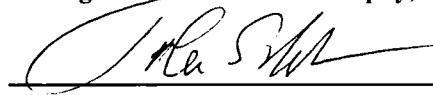


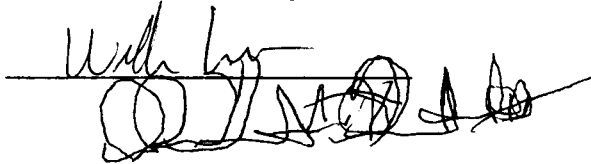
To The Graduate Council:

I am submitting herewith a dissertation written by Lori Maxwell Edgemon entitled "The Function of Per Curiam Summary Dispositions in the Supreme Court: The Warren, Burger, and Rehnquist Eras." I have examined the final copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Political Science.



John Scheb, Major Professor

We have read this dissertation
And recommend its acceptance:



Accepted for the Council:



Associate Vice Chancellor
And Dean of the Graduate School

**THE FUNCTION OF PER CURIAM SUMMARY
DISPOSITIONS IN THE SUPREME COURT:
THE WARREN, BURGER, AND REHNQUIST ERAS**

A Dissertation

Presented for the

Doctor of Philosophy

Degree

The University of Tennessee, Knoxville

**Loretta Maxwell Edgemon
August 1998**

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DEDICATION

To my greatest loves,

My beloved husband

Eric Bruce Edgemon

Without whom this work and my life would have never been complete,

And our precious daughter

Brenna Faith

Who puts all things in true perspective,

And to my first loves,

Brenda Jones and Sean Maxwell

Without whom there would not be another “**Doc**” in the family.

Ephesians 3:20-21

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For my family, however, a mere "thank you" seems woefully inadequate. My father, Rick Maxwell, and his parents Joe & Libby Maxwell, provided the means for me to attend college and graduate school. I must also thank my brother Sean for laughing when I feared this work would not ever be completed – as though such a thought was really that far-fetched. My mother, Brenda Jones, first instilled in me the Christian faith which has allowed me to persevere in this endeavor.

Finally, it is to my husband, Eric, that I owe a debt I can never repay. I can't put into words what your support means to me. Thank you, honey. I must also thank my big girl Brenna whose crayon marks, juice smudges, and footprints on drafts of this work helped me realize its place in the grand scheme of things.

ABSTRACT

Each year the U.S. Supreme Court is deluged with thousands of requests to accept cases. In each instance, the Justices must make two crucial preliminary decisions. The first is whether to take the case or not. If the answer is yes, the Justices must then decide how they will dispose of the case. They may choose to either give the case plenary or summary treatment. Plenary treatment means that the Court will accept briefs on the merits of the case and will accord the case oral argument. Summary dispositions, on the other hand, lack both briefing on the merits and oral argument. Students of the Supreme Court have typically given very little treatment to summary dispositions. This type of adjudication has been viewed as a technical, perfunctory process of little scholarly significance.

This research sought to demonstrate that summary dispositions are, in fact, significant, often controversial decisions which adjudicate policy case of tremendous import. To facilitate this inquiry, a context analysis of one type of summary disposition, the per curiam summary disposition, was used. Specifically, thirteen terms of the Warren, Burger, and Rehnquist eras were analyzed. Through exploration of the form, function, issues, and relevant opinions in each of the cases, this dissertation will unveil the true function of per curiam dispositions.

This dissertation concludes that per curiam summary dispositions, do serve significant policy roles. This type of adjudication has been used over time to remedy injustices to individuals, reprimand recalcitrant lower courts, facilitate pro-prosecutorial objectives, and create or clarify policy in a variety of areas. Some of these policy areas

include criminal procedure, civil rights, civil liberties, administrative law, and access to the Supreme Court. Moreover, the per curiam summary disposition is hardly a non-controversial type of judgement. The Justices have rendered vociferous dissents in a majority of the cases since the Burger years. Certainly more scholarship is needed to fully explore summary dispositions. They have been called a “dark corner of Supreme Court Practice” (Hellman 1984:389). Hopefully, this investigation of per curiam summary dispositions has begun the illumination.

NOMENCLATURE

Amicus curiae: literally “friend of the Court” someone other than the party to a case who is allowed to submit a brief.

Brief on the merits: the specific facts and issues of a case. Petitioners are allowed to submit these to the Supreme Court only when the Court has granted a case plenary consideration.

Disposition: The Court’s final judgment in a case.

In forma pauperis: literally “in the manner of a pauper.” The Court has always had exceptions to its filing fees which allow indigent clients access to the Court.

Original jurisdiction: the authority to hear a case in the first instance. The Court has a narrow list of original elements required by Article III of the Constitution.

Per curiam: literally “by the Court.” This is an opinion issued anonymously by the Court speaking in one voice. It is different from the majority of cases in which all of the Justices sign their names to either the majority or minority opinion(s).

Per curiam summary disposition: an opinion “by the Court” rendered without briefing on the merits or oral argument. The opinion may range in length from a few paragraphs to several pages and it is recorded in the plenary section of the *U.S. Reports*.

Plenary treatment: the cases is given oral argument and briefs on the merits are allowed.

Res judicata: literally “a thing decided.” It is settled law in an area.

Summary treatment: a case is decided absent briefs on the merits or oral argument.

Writ of mandamus: literally “we command.” This is a writ ordering compliance usually issued in instances of abuse of power.

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CHAPTER 1

INTRODUCTION TO PER CURIAM SUMMARY

DISPOSITIONS: RESEARCH HYPOTHESIS AND DESIGN

INTRODUCTION

Each year the United States Supreme Court is deluged with thousands of requests to accept cases. In each instance, the Justices must make two crucial preliminary decisions. The first is whether to take the case or not. If the answer is no, this is the end of the line for the parties involved.¹ If the answer is yes, the Justices must then decide how they will **dispose** of the case.² They may choose to either give the case **plenary** or **summary treatment**. Plenary, or full-dress treatment, means that the Court will accept **briefs on the merits** of the case and will accord the case oral argument. The Court adjudicates roughly 100 plenary opinions each term³. Summary dispositions, on the other hand, lack both briefing on the merits and oral argument. The Court disposes of these

¹ Technically, the decision not to accept a case does have, in some instances, precedential weight which may affect the parties involved. Specifically, the decision not to accept an appeal suggests that the decision below is correct, and is to be accorded precedential value. The decision not to grant a writ of certiorari is not deemed by the Court to have any precedential value though some scholars have disputed the accuracy of this. See Linzer, Peter. "The Meaning of Certiorari Denials," 79 *Columbia Law Review* 1227-8, 1979.

² Words in bold represent the first instance of a term that was previously defined in the nomenclature section. After the initial bold caption, the word will not be defined or set apart.

³ The Supreme Court Yearbook lists the total cases each term. For the 1995-6 Term only 77 plenary opinions issued. The Court seems to be lessening its caseload. It used to adjudicate over 100 each Term. See Jost, Kenneth. The Supreme Court Yearbook 1995-6. Washington: Congressional Quarterly, 1996.

cases based solely on the preliminary papers – the aforementioned initial requests by the parties involved. The Court may hand down several hundred of these decisions in a single Term.

Students of the United States Supreme Court typically focus on plenary or full-dress treatment of cases. Constitutional law texts, classes, and scholars focus almost exclusively on this type of case resolution⁴. Very little treatment, however, has been given to summary dispositions. Two reasons explain the dearth of scholarship. First of all, the summary disposition is widely believed to be a technical, perfunctory process. It is viewed as a housekeeping mechanism, if you will, whereby several cases can be disposed of quickly on technical grounds. Henry J. Abraham, for example defined this mode of adjudication as “an unsigned, more often than not brief, opinion for the Court applying *res judicata* (settled law)” (Abraham 1993: 184). He then added that these opinions are “usually unanimous” (1993: 184). More recently, the Supreme Court Yearbook, which catalogues the Court’s decisions each year, described the summary decisions as a “procedure for cases where lower courts clearly conflict with established precedent. For that reason [they] are usually unanimous” (Jost 1996: 70).

This pervasive belief, mistaken though it is, has lead to the second reason for a lack of research in this area – lack of interest. Summary dispositions have not generally been viewed as a hot topic deserving of attention. And if the pervasive view of the summary disposition as a merely technical procedure were accurate, one could hardly

⁴ Most texts do not even mention summary judgments. Arthur D. Hellman has suggested that even the Stern and Gressman text, Supreme Court Practice (Washington: Bureau of National Affairs, 1978), which even the Justices reference only mentions summary judgments in a footnote (Hellman 1984: 390). Notable exceptions are Stephens and Scheb’s American Constitutional Law (St. Paul: West, 1993.) and Henry Abraham’s The Judicial Process 6th edition. (New York: Oxford University Press, 1993.)

fault the indifference.

I seek to demonstrate, however, that at least one type of summary disposition, the **per curiam summary disposition**, is anything but a perfunctory or technical process.

The per curiam summary disposition is a summary judgment that is issued anonymously “by the Court.” It ranges in length from a few paragraphs to several pages, and it is included in the front of the *U.S. Reports*, along with all of the plenary rulings.

Far from perfunctory or technical, it is a powerful policy tool wielding precedential power that the Justices have been quietly using for decades with few questions asked. Asked, I should clarify, from without. Within their own ranks, the Justices have been questioning the process incessantly since the Warren Court era. Note the following dissents:

Today’s decision is profoundly disturbing not only because the Court has misused precedent ..., but also because it represents yet another instance of this Court’s ‘growing and inexplicable readiness ... to dispose of cases summarily.’ I am, of course, cognizant that, because of an ever-increasing docket, the court has come under extraordinary pressure to accelerate its disposition process. But I do not believe that summary disposition on the basis of the certiorari papers is a proper response to such pressure ... Brennan, J. dissenting in *Hutto v. Davis* (454 U.S. at 387-8, 1982).⁵

In my opinion it is unwise for the Court to announce a law-changing decision without first ordering full briefing and arguments on the merits of the case.
Justice Stevens with whom Justice Breyer joins

⁵ This dissent as well as the dissent of Marshall that continues onto p. 2 is reprinted in Phillip J. Cooper’s *Battles on the Bench*, (Lawrence: University Press of Kansas, 1995) in a section addressing the debate engendered by summary dispositions. See pp 88-89.

dissenting in *Puckett v. Elem.* (514 U.S. 770, 1995).
The Court justifies its approach on the ground that it
'alleviates the potential for unequal treatment that is
inherent in our inability to grant plenary review of all
pending cases raising similar issues' ... [I]f we were
to conduct, for example, in all cases involving summary
decisions, today's balancing... we would have no time
left for the cases we grant to consider on the merits.
Justice Scalia with whom Justice Thomas joins
Dissenting in *Lawrence v. Chater* (516 U.S. at 190-1, 1996).

I write separately to underscore my disapproval of
what I perceive to be a growing and inexplicable readiness
on the part of the Court to 'dispose of' cases summarily.
Perhaps this trend is due to what is often lamented as our
'increasing caseload'. Whatever the reason for this trend,
I believe that it can only detract from this Court's
decisions in deserving cases by consuming time and
energy better spent elsewhere. Marshall, J. dissenting
in *Harris v. Rivera* (454 U.S. 349, 1981) .

These are but a sampling of Supreme Court Justices' dissents regarding summary
dispositions. The irony of Justices as ideologically polarized as Scalia, Thomas, Breyer,
Stevens and Marshall being on the same side of a debate is surely not lost on the
Constitutional scholar. Similar dissents, from numerous Justices, have raged from the
Warren Court to the present. They became so frequent during the Burger Court era that
they prompted a New York Times article addressing "a contentious court for a
contentious society" (Cooper 1995: 89). Yet, despite these dissents, and more damning
self-indictments which deem summary dispositions "a patent abuse of our judicial
power"⁶ and a "dangerous level of judicial irresponsibility,"⁷ summary dispositions
remain largely ignored.

⁶ *Hutto v. Davis* 454 US 387-8 (1982) . Reprinted in Cooper. p 89.

⁷ *Rose v. Locke* 423 US 48, 59 (1975). Reprinted in Cooper *ibid.* p88.

It is surprising that this amount of internal debate in the Supreme Court has failed to garner interest in the academic community. Only a handful of scholars has even addressed summary dispositions, and most of these have given the topic only cursory attention. A few exceptions are to be found, however. Most notably, Arthur D. Hellman, the foremost scholar in this area, has been suggesting, since the 1970's, that a policy role is evident in summary dispositions⁸. Also, scholarship by Stephen L. Wasby and William H. Perry, Jr. suggest that summary dispositions may alternately serve a pro-prosecutorial function or serve to remedy injustices to individuals⁹. (More will be discussed on these works later in this chapter.) However, with the exception of a study of the Burger years by Hellman, no systematic work has tested these hypotheses¹⁰. Certainly no work has followed more than one natural Court in an effort to delineate the function of summary dispositions over time.

This work attempts to fill that void. In an effort to add to the limited body of research, this dissertation will focus specifically on the per curiam summary disposition. More specifically, per curiam summary dispositions from the Warren, Burger, and Rehnquist Courts, respectively, will be analyzed in order to ascertain what function(s) they serve and if those functions have changed over time. The reason for isolating per curiam summary dispositions is that they mark the sole form of summary disposition that is almost never critically discussed and for which a function - though hypothesized - has

⁸ See his "Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review," *University of Pittsburgh Law Review*, Vol. 44, pp 795- 877; "Granted, Vacated, and Remanded" - Shedding Light on a Dark Corner of Supreme Court Practice," *Judicature*, Vol. 67, No. 8, March 1984. Pp. 389-401; "The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions," *Hastings Constitutional Law Quarterly*, Vol. 11:1, Fall 1983.

⁹ See Wasby, Stephen L. *The Supreme Court in the Federal Judicial System*. New York: Holt, Rinehart and Winston, 1978; Perry, William H., Jr. *Deciding to Decide*. Cambridge: Harvard University Press, 1991.

¹⁰ See his "Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review," *University of Pittsburgh Law Review*, Vol. 44, pp 795-877.

not been clearly elucidated. The other type(s) of summary dispositions are relatively straightforward in function. For example, virtually all denial of appeals take the form of summary dispositions, and this is a non-controversial way in which the Court handles its extensive caseload. Other types of summary dispositions are used similarly, as we shall see.

Unfortunately, however, almost of the different types of summary disposition – even the non-controversial ones can, in rare instances, take the form of per curiam summary disposition. For example, take the aforementioned dismissal of an appeal. This is usually just a footnote recorded in the Supreme court reporters, but in rare instances it may be a per curiam summary disposition included in the text of reported plenary and per curiam opinions. Thus, it will be necessary to clearly define all of the forms and function of summary dispositions in order to isolate per curiam summary dispositions that are not being used to just handle the Court's caseload. Upon doing this, it will become clear that once the perfunctory, noncontroversial forms of summary disposition are eliminated, there is a substantial category of per curiam summary dispositions whose function is not clear without case analysis.

Statement of Objectives

This study will seek to accomplish the following:

- (1) To clearly delineate the various forms and functions of summary dispositions;
- (2) To specifically isolate the function(s) of per curiam summary dispositions;

- (3) To trace the function of per curiam summary dispositions over the Warren, Burger, and Rehnquist courts, respectively.
- (4) To explain the precedential value of per curiam summary dispositions.

Research Questions

I will answer the following questions:

- (1) What are the forms of summary dispositions?
- (2) What is the function of per curiam summary dispositions?
- (3) Has the function of per curiam summary dispositions changed over time as demonstrated by the Warren, Burger, and Rehnquist courts, respectively?
- (4) What is the precedential value of per curiam summary dispositions?

Chapter Outline

This work will be divided into eight chapters. The first two chapters will provide a brief overview of research on both summary dispositions generally and per curiam summary dispositions specifically. Chapter one is an overview, and Chapter 2 contains terminology and a literature review. The third chapter will delineate my methodology. The fourth chapter will critically analyze per curiam summary dispositions from four terms of the Warren court – October terms 1954, 1958, 1962, and 1966. The fifth chapter will be an investigation of the Burger era, with an inquiry into the October terms of 1970, 1974, 1978, and 1982. The sixth chapter will evaluate the per curiam summary decisions

of the Rehnquist terms of 1986, 1988, 1990, 1992, and 1994. The seventh chapter will be a longitudinal evaluation of the per curiam summary dispositions over time. Lastly, the eighth chapter will be a conclusion of the work.

Contributions of this Research

This research contributes to the discipline of political science in the following ways:

- (1) It adds to the body of research on summary dispositions;
- (2) It critically explores the expected and actual role of per curiam summary dispositions;
- (3) It comprehensively evaluates the per curiam summary dispositions of the Warren, Burger, and Rehnquist Courts respectively;
- (4) It reviews relevant literature on summary treatment by the Supreme Court.

Research Design

This dissertation is a longitudinal content analysis of various terms of the Warren, Burger, and Rehnquist Courts. The terms selected (October terms 1954, 1958, 1962, 1966, 1970, 1974, 1978, 1982, 1986, 1988, 1990, 1992, and 1994) are not random. Rather, they are the best representation of natural Courts that encompasses all major personnel changes (See Appendices A, B, and C for the Court's personnel during these

Terms). For each term, I will discuss every per curiam summary disposition¹¹.

Additionally, I will code each case according to form, function, the relationship between form and function, issues, and relevant concurrences and dissents, such that a trend in the function that these dispositions are serving can be better traced over time. A fuller explication of my methodology is offered in chapter 3.

Hypotheses

I expect my research to generate the following results¹²:

- (1) I anticipate Warren Court cases will demonstrate the individual justice function of per curiam summary dispositions.
- (2) I expect Burger and Rehnquist cases will be largely pro-prosecutorial in nature.
- (3) A small percentage of cases may be substantial policy decisions.
- (4) A link between the form of GVR and the function of error correction is expected.

¹¹ In Chapter 2, I will borrow the categories of summary disposition as defined by Hellman. Of these, the order and statement are only one or two sentence judgments. While they may be in the form of per curiam rulings they do not comport to my conceptualization of per curiam summary disposition.

¹² A fuller understanding of these hypotheses will be found after reading the next chapter which elucidates forms, functions, and a literature review of theories of summary dispositions.

CHAPTER 2

THE FORMS AND FUNCTIONS OF SUMMARY DISPOSITIONS

SUMMARY DISPOSITIONS

At this juncture, it is clearly necessary to fully define summary dispositions in order to place per curiam summary judgments in a broader context. First of all, scholars differ as to the semantic usage of the term **disposition**. Most scholars use the term to refer to an actual judgment of the Court, and this is the application I have used up to this point and will adopt throughout this research. It is important to distinguish this from the broader notion of **disposition**, however, because some scholars use the term literally to reference every instance in which the Court disposes of a case – even by refusing to adjudicate. This definition, used sparingly by Wasby and others¹³ would include every denial of certiorari as a type of summary disposition. This work does not include these thousands of denials, which are not judgments in the truest sense of the term.

Summary dispositions, again, are rulings arrived at without the benefit of oral argument or briefing on the merits. It would seem as though summary dispositions are both a blessing and a curse to the Court. On the one hand, these brief decisions allow the

¹³ See, for instance, the 1968 Harvard Law Review article entitled, “Individualized Criminal Justice in the Supreme Court: A Study of Dispositional Decision Making” at p 1260.

Court to lessen its burdensome load of cases through speedy resolution of more than 100 cases each term. However, they also “engender confusion among the lower courts” (O’Brien 1993: 258). The problem is that while “the court holds that summarily decided cases do not have the same precedential weight as plenary decisions” they are “nonetheless binding on lower courts until such time as the Court informs them that they are not” (O’Brien 1993: 258). Exactly what precedential weight these cases are to be accorded is not quite clear.

The literature on summary dispositions is so sparse that even a consensus on a definition of summary treatment is lacking. Most scholars couch a definition in terms of a contrast to plenary opinions.

For instance, take Stephen L. Wasby’s definition:

Most cases accepted for review proceed to plenary consideration – full briefing, oral argument, and a full opinion signed by the author. However, some ... are given summary treatment, being decided solely on the basis of the certiorari or appeals papers, with only a one- or two-line statement issued to explain how the case is being decided. (Wasby 1988: 204)

This seems a fairly straightforward and clear definition, but note the follow-up to his definition:

Summary treatment may, however, result in a full but usually unsigned per curiam (“by the Court”) opinion. ... Use of a per curiam opinion ruling rather than a signed opinion may indicate that a case is considered routine or noncontroversial or may be used to signal that the outcome is obvious and should receive prompt compliance, ... However, the Court does sometimes use per curiam opinions in argued cases... Another type of summary disposition is the Court’s sending a case back to the lower courts so it can be reconsidered on the basis of a Supreme Court ruling rendered after the lower court first decided the case. (Wasby 1988: 204)

It would appear, then, that summary definitions are used for a variety of situations and take a variety of forms – situations and forms not always clearly distinguishable from plenary opinion or “full-dress” treatment. Arthur D. Hellman has put forth a useful list of four broad types of summary disposition:

1. order: “a simple statement of the disposition unaccompanied by any explanation or justification” (see Appendix D for example of this type).
2. statement: “a one-sentence holding perhaps accompanied by a short description of the procedural posture, but with no exposition of the legal issues.” (see Appendix E for example of this type).
3. memorandum: “a description of the facts or procedural posture and some exposition – two sentences or more – of legal issues, totaling less than two pages of text” (See Appendix F for example of this type).
4. Per curiam: “a regular or ‘full’ opinion of two pages or more, not signed by a Justice” (See Appendix G for example of this type) (Hellman 1983: 809).

The latter two types of summary disposition are the focus of this inquiry. They are the obvious choices for my purposes because their very length should facilitate greater understanding than a mere sentence or two. While I find Hellman’s categories useful, I do object to the arbitrary page assignment separating memorandum cases from per curiams. It seems a bit contrived; a case does not have to exceed two pages to be

substantial. Thus, my definition of per curiam summary dispositions is any summary opinion by the Court ranging in length from a few paragraphs to several pages. I am essentially merging the latter two categories of Hellman. The page limit is excluded. Indeed, to give away a bit of my research findings, if I had adopted only the latter category, I would have eliminated several substantive policy per curiam decisions solely by virtue of their brevity. Whether one adopts my definition or Hellman's, per curiam summary dispositions have been mentioned by only a few scholars, but a discussion of them is needed here.

PER CURIAM SUMMARY DISPOSITIONS

Abraham defined the per curiam summary disposition as "an anonymous opinion expressing the summary judgment of the Court as a whole" (1993: 184). As noted earlier, he says that these cases are "usually ... written for a unanimous Court" although he admits there are "exceptions" (1993: 184). Abraham further offers reasons why the Court would use a per curiam summary disposition. One reason is that it "constitutes an attempt by the Court to resolve the conflict between fully reasoned opinions and affording the finality of Supreme Court adjudication to as large a number of litigants as possible" (1993: 184). Another possibility is that the usage "represents a stopgap expedient...[for] an area that has defied a firm, universally applicable rule of law – notwithstanding continued attempts to determine one" (Abraham 1993: 184). He cites obscenity as the classic example of such cases.

Stephen L. Wasby, on the other hand, proposes very different reasons why the

Court might issue a per curiam summary disposition. He indicates that it "may indicate that the case is considered routine; the Court may also wish to signal that the outcome is obvious and should receive prompt compliance..." (Wasby 1978: 153). The Justices may also opt for this mode "when the Court is very badly divided -- the opinion is limited to the policy on which the Justices can agree" (Wasby 1978: 153-4).

Wasby also delineates the pros and cons of per curiam summary dispositions. In their favor, he notes (1) they "allow the Court to 'clean up' a large number of cases in a particular policy area;" (2) they may "make clear to lower court judges that their cases need to be re-examined;" and (3) they "preserve freedom of action for the justices, by providing a result ... without the constraints which full development of doctrinal reasons would impose" (Wasby 1978: 154-5). Conversely however, they have unclear precedential weight, and "the visibility of a [per curiam ruling] may be too low for the ruling to have its intended effect" (Wasby 1978: 154-5).

The confusion regarding precedent centers around a few murky quotes by Justices. One of these was a reason for denial of certiorari offered by Justice Brennan:

In form, and for many purposes in fact, ... summary dispositions are decisions on the merits and must be treated as such by the lower courts; yet there is strong evidence from the Justices themselves that the cases receive far less than the consideration which attends cases accorded plenary review. Moreover, the ambiguities inherent in a decision unaccompanied by any explanation often give rise to difficult problems of interpretation for lower courts. (qtd. in Hellman 1979: 26).

The key to this passage is that any precedential confusion is thought to stem from "decision[s] unaccompanied by any explanation." My research focuses on cases that do have explanation. Thus, the precedential question is not an issue as it might be in order

or statement summary judgments. Lest I find evidence to the contrary in my cases, I will rely on the first part of this passage – that the rulings are in effect “decisions on the merits and must be treated as such.” Justice Burger also disavowed the precedential impact of affirmances, but affirmances are always to be eyed with caution (Wasby 1978: 154). One cannot ascertain precedent from an affirmance because the judgment only is affirmed. The rationale or construction of the case may be entirely wrong. Thus, if my results are largely affirmances, I will have to negate their precedential impact.

It is essential that all of the aforementioned functions, pros, and cons of the per curiam summary disposition be critically evaluated, particularly because, despite its use over time, there are hints that the mode of disposition may soon become obsolete. In Deciding to Decide, William H. Perry indicates that there are two justices who never vote to dispose of a case summarily (Perry 1991: 100)¹⁴. This is of tremendous significance because there is, according to another current member of the Court, a previously unknown rule of six required for summary treatment of a case.

The rule now, well it is not a rule, but it is a convention, is that it takes six to do that [decide at the cert. vote to dispose of a case summarily and issue a per curiam opinion] rather than five. ... I think Justices A and B now dissent from every summary judgment. Justice C is close to that attitude, but he will join a summary opinion when a decision is so obviously wrong. (Perry 1991: 100)

¹⁴ Most of Perry's interviews focused on the Terms 1976-80, although there are references to a female Justice which means that some of his sources were from the 1981 Term. The current implications of this are that the join six convention would only remain in peril if the same Justices who opposed summary treatment then are still on the Court today. The only ones who are even coterminous to all of the above years are Stevens, Rehnquist, and O'Connor.

It is possible then, that the use of summary dispositions generally and per curiam summary dispositions in particular is going to become obsolete before any real systematic study of its current role or usefulness can be completed. If, at present, two of nine will not decide summarily and another is close to that posture, then the summary disposition is in peril. A join six convention would be thwarted with the addition of but one additional Justice opposed to less than "full dress" treatment. If an investigation of the role of per curiam summary dispositions indicates a vital needed for such adjudication this trend could be problematic. If, on the other hand, this investigation suggests that per curiam summary dispositions are not warranted, then the trend may be long overdue.

In order to extract per curiam rulings from other types of summary dispositions, it is necessary to explore the various forms summary dispositions take. It is to that I now turn.

FORMS OF SUMMARY DISPOSITIONS

No hard and fast rules dictate the form that a summary disposition must take. The Supreme Court, in its own self-imposed Rules, has only the following to say regarding the summary disposition. "The order may be a summary disposition on the merits". (Rule 23.1 445 U.S. 1011-12).

Theoretically, then, a summary disposition might take any of the forms that a plenary opinion takes. Arthur D. Hellman has explored the forms of GVR (certiorari granted, vacated, and remanded) , as well as affirmances, dismissals for want of a substantial federal question, reversals without opinion, opinions in non-argued cases, and

summary reconsideration orders (Hellman 1983). It is interesting to note that what Hellman refers to as opinions in non-argued cases are what I term per curiam summary dispositions. I believe that the per curiam component of the terminology is integral because each case does take this form, but this is illustrative of the aforementioned lack of conceptual clarity that plagues summary adjudications.

GVR's

While Hellman has studied summary rulings taking the forms mentioned above, and there is no Court Rule barring any form of summary adjudication, one gets the distinct feeling in reading scholarship on the subject of summary dispositions that a direct corollary exists between the summary disposition and the form of a GVR. A GVR stands for a certiorari petition that is granted, the lower court decision is vacated, and the case is then remanded to a lower court for a decision. The remand is usually accompanied with the instruction that the decision reached on remand, be "not inconsistent with" the GVR instruction or rationale. Arthur D. Hellman, the leading authority on summary dispositions, has extensively explored the GVR in his article "Granted, vacated and remanded – shedding light on a dark corner of Supreme Court practice" (1984). He notes that it is the Court who termed the process the "GVR." The "abbreviation derives from the fact that, except in cases coming to the Court on appeal, the disposition reads, 'The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to [the court below] for further consideration in light of the [case cited below].'" (Hellman 1984: 390). I would expect, then, that the GVR is the most frequently

coded form of per curiam summary disposition. There is a further link between the GVR form and the known function of summary adjudications, as will be discussed in the next section. This further reinforces my expectations of frequent GVR's.

Dismissals of Appeals

Summary dismissals of appeals are usually included in the Orders section of the U.S. Reports¹⁵. The review of an appeal, though technically mandatory, has come to evince a discretionary character similar to that of certiorari petitions because the Court can dismiss state appeals for want of a "substantial federal question" based on the information included in the jurisdictional statement of the appeal. If this occurs, the Court will dismiss the state appeal. Other legislated means for lessening the Court's mandatory jurisdiction have been put in place since the Warren era. To confuse the summary application, this dismissal has the precedential effect of a summary affirmance. That is, the Court has essentially affirmed the state's ruling because there are no controlling federal issues raised by petitioners. Conversely, at the federal appellate level, an affirmance is issued to summarily affirm the Circuit Court ruling¹⁶. Summary dismissals at the federal level are usually for mootness. Again, all summary appellate action can, in some instances, take the form of per curiam summary dispositions, so it is important to note the distinction from the type of per curiam dispositions that I will be

¹⁵ The *U.S. Reports* contain all of the decisions of the Court. The "front of the book" is reserved for plenary opinions and substantive summary judgments ie. per curiam summary dispositions. The back of the book lists Orders of the Court and contains routine ways in which the Court manages its caseload.

¹⁶ For an excellent discussion of the nuances of appellate summary action see Perry's section on "Jurisdiction and Procedure."

evaluating. The dismissal of appeals would almost always take the order or statement form mentioned by Hellman. Thus, even if they are per curiam summary dispositions in the broadest sense, they will not be included in my research.

FUNCTIONS OF SUMMARY DISPOSITIONS

These forms are used to serve several known functions: primarily the correction of lower court error, and the expediting of similar cases. Once these are accounted for, there is still a substantial category of per curiam rulings left unexplained, as we shall see. First of all, however, the known and hypothesized functions of summary disposition will be addressed.

Error Correction

In William H. Perry's Deciding to Decide (1991), the justices and clerks pinpoint two key areas which are frequently handled summarily: miscarriages of justice and misapplication of law by lower courts (Perry 1991: 267). Somewhat confusing, however, is the fact that the Court personnel refer to both of these areas as error correction – the remedying of “egregious” lower court decisions. The implication, of course, is that miscarriages of justice are egregious injustices and lower court mavericks are egregiously ignoring or misapplying precedent.

This latter topic has to do with the Court sending a message regarding “flagrant disregard for precedent” (Perry 1991: 267). It is generally referred to in judicial

scholarship as error correction. One clerk described this practice thusly:

...[T]here is a fear on the Supreme Court, and I think a real fear, that these courts seem to think that they can just ignore the Supreme Court because they know that the Court simply can't take but a few cases (Perry 1991: 268).

This type of egregious lower court decision, that which plays "fast and loose" with precedent has been referred to as a "slap on the wrist" of the lower court (Perry 1991: 268). These so-called slaps on the wrist can be presented in a per curiam summary disposition; they are then one of the functions I will be looking for.

The following textbook presentation best encapsulates the predominant view on this phenomenon.

Occasionally, one hears of a recalcitrant judge who, for one reason or another, defies a Supreme Court decision, but this phenomenon, while not uncommon in the early days of the Republic, is an eccentric curiosity today. (Stephens and Scheb 1993:95)

Accordingly, I do not expect to find many of these cases.

Somewhat confusing is that another category of error correction exists. Perry, in his interviews with current Court members, detected a second facet of egregiousness – the remedying of extreme injustice to individuals whose cases lack general applicability. He suggests that the remedying of such egregiousness is one of the primary roles of per curiam summary dispositions (Perry 1991).

To further muddy the waters, other scholars, and the Justices themselves use error correction in a third sense: the overturning of a case that is for whatever reason incorrect in its application of *res judicata*. Accordingly, I will include three categories of error correction under my classification of function: error correction in the latter sense, the remedying of individual injustices, and slaps on the wrist of lower courts.

To Expedite Similar Cases

Summary dispositions are also used to expedite decision-making when several cases are similar enough to be disposed of collectively. This occurs when the Court holds several cases which are related in nature “pending the disposition of a similar case” (Perry 1991). Usually this similar case will be a plenary ruling (during the same term) in which the Court’s rationale is clearly elucidated. As a result, those lower decisions that anticipated the appropriate disposition are summarily affirmed. Conversely, those lower Court decisions that are, by virtue of the Court’s ruling in a similar case, improper applications will take the form of a GVR. These comprise the majority of the Court’s summary dispositions each term. Here, of course the remand will be in light of the coterminous case the Court is handing down that same term. These cases are frequently recorded in the ORDERS or MEMORANDUM section of the reporters. Rarely, however, these GVR’s may also be presented in a per curiam summary disposition. They are usually mere statements or orders, and will thus not reach the threshold requirements for entry into this study.

Pro-Prosecutorial Adjudications

Stephen L. Wasby, in The Supreme Court in the Federal Judicial System(1978), briefly mentions a more conservative function for per curiam summary dispositions: “[r]ecently dissenters have claimed that the Court’s use of such decisions is ‘one-sided’, favoring prosecutors as the Court reverses prodefendant lower court rulings but not

proprosecution rulings” (Wasby 1978: 205). My inquiry will explore the function of the per curiam summary disposition to see if pro-prosecutorial cases are extant. Given the conservative ideologies of the Justices on both the Burger and Rehnquist Courts, one would expect the percentage of pro-prosecutorial cases to be high in these eras.

Policy Cases

An even more significant role for summary rulings has been discussed by Arthur D. Hellman. He suggests that the function of summary rulings may be amenable to the policy persuasions of the Court. In his exploration of summary adjudications in the Court from 1975 through 1979, he found a substantial percentage of cases which could only be described as policy rulings --cases in which policy was changed, first delineated, or clarified. The policy role for summary decisions would possible encompass the theories of both Perry and Wasby. Policy could be decided which could alternately benefit individuals wronged in lower court decisions or prosecutors who were unsuccessful in lower court proceedings. The next section will elaborate on the literature in which these theories have been developed.

Clearly, it was necessary to explore the various forms and functions of summary dispositions generally because, chameleon-like, they may all take the form of per curiam summary dispositions. But is there a further function of per curiam summary dispositions? That is, is the per curiam summary disposition merely an instrument of the above cited functions of summary rulings, or is there a reason that the Court offers a ruling of one to several pages that makes this form of summary adjudication distinct?

When all of the aforementioned per curiam summary dispositions have been accounted for, are there still per curiam rulings which are left unexplained? If so, what is their function?

LITERATURE REVIEW

Perry's View of Per Curiam Summary Dispositions

Perry concludes that remedying of egregious decisions is a role of per curiam summary dispositions despite the Court's objections to the contrary. Having already discussed slaps on the wrist, allow me to elaborate on the remedying of injustices. Note the response from two current justices in anonymous interviews. From one, "This is not a Court to simply assure that justice is done. We cannot right all wrongs." Another agrees, "Basically, we see it not as a court of justice" (1991: 266). Finally, a clerk quotes a frequent lament of another member of the current Court when faced with a case of injustice, "boy, this is a shame, it really is wrong, but we just can't correct everything" (1991: 267).

Perhaps the justices protest too much.¹⁷ To his credit, Perry detected some equivocation on the part of both justices and clerks regarding their self-reported practice of "overlooking injustice" (1991: 266). In fact, when he pushed the respondents, they frequently changed their stories. Note the responses when Perry suggests, "There always seem to be a few cases that the court picks that, to an outsider, the only justification for

¹⁷ Apologies to Shakespeare, of course.

taking the case seems to be that you felt the result was so egregious” (1991: 266). From one, “That’s true. That happens” (Perry 1991: 266). Another admits, “[s]ure that happens, but it happens rarely (Perry 1991: 267). Finally, a clerk offers what Perry deems the best explanation:

They all kind of have these tug at the heart string cases...
I mean the justices are human, and when they see something
like that [a terrible injustice he had described], sometimes
it strikes them. (1991: 265)

The real question remains, then, does the Supreme Court serve to remedy injustice or does it not? The question, it would seem is ultimately answered for Perry by one of the current Justices. Perry confesses that the information would ... “add a great deal of insight about this justice, and perhaps a lot about decisions processes at the Court generally” (1991: 266). Regrettably, this same Justice hamstrung the author by suggesting that his information was ... “not really for public consumption” (Perry 1991: 266). Clearly, Perry was obligated to protect this information – particularly given the infrequency with which members of the Court grant interviews. However, it is interesting that the Court would grant interviews ostensibly aimed at educating the public and then refuse to allow full disclosure. Are we as constitutional scholars only to uncover this information on a one-by-one basis as we are granted interviews and then sworn to secrecy?

All is not lost however. Sufficient information is provided by Perry in Deciding to Decide to facilitate an independent inquiry into the role of the Supreme Court and issues of injustice. Specifically, he suggests that the increase of summary dispositions may herald an increase in remedying egregious lower court decisions. One clerk referred to

the use of summary dispositions in this manner as ‘the Zorro concept – where they strike like lightning to do justice’ (Perry 1991: 100).

Perry is also instructive as to what types of cases may signal a summary disposition. Several of his interviewees pointed toward “cases involving children” as ones in which the justices were prone to take action:

There are some cases like that [egregious], and I think sometimes that it turns on the kind of case. In the last few terms where we have had a parent/child legitimacy issue – that may just have more appeal and cause you to take it than something on the Miller Act. (Perry 1991: 267)

Accordingly, cases involving children will merit special exploration in my review of cases. However, this is far from a definitive formula for detecting the remedying of injustices. Even clerks with first-hand knowledge of and involvement in case selection were befuddled as to why some cases were addressed and others were not. Take, for instance the comment of a former clerk who was a lawyer at the time of the interview, “we certainly saw cases where someone really got screwed below ... and I would recommend that they take ... and often those cases were just not followed” (Perry 1991: 266-7). To emphasize that “they are just not predictable on these things”, he noted that, “I have a case now, and the Court granted cert., and I have no idea why they did” (Perry 1991: 266). Possibly during the course of my investigation, I will be able to detect a pattern in summary judgments. We need to know some idea of why the Court is issuing per curiam summary dispositions and if they are used to remedy lower court injustices against individuals.

Another point regarding per curiam summary dispositions that Perry makes needs mention. He suggests that if this is a prominent mode of disposition, the Court may be at

fault in its requirements for the submission of jurisdiction papers. These initial papers to the Court are not supposed to contain the merits of the case. Petitioners do not send those unless the case is granted plenary review. However, Perry notes that fear of a summary disposition may force lawyers to sneak the merits into the earlier papers. One of the Justices admits that “there is an unfairness” to this dilemma (Perry 1991: 101).

Wasby’s View of Per Curiam Summary Dispositions

To be completely accurate, Wasby never espouses a view of the role of summary dispositions as per curiam rulings. But I attribute to him the perspective of a trend toward a pro-prosecutorial function because without his mention of current dissents along those lines, I would not have been searching for this type of per curiam ruling.

Specifically, he notes that “[r]ecently, dissenters have claimed that the Court’s use of such decisions is ‘one-sided’, favoring prosecutors as the Court reverses pro-defendant lower court rulings but not pro-prosecution rulings” (Wasby 1988: 205). This is what prompted me to engage in a longitudinal study to see what the function of summary dispositions has been over several Courts in order to ascertain if it has changed as personnel and ideological majorities have changed. Indeed, if Wasby’s interpretation of the dissents is correct, then the per curiam summary disposition may be functionally amenable to different ideological trends on the Court.

Wasby also raises another issue related to the nature of summary adjudications. He suggests that a partial reason for their low visibility is “that the reasons underlying [summary action] are often intentionally well hidden” (Wasby 1978: 143). This is an

illusion to the so-called “cult of the robe” – the accusation that the Court is said to cloak its practices to ensure total secrecy (Wigdor 1994:638). The “cult of the robe” is the outgrowth of a theory of the Court known as mechanical jurisprudence. The key tenet of this theory is “judicial secrecy [is] an essential element in sustaining the assumptions of judicial neutrality, decisional certainty and the rule of law” (Wigdor 1994:638).

Events of this century have obviated the cult of the robe to a certain extent. The publication of Justice Burton’s papers in 1965 allowed insight into the conference proceedings of the Justices. Also, the Justices themselves have granted interviews and published material on their daily activities - an unheard-of practice less than three decades ago. Despite this gradual erosion of the so-called “cult of the robe,” summary adjudications remained mysterious. Hellman alluded to this in the title to one of his articles on summary dispositions, “Granted, Vacated, and Remanded, Shedding Light on a Dark Corner of Supreme Court Practice” (1984). Hopefully my work will help expose the “cult of the robe” to the extent that it cloaks information regarding summary dispositions.

To return to the theories of the functions of per curiam summary dispositions, possibly, both Perry and Wasby may have pinpointed a use of the per curiam summary disposition. If they are correct, this is a vastly powerful tool --particularly when one bears in mind that it is a decision of the Court without giving the petitioners the opportunity for oral argument or submission of briefs.

Beyond Perry and Wasby’s hypotheses concerning per curiam summary dispositions and their informative discussions of summary dispositions in general, which have already been mentioned, there is precious little literature to review on the topic of

either summary dispositions broadly or per curiam rulings specifically. This literature review, has been, then, of necessity, very author-specific. They are two of the leading authorities on summary dispositions.

The foremost scholar in this area, though, would have to be Professor Arthur D. Hellman, of the University of Pittsburgh. He has explored summary dispositions extensively, and he has evaluated many of the forms of summary disposition – including per curiam summary dispositions of the Burger era. A discussion of his contributions in the area of summary rulings is herein warranted.

Hellman's View of Policy Decisions

Hellman studied four Terms of the Burger Court and found that “more than a third of the cases did appear to involve, in varying degrees, ‘the appropriate settlement of questions of general importance.’” (1983: 829). The article generated by this research, “Error Correction, Lawmaking, and the Supreme Court’s Exercise of Discretionary Review” is virtually the cornerstone of scholarly research on summary dispositions.

He aptly notes the significance of his results:

When the Court is doing no more than reviewing for error, only the parties, the courts below, and perhaps the Justices themselves run the risk of suffering injustice or embarrassment. But when the Court uses the summary opinion as a vehicle for fashioning or redefining a rule of law, the consequences can be felt far more widely (1983: 833) .

The use of a per curiam disposition as a policy vehicle has major ethical and practical implications. Certainly a finding of such a role over time would be of significant importance.

Hellman discusses the functions of summary rulings in the terms from 1971-1979, and I cannot overstate his contribution to my understanding of the role of summary adjudication in general and per curiam summary dispositions in particular. For instance, he notes that “until the mid-1960’s, it was quite uncommon for the Supreme Court to write opinion in cases that did not receive plenary consideration” (1983: 796). Thus, I may find few illustrations of per curiam summary dispositions in the Warren Court era, but even this finding would be informative because Hellman does not specify with precision how “uncommon” the practice was.

He does however, comment on the increased trend during the Burger era. He suggests that “[n]o one will mourn the demise of the summary reversal without opinion” but he aptly notes that it begs the question of how the Court is now adjudicating aside from the obvious addition of “brief opinions explaining the Court’s reasoning” (Hellman 1983: 825).

He predicts that one area of summary treatment during the Warren era, “criminal defendants whose arguments appeared to have received inadequate consideration in the lower courts” has changed dramatically (Hellman 1983: 825). This function of summary opinion -- error correction or remedying of egregiousness -- he predicted in 1983 have been obviated by “reforms in the criminal justice system” which “have made it much less likely that meritorious (or possibly meritorious) claims will be thwarted by procedural obstacles” (1983: 825). He admits in a footnote that another possibility is that the “Court today is less receptive to prisoner pleas” (1983: 825). Given the ideological conservatism of the Burger and Rehnquist courts, I think the latter argument would be more compelling than the former. Accordingly, I will be challenging Hellman’s assertion that ‘justice-and

the appearance of justice” are no longer as relevant as they were under the Warren Court (1983: 825).

To sum up, I have outlined Perry’s view of error correction of lower court decisions, Perry’s view of the remedying of instances of egregious injustice to individuals, Wasby’s pro-prosecutorial function, and Hellman’s theory of lawmaking, or policy initiatives. A fourth possibility is one that I alluded to in the discussion of Perry’s rule of joining six, and it is also a point made by Hellman in contrasting the Warren and Burger Courts – that is that the function of the per curiam summary dispositions may be less related to the caseload than it is to personnel changes on the Court over time. Recall that Perry’s interviewee suggested that six were required to summarily adjudicate and three consistently refuse to do so. This could mean that the entire use of summary adjudication – whatever its function – may soon become obsolete.

A related possibility is that the per curiam summary disposition is a tool the Court uses to serve a variety of functions, depending upon the ideological composition of the court at the time. Hellman explored this possibility briefly in a footnote when he astutely observed that the start of the consistent use of a brief explanation with summary dispositions “coincided almost precisely with the arrival on the Court of Justices Powell and Rehnquist” (1983: 822). He leaves this possibility largely unexplored, but I think it is of paramount concern to this inquiry. A mode of disposition that is amenable to a variety of functions is a powerful tool indeed! All the more so when one remembers that this is a mode of disposition that affords the parties involved no opportunity to submit briefs on the merits or present oral argument! Clearly this is a theme underlying Wasby’s theory of pro-prosecutorial bias on the part of the Court. The suggestion that the Court,

as it becomes more ideologically conservative, has used the per curiam summary disposition to adjudicate accordingly is an allegation fraught with ethical considerations. The charge is compounded if Hellman is correct in suggesting that the per curiam summary disposition is used in some instances to adjudicate major and new policy initiatives!

To comprehensively address the function(s) of per curiam summary dispositions, then, I must explore not only the function in each case, but track also the functions that predominate over time and so if there is a direct corollary to personnel changes and/or ideological shifts.

CHAPTER 3

METHODOLOGY

OVERVIEW

To this point, I have overviewed the research as a whole. It is necessary prior to the case analyses to also specifically delineate my methodology. I must elucidate what criteria I am using to locate and categorize the per curiam summary dispositions for each term.

Having to explain how one locates Supreme Court decisions in this technology era may seem anachronistic. Surely, the cases are available in the resources known to all constitutional scholars: the contents pages of the three Supreme Court Reporters, WESTLAW, and available at various cites on the Internet. In point of fact, the per curiam summary dispositions are to be found in none of these sources! Indeed, I found the per curiam summary dispositions (after trying all of the aforementioned to no avail) for each term by literally turning through each page of the *U.S. Reports*. I detected a pattern rather quickly in this quest – the vast majority of the cases were to be found in the beginning of the plenary section for the first volume of each October Term of interest. However, stragglers were found interspersed throughout subsequent volumes with seemingly no rhyme or reason. This admittedly unscientific approach, I found was codified by the previous research of Professor Arthur Hellman. He encountered the same problem and upon further investigation pinpointed the difficulty as one of procedural

changes in the instructions to the Court Reporter. Specifically, the reporters listed all summary dispositions in the front section of the Reports “from 1957 through 1969” (1983: 826). After this, the front section was to be used only for per curiam summary dispositions (1983: 826). Unfortunately, however, these changes were not invoked immediately, and I have found isolated cases in even the most recent terms. One will recall that the obscurity of these cases, according to Wasby, is no accident (1978).

I will not hazard a guess as to whether the placement is haphazard or intentionally covert. I must, however, attach to this section the same disclaimer invoked by Hellman that there is always in an investigation of this sort the possibility of human error. I could have overlooked a case – particularly since many of the per curiam summary dispositions in the Warren Court era were no more than a paragraph in length (see Appendices D and E for examples).

Having explained how I found the cases, what did I do with them once I found them? Essentially, I utilized a content analysis of each of the dispositions. I analyzed every per curiam summary disposition for the Warren Court terms of 1954, 1958, 1962, 1966, the Burger Court terms of 1970, 1974, 1978, 1982, and the Rehnquist Court terms of 1986, 1988, 1990, 1992, and 1994 (excluding memorandum summary dispositions compiled in the index of the US Reports which in the broadest sense of the terms could be considered per curiam by virtue of being a unanimous order of the Court).

One may wonder why the cases are dispersed every four years until the Rehnquist era. The problem was one of the N (total number of cases). The total cases generated in the Warren and Burger eras was sufficient, but using only three Terms of the Rehnquist era was insufficient, so I added 1988 and 1882.

To facilitate the content analysis, I borrowed the methodology of Lee Sigelman and George H. Gadbois, Jr. in "Contemporary Comparative Politics: An Inventory and Analysis" because their research, though in an unrelated sub-field, closely mirrors the objectives of my own. They were analyzing articles over several years with the objective of treating the findings as a "corpus of literature" that could indicate trends and "changes over time" (1983: 277).

More specifically, they were attempting to reconcile Macridis' dismal assessment of the sub-field of comparative politics in the 1950's with more optimistic evaluations in the 1960's which heralded comparative as the "field in which the most significant work was being done." They felt that the best way to clarify the conflicting reports was to analyze the content of the scholarship and see whether the field was in despair or repair. I too am seeking to extrapolate the true function of per curiam summary dispositions from diverging assertions that they are vehicles for policy, individual justice, or pro-prosecutorial rulings.

Sigelman and Gadbois followed two scholarly journals over a period of thirteen years focusing specifically on the form, function, and topics addressed by the articles. Theirs was, of course, a longitudinal study that would indicate trends over time. I, too, am seeking to trace the Court's use of per curiam summary dispositions over time. Because of the similarities between their research and my own, I was able to borrow from their methodology in my content analysis. I listed each case separately in a tabular format. I listed all cases in chronological order and for each I provided the case name and citation for the purposes of case identification. Additionally, I pinpointed the form of the case, the function of the case, corollaries between form and function, issues addressed

by the case and relevant concurrences and dissents.

FORM OF CASES

There is little subjectivity involved in coding the form a case took. Theoretically, at least, a per curiam summary disposition can take any of the same forms of a plenary decision. Because Hellman had discussed the form of GVR (Granted, vacated, and remanded) at length, this was one of my form codes. I expected it to encompass the vast majority of cases. Hellman had also distinguished the GVR from reversals so I also included the categories of GRR (granted, reversed and remanded) and GR (granted and reversed). I also knew that the mandatory appellate jurisdiction had not been obviated during the earliest terms I was investigating, so I included the categories of Appeal Dismissed, and Appeal Vacated and Remanded. Because the existence of a per curiam summary disposition used as an affirmance was intriguing, I added Affirmance as a category, and then I would specify whether it was a cert. petition or an appeal that was affirmed. Lastly, I added the catch-all Other coding, but for each that I listed as this form, I specified the exact type so that I could see if there were any other forms that occurred with statistical significance. Several trends emerged with the forms of writs of mandamus and in forma pauperis petitions, as we shall later see.

Of course, the Constitutional scholar will recognize that I am sacrificing specificity for inclusion with my coding categories. The form of Appeal Dismissed, for instance, could be further coded with many sub-forms. These would include appeals dismissed for want of a substantial federal question, appeals dismissed for want of a

properly presented federal question, appeals dismissed as improvidently granted (so-called DIG's), appeals dismissed as moot, and appeals dismissed as untimely. This specificity would have detracted more than it added, however, because cases could become coding categories in and of themselves when one takes into account the percentage of cases which are granted in part, dismissed in part, affirmed in part, reversed in part, etc... I placed such cases into the most applicable category. If the case turned on the affirmance more than the part reversed, then I would code it as an affirmance, and so forth. There were several instances in which the Court adjudicated more than one form of petition in a single disposition. For example, a certiorari petition would be accompanied by a petition for a writ of mandamus. If both were dispositive, then I would code a single case as both forms. This is treating the cases as **replicative**, and it was delineated by Sigelman and Gadbois in their content analysis. They suggest that where coding categories are not "mutually exclusive", then there may be a multiple form, function, or topic addressed by a single article (1983: 278). Moreover, such replicative cases, according to them, cannot be sacrificed to maintain statistical simplicity. Clearly, replicative cases result in a greater number of coded cases than the total N under inquiry, but they suggest that this is preferable to forcing cases to fit only a single mold. While this occurred only a few times in my coding of the forms of cases, it was the rule rather than the exception in the function category – to which I now turn.

FUNCTION OF CASES

Sigelman and Gadbois coded articles “pertaining to the general function or functions of each” on the basis of whether the function(s) were “stated or implied” (1983: 278). Likewise, I will code each disposition as to its stated or implied function. The functions I anticipate finding based on relevant literature would be: (1) Perry’s error correction that is aimed merely at slapping the wrist of lower courts; (2) Perry’s instances of remedying individual injustice or egregiousness; (3) Wasby’s reference to pro-prosecutorial bias (4) traditional error correction – including cases remanded in light of a coterminous decision (5) Hellman’s “lawmaking” function (I have renamed this category policy decisions because lawmaking is not semantically accurate). To ascertain the function, I will seek either “stated or implied” functions as did Sigelman and Gadbois. To recapitulate, the categories were Error Correction (traditional); Remedying of individual injustice; Pro-prosecutorial judgments; Policy decisions; and Slaps on the wrist of lower court judges. Again, I left an out with an Other category. I later renamed this category Confession of error when I observed a small but consistent percentage of cases coming at the request of the Attorney General or Solicitor General on confession of error.

Not only did the function of the case involve a higher percentage of replicative cases, but it also involved an element of subjectivity in ascertaining the stated or implied function. Often the stated function did not seem to comport with the outcome of the case. Also, there was frequently disparity between what the per curiam ruling asserted or implied the function to be and what the dissent suggested. As a result, I often had to independently evaluate the function by determining what the implications of the

disposition were.

If more than one function was stated or implied and they were not mutually exclusive, then I could incorporate them all as functions if the outcome of the case so warranted. However, there were numerous cases in which the implied or stated functions were not reconcilable. For example, the frequent case type in the Rehnquist era was the dismissal of a petition filed *in forma pauperis*. The per curiam opinion often suggested in these cases, as we shall see, that this was a case aimed at providing justice to other petitioners who had not abused the system. The dissent, however would counter that this was a pro-prosecutorial adjudication and trend that had nothing whatsoever to do with justice unless justice was defined by monetary wealth. Clearly, in such an instance, I could not code a case as both pro-prosecutorial and individual justice because that would violate Sigelman & Gadbois' definition of replicative. The subjective decision was in assessing what the real outcome of the case was. In the end I coded all but the initial two of the pauperis cases as pro-prosecutorial. The first cases were coded as policy. In addition to coding the forms and functions, I will look for the aforementioned links between the two.

ISSUES

The issue codings were not categories that I could portend ahead of time. I listed the topic or topics present in each case, and then I looked for similarities after the fact – a retrodution, if you will. The topic category did indicate trends over time; however, the are more instructive viewed within each era. This component of the investigation, then,

is less a longitudinal result, than a Court-specific shift in topics over time.

Within the particular Courts however, I did find that dominant themes or “cues” are traceable. The only theme that I anticipated was based on one of Perry’s interviews that suggested that individual instances of egregiousness were remedied when children were involved. That particular type of case, though, appeared only twice. I have no suspicions of other case matter other than that the prevalence of prisoners’ appeals issues will probably typify the Warren Court era prior to the elimination of mandatory appellate jurisdiction.

RELEVANT CONCURRENCES / DISSENTS

Additionally, Sigelman and Gadbois coded “other characteristics” that were “interesting in and of themselves” and for “what they said about the status of the field” (1983: 279). I, too, will code concurrences and dissents that are relevant “in and of themselves.” Some of these opinions are relevant because they indicate disagreement over the form and function appropriate to particular cases. Others are fascinating because they betray the extent to which lower courts were out of line with Supreme Court rulings. Finally, there was an internal disagreement between members of the Court as to what the appropriate role of per curiam summary dispositions ought to be. This tension was evinced throughout my investigation – across all three Courts and across ideological lines.

Because I would not presume to summarize a dissent or concurrence of a Justice of the Supreme Court, and because the cases are already noted for their brevity, I will cite relevant parts of opinions or complete opinions in toto. Also, I will include quotes from

the anonymous per curiam opinion if it serves to clarify the case or the dissent. Finally, if any unanticipated results are generated, I will code them as I go. Table 3.1 depicts the coding of each case.

Having clarified the coding issues, I now turn to presenting the cases. I struggled with whether to include the case summaries within the body of the text because they do give the reader a broader feel for the particular predilections of Justices. Ultimately, however, I had to select a more synoptic flow. Accordingly, all of the Court cases are found in Appendices K, L and M. They are presented chronologically and with comments following the important adjudications. Chapters 4, 5, and 6 are drawn directly from the cases included in the Appendices. I strongly suggest that one read the cases either before or after reading each chapter. I will, however, follow the lead of Perry and others, in noting that I have so constructed the chapters within the text that one could exclude the cases and still be able to logically follow the case trends.¹⁸

While I will chronologically arrange these cases by Volume number within each term presented in the Appendices, the analysis of Terms will be for the three broader longitudinal focuses – the Warren, Burger and Rehnquist Courts, respectively. Thus, unless clear patterns emerge from one Term to another, they will not be discussed separately. Additionally, the last chapter of this work will include conclusions drawn from the cases taken as a whole –often excepting particular eras altogether. This focus on the cases as a “corpus” to borrow Sigelman and Gadbois’ terminology, will allow conclusions as to the enduring features of the per curiam summary disposition.

¹⁸ Perry adopts this practice in *Deciding to Decide* (1991) where he includes his “Extended discussion of Jurisdiction” in his Appendix.

1958 - CASE 9	
CASE	National Association for the Advancement of Colored People v. Alabama Ex. Rel. Patterson
CITE	360 US 240
FORM	cert. granted reversed / writ of mandamus denied * see below
FUNCTION	error correction slap on wrist; justice issue for NAACP membership lists
TOPIC	whether NAACP can be held in contempt for failing to produce mebership rolists in court Supreme Court had already reversed a contempt ruling state court again affirmed conviction
RELEVANT CONCURRENCES/ DISSENTS	per curiam 357 US 449 had remanded for "proceedings not inconsistent with " our decision. Had reviewed before. Supreme Court of Alabama again affirmed contempt adjudication p241 and concluded that this Court was 'mistaken'...p 242 In these circumstances the Alabama Supreme Court is foreclosed from re-examining the grounds of our disposition. ' Whatever was before the Court, and is disposed of, is considered as finally settled.' ... We assume that the State Supreme Court, thus advised, will not fail to proceed promptly with the disposition of the matters ... and therefore, deny petitioner's application ... for a writ of mandamus" p 244-245 - No dissents

Figure 3.1 - Sample Case Coding Table

Finally, I will, for the respective Terms statistically summarize the results. That is, what percentage of cases were policy issues, pro-prosecutorial dispositions, remedying of individual injustice, and so forth. This will be included within the respective chapter. This is completely separate, of course, from the results and implications chapter that is a broader longitudinal discussion – also featuring statistical results over time.

METHODOLOGICAL DIFFICULTIES

In addition to the methodology used throughout the work, there were certain issues endemic to particular Courts. One difficulty inherent in the Warren years was the vast reserve of cases adjudicated on mandatory appeal. These cases were technically of the per curiam summary disposition mode of disposition, but most of them were not instructive. They would contain a mere sentence or paragraph ordering that the case be “remanded in light of Gideon v. Wainwright¹⁹” or that the “appeal is dismissed for want of a substantial federal question.” While the number of these cases would have tripled or quadrupled the N, that was not the most difficult statistical consideration. Rather, these cases were all of the traditional GVR type, and they would have skewed the results. Hellman suggests that there were “more than 100” such cases in the Warren era alone (Hellman 1983: 836-7). As a result, the form and issue categories would be overwhelmingly reflective of these cases and the function category would be staggeringly in favor of error correction and individual justice. These results would be more an

¹⁹ For example. 372 U.S. 335

artifice of the mandatory appellate jurisdiction than the Court's predilections regarding per curiam summary dispositions. Moreover, the figures would be irreconcilable with later Terms when most all of the mandatory appellate jurisdiction had been abolished.

I mention this here because while most of the cases could be excluded anyway based on the fact that they were mere statements or orders, some were not. The Court would sometimes elaborate on the case, but it was still the effect of a GVR in light of a coterminous decision. Indeed, it was the same type of case that I was largely excluding based on Hellman's four categories of summary dispositions – that is, based on length. Yet some were inexplicably longer than statements, orders or memorandum (Hellman 1983). Nevertheless, I excluded them to avoid skewing my results. Beyond this jurisdictional consideration, these types were a practical impossibility to code absent tracing the lower court adjudication because, as Hellman aptly notes, there was no “discussion of the legal issues”.

CHAPTER 4

THE WARREN COURT ERA

RESULTS OF WARREN COURT CASES

The following cases are from the Warren Court era focusing on the October Terms of 1954, 1958, 1962, and 1966. There were a total of 39 cases with only one case in 1954, 11 in 1958, 16 in 1962, and 11 in 1966. The years encompass numerous personnel changes on the Court (see Appendix A). The total N of 39 is misleading given that the 1954 Term included only a single case. As a result, the cumulative results in the concluding chapter will be presented both with and without this case so that a single outlier does not skew the overall results.

I will present the findings in the same format for Chapters 3 through 6 as well as for the overall findings presented in Chapter 7. I will first discuss the form, then the function served by the cases, and then I will discuss observed links between form and function. Next, I will discuss the issues covered by the cases, followed by an analysis of the relevant concurrences and dissents. Lastly, I will present any unanticipated findings from the content analysis. Let us turn, first then, to the form of the cases.

FORM OF CASES

The form of cases in the Warren era was varied. 27% of the cases were GVR's, and the same percentage of cases were in the broad Other category. These two categories amassed the highest percentage of cases. (See Figure 4.1 for results). 12% of cases were dismissed appeals, and the forms of GRR, GR and Appeals Vacated and Remanded account for 4% each of the total cases. The remaining 5% of cases were affirmances. What do these statistics, mean, then?

GVR

The finding of a high percentage of cases as GVR's was anticipated because the expectation would be that a large majority of cases were those affecting individual injustices. The reader will recall that Perry predicted a direct corollary between the GVR and error correction of egregious cases. More will be discussed on a link between GVR and justice cases in subsequent sections, but this form of cases was linked to a variety of functions. The high percentage of GVR cases, then, may not be for the reasons predicted.

Other Category

I did not expect a substantial number of cases at all to fall into the Other category. This was to be a catch-all category, if you will. Because no obstacle bars summary dispositions from taking any form that plenary opinions take, it would have been unwise to only allow for seven coding categories. What I found, though, was that the Other

	GVR	GRR	GR	Dismissed Appeal	VR Appeal	Affirmed Case	Type Other
Totals	11	4	4	5	4	2	11
%	27%	10%	10%	12%	10%	5%	27%

41 Total Cases

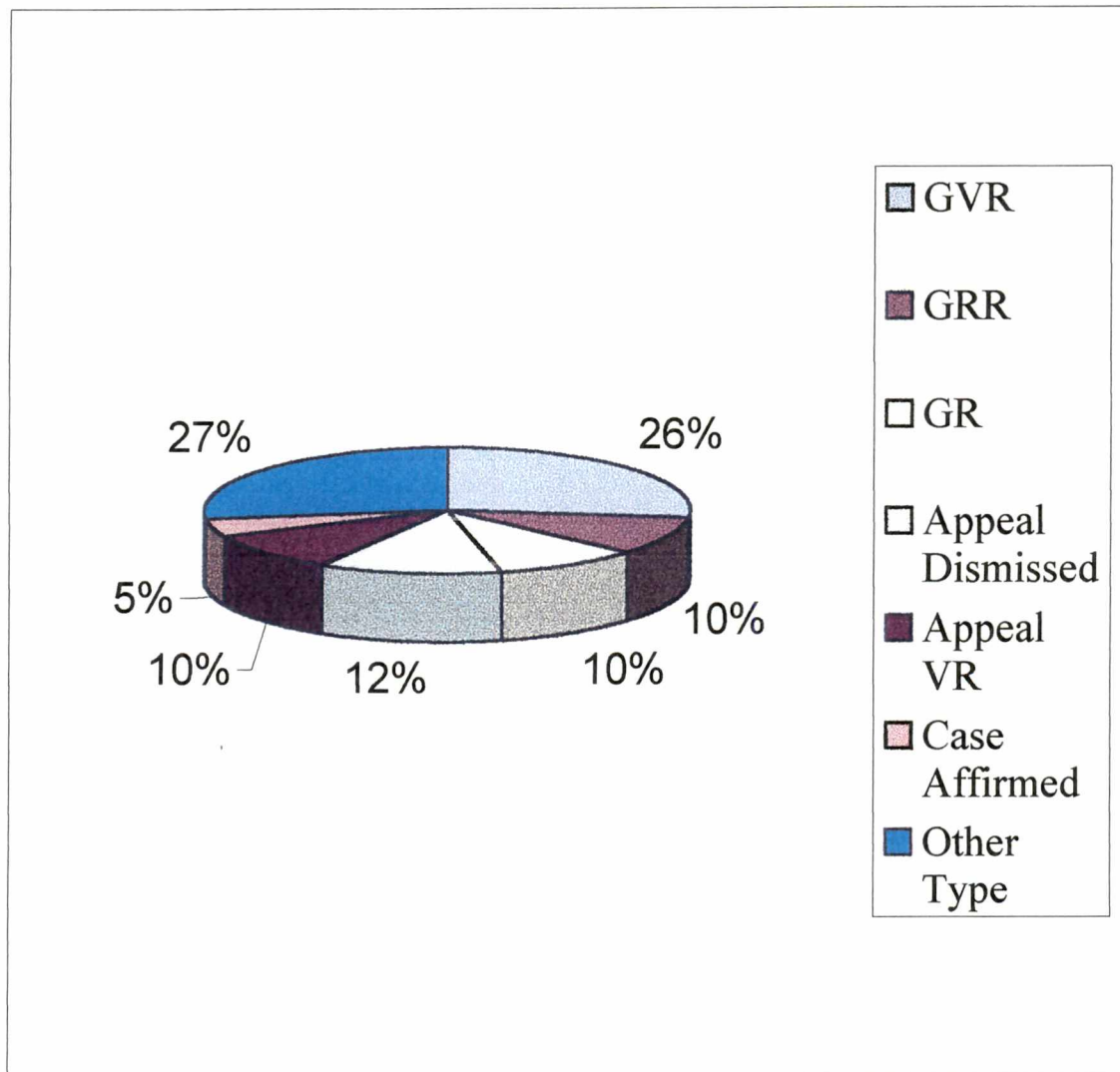


Figure 4.1 - Warren Court: Form of Cases

cases were substantial.

Many of them in the Warren years were requests that the Court issue **writs of mandamus**. A writ of mandamus is an order by the court, and it is a power rarely used. It is the closest thing the Court has to enforcement. While the Court “may be truly said to have neither force nor will, but merely judgment,”²⁰ this is its most stern judgment in its arsenal. (Wills 1982: 394). The writs of mandamus in the coded cases all centered around instances in which a lower court had defied the Supreme Court, either directly or indirectly. The function as well as the link between writs of mandamus and a specific function will be discussed in the subsequent chapters. It is important to note, though, that the writs of mandamus were never actually issued by the Court, in these cases. Leave was granted to file a petition for a writ of mandamus, but the writ did not issue. The per curiam would usually contain the following language, “[a]ssuming as we do that the [lower court] will of course conform to the disposition we now make, we do not issue the writ of mandamus”²¹

Appeals

The final thing to be noted in discussing the form of the per curiam summary dispositions in the Warren years is that the percentage of appeals cases was not tremendously high. While this may seem odd given the mandatory jurisdiction of appeals, the low percentage is explained by the fact that I chose to omit the cases that

²⁰ Alexander Hamilton *Federalist* #78

²¹ 360 U.S. 240

were mere orders or statements. These were the one or two line case rulings which shed no light on the issues or function of the case, and it is logical that their incorporation would have substantially raised the number of appeals cases.

FUNCTION OF CASES

To briefly overview the function of cases, the findings indicate that the majority of cases in the Warren era were those that served to remedy injustices to individuals. (See Figure 4.2) These comprise 30% of all the cases. This is not a surprising result given the ideological tenor of the Warren Court. Somewhat surprising was the high percentage of cases – 26% -- that involved substantive policy decisions. I also would not have predicted that the Warren Court would engage in pro-prosecutorial adjudications, but 5% of the cases were of this type. The function of 6% of the cases was a stern rebuke of a lower court – a slap on the wrist to borrow Perry's terminology.

Error Correction

Finally, 28% of the cases were error correction, but I want to trace this function over time because I am not sure it has meaning in and of itself. The prediction was that a link existed between GVR's and error correction, and that error correction was further linked to the remedying of injustice to individuals and rogue lower courts. The Warren Court cases might ostensibly seem to show a linkage because the figures for GVR's, error correction and injustice cases are all close to 30%. However, such a conclusion would be

	Correction Error	Justice Individual	Policy	Prosecutorial Pro-	Wrist Slap On	Of Error Confession	Other
Totals	23	24	21	4	5	4	0
%	28%	30%	26%	5%	6%	5%	0%

81 Total Cases

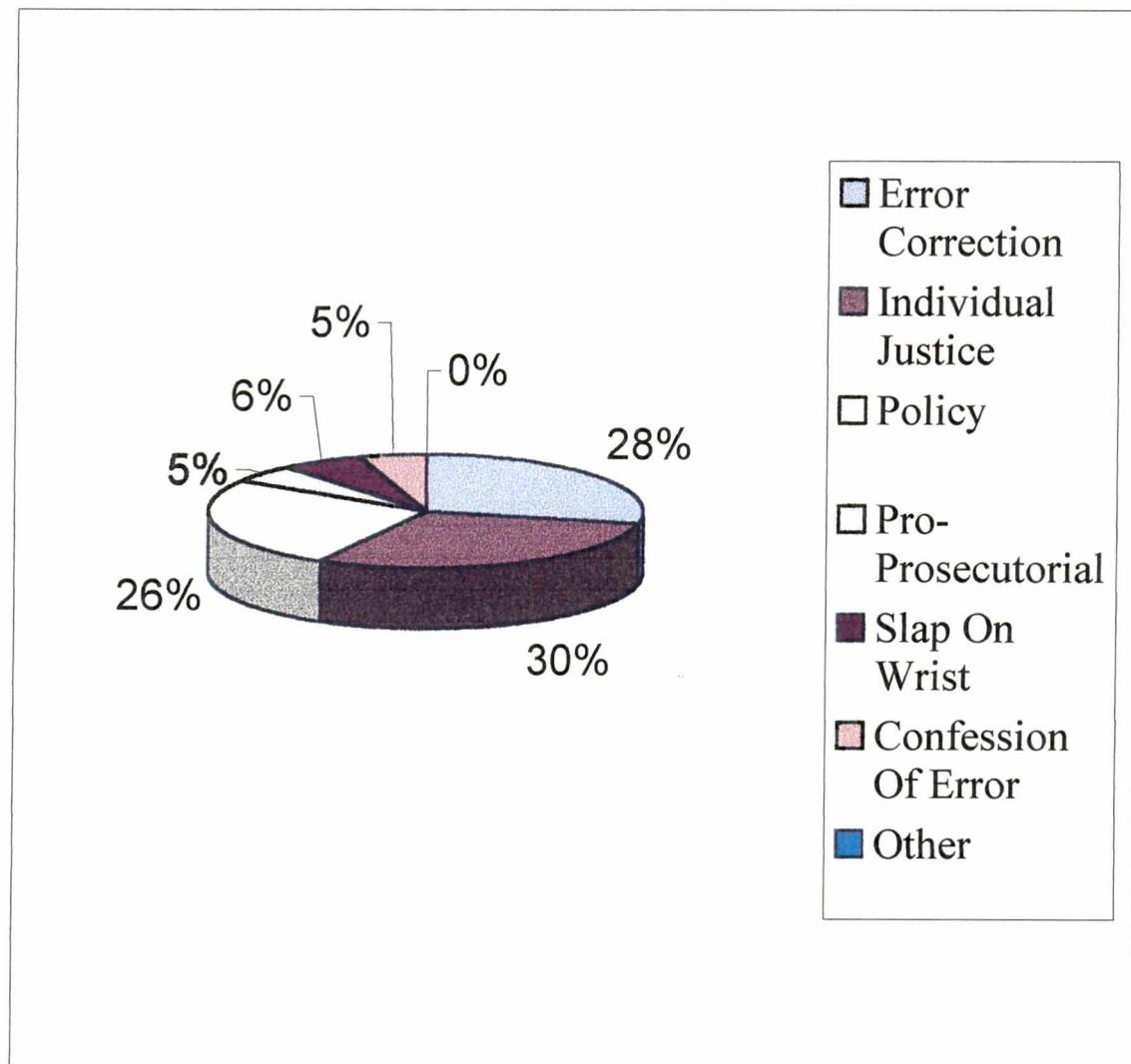


Figure 4.2 - Warren Court: Function of Cases

a spurious correlation because the GVR's were not consistently error correction cases. Moreover, the error correction cases were not necessarily injustice cases or slaps on the wrist. The role of GVR's and error correction will have to be explored more fully in subsequent chapters, but the initial cases do not show the anticipated results.

Policy Cases

By far, the most significant finding with regard to the function of cases is that 26% of the cases had clear policy implications. In some instances, they marked the first exposition of a policy. In others, they served to clarify, re-emphasize, or further delineate established policies. I based my conclusion that some cases mark the first instance of a policy on self-report. That is, whether the majority or the minority noted that this was a policy shift. For instance, they indicate that untimely appeals, even those which are clearly the result of counsel error over which the prisoner had no control, will not be allowed²². They admit this is a shift from the previous practice of "being generous in excusing" such errors (*Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., et al.* 385 US 32).

The Court also changed policy regarding wiretapping laws. It ruled that a wiretap that results in recordings of attorney-client conversations demands an automatic retrial. They later altered this policy again in yet another per curiam summary disposition (*Black v. United States* 385 U.S 26). This example was a pro-defendant ruling, to be sure, but surprisingly the Court handed down new policies which were distinctly pro-prosecutorial.

²² 385 U.S. 32

These will be discussed in the pro-prosecutorial section below.

The Justices also clarified a number of policies. These were mainly in the areas of criminal procedure and administrative law. They delineated the scope of ICC power²³, the threshold for standing to sue under the Federal Employee's Liability Act²⁴, and the government's role in settling labor disputes under the Railroad Act²⁵. Also, they determined that a State cannot review the actions of an Attorney General, that an Appellate Court cannot substitute its judgment for a jury verdict, and that the defendant in military proceedings may be allowed to present witnesses. Finally, they reinforced policy in several instances. For example, they remanded almost each case in which an insufficient counsel or lack of counsel argument was made. (Appendix K contains these cases.)

The implications of policy decisions being rendered absent briefing on the merits or oral argument are myriad, and they will be discussed in the concluding chapter. It will also be interesting to see if policy cases persist over time, and if so, the issues they decide.

Individual Injustice Cases

A finding that was anticipated was cases that served to remedy instances of injustice to individuals. However, 30% of the cases is hardly an overwhelming majority.

²³ 400 U.S. 8

²⁴ 358 U.S. 57

²⁵ 372 U.S. 284

Many of the cases were criminal procedure cases involving prisoners' rights. Several more of the cases were civil rights issues of desegregation. It was clear that the Southern states were allowing legislation that attempted to skirt federal desegregation laws. Examples of this were laws attempting to force the NAACP to publish its membership lists, for instance, and challenges to the constitutionality of Presidential authority to station troops²⁶ --in both instances the Court ruled against the State.

Pro-Prosecutorial Cases

Given the liberal tendencies of the Warren Court, it was surprising that the Court adjudicated cases that seemed to serve a distinctly pro-prosecutorial agenda. While these cases comprise only 5% of the total, they were significant cases. The Court announced it would stop allowing any exceptions for untimely appeals, it denied an estate ruling to an heir in a sovereign State recognized by the United States²⁷, and it announced that the practice of dismissing appeals as moot was constitutional in cases where sentences had been suspended (See Appendix K).

All three of these cases have policy implications, but the latter of the three is particularly surprising from a Court known for safeguarding the rights of the accused. *Jacobs v. New York* (388 U.S. 431) has the effect of denying a convicted person the right to appeal his or her case. While this is problematic on its face, it has significant repercussions for the individuals. Warren dissents that "{a} State could thus keep a person under continual threat of imprisonment without review by this Court ... by a

²⁶ 360 U.S. 471

²⁷ 371 U.S. 30

continued series of convictions and suspended sentences” (388 U.S. at 432) Douglas further fears that the falsely accused person has no recourse to recoup seized property. Essentially under this ruling, you or I could, through mistaken identity, lose property, and have conviction records with absolutely no judicial recourse. The conservative Rehnquist court with its liberal takings allowances make the updated application of this ruling even more frightening. Since these cases, though primarily pro-prosecutorial also had policy implications, it is clear that there was a need for replicative coding of the cases.

Slaps On The Wrist

The function of slaps on the wrist of lower courts was a fascinating finding. In 6% of the cases, the Court was forced to sternly rebuke courts that had either misunderstood their constitutional authority or had directly defied the highest Court in the land. This was not an anticipated percentage. At most, I would have expected a case or two because, as noted earlier, previous scholarship has suggested that such defiance almost never happens.

My results suggest it may be more common than widely believed. Note the language of the following lower court decisions cited by the Justices in their rebukes: “the Texas Supreme Court remanded the case ... with directions to ... ‘adjudicate upon its own independent evaluation of the evidence and wholly apart from the judgment of the United States Supreme Court of the United States.’ ” (358 U.S. 57). Even more brazen was the Alabama Supreme Court’s suggestion, in *NAACP v. Alabama Ex. Rel. Patterson* (360 U.S. 240) that the United States Supreme Court was “mistaken” (360 U.S. at 242)! The

Justices reminded the lower court that they were “foreclosed from re-examining the grounds of their disposition. ‘Whatever was before the Court, and is disposed of, is considered as finally settled.’” (360 U.S. at 244).

The Court’s strongest rebuke came in the case of *United States v. Haley* (371 U.S. 18). Again the Court stopped short of issuing the writ, but it indicated that it would do so if the lower court did not specifically follow its instructions “without delay” (371 U.S. at 20). The surprising aspect of this case is that while the others were clear examples of defiance, this case may have turned on a misunderstanding of the precedential weight to be accorded per curiam summary dispositions. The prior ruling of the Supreme Court had been just such a disposition, and the lower court did not treat it as deserving the same respect as a plenary decision. The Supreme Court admits this might underlie the lower courts seeming defiance when it says, the “order of the District Court ... evidently rests on a misperception of the scope and effect of this Court’s per curiam opinion on the Government’s earlier appeal” (371 U.S. at 19).

The Court then goes on to clarify the scope and effect of per curiam summary dispositions. It suggested that its previous ruling had the following implications:

- (1) “That it had jurisdiction over such appeal, and
- (2) The Act was constitutional as applied...” (371 U.S. at 19).

The Court then stated that the “District Court erred in believing that its was not foreclosed from inquiring into this Court’s jurisdiction over the Government’s appeal and from reinstating its own original judgment in the case” (371 U.S. at 20). This response by the Court tends to support my earlier assertion that per curiam summary dispositions

are to be accorded precedential value.

Confession of Error

The category of confession of error explained 5% of the cases. The role of the Solicitor General or Attorney General is not automatically concerning in these types of cases because a confession of error usually results in a more fair trial or decision for a defendant. What is more problematic is that the Government was playing a broader role than the 5% of confession of error cases indicated. The Court frequently allowed amicus curiae briefs from the Solicitor General or the Attorney General in cases other than confession of error. Amicus curiae, literally "friend of the Court," are briefs on the merits that the Court accepts from interested parties other than the parties to the case. While this was a completely unanticipated finding, I mention it here to give full treatment to the role of the Government in Court decisions. Studies have long indicated a symbiotic relationship between the offices of the SG and AG and the Court, but their role in these types of adjudications is troubling²⁸. In cases where the parties involved are not being allowed to present briefs on the merits, it seems ironic that the Government is allowed to do so.

²⁸ For an excellent discussion of this see the "Advocates" section of several brief articles in Bloch and Krattenmacher's *Supreme Court Politics*. St. Paul: West 1994.

CORRELATION BETWEEN FORM AND FUNCTION

The relationship between form and function of cases has already been alluded to. The expected links between GVRs and error correction, individual justice cases, and slaps on the wrist were not found. However, two links between form and function did exist. The first of these is a link between writs of mandamus and slaps on the wrist. The second was between affirmances and policy decisions. I have already noted that all of the slaps on the wrist took the form of petitions for writ of mandamus. Although the Court in each instance stopped short of actually issuing the writ, these cases were stern rebukes of recalcitrant lower courts. The second link was between those cases affirmed and a policy decision. Affirmances, as I have already noted are, by definition, a curious mode of disposition. The Court is not obligated to affirm any cases on cert. because the denial of certiorari would have the same effect. Also, if the Court wishes to affirm an appeal in light of a precedent, it can issue an order in the "back of the book" of the Reporters. Also, it could GVR in light of said coterminous decision. Thus, the choice to accept a case if only to affirm it is interesting. The Court, in the per curiam cases coded herein, was proactively affirming cases to reinforce policy positions. The Court affirmed a decision which had suggested that a right to counsel is not contingent upon "a request" (*Swenson, Warden v. Bosler* 386 U.S. 258). It also affirmed a case in which the lower court had suggested that the government has no role in railroad labor disputes unless the "parties submit to arbitration" (*Brotherhood of Locomotive Engineers, et al v. Baltimore and Ohio Railroad Co. et al* 372 U.S. 284). These cases were tantamount to a policy "amen."

ISSUES

Many of the issues have already been delineated in the previous sections. To recapitulate, there were civil rights cases, criminal procedure issues, and a number of administrative law cases. The issues were a virtual potpourri. (Appendix H contains the entire list of cases by issue). The criminal procedure cases explain 27% of the cases – barely eclipsing civil rights issues which were 24% of the cases. Surprisingly, 22% of the cases were administrative law decisions. Figure 4.3 depicts the results. It will be interesting to see if the cases conform to these issue patterns over time. If so, some definitive conclusions may be drawn as to the types of cases that receive this mode of disposition.

RELEVANT CONCURRENCES/DISSENTS

One will recall that this section was intended to trace opinions which might serve to elucidate the functions served by typically brief per curiam rulings. What I found instead is that there were almost no concurrences to any of the decisions. This is not surprising since by definition a per curiam is a ruling “by the Court” speaking in one voice. While there were a few dissents that helped me code the cases, the most significant aspect of the dissents was totally separate from the case in question. The noteworthy dissents were from the mode of disposition – the per curiam summary disposition itself. In some instances, the dissent was a brief statement, as in *Cofield v. United States* (360 U.S. 472): “Mr. Justice Clark and Mr. Justice Harlan dissent,

	Procedure Criminal	Rights Civil	Liberties Civil	Law Administrative	Jurisdiction Technical	Other	Petitions Frivolous
Totals	11	5	2	9	10	4	0
%	27%	12%	5%	22%	24%	10%	0%

41 Total Cases

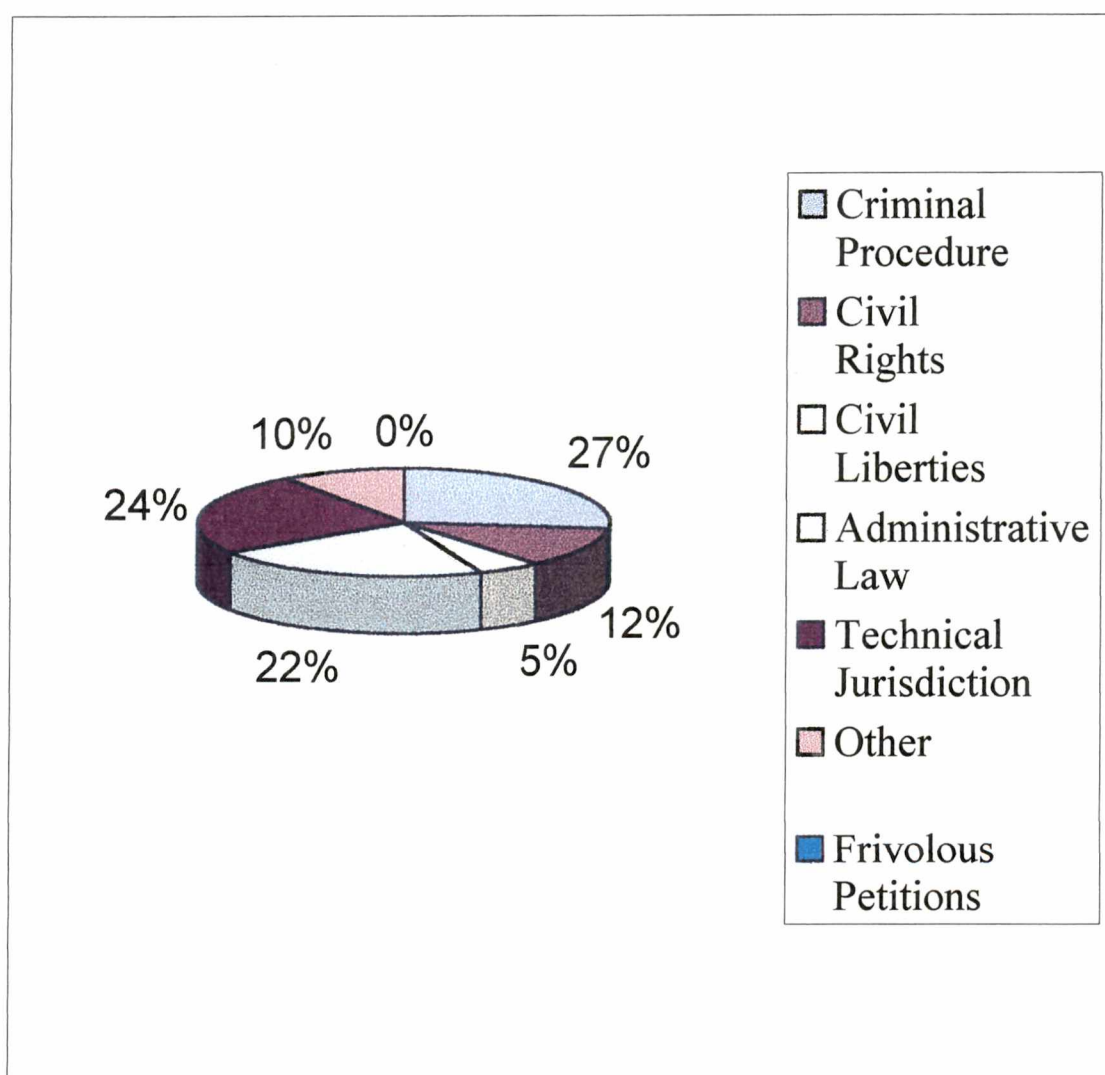


Figure 4.3 - Warren Court Issues

believing that this case should not be disposed of without plenary consideration" (360 U.S. 472).

Other cases, however, contained more strident objections. The dissent by Justice Harlan in *Black v. United States* 385 U.S. 26, for instance, states in part, "...I cannot believe that the Court, without even briefing or argument, intends to make any such sweeping innovation in the federal criminal law by today's peremptory disposition of this case" (385 U.S. at 31). Despite several of these dissents, it should be noted that the majority of cases were typified by their unanimity. This was as predicted by Hellman and other. Specifically, 66% of cases were unanimous, and 34% were typified by dissent. (Figure 4.4 depicts the percentage of dissent.)

To sum up the Warren findings, then, the Court adjudicated some cases in an expected manner, but the vast majority it did not. Because the unanticipated findings have already been discussed, there is no need for the extra section. To recapitulate, however, the Court did remedy instances of individual injustice. However, it also adjudicated pro-prosecutorial decisions. Moreover, the policy implications of the decisions just in these Terms are far-reaching, and were not anticipated in the numbers found. Also unanticipated were the several slaps on the wrist and the confession of error cases. It will be interesting to see if the trend of these years continue over time.

With Dissents	34%
Without Dissents	66%

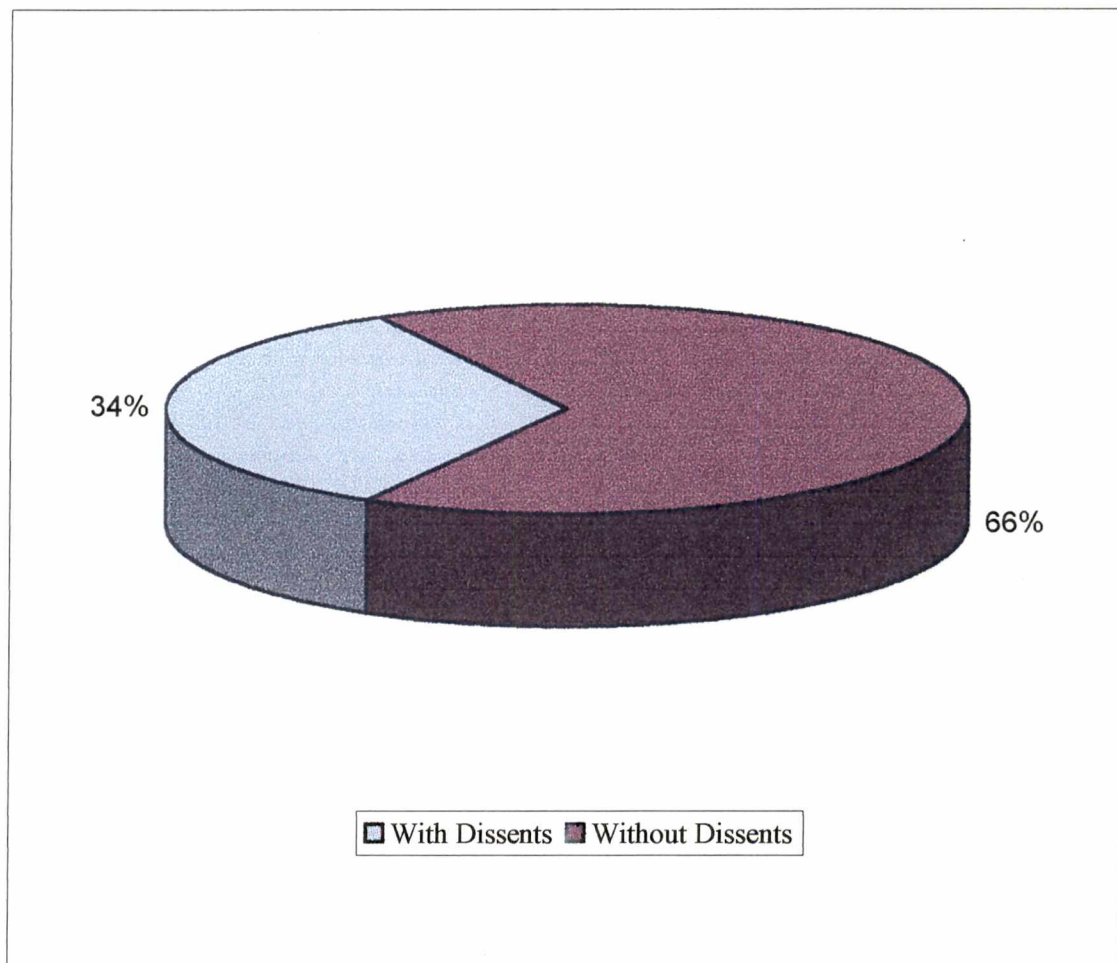


Figure 4.4 - Warren Era Dissents

CHAPTER 5

THE BURGER COURT ERA

RESULTS OF BURGER COURT CASES

The Burger years represent the highest number of cases with an N of 52. The breakdown was 14 cases for the 1970 term, 8 in 1974, 20 in 1978, the highest number of cases for any single term, and 10 in 1982. See Appendix B for the changes in the Court personnel over this time period.

