Review of *Crafting Law on the Supreme Court*

by:

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Crafting Law on the Supreme Court, by Forrest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck, was published in 2000 by Cambridge University Press. The authors attempt to understand, through a series of research projects, what strategic methods American Supreme Court Justices use in deciding Court opinions (p 6).

Forrest Maltzman is an Associate Professor of Political Science at the George Washington University. He has been a Fellow at the Brookings Institute, as well as a Congressional Fellow for the American Political Science Association. Paul J. Wahlbeck is also an Associate Professor of Political Science at the George Washington University. This is his second book. James F. Spriggs II is an Associate Professor of Political Science at the University of California's Davis campus. All three authors have published articles in various journals, and all three were contributors to the book, *Supreme Court Decision-Making* (1999).

SYNOPSIS OF BOOK

Crafting Law on the Supreme Court opens with a discussion of the *Pennsylvania v Muniz* case (1990). The case centered on an issue of Miranda rights, and what constituted investigative questioning on the part of police. The Court had decided in conference to uphold a conviction of Muniz, but Justices Marshall and Brennan disagreed.

Brennan, however, actually decided to vote with the majority, upholding a conviction he believed violated the defendant's Civil Rights. In a personal memo to Marshall, Brennan explained that since a majority had already agreed to uphold the conviction, Brennan decided to side with them, in the hopes that he could guide the opinion as narrowly as possible. Explaining himself to Marshall, Brennan wrote:

> Thanks, pal, for permitting me to glance at your dissent in this case. I think it is quite fine, and I fully understand your wanting to take me to task for recognizing an exception to *Miranda*, though I still firmly believe that this was the

> strategically proper move here. If Sandra had gotten her hands on the issue, who knows what would have been left of *Miranda*. (p 3, 4)

Brennan openly admits, to Marshall, that he is not voting *sincerely*, but *strategically*. His knows that no matter how he votes, the case will be decided against Muniz, and *Miranda* will be limited. Brennan's goal, now, is to use his leverage as a member of the majority to guide the Court's opinion toward the most limited view.

Up front, the authors challenge Segal and Spaeth's views of the justice's voting as pure reflections of their policy preferences (p 6). They also disagree with the analogy of the Court being "nine small, independent law firms" (p 15). Instead, the authors see the Court as an interacting group of justices, each seeking to guide the Court's majority opinion toward their individual ideals (p 18).

Crafting Law concerns what happens in the time period between the first vote, in conference, until the Court's official opinions are released (p 16). Research is based on the "original records" of justices, available from Spaeth and Gibson (p 26). Records include items such as lists of internal memos between justices, and records of opinion drafts. The "docket sheet" of Justice Brennan is used to learn conference votes and who was assigned to write opinions (p 40).

One of the first issues the authors investigated is who is assigned to write majority opinions. What they found was that both Chief Burger and associate justices are more likely to assign an ideologically similar justice when the conference vote shows a large majority. However, when the majority is slim, it is more likely for an ideologically different justice to be assigned the opinion (p 50, 51, 54). "The Chief is clearly responding to this important strategic characteristic of the case," the authors wrote (p 51). In other words, the authors believe when the vote is close, the Chief or assigning associate is more likely to choose an ideologically different

justice to write the opinion because in close cases it is more important to draft an opinion that takes different views into account. In close votes, strongly ideological opinions could easily alienate enough votes to change who holds the majority. Similarly, the authors found the Chief never writes opinions that are highly salient himself (p 51).

Just as in the case of *Pennsylvania v. Muniz*, the authors show strategic decisions in the case of *Ohio v. Roberts* (1980). The *Roberts* case was decided in a way that limits 6th Amendment rights to cross-examine witnesses. While there was a 6 to 3 majority in conference, Powell voices concern over Blackmun's use of the word "effective" in a draft of the opinion. Blackmun decided that he was not going to make any changes to accommodate Powell. However, Stewart then announced he was more inclined to agree with Powell (p 57-59). Powell decided that he would write a concurring opinion. The potential loss of two votes made Blackmun reconsiders his draft. Blackmun offered a minor revision, but threatened that if Powell did not accept the new draft, Blackmun would go back to the original. Powell's clerk advised him the changes were "half of what you requested" and "I would recommend joining the latest effort." The opinion was finalized with the few modifications negotiated between Powell and Blackmun (p 61).

The authors found, in analyzing the available data, that in 23.4% of Burger Court decisions, at least one justice wrote a memo attempting to negotiate a change in the first draft (p 61). In 12.8% of cases, at least one justice signaled he would postpone deciding whether or not to join an opinion. Postponing joining allows the justice to show he is not totally satisfied with the draft and gives him time to see what other justices are going to do. Justices often decide to write concurring opinion, which often results in a rewrite of the majority opinion (p 64).

"Bargaining" strategies, such as threatening a concurring or dissenting opinion, and

postponing joining, is more common when cases are more important politically. In fact, a "politically salient" case triples the likelihood of bargaining. Because opinion writers want as many justices to join as possible, bargaining tactics can be quite successful (p 83). Use of such tactics also increases with the complexity of the opinion. The authors conclude that complicated opinions allow more room for disagreement and negotiation. However, the tactics become less frequent as the Court's session draws to a close. Presumably, justices simply feel there is less time for delaying opinions (p 84). An exception to bargaining is Chief Burger who uses these tactics half as often as other justices. The authors suggest that as Chief, his interest is in keeping the Court unified, as opposed to using divisive strategies (p 89-90).