewis' observation.

In the most essential way, oral argument at the Supreme Court is what it generally is in US appellate tribunals, both federal and state. Oral argument is an occasion not for speeches, but for an exchange of ideas about the case, a dialogue or discussion between knowledgeable counsel and judges who have done their homework, a "hot bench", as appellate advocates say, judges who have read first and foremost the decision we are reviewing, the relevant portions of the record, the statutes and other judicial decisions in point, and the often long briefs filed by the parties and their supporting amici. (We allow 50 printed pages for opening briefs, 20 for the petitioner's reply, 30 for friend of the court briefs.)

Some lawyers, I have been told, resent interruption of an oral argument carefully planned as a lecture, and some judges ask few questions. A recently deceased colleague, Justice Harry Blackmun,

for example, often recounted the advice he was given by Justice Hugo Black in 1970: “Harry”, Justice Black cautioned, “never ask many questions from the bench because if you don’t ask many questions, you won’t ask many foolish [ones]”. But it seems to me a loss of a precious opportunity if an advocate can do no more with her oral argument time than recapitulate the briefing. She will serve her client and cause better, I believe, by welcoming and responding to questions that may uncover what is in the decisionmakers’ minds. So I do not follow Justice Black’s advice. And in that, I am hardly alone. (Three members of the current Court Justice Scalia, Justice Breyer, and me — were once full time law teachers, and that breed is addicted to asking, “What if ...?”, or “Suppose that?”) Questions from the bench give counsel a chance to satisfy the Court on matters the questioner, at least, thinks significant, and might resolve less satisfactorily without counsel’s aid. Sometimes, it is true, a question is asked with persuasion of a colleague in mind; at such times, the lawyer may sense she is being talked through, not to. Other times, the questioner may be trying to cue counsel that an argument pursued with gusto is a certain loser, so counsel would be well advised to move on or shift gears. Counsel too intent on adhering to a prepared script may miss the cue.

There is, I appreciate, a difference in the dynamics of a nine member Court and of a panel of three. A conversation accommodating clarifications, interjections, and often interruptions, readily managed among four (counsel and the typical three-judge appellate panel), is less feasible among ten. We do not assign reporting judges, as many high courts in other nations do. Any justice may ask a question anytime he or she pleases within the allotted half hour per side.

A judge at one end of our long, barely curved, nine member bench cannot always see what is going on at the other side. In particular, she may not see that an inquiry is emerging or continuing several seats away. When we interrupt or step on each other’s questions, that is the reason why. One tries to await another’s questions, but is not always successful. (I prove this from time to time.)

Though the format is not flawless (some would prefer more time for each side and fewer questions), argument at the Court largely succeeds in its mission. It more than occasionally reduces or diminishes confusion and conflict. And, as Anthony Lewis suggested, it gives counsel a last clear chance to convince the justices concerning

points on which the decision may turn. (In typical civil law courts abroad, in contrast, appellate advocates ordinarily speak with barely any interruption. When the advocates complete their presentations, the presiding or reporting judge may sometimes ask a question or two, in any case, rarely more than a few. I would find it hard to listen so passively.)

We do not allow cameras in Court. In the recent *Bush v Gore* controversy we made an accommodation. The audiotape of the argument was instantly available. It was played on radio stations, and TV stations ran it too, matching photographs of each justice with his or her voice.

I move on, finally, to decisionmaking.

III REACHING DECISIONS

To reach decisions, in a typical two week sitting period, the Court meets each Wednesday afternoon to discuss the preceding Monday's cases, and each Friday, both to dispose of accumulated petitions for review, and to discuss the cases heard the preceding Tuesday and Wednesday. On the second Friday, or the Monday morning after, the Chief Justice circulates opinion writing assignments made by him whenever he is in the majority; when he is not, he conveys to the full Court the assignments made by the most senior justice in the majority. Justice Tom Clark wrote in 1956 that then, as in the time of Chief Justice John Marshall in the early 1800s, discussion of argued cases proceeded down the line in seniority order, but the voting started with the junior justice and moved up. Sometime between 1956 when Justice Clark wrote, and 1971, the year our current Chief, Chief Justice Rehnquist, began his service as an Associate Justice, the old way passed; the Court telescoped its case conferences. Views and votes merged and a strict seniority system prevailed. The Chief speaks and votes first, the junior justice speaks and votes last.