FORM OF CASES

The form of the cases seemed again almost haphazard. The GVR still had the highest percentage at 28%, but the GRR was 2% of the cases, and the GR was 17%. The Other category tallied 19% of the cases, but the forms here were somewhat different from the Others of the Warren Court as we shall later see. The appeals dismissed were 5% of cases, as were those cases affirmed. Finally, the appeals vacated and remanded were 4% of the total cases. See Figure 5.1 for results.

GVR

While the GVR percentage remains high, the Burger cases helped substantiate my earlier hunch that the GVR is a dominant form of per curiam summary dispositions only

	GVR	GRR	GR	Dismissed Appeal	VR Appeal	Affirmed Case	Type Other
Totals	15	12	9	3	2	3	10
%	28%	22%	17%	6%	4%	6%	19%

54 Total Cases

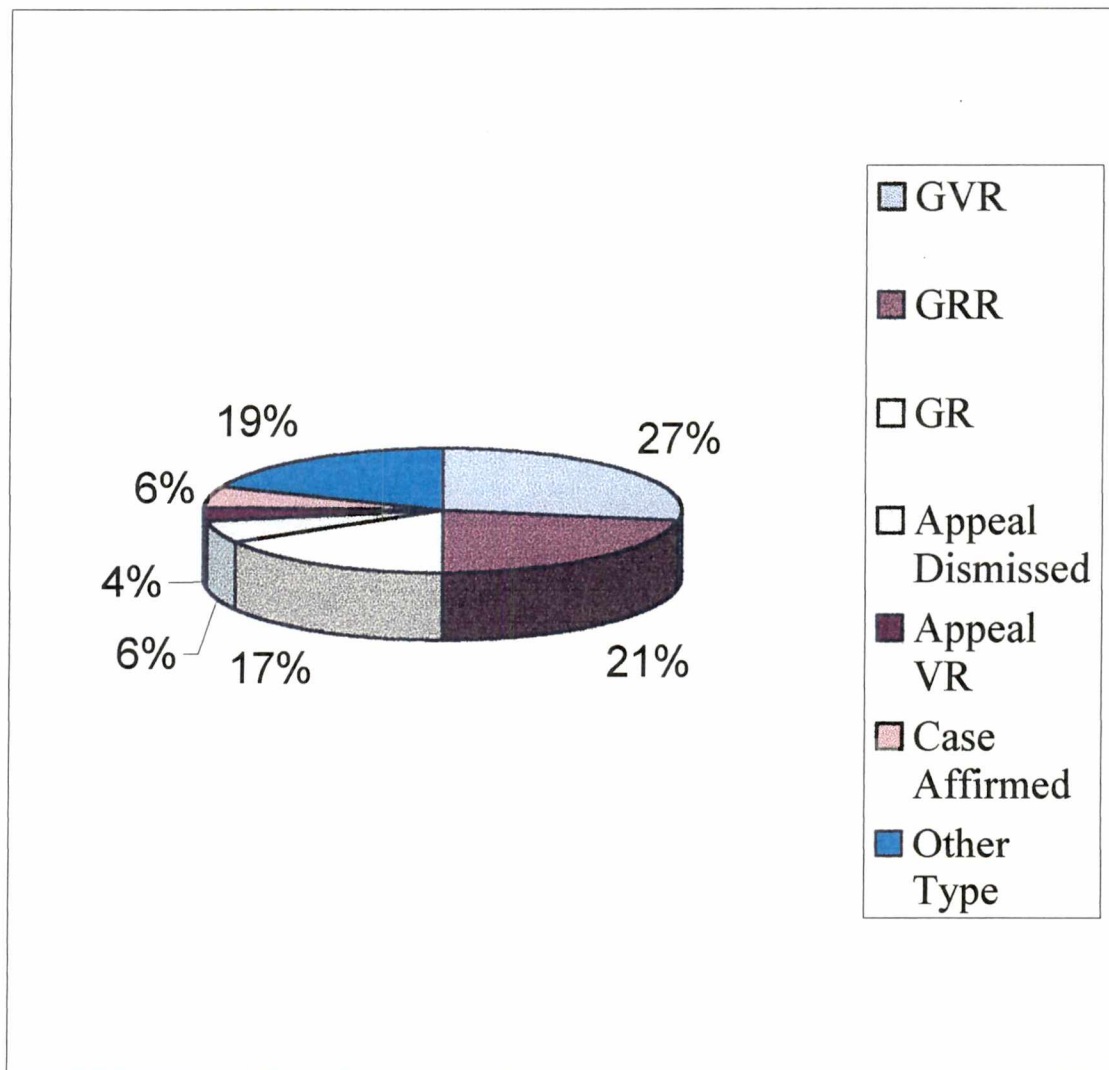


Figure 5.1 - Burger Court: Form of Cases

by virtue of a Court's readiness to accept state cases. The number of state cases far outweighed federal cases in the Burger era, thus it is logical that the number of GVR's as well as GRR's would be high. This is because of jurisdictional differences in state court and federal court cases at the Supreme Court level. The Supreme Court has jurisdiction over the federal issues presented in a state case, but the state court has ultimate authority over the controlling facts and construction of state law. As a result, the Supreme Court does not have final disposition of the case; rather, it remands the case in light of its federal interpretation. It is then incumbent on courts of last resort in the state systems to reconsider the case in light of the Supreme Court ruling. Accordingly, the form of a grant and remand – whether GVR, GR, or GRR – is endemic to the state case, not to per curiam summary dispositions. The high number of state cases adjudicated summarily, then, explains the collective 57% of GVR's, GRR's and GR's.

Other Category

The Other category contained several different forms of cases. Some writs of mandamus, as in the Warren era, were present, but there were as many rulings on stays of execution. Also present were several cases that were complex in that they were granted in part and reversed in part or vice versa. Both of the cases requesting the vacation of stays of execution were granted. This tends to support my hypothesis that the cases would begin evincing more pro-prosecutorial tendencies in the Burger era.

FUNCTION OF CASES

The function of cases in the Burger era continued to have policy overtones. Indeed, the policy cases tied with error correction in accounting for the highest percentage of cases at 29% each. See Figure 5.2. This begs the question of the role of error correcting cases, which will be discussed subsequently. Pro-prosecutorial cases rose in number as expected; they comprised 19% of the total cases. Also, there were again several slaps on the wrist of lower courts – 4% of the total cases.

Policy Cases

The policy decisions in the respective terms covered a variety of issues. Criminal procedure was at the forefront. A caveat of the broader criminal procedure focus was the controversy surrounding the retroactivity of cases. The court disposed of several cases -- determining on a case-by-case basis what plenary rulings were to be applied retroactively. The Court also clarified abortion policy with a conservative interpretation of viability²⁹. Policy decisions on reapportionment, Miranda rights, and the representativeness of juries were common (See Appendix L).

Two of the more bizarre policy clarifications came in *Chase Manhattan Bank N.A. et al v. Finance Administration of City of New York* (440 U.S. 447) and in *Connor et al v. Waller, Governor of Mississippi, et al* (421 U.S. 656). In the former case the Court answered again the question of whether a state can tax a federal bank. The

²⁹ 440 U.S. 445

	Correction Error	Justice Individual	Policy	Prosecutorial Pro-	Wrist Slap On	Of Error Confession	Other
Totals	28	16	28	19	4	3	0
%	29%	16%	29%	19%	4%	3%	0%

98 Total Cases

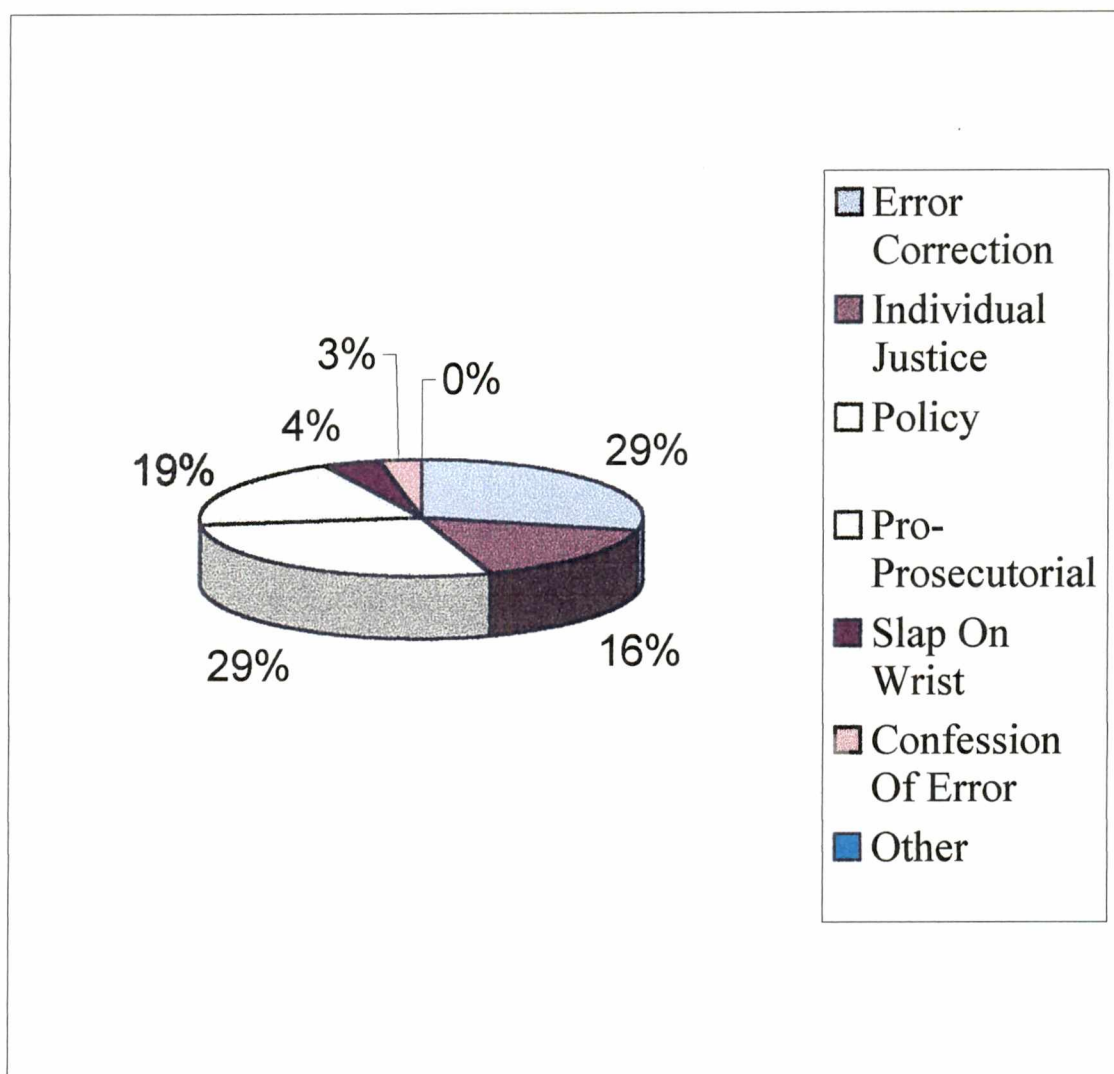


Figure 5.2 - Burger Court: Function of Cases

Constitutional scholar will recall that in the decision in 1815 *McCulloch v. Maryland* -- one of the most important constitutional clarifications of federalism in history -- the Court definitely answered no to this question (17 U.S. 316). In the second case the Court, it seems, was asked to determine if Mississippi had to comply with the Voting Rights Act of 1965. The ridiculousness of this question need not be belabored. The Court of course, held that it did.

The most interesting finding within the policy cases was less the range of issues -- though this was significant -- than the internal controversy surrounding the dispositions. Several vociferous dissents were lodged in cases where new policy rulings were delineated. Marshall has a tone of frustration in one such dissent, "[n]ow this Court is deciding vital Constitutional questions without even a plenary hearing. I dissent. I decline to join a summary reversal that so cavalierly disposes of substantial First Amendment issues" (*Smith et al v. Arkansas State Highway Employees Local 1315 et al* 441 U.S. 463, at 466-67). He was dissenting from the per curiam's determination that a state is within its rights to refuse to hear grievances filed by a union instead of the affected individual(s). A similar complaint was found in a different case -- this one centered around whether States must accord out of state attorney privileges. The per curiam ruling held that they did not, to the following objections of Stevens, Brennan, and Marshall:

Such reversals are egregiously improvident when the Court is facing a novel constitutional question. Summary reversal 'should be for palpably clear cases of error'. Accordingly, I dissent from the Court's summary disposition of a question of great importance to the administration of justice" (*Leis et al v. Flynt et al* 439 U.S. 438, at 458).

Justices Black, Harlan, and Chief Justice Burger dissented in yet another policy

case, an apportionment ruling, on the basis of the effect a per curiam summary disposition would have. They concluded that the case “plunges into an utterly unfamiliar arena and creates utter confusion” (*Connor et al v. Johnson et al* 402 U.S. 690, at 694).

Injustices To Individuals

The balance between cases of individual injustice and pro-prosecutorial dispositions was almost even – with pro-prosecutorial cases at 19% slightly edging the remedying of injustice which was 16% of the cases. The remedying of injustice most often took the form of correcting errors of criminal procedure. Interesting comments on the use of per curiam summary dispositions to remedy injustices or further pro-prosecutorial aims were offered in some dissents in these cases.

For instance, in *Anderson, Warden v. Harless*, Justices Stevens, Brennan, and Marshall offer this insightful objection:

...[E]ven if I shared the Court’s analysis in this particular case, I would nevertheless take issue with its decision to grant certiorari for the sole purpose of correcting what is considered to be a technical, procedural error. It is not appropriate for this Court to expend its scarce resources crafting opinions of only local importance where the correction in no way promotes the development of the law. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolutions will have immediate importance far beyond the particular facts and parties involved. This case illustrates how ineffectively the Court is supervising its discretionary docket (459 U.S. 4).

Clearly, they are opposing the use of per curiam summary dispositions to remedy injustices to individuals. Justice Rehnquist offers similar dissents in different cases. In one instance, he suggests that “[n]othing in the United States Constitution gives this

Court any authority to supercede a state's code of evidence because its application in a particular situation would defeat what this Court conceives to be the ends of 'justice' (*Green v. Georgia* 442 U.S. 95, at 98).

Pro-Prosecutorial Cases

This opposition is also found with regard to the function of pro-prosecutorial rulings. The same dissenters from the remedying of injustice are found here as well. Stevens, Brennan, and Marshall, suggest in *California v. Beheler*, "[w]e are far too busy to review every claim of error by a prosecutor who has been unsuccessful in presenting his case to a state appellate court" (463 U.S. 1121, at 1127).

The near even split between the more conservative and more lenient of these functions is typical of the types of responses the Burger Court garnered with its plenary adjudications. While it was expected by Nixon and others to be the most conservative of all Courts, it handed down some of the most liberal cases of our day – *Roe v. Wade* being the classic example (410 U.S. 113). This inherent tension was evinced in the summary adjudications as well, its seems.

Slaps On The Wrist

As in the Warren years, the Court again was forced to slap the wrists of lower courts -- only the Burger years saw this occur with lesser frequency. The most extreme case occurred when a lower court attempted to overrule the United States Supreme Court. The Court responded in one united voice: [n]eedless to say, only this Court may overrule

one of its precedents. Until that occurs, Rice is the law, and the decision below cannot be reconciled with it" (*Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd* 460 U.S. 533, at 535). A pattern of unanimity seems to be emerging in these slap on the wrist cases, but I will reserve judgment on this until the Rehnquist cases are coded.

The confession of error cases were only a small percentage of cases, but they again highlight the close role between the Government and the Court. The Government's submission of amicus briefs continued during the Burger years, as well.

CORRELATION BETWEEN FORM AND FUNCTION

The relationship between the forms and functions that were detected in the Warren era remained constant during the Burger years. The writs of mandamus were linked with the slaps on the wrist of lower courts, and affirmances were linked to policy functions. Again, however, the anticipated link between GVR and error correction, individual justice, and slap on the wrist cases was not present. The explanation that I proposed in the preceding chapter seems controlling in these cases as well.

There is a further problem endemic to the category of error correction, though. The error correction function, it seems is an erroneous (no pun intended) coding category. The conceptual confusion regarding error correction has already been noted. Error correction has been used to refer to rogue courts, the remedying of egregious injustices, adjudicating cases which had been previously adjudicated absent relevant data such as an intervening precedent, or simple mistakes by lower courts (mistakes not intended to snub the Court). The problem with error correction is more than this conceptual confusion,

however. It is, I believe, a virtual tautology to assert that a case in the Court is correcting error. This is because the Court is by definition correcting errors in all instances other than affirmances and cases of original jurisdiction. The Court is, after all, never the Court of first instance unless a case comes on original jurisdiction - this accounts for less than a handful of cases each term. The remaining cases, the bulk of the Supreme Court's caseload, are cases in which the Court, in the simplest of terms, is correcting errors. The Justices are Constitutionally mandated to be primarily a court of review. Here again, though is where one gets into conceptual quagmires. The classic statement by the Court came from Justice Frankfurter when he said the Court does no review for error. This is because he was relying on the notion of error correction or review as the remedying of individual justice. In point of fact, though, the Court is reviewing error. Even in the instances in which the Court fashions new policy, it is ostensibly determining previous policy to be in error. Thus, the error correction category was no more necessary than in a coding of plenary opinions. It is not a function linked to summary dispositions in general or per curiam summary dispositions in particular.

Issues

The Court, as mentioned, adjudicated the issues of apportionment, abortion, and the retroactivity of several criminal procedure cases in policy decisions. Additionally, the Court ruled on the civil jurisdiction of Indian reservations, and on a number of administrative law cases. Criminal procedure cases again mark the highest coding category at 35%. The civil rights cases and administrative law cases were still substantial as well. See Figure 5.3. However, the Court handled a great deal of cases to clarify

	Procedure Criminal	Rights Civil	Liberties Civil	Law Administrative	Jurisdiction Technical	Other	Petitions Frivolous
Totals	20	6	2	8	12	7	0
%	36%	11%	4%	15%	22%	13%	0%

55 Total Cases

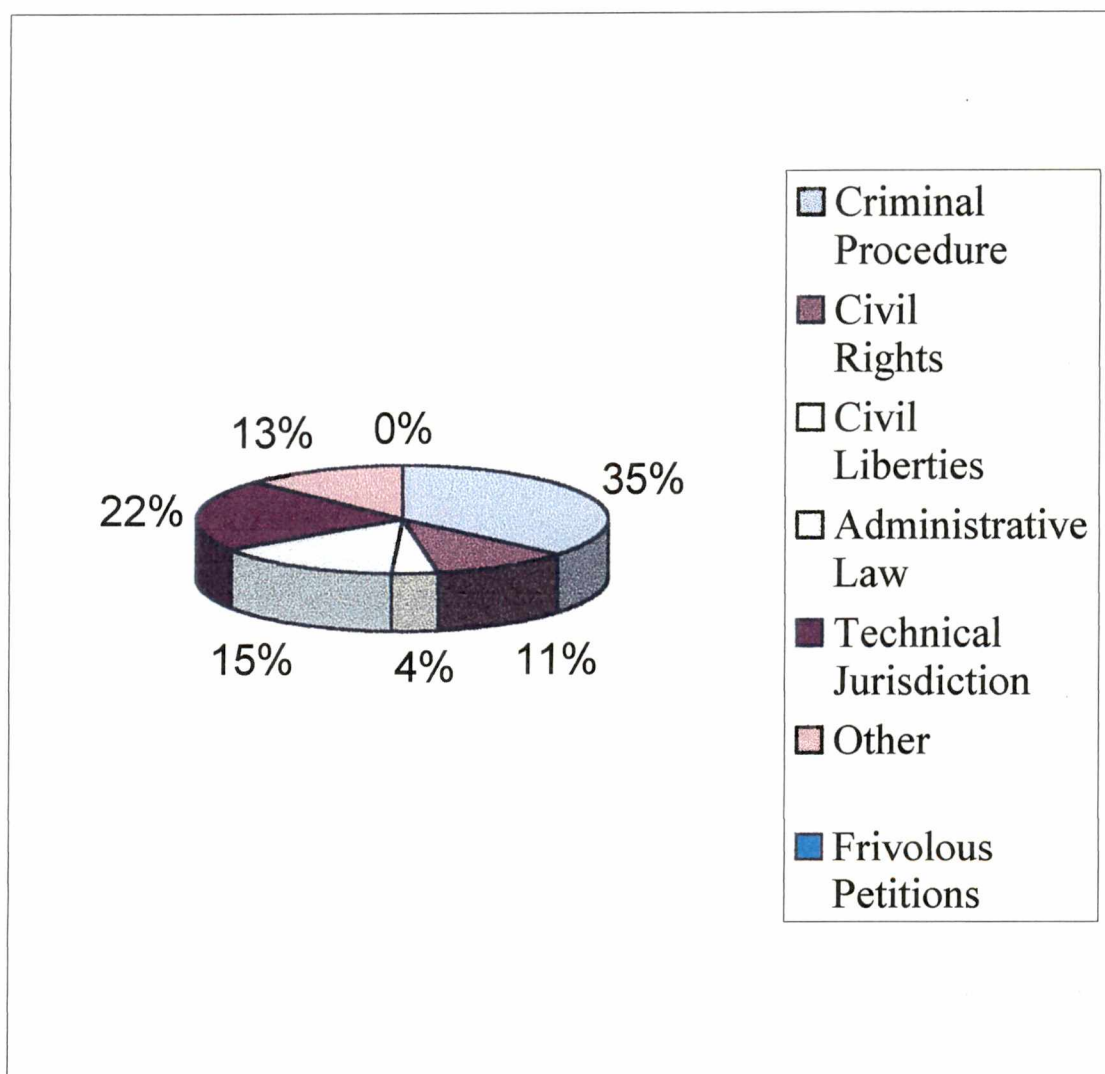


Figure 5.3 - Burger Court Issues

its own jurisdiction and processes. This shift in issues addressed by per curiam summary disposition from the Warren to the Burger Courts may have important implications. The per curiam summary disposition can be used to adjudicate virtually any “case or controversy”. This immediately obviated the scholarship that would suggest that summary adjudications are mere technicalities or housekeeping chores. Rather, they are distinct from plenary opinions, it seems, only in their lack of oral argument or briefing on the merits. But there’s the rub. If these cases can be as substantive as plenary rulings, and if the Court disallows anything but full compliance with summary adjudications, then the policy function of this mode of dispositions becomes increasingly problematic.

Appendix I contains the full list of issues addressed by the Burger Court.

RELEVANT DISSENTS/ UNANTICIPATED FINDINGS

I have grouped the relevant dissents and the unanticipated findings together because the dissents were the unanticipated findings. The most drastic change from the Warren to the Burger Court eras was in the number of cases with dissents. One will recall that the vast majority of Warren Court cases were unanimous. However, the majority of cases in the Burger years were typified by dissent – 65%. See Figure 5.4. This is a one hundred and eighty -degree shift from the previous Terms. Many of the dissents were immaterial to the substance of the case; rather they were dissents “from summary disposition of this case.” A continuing theme throughout the dissents was the unfair nature of disposing of cases without affording the parties “oral argument or briefing on the merits.”

With Dissents	65%
Without Dissents	35%

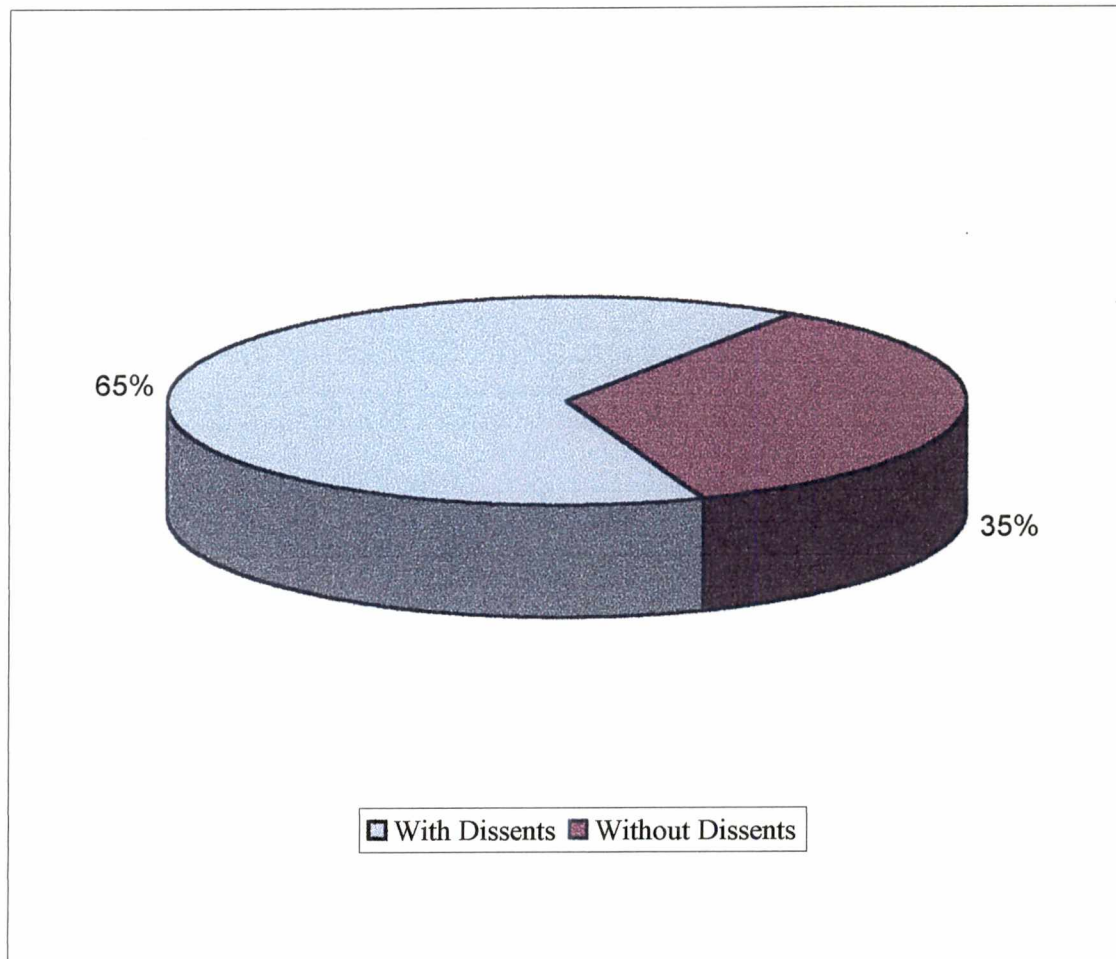


Figure 5.4 - Burger Era Dissents

Note, for instance, the following dissents: “ It is entirely inappropriate to dispose of this case on nothing more than the necessarily limited briefing filed by the parties to date” (*Maggio, Warden v. Fulford* 462 U.S. 111, at 121). Marshall, a frequent dissenter from this mode of disposition, in a second case cautions, “ [a] summary reversal is an exceptional disposition. It should be reserved for situations in which the applicable law is settled and stable, the facts are not in dispute, and the decision below is clearly in error” (*Wyrick, Warden, Missouri State Penitentiary v. Fields* 459 U.S. 42, at 50).

Marshall felt so strongly about the wrongful use of per curiam summary dispositions that he proposed a hybridized solution to the total exclusion of the parties involved. He suggested, “[if] the Court believes, as I do not, that this case raises issues of sufficient importance to justify the exercise of our certiorari jurisdiction ... I would at least notify the parties ... so that they may have an opportunity to submit briefs on the merits” (*Immigration and Naturalization Services v. Miranda* 349 U.S. 14). Stevens, who joined Marshall in this dissent as he frequently did, refused to join his proposed remedy, suggesting that he “fear[ed] that the institution of such a practice would tend to regularize and expand the number of our summary dispositions” (349 U.S. 14).

Stevens was also concerned with the message that per curiam summary dispositions were sending to interested observers. He noted that “[I]f we have time to grant certiorari for the sole purpose of correcting highly technical and totally harmless errors, one might reasonably (but incorrectly) infer that we have more than enough time to dispatch our more important business” (*Great Western Sugar Co. v. Nelson* 442 U.S. 92 at 94).

To sum up, then, the Burger years continued the significant trend of policy adjudications through per curiam summary disposition. The Court lessened its focus on the remedying of injustices, and rendered many pro-prosecutorial judgments, as was expected. The links between form and function as well as the role of form and per curiam summary dispositions are becoming more evident, but I will reserve judgment until the Rehnquist Court cases are added. Uneanticipated results were the continued focus on the remedying of injustices, and the switch in cases typified by dissent. The Rehnquist cases will add finality to some of the trend detected thus far.

CHAPTER 6

THE REHNQUIST COURT ERA

RESULTS OF REHNQUIST COURT CASES

The Rehnquist Court cases mark a bit of a departure from the high N of the previous chapter. Indeed, I initially proposed only three years of inquiry, 1986, 1990, and 1994, but these were insufficient to generate data -- with only 26 cases. To remedy this, I added the 1988 and 1992 terms. The resulting N of 41 was comparable to the other Courts' totals of 39 and 52, respectively. The implications of this seeming decline in per curiam summary dispositions will be addressed in the next chapter. To see the relevant changes in personnel during these years, see Appendix C.

FORM OF CASES

The form of cases was again different from previous Courts. See Figure 6.1. The GR category this time amassed the highest percentage of cases with 32%. The GRR and Other categories each had 29% of the cases. Finally, the GVR and Affirmance categories each had 5% of the total cases. No cases were coded for appeal dismissals or appeals vacated and remanded during the Terms of inquiry. Within the Other category, the cases were not all of the same forms as in previous years. Rather, the majority of them took the form of certiorari petitions with motions to proceed *in forma pauperis*. The Court denied

	GVR	GRR	GR	Dismissed Appeal	VR Appeal	Affirmed Case	Type Other
Totals	2	12	13	0	0	2	12
%	5%	29%	32%	0%	0%	5%	29%

41 Total Cases

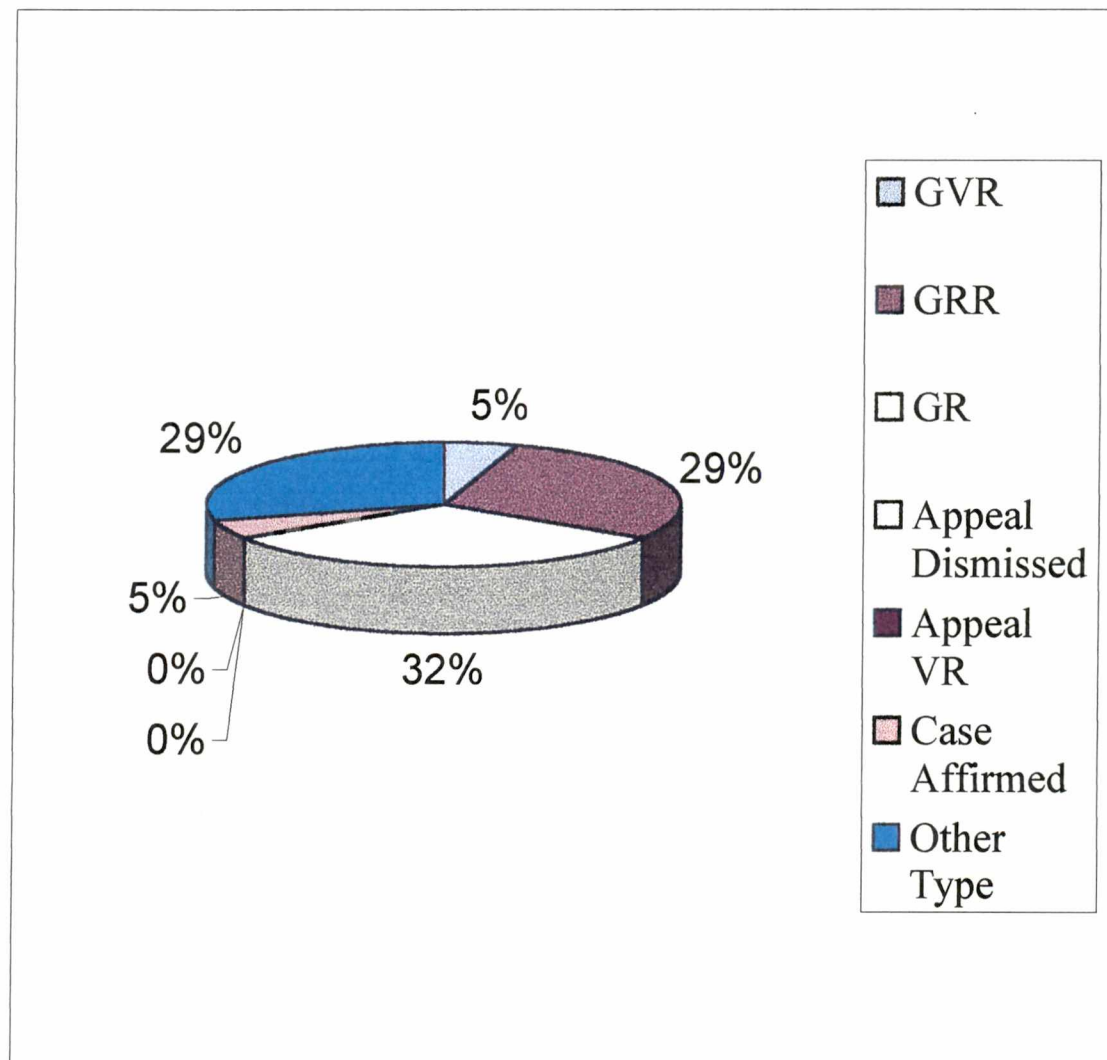


Figure 6.1 - Rehnquist Court: Form of Cases

all of these requests. More will be discussed regarding the prevalent denials of *pauperis* filings in the next section because this marks a clear policy shift by the Rehnquist Court.

Having now the full corpus of cases, the cases in the Rehnquist years seem to bolster my initial conclusions regarding the forms of per curiam summary dispositions.

GVR

There are no clear links between the mode of per curiam summary disposition and any particular form. Specifically, the GVR was no more dominant than the catch-all Other category over time. It would seem that a per curiam summary disposition can take any form that a plenary ruling takes. The only limitations on this are the type of cases and the jurisdiction the Court has over the adjudication. The forms taken in my sample were widely dispersed.

In reality, the forms were even more numerous than this illustration would indicate because the Other category contained at least ten different forms. Moreover, the categories are broad rubrics under which more individualized forms were coded. For instance, one will recall that I chose to code cases that were granted only in part or reversed only in part by the impact the case would have. These dual forms really would be yet another coding category if the specified methodology were less general.

FUNCTION OF CASES

The function of cases also changed in the Rehnquist years. See Figure 6.2. 28% of the cases were pro-prosecutorial in nature. The remaining cases broke down as follows: the policy cases comprised 24% of the total, the individual justice cases marked a surprising 17% of the total functions, and 3% of the cases were slaps on the wrist, so to speak, of lower courts.

Error Correction

The high percentage of pro-prosecutorial cases was rivaled only by the number of error correction cases (also 28% of the total) – a fact which seems to confirm my earlier suspicion that this function is erroneous when viewed in isolation. This means that while the functions of individual justice cases, policy cases, and pro-prosecutorial cases has shifted over time, the error correcting function has remained consistently high throughout. Since the cases are coded as replicative, it would seem that the Justices are citing or implying error correction a great deal of the time. In fact, though, the error correcting function has no meaning in and of itself. In other words, there is not separate function that all of these cases are consistently serving regardless of changes in the Court's personnel. It is impossible to find such covariation between cases that are alternately pro-prosecutorial, justice issues, or policy shifts. The real functions of the majority of these cases is the latter. The error correction figures are just an artifice of the coding. More on this function, or non-function, will be explored in the next chapter.

	Correction Error	Justice Individual	Policy	Prosecutorial Pro-	Wrist Slap On	Of Error Confession	Other
Totals	22	13	19	22	2	0	0
%	28%	17%	24%	28%	3%	0%	0%

78 Total Cases

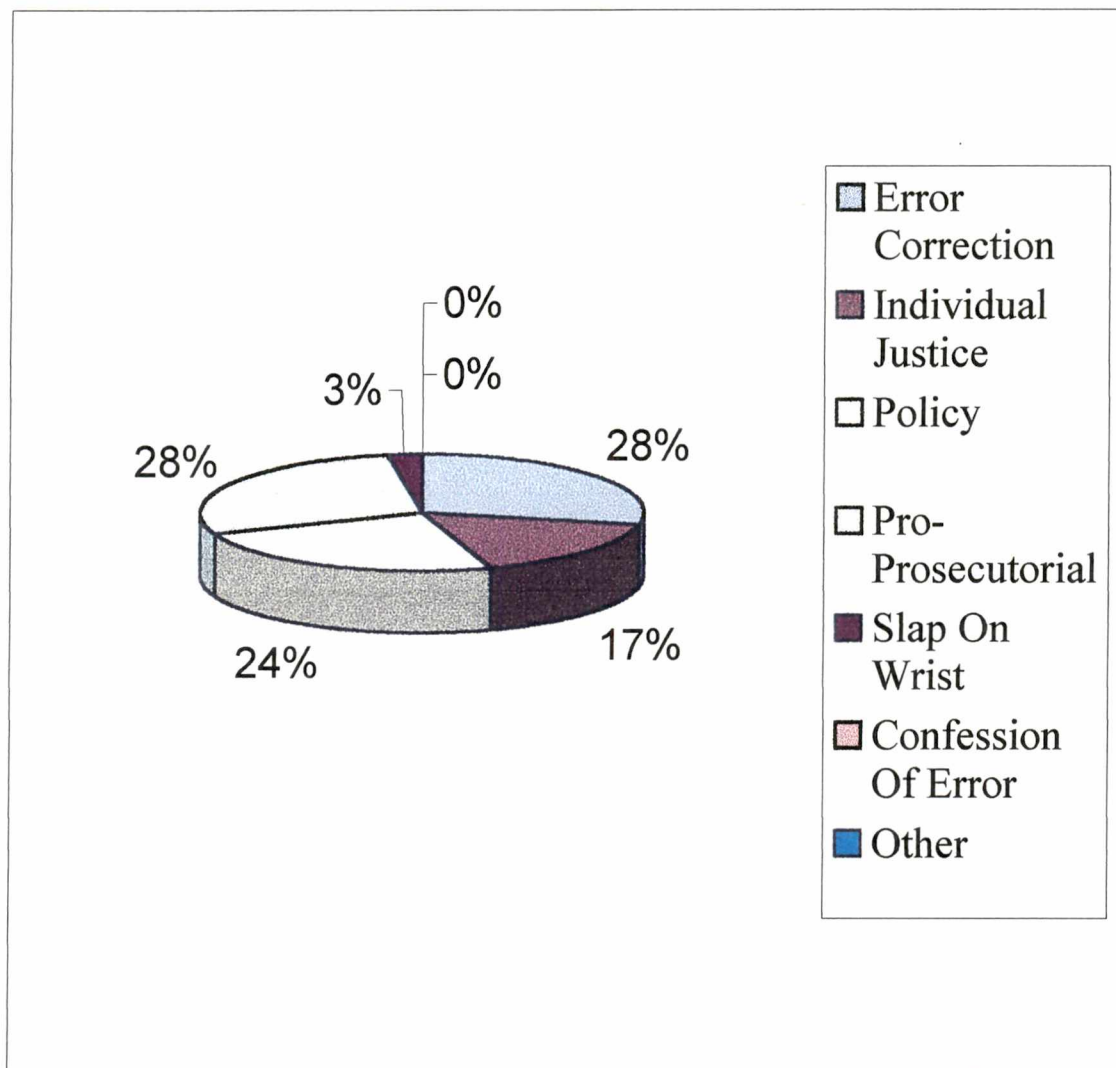


Figure 6.2 - Rehnquist Court: Function of Cases

Policy Cases

Interestingly, the figure for policy cases could have been much higher. The aforementioned denials of *pauperis* petitions were technically policy decisions in that they reinforced a policy shift in the Rehnquist era. But I chose to only code this one time with the initial policy departure. The resulting policy cases, if I had not done so, could have been closer to 44% of the total function of cases. This policy shift came in the form of an Amendment to Rule 39. The Rules of the Court, as previously noted determine the specific procedures and restrictions on petitions, appeals, and the dispositions of cases. The Court, in a per curiam opinion, *In re Amendment to Rule 39*, amended the Court's allowance of petitions in the following way:

If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ, as the case may be, is frivolous or malicious, the Court may deny a motion for leave to proceed in forma pauperis. (500 U.S. 13, at 14).

Not unsurprisingly, the Justices known for their advocacy of indigent clients were outraged. Justice Marshall lamented that “[t]his Court once had a great tradition: ‘All men and women are entitled to their day in Court.’ That guarantee ... will now read: ‘All men and women are entitled to their day in Court only if they have the means and the money.’” (500 U.S. at 15). He also questioned the “invidious” nature of an Amendment that failed to similarly punish paying litigants whom he felt were “a substantial source” of the frivolous filings (500 U.S. at 15). Justice Blackmun joined Justice Stevens’ dissent that challenged both the fairness and the efficacy of the Amendment:

...During my years of service on the Court, I have not detected any significant burden on the Court, or threat to

the integrity of its processes, caused by the filing of frivolous petitions. It is usually much easier to decide that a petition should be denied than to decide whether or not it is frivolous. ... Transcending the clerical interest that supports the Rule is the symbolic interest in preserving equal access to the Court for both the rich and the poor. I believe the Court makes a serious mistake when it discounts the importance of that interest. (500 U.S. at 15).

This change in Rule 39 was a policy shift that is distinctly pro-prosecutorial in nature. Other policy decisions included the following: (1) mitigating circumstances do not have to be presented in cases; (2) the striking of a black juror does not warrant retrial; (3) Miranda warnings do not have to be given prior to roadside interrogation; (4) petitioner must raise federal claims at the state level. These cases all have a pro-prosecutorial component to them as well (See Appendix M for cases). This seems to reinforce, then the coding of cases as replicative.

Pro-Prosecutorial Cases

The remaining number of pro-prosecutorial cases comes from the aforementioned coding of the pauper cases. I only coded the Amendment and the first application of it as policy; the others were coded as pro-prosecutorial. These nine cases raised this category to the highest percentage of functions of cases. At least one of my hypotheses is then definitively confirmed. The pro-prosecutorial cases were substantial during both the Burger and Rehnquist eras. This begins to suggest that the per curiam summary disposition is amenable over time to the policy predilections of the Justices.

Injustices To Individuals

Surprisingly, though, there would have been almost as many individual justice cases absent the category of pauperis filings. The Rehnquist Court adjudicated numerous cases to benefit aggrieved individuals – most of these had policy implications as well. For instance, the Court ruled that if the INS would not consider hardship cases for anyone other than spouses and children, the petitioners could seek relief under the Immigration Reform and Control Act of 1986³⁰. They also provided for Social Security benefits to a child absent paternity tests. These two cases may account for the Court clerk's assertion, in Perry's work, that the Court is more likely to adjudicate summarily in cases that "involve children" (Perry 1991).

In addition to these cases, the Court denied a State attempt to decrease widow benefits in light of federal relief. Also, the Court provided relief in two cases for attorneys at their bar (granted, this is not typically the type of person one would consider needing justice issues resolved by the Court). They increased the pay allowance to \$5,000.00, and they admitted the ridiculousness of forcing attorneys to submit petitions for their clients and then punishing the attorney if said petition is frivolous (See Appendix M for cases).

³⁰ *INS v. Hector* 479 U.S. 85

Slaps On The Wrist

Regarding slaps on the wrist, the Court only had to do this twice in the cases under inquiry. In the first instance, the Court reversed the Texas Court of Criminal Appeals after the Texas Court reinstated a decision the Court had remanded. Essentially, the Texas Court acted as if the intervening remand by the Supreme Court never occurred even though it was dispositive on federal grounds(*Powell v. Texas* 492 U.S. 680).

In the second instance, the per curiam ruling rebuked a Court of Appeals for granting a stay of execution. In this case the Court criticized the “abuse of discretion” by the court “to interfere with the orderly process of a State’s criminal justice system” -- suggesting that it is “ ‘particularly egregious’ to enter a stay on second or subsequent habeas petitions unless ‘there are substantial grounds upon which relief might be granted.’”

(*Delo, Superintendent, Potossi Correctional Center v. Blair* 509 U.S. 823).

CORRELATION BETWEEN FORM AND FUNCTION

The above cases mark a departure from the earlier links between writs of mandamus and slaps on the wrist. Neither of the above cases were adjudicated by mandamus. Thus, this correlation between form and function is limited to the two earlier eras. The other link between form and function that typified the earlier Courts was present, however. Affirmances were policy cases. Another link was particular to the oft-discussed *pauperis* filings in the Rehnquist era. These all took the form of a writ for certiorari being denied, and the motion to proceed in forma *pauperis* was denied as well. This is not in the truest sense a link between form and function, however, because the

pauperis cases were coded as policy in two instances and pro-prosecutorial in the other 9.

ISSUES

The issues are much more disperse in the Rehnquist cases. No clear issues emerge as civil rights, retroactivity, and administrative law did in the earlier Terms with the sole exception of criminal procedure cases. See Figure 6.3. (Appendix J contains the total issues covered). Rather, the Court adjudicated 27% of its cases on the amendment to Rule 39 regarding frivolous petitions. 17% of the cases were regarding the processes of the Court. A diversity of issues is an interesting result in and of itself however. This indicates, again, that the per curiam summary dispositions can dispose of virtually any type of case. More will be discussed on the seeming malleability of per curiam summary dispositions in the next chapter.

RELEVANT CONCURRENCES / DISSENTS

To begin, I need to clarify a coding problem. The frequent dissents in previous Terms which simply stated "Justice _____ dissents from summary disposition of this case," were largely replaced in these Terms. The alternative statement in the Rehnquist era was "Justice _____ would grant certiorari and give the case plenary consideration." While this might initially seem to be a mere restatement of the earlier dissents, I concluded that it was, in fact, a concurrence. I drew this conclusion from cases

	Procedure Criminal	Rights Civil	Liberties Civil	Law Administrative	Jurisdiction Technical	Other	Petitions Frivolous
Totals	15	2	1	3	7	2	11
%	37%	5%	2%	7%	17%	5%	27%

41 Total Cases

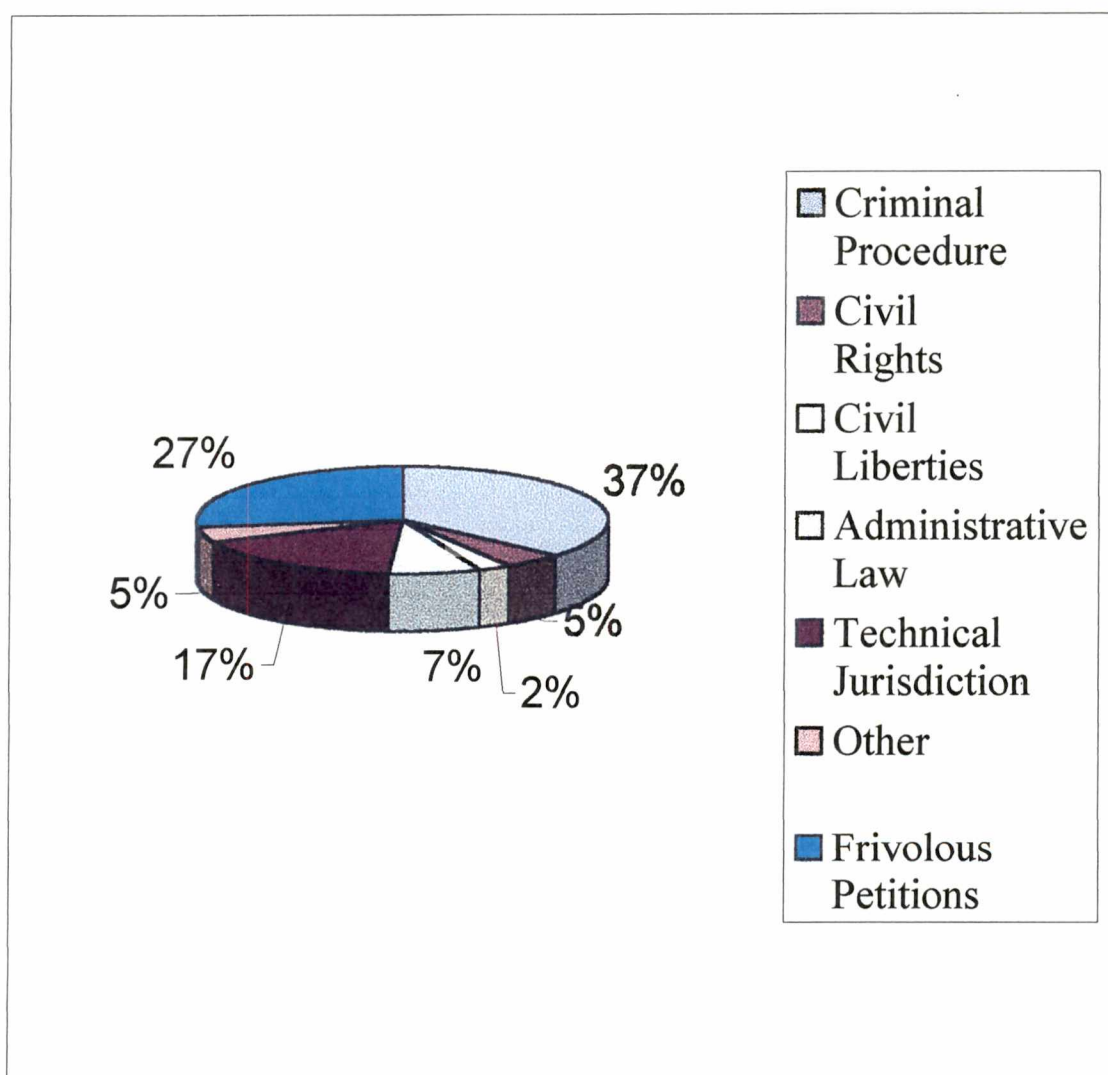


Figure 6.3 - Rehnquist Court Issues

in which the statement would be listed prior to concurring opinions. Since I know of no instances of dissenting opinion preceding concurring opinions, this is the only coding conclusion to draw. This lessened, then, the number of dissents solely focused on the mode of disposition, but several were still found. Justices, Marshall, Brennan, and Blackmun voiced concern over the impact of summary dispositions on the Court itself, "I continue to believe that it is unfair to litigants and damaging to the integrity and accuracy of this Court's decisions to reverse a decision summarily ..." (*Rhodes et al v. Stewart*, 488 U.S. 1, at 4-5). Justice Scalia joined by Thomas, concurring in a case, is also concerned with the mode of disposition:

As a general matter, I agree with Justice Stevens frequently cited view that [I]t is not appropriate for this Court to expend its scarce resources crafting opinions that correct technical errors in cases of only local importance where the correction in no way promotes the development of the law. (*Dobbs v. Zant, Warden* 506 U.S. 357)

This last dissent is relevant because it tends to call into question the future of per curiam summary dispositions. If Perry's research which suggested that a Rule of Six was required to dispose of a case summarily, then here are three current Justices who seem reluctant to do so. Stevens' opposition has been consistent over time. Scalia and Thomas, however, do not have a history of dissent from per curiam summary dispositions. This case may, though, mark a shift for them.

In addition to these dissents and previously noted dissents, the remaining dissents were largely aimed at the many applications of Rule 39.8. Overall, there were again more cases with dissents than without, but the results were more moderate than before. See Figure 6.4.

With Dissents	59%
Without Dissents	41%

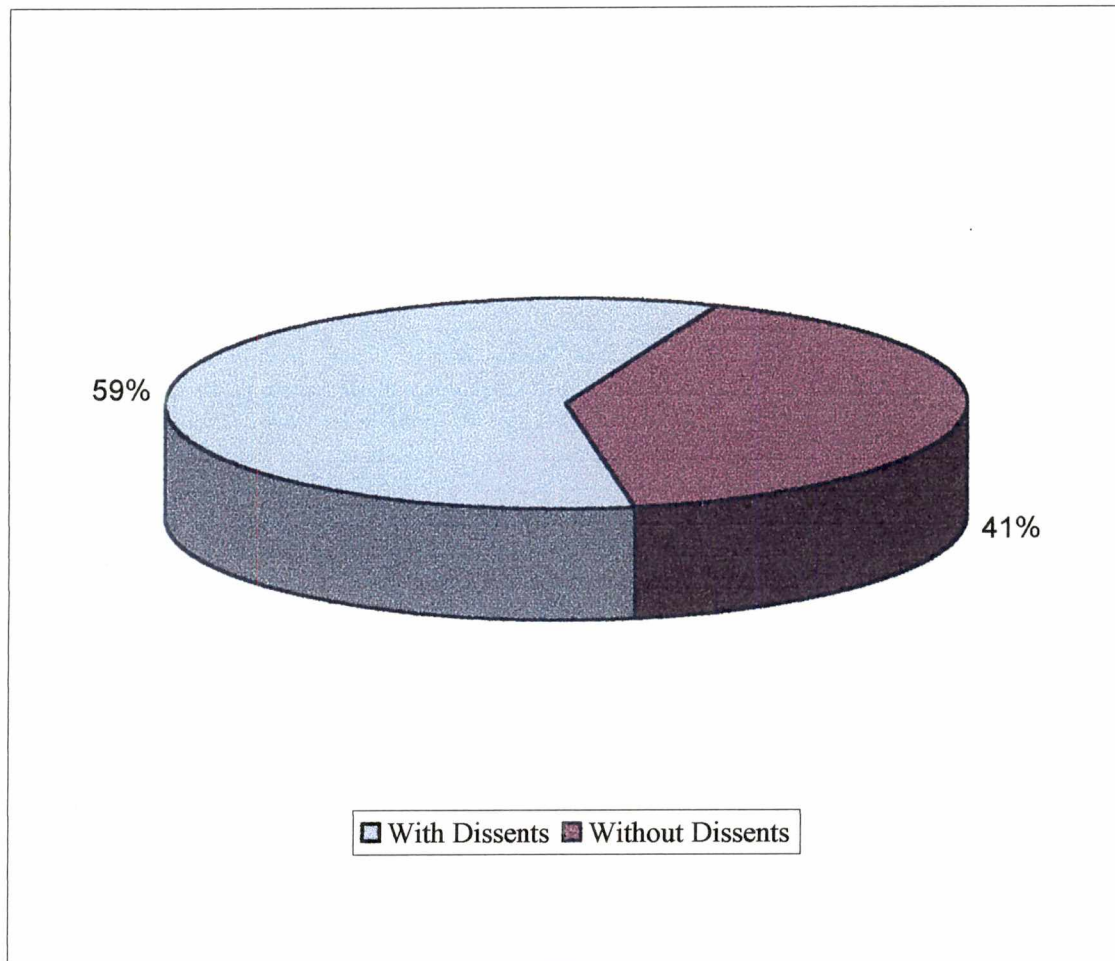


Figure 6.4 - Rehnquist Era Dissents

UNANTICIPATED FINDINGS

Essentially, the unanticipated findings of the policy cases and the role of justice issues have already been explored. If the horse is not yet dead, the *pauperis* cases were not anticipated either from a policy or pro-prosecutorial standpoint. However, the general trend of a high percentage of pro-prosecutorial cases was expected. Overall, the form and function of cases has changed with all three Courts. The implications of these shifts are to what I now turn.

CHAPTER 7

FINDINGS AND IMPLICATIONS

CUMULATIVE RESULTS OF CASES

While the results viewed in isolation over the three Courts are interesting, the really telling results are found in viewing the cases as a “corpus” of literature, to borrow the phraseology of Sigelman and Gadbois, and assessing the trends over time. In so doing, I will look at the form of cases, the function of cases, the links between form and function, the issues of the cases, the role of dissents, and the seeming decrease over time in per curiam summary dispositions.

FORM OF CASES

The form the cases took varied over time with GVR’s dominating the Warren and Burger Courts’ per curiam summary dispositions while GR’s followed by GRR’s were dominant during the Rehnquist era. See Figure 7.1. The Other category also shared the same percentage of cases as the GRR’s in the Rehnquist era.

GVR

I believe that the general form of a certiorari granted and remanded, whether GVR or GRR is explained not by any phenomenon unique to per curiam summary dispositions,

	GVR	GRR	GR	Dismissed Appeal	VR Appeal	Affirmed Case	Type Other
Totals	28	28	26	8	6	7	33
%	21%	21%	19%	6%	4%	5%	24%

136 Total Cases

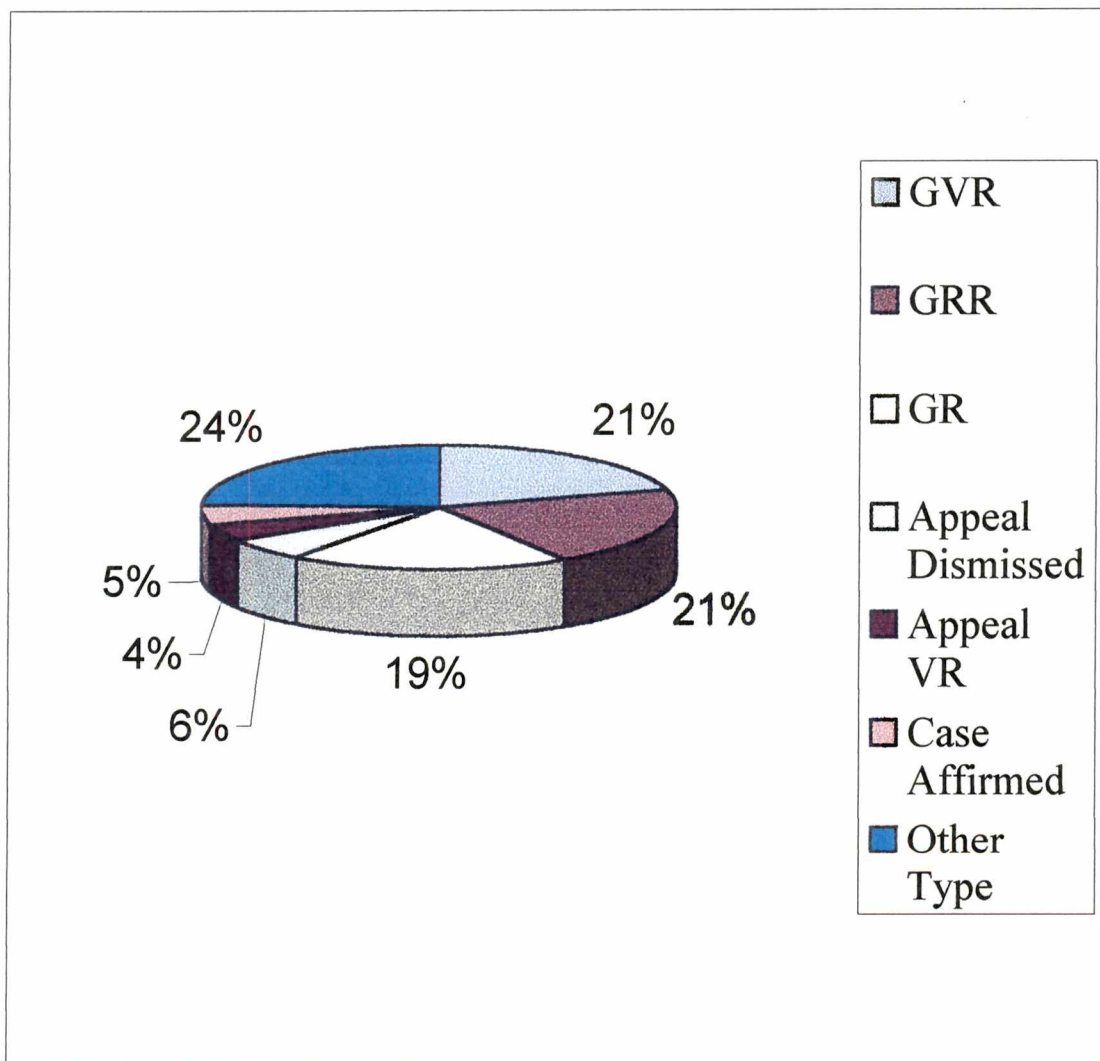


Figure 7.1 - Cumulative Form of Cases

but by the jurisdiction that the Court has over state cases as opposed to federal questions. While the Supreme Court have jurisdiction over the federal issues raised at the state level, the state supreme courts has ultimate authority over the controlling facts and construction of state law questions. As a result, the Supreme Court cannot hand down the final resolution of a case; rather, it must remand the case in light of its interpretation of the federal questions.

It is then incumbent on the state courts of last resort to reconsider the case in light of the Supreme Court's decision. Accordingly, the Granted and Remanded format -- whether GVR or GRR -- is endemic to state cases, not per curiam summary dispositions.

Appeals

Furthermore, the high percentage of appellate cases in the Warren and early Burger years is also related to the Court's mandatory jurisdiction, and not to the per curiam summary disposition. When one eliminates these numbers of cases, the result is a smattering of forms with seemingly no specific link to summary adjudication in and of itself. Indeed, the catch-all category of Other amassed a substantial percentage of cases in all three eras, with 27%, 19%, and 29% respectively.

Other Cases

And to add support to the assertion that there was no consistency to the forms of these adjudications, the cases that comprised the Other category were varied both within the Courts and across time. The Warren Court cases that fell in this category ranged from

disbarment, to writs of mandamus, to petitions for rehearing, to an appeal reversed outright. In the Burger years, there were several of these reversed appeals (reversed in part or in whole), but there were other types not seen in the Warren cases such as stays vacated, and writs of mandamus both granted and denied. The cases in the Rehnquist era were largely petitions to file in forma *pauperis*, but there were also cases vacating stays of execution, a petition to withdraw as counsel, and a change in the Court's RULE 39 which it entered by per curiam summary disposition. While some of these forms were linked to function within a particular era, there was no broad trend to be detected in the form. Essentially, it seems that per curiam summary dispositions are no different from plenary opinions in that they can take the same forms as plenary opinions on both petitions for certiorari and appeals.

FUNCTION OF CASES

The function of the cases did evince some consistent patterns over time as well as some uses linked to a particular era. See Figure 7.2. However, there was one category that I believe is extraneous to the actual function served by a case – error correction.

Error Correction

The error correction function was consistently one of the highest percentages of cases despite the fact that the other categories of function fluctuated drastically over time. Despite the prevalence in the literature of a link between the so-called error correcting

	Correction Error	Justice Individual	Policy	Prosecutorial Pro-	Wrist Slap On	Of Error Confession	Other
Totals	73	53	68	45	11	7	0
%	28%	21%	26%	18%	4%	3%	0%

257 Total Cases

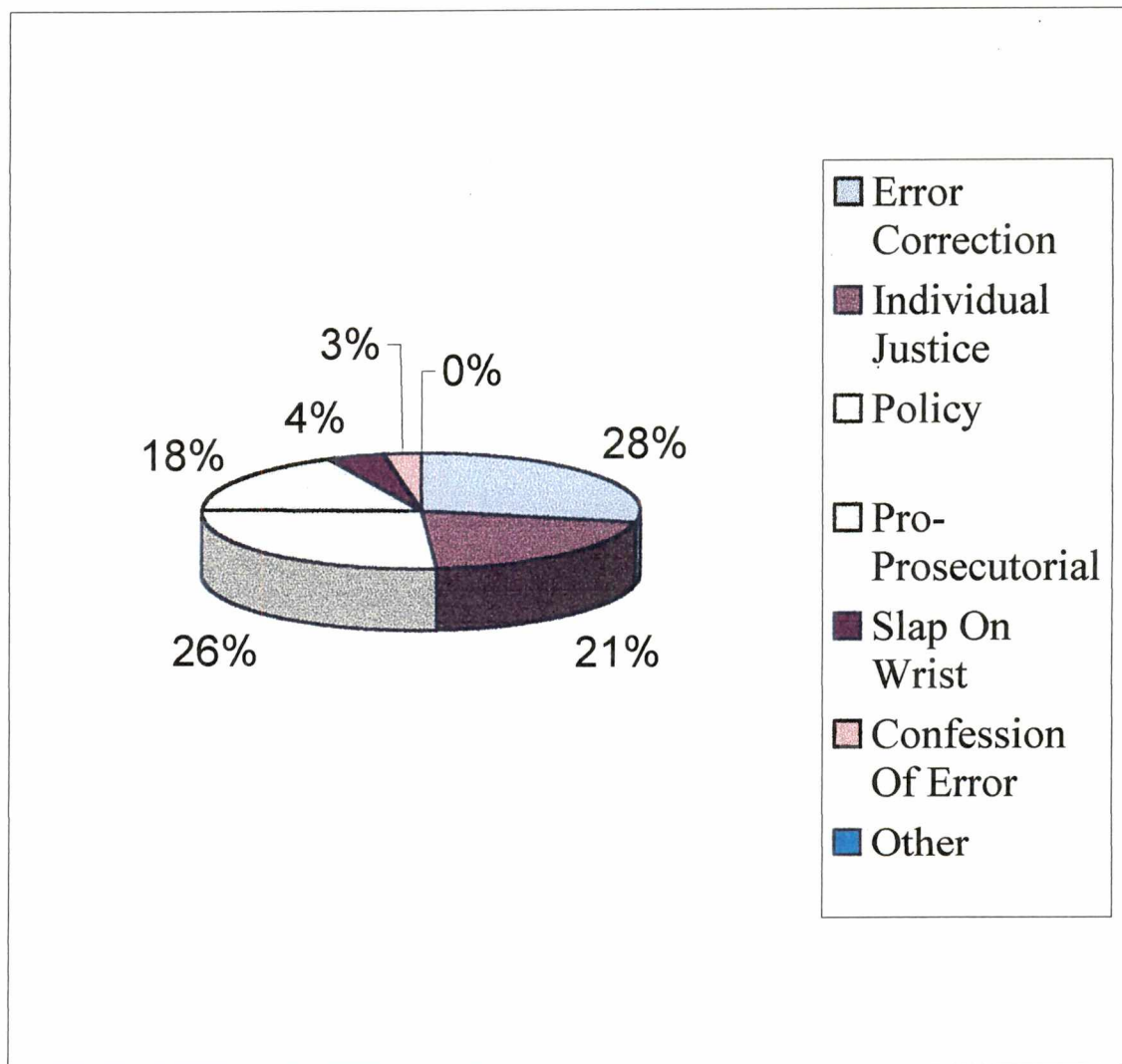


Figure 7.2 - Cumulative Function of Cases

function of the per curiam summary disposition, I believe that it is little more than axiomatic in most instances. Clearly, the error correction of the type that was classified as a slap on the wrist is a legitimate function of these types of adjudications. However, as a category in and of itself, it was stated or implied in a vast majority of the cases – cases with seemingly irreconcilable functions such as individual justice or pro-prosecutorial judgments.

Allow me to elaborate on the extraneous nature of the error correcting function with a brief review of the role of the Court broadly. The Supreme Court is never the Court of first instance unless Constitutionally -mandated original jurisdiction is involved³¹. Thus, in the vast majority of cases the Court reviews, over 95% most terms, the Court is reviewing a decision of either a state court or a federal Court of Appeals. Upon reviewing these cases, the Court will either affirm or order changes in the lower courts ruling. The cases it chooses to affirm are left intact. The other cases – again the vast majority of adjudications – are ordered CORRECTED to the extent that they are in ERROR.

Obviously, this is an extreme simplification of the Court's processes; nevertheless, I think it betrays an underlying truism. The Court is by definition serving the function of error correction in all cases that it adjudicates that are not affirmances.

³¹ See discussion of Court rules and jurisdiction in Epstein et al. *The Supreme Court Compendium*. Washington: Congressional Quarterly Inc, 1994.

Affirmances

As a matter of fact, I would argue (based on the cases reviewed herein) that many of the affirmances are error corrections as well. An affirmance is a curious animal to the Court observer. Why would the Court take a case just to affirm it? If it denied review, the decision below would stand. Why go to the extra trouble of affirming it? One will note that I am discussing a form of case in the function section, but this is the sole form (affirmance) which is directly linked to a function.

The cases presented here suggest that the affirmance is more than a mere exclamation point. It is used to clarify a policy position, or more frequently, to clarify a policy which is being applied incorrectly. The Court often uses an affirmance to uphold a case but on different procedural grounds or on a different construction of a case than was applied below. This is tantamount to an error correction! The Court essentially says that the lower court got the right answer by the wrong method, if you will. The role of affirmances need not be exhaustively explored at this juncture; however, the point remains. It is the business of the Court to correct errors.

It is the semantic interpretation of this phrase, **error correction**, which is problematic, however. The Court is to engage in error correction in only those instances which add to the understanding of substantial federal questions and have broad applicability beyond the parties involved in the case. Its job is not to remedy errors which are of only local interest or affect only the petitioners in a specific instance. One will recall the many dissents of this nature. In spite of the Court's vociferous objections to the contrary, however, the scholarship on per curiam summary dispositions has applied

just such an interpretation of error correction because of the tendency of the Court to frequently refuse to practice what it preaches.

In other words, it is both error correction and individual justice that are alluded to in the literature as one and the same practice. No semantic clarification is to be found. However, my research indicates that error correcting is also stated or implied with policy initiatives or pro-prosecutorial adjudications. This is because of the broader role of error correcting that the Court is by definition undertaking in all cases except affirmances. As a result, one would expect to find implied or stated error correction extant in each case that the Court reviews – plenary or per curiam summary disposition – except the aforementioned affirmance.

Aside from error correction as a spurious correlation to function, there are clear trends in function over time. That the highest percentage of individual justice cases permeate the Warren era and the pro-prosecutorial dominance is endemic to the Rehnquist Court is almost tautological. However, I did not expect to find pro-prosecutorial cases in the Warren cases nor such a high percentage of individual justice judgments in the Rehnquist era!

Policy Cases

Even more surprising, though, is such a high percentage of policy decisions – a percentage that remains fairly constant over time. As a matter of fact, the policy cases were the highest percentage of cases during the Burger era. Of course, the types of cases in which policy was created, explicated, or emphasized, varied over time, but the policy function was consistent. The Warren Court cases forged policy in the administrative law

arena –clarifying the role of the ICC, and the Federal Employees Liability Act, among others. Criminal procedure, civil liberties, and civil rights issues were also policy areas. The Burger Court also adjudicated administrative policy and criminal procedure as well as the retroactivity of *res judicata*. The Rehnquist Court dispensed policy decisions in the administration of its own procedures – most notably altering Rule 39 such that frivolous petitioners could be denied in a specific instance as well as being barred from future filings. Most of the per curiam summary dispositions in the Rehnquist era which were coded pro-prosecutorial stemmed from this single policy initiative. This offers a glimpse into the impact of a sole per curiam summary disposition.

The implications of the high percentage of policy cases, however, are much broader than the topics that they address. The fact that a case (typified by a lack of oral argument or briefing on the merits) may impact policy suggests that the per curiam summary disposition may be a malleable vehicle which the Court can use to effectively make policy. Of course, such a conclusion is fraught with ethical import. It must be codified, however, with the admission that per curiam summary dispositions have not historically been viewed as deserving of equal precedential value as plenary opinions.

I hypothesized, however, that the Court does intend these decisions to serve as precedent. If my interpretation is correct (and the slaps on the wrist of courts who had undervalued the Court's summary rulings contained herein would suggest so), then one could come perilously close to suggesting that the per curiam summary disposition is not only a manipulable policy tool, but that it has been molded to fit the ideological tenor of the Court over time!

CORRELATION BETWEEN FORM AND FUNCTION

One will recall that I hypothesized a direct link between form and function. More specifically, I suggested, based on prior scholarship, a link between the GVR form and the functions of individual justice and error correction. Clearly, I have already negated discussion of the latter function. The GVR and individual justice link was not found. The temptation is there to find significance in that fact that GVR's and individual justice were the highest percentages in both form and function in the Warren era, but any correlation between the two is spurious.

However, there were unanticipated links between form and function. I have already alluded to a link between affirmances and policy decisions. There seems no real purpose in taking a per curiam summary disposition and then affirming it absent a desire to drive home a policy point, if you will. The other point regarding affirmances that needs to be made is that they were not of sufficient numbers to justify excluding the precedential value of per curiam summary dispositions.

There was also a definite link between the form of a writ of mandamus (which fell under the Other category) and the slaps on the wrist of lower courts. The Court never actually issued the writ but it did grant the petition which would be the warning signal that a writ could issue. The Court granted these petitions, and then sternly rebuked the lower courts. It always concluded, though, with the assumption that the lower court "would comply" and that the writs would not be "necessary." These cases are a fascinating microcosm of the research because the lower courts were ridiculously bold in their assertions that the Supreme Court was "mistaken", "in error", "to not be

considered”, or that one of its precedents was no longer “good law” or “controlling” (See Appendices K, L, and M). In these instances, a threatened writ of mandamus seems the obvious form to serve the function of slapping the wrists of these rogue courts.

ISSUES

The cases’ issues are as myriad as the cases themselves. No definitive patterns emerged over time that represented a high percentage of cases except criminal procedure cases. This result supports my previous assertion that per curiam summary dispositions are tools that can comport to various forms and functions. To those chameleon –like characteristics we can now add issues. The per curiam summary disposition can really take on any form, function, or topic, that the Court so desires. See Figure 7.3.

RELEVANT CONCURRENCES/ DISSENTS

One area that I did not propose to investigate was the extent to which cases were unanimous. Several previous authors had asserted such a characteristic of the summary ruling, and the initial cases that I coded seemed no exception. However, in following the Burger decisions there seemed a virtual flip-flop in cases with dissent. They suddenly seemed to comprise the majority of cases. To assess this trend I went back and coded the number of cases with dissents and, of those, the number of dissenters for all of the years under investigation. Yet another unanticipated result of my inquiry was that the per curiam summary disposition is not, as numerous authors have asserted, typified by its

	Procedure Criminal	Rights Civil	Liberties Civil	Law Administrative	Jurisdiction Technical	Other	Petitions Frivolous
Totals	46	13	5	20	29	13	11
%	34%	9%	4%	15%	21%	9%	8%

137 Total Cases

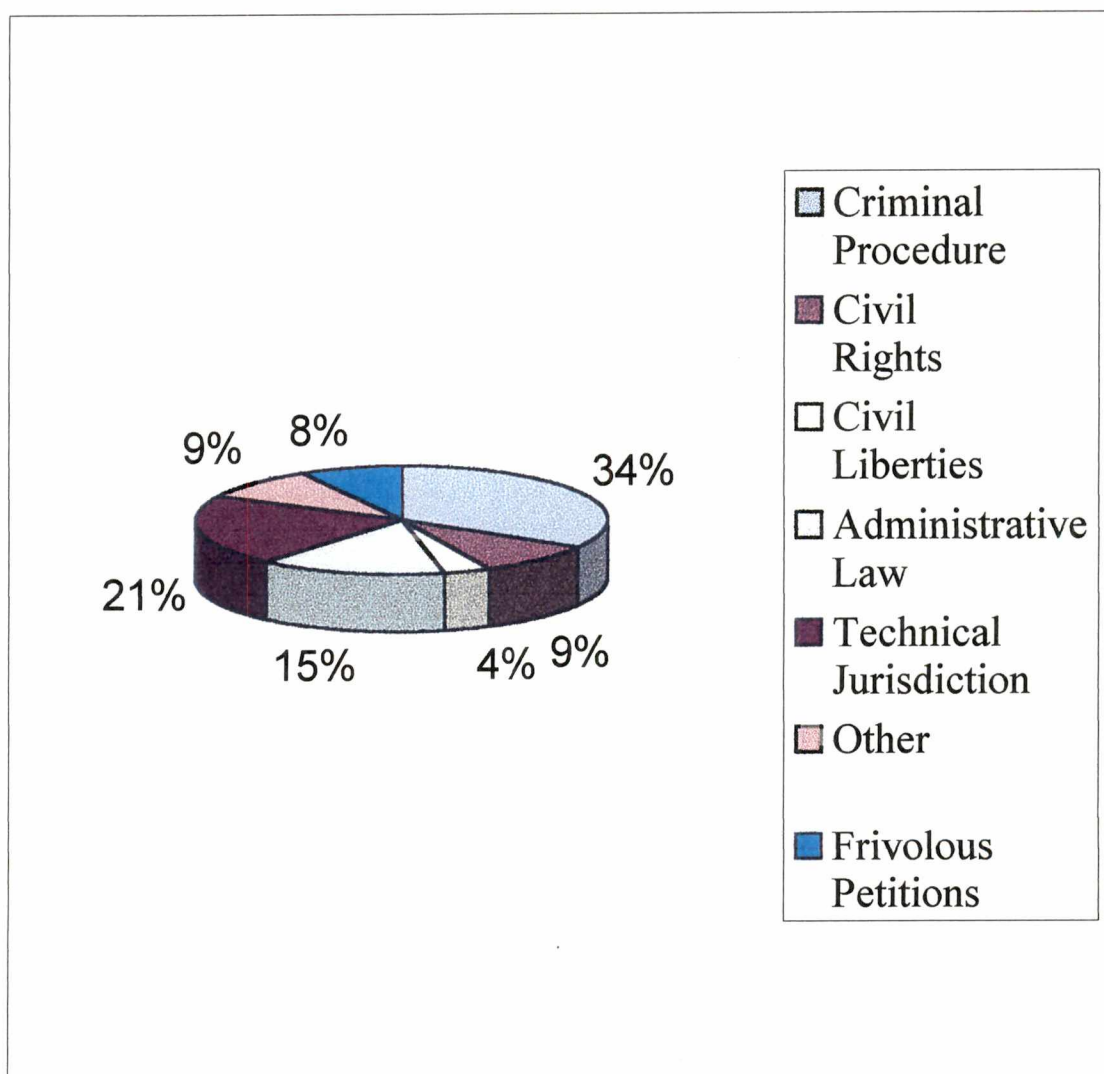


Figure 7.3 - Cumulative Court Issues

unanimity. On the contrary, the Burger and Rehnquist eras found cases with dissent to be the rule rather than the exception. This again supports the conclusion that substantial policy decisions are being doled out, rather than mere perfunctory corrections of lower courts' misapplications of the law.

Another key aspect of the dissents is that so many of them were dissents not from the majority's position but from the form of summary dispositions to adjudicate the case at hand. This finding was an unanticipated outgrowth of my choice to include relevant concurrences and dissents. The rationale behind the incorporation of separate opinions was to facilitate understanding of cases which presented policy issues, individual justice issues, or pro-prosecutorial rulings. What presented itself instead was a recurring undercurrent of dissent from the use of summary adjudications in particular instances but more to the point dissents from the use of summary judgments at all! This trend was present throughout the entire content analysis of cases, though of course the Justices raising objections changed over time. This tendency will be explored more in just a moment but first allow me to clarify what may be a methodological problem in measuring the percentage of dissent over time. Many justices in the Warren and Burger eras issued one-line dissents which simply stated "I dissent from the summary disposition of this case," However, a change began to emerge in the Rehnquist years, as I noted earlier. Frequently following the per curiam ruling was a statement that "Justice _____ would grant certiorari and set the case for oral argument." What it means for this research is that the percentage of cases marked by dissent in the Rehnquist era may be artificially low as a result of the changed reporting.

Returning to the broader significance of the dissents throughout time, they are a

telling insight into the schizophrenic nature of the Court regarding summary rulings. All of the Justices who dissent from such rulings – regardless of the frequency with which they do so – are also in majority on numerous other summary decisions. The most consistent dissenters from such rulings were Marshall, Brennan, and Stevens. Justice Marshall consistently proposed a hybridized solution to what he felt were the problems inherent in summary judgment. He suggested that the parties be allowed to submit briefs on the merits of the case. The decision would still be summary, then, in that it would lack oral argument, but it would afford a broader forum for petitioners.

Marshall never found support for his proposal within the Court although Professor Hellman did lend his support to the proposal in his scholarship on the subject (1983). The Justices, however, were less easily swayed. Brennan, who often joined Marshall in dissenting from summary disposition of a case, also frequently disclaimed his proposed solution fearing that the allowance of briefs on the merits would serve only to “regularize and “systematize” the use of summary judgments,” as noted earlier. This he feared would further entrench a mode of disposition that he said he opposed altogether. While Brennan’s concern may seem legitimate, a factor that might change one’s opinions regarding the inclusion of briefs by petitioners is one of the several unanticipated findings in the cases. Specifically, the Court frequently allowed the inclusion of *amicus curiae* briefs in the summary cases! In other words, the petitioners were not allowed to present their arguments in either an oral or written format, but outside parties could. The frequency of this was greatest in the Warren era, but it was also seen to a lesser extent over time. The inclusion of the *amicus* is even more problematic when one takes into consideration the recent revelation by the current Chief Deputy Clerk of the Supreme

Court who has suggested in an oral interview that often “whole paragraphs will be lifted from the amicus brief” and will then find their way into the majority’s opinion³².

Nevertheless, even Brennan, and Marshall for that matter, were not always in dissent in summary cases. For instance, the function of slapping the wrist of a lower court or judge was always accomplished through a unanimous per curiam opinion. Thus, both the percentage of dissents over time and the topics of the dissents were unanticipated results in my investigation. Yet another result that was not envisioned was the number of cases. It is to this that I now turn.

MEAN NUMBER OF CASES

Despite the high rate of dissent, many of which are aimed at the per curiam summary disposition itself and not the construction of the case, this type of adjudication remains pervasive. It seems Perry’s intimation that the per curiam summary disposition might be soon extinct overestimated the capacity of the Court to police itself. Though there was a decrease in the last two Terms surveyed in this work, the Congressional Quarterly annual publication of The Supreme Court Yearbook has indicated that per curiam summary dispositions are again on the rise in the 1996 and 1997 terms (1998). Also surprising was the high numbers of cases that were more than mere statements in the Warren Court era. The case of the 1954 Term is an obvious exception, of course, but I had anticipated low numbers throughout the Warren years by virtue of Hellman’s assertion that this mode of disposition was used rarely until the Burger years (1984).

³² CSPAN oral interview 6/20/98.

That is not the case, I found out. Figure 7.4 indicates the trend over time. The average number of cases per Term would be 10 absent the outlier of 1954.

IMPLICATIONS

Overall, the findings tend to substantiate both Abraham's and Wasby's portrait of the positive and negative effects of per curiam summary dispositions. The cases do seem to "constitute an attempt by the Court to resolve the conflict between fully reasoned opinions and affording the finality of Supreme Court adjudication to as large a number of litigants as possible" (Abraham 1993: 184). The utility of this is exemplified by the Court's slaps on the wrist of lower courts. The need for this type of resolution is obvious when lower courts are suggesting, as happened in the cases already addressed, that the Supreme Court is in "error" or to be "ignored." However, the costly burden of briefs and oral argument is not warranted. Nor would plenary adjudication make the lower court any less wrong in its attempt to override the highest Court in the land. These slap on the wrist cases also bolster Wasby's suggestion that "the Court may wish to signal that the outcome is obvious and should receive prompt compliance" (1978: 153).

Also, Abraham's assertion that the mode of disposition is efficacious in areas that have "defied a firm, universally applicable rule of law" is accurate (1993: 184). The administrative law cases and the recurrent issue of retroactivity indicate that the Court is more comfortable adjudicating these areas in a case-by-case fashion. Where the facts of the case are not in dispute, the mode of per curiam summary disposition again seems expedient and cost-conscious.

The drawbacks of per curiam summary dispositions cited by Abraham and Wasby

Total	1	11	16	11	14	8	20	10	7	8	12	7	7
Date	1954	1958	1962	1966	1970	1974	1978	1982	1986	1988	1990	1992	1994

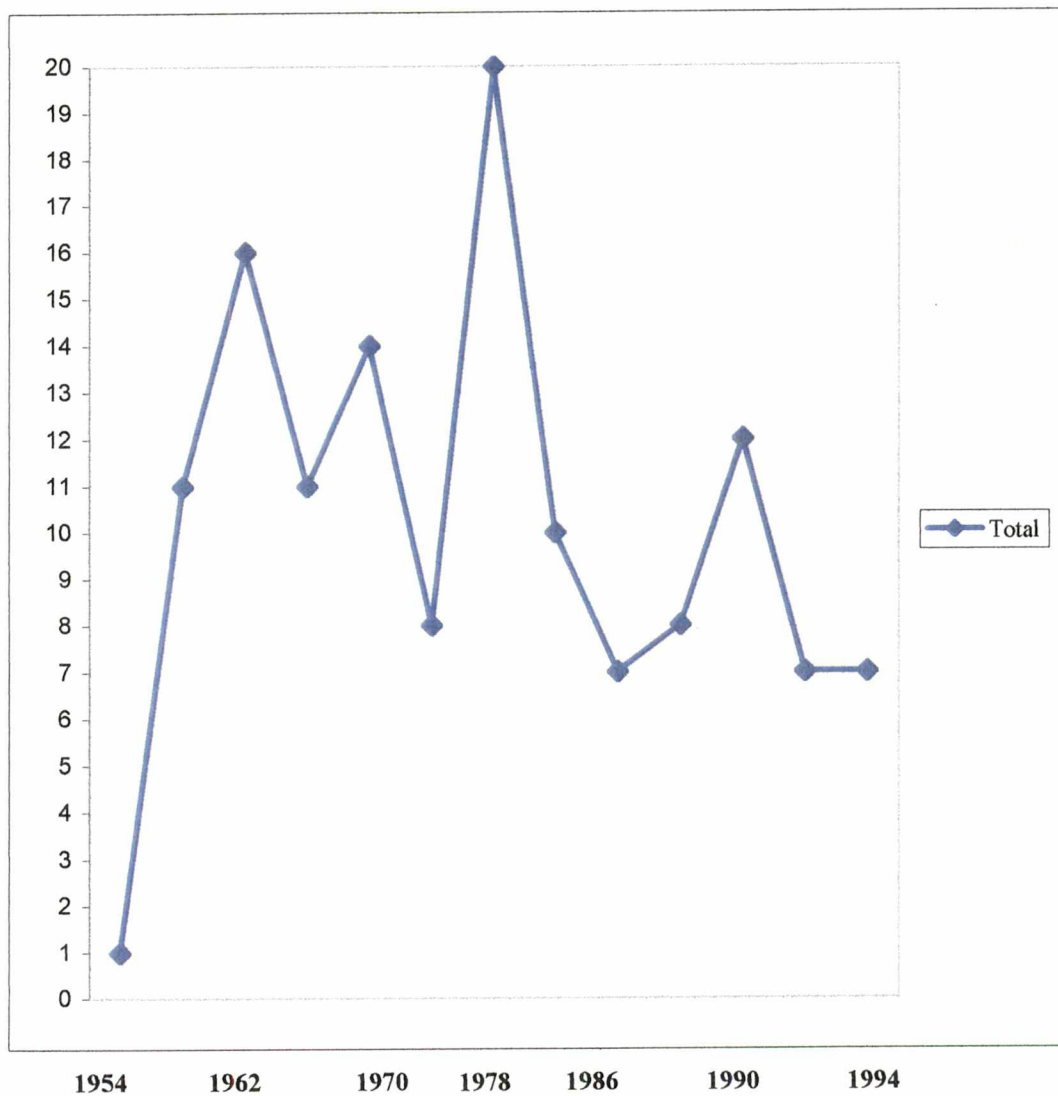


Figure 7.4 - Cumulative Number of Cases

were only partially found, however. Wasby felt that the low “visibility” of these judgments hampered their implementation. Abraham also despaired the precedential weight to be accorded such adjudications. The low visibility may have had some impact as was evinced by slaps on the wrist following a summary judgment by the Court that had been ignored. However, the Court made it clear in *United States v. Haley* (371 U.S. 18) that the per curiam summary judgment was no less controlling or significant than a plenary opinion when it clarified the lower court’s “misperception of the scope and effect of this Court’s per curiam...” (371 U.S. at 19). Thus my assertion that per curiams should be accorded full precedential value.

Speaking of the precedential value of such adjudications, this was also cited as a drawback. Based on the earlier discussion of precedential value, my conclusion that this was only an issue to the extent that affirmances dominated the adjudications. That was clearly not the case; therefore, I do not think there is any reason to suggest that these cases are to be treated any differently from their plenary counterparts. It is true that affirmances are questionable regarding precedent, but this is true for both plenary and summary judgments. Recall that an affirmance is merely codifying the judgment below, but it may be on different grounds or a different construction of the case. Therefore, one cannot draw conclusions regarding *res judicata* based on affirmances. The concern expressed by Perry regarding the sneaking of merits into petition papers is also worthy of note. The consistent use over time of the per curiam summary disposition may generate lawyers who are able to circumvent the system of submission of briefs.

While these particular pitfalls of per curiam summary dispositions were not specifically found, several other notes of caution need mentioning. Clearly, the Court has

at its disposal a powerful policy instrument. The per curiam summary disposition is limitless in form, function, and issue. In other words, the Court can adjudicate virtually any type of request³³, covering any area, in any fashion it chooses without the benefit of oral argument or briefing on the merits. To add insult to the injury to the parties, other persons may be allowed to submit briefs to the Court, amicus briefs.

The myriad functions that have been demonstrated in my limited investigation betray a policy role that is not only amenable to any conceivable case, but also to the personnel of the Court. The per curiam summary disposition has been malleable, over time, to best fit the predilections of the Justices. This is not inherently a negative characteristic. The Court, despite personnel changes has been receptive to injustices to individuals, as well as to confessions by the Government of aggrieved individuals. I for one will not cast the first stone³⁴ at a Court which declines to “stand by and do nothing simply because the case has no importance to anyone but the litigants” (Hellman 1983: 802).

More troubling, however, is the tendency towards pro-prosecutorial dispositions. The earlier concerns of Justices Stevens, Brennan, and Marshall that the Court is “far too busy to review every claim of error by a prosecutor who has been unsuccessful in presenting his case to a state appellate court” bears repeating (*California v. Beheler* 463 U.S. at 1127). The ramifications of a prosecutor getting two bites at the apple are staggering – particularly given the current ideologies on the Court.

Most troubling of all of the findings, though, has to be the high percentage