The Chief Justice has described the disappointment he years ago felt, as the junior justice, when his "significant contributions" were not heeded, because "votes [already] had been cast [higher] up the line". He reported "with newfound clarity", however, having "risen from ninth to seventh to first in seniority", that his idea for "more of a round table discussion" was academic: "fine in the abstract", but unlikely to

“contribute much in practice, and at any rate, doomed by the seniority system to which the senior justices naturally adhere”. Yes, I do detect a certain impatience, a high premium on brevity, when the vote comes round to me, the eighth justice to speak, and there is already a clear majority. But last place the one now held by Justice Breyer — has its heady moments, times when the ninth vote ends a tie.

Discussion at Supreme Court conferences is often spirited, more so than I anticipated, but seldom protracted. “It will come out in the writing”, a senior justice sometimes comments, when we have all had our say. And so it does. At least once each of the seven full terms I have served on the Court, an opinion writer finds that the conference position, in whole or in part, “won’t write”, so the writer ends up taking a different view. And sometimes an opinion circulated as a dissent attracts the majority’s approval and becomes the opinion of the Court.

Turning specifically to opinion writing, my colleagues and I have high regard for the label, “opinion of the Court”. That regard is demonstrated in “Dear Ruth” letters responsive to a circulating opinion. (In all intra Court correspondence, we use only first names.) “Dear Ruth” letters not uncommonly read: “I think you should add, delete, drop, revise to say ... “, or, more hopefully, “I will join your opinion if you will take out, put in, alter or adjust as follows”. I am comforted, at such times, by a remark our current Chief has traced to Chief Justice Hughes:

Hughes said that during the many years he served on the Court he always tried to write his opinions logically and clearly, but if another Justice whose vote was necessary to make a majority insisted that particular language be put in ... , in it went, and let the law reviews figure out what it meant!

There was a long time in the US Supreme Court’s history, indeed until Chief Justice Melville Fuller’s 1888 1910 tenure, during which justices did not routinely circulate their draft opinions among their colleagues prior to delivery. The consultation process was less formal; the opinion author in those days had a freer hand to compose and publish an opinion untouched by all his colleagues’ minds. I would not vote for a return to that old way. Most of the time, my

colleagues' comments help me to improve an opinion. And there is nothing better than a good dissent to force one to sharpen her presentation for the Court.

I prefer and continue to aim for opinions that both get it right, and keep it tight, without undue digressions or decorations or distracting denunciations of colleagues who hold different views. (But I doubt if I will ever match Justice Breyer's restraint in religiously refusing to use footnotes.) And it is worth repeating that our Court really does prize collegiality. Yes, in close to 25 percent of the argued cases we divided 5-4 in recent terms, but, as I said earlier, our unanimity rate is high hovering around 40 percent for the last three or four terms.

Most impressive, I think, despite sharp differences on certain issues — the Court's recent disagreement on the recount of votes in Florida is a prime example — we remain good friends, people who respect each other, and genuinely enjoy each other's company. Our mutual respect is only momentarily touched, in most instances, by our sometimes strong disagreement on what the law is. The institution we serve is ever so much more important than the particular individuals who compose the Court's bench at any given time. And our job, the job of judging in a US federal court generally — is, in my view, the best work a US lawyer could wish for. We serve no client, our commission is to do what is right — what the law requires and what is just. And the guarantees of judicial independence the Founding Fathers were wise enough to place in the US Constitution (life tenure and no diminution in our salary while we hold office) arm us to do just that. (In many Constitutional Courts abroad, long, nonrenewable terms — 12 years, for example — are the means used to secure the judges' independence. Contrast the relative insecurity of judges in 42 of our 50 state court systems, judges who must stand for periodic elections. That system is understandable historically, given the distrust of the King's judges in the colonial period, but, at least in my judgment, it has outlived its utility.)

I have tried to put in a nutshell an account of the US Supreme Court's operations. If, as I hope, my remarks have sparked some questions, I invite you to present them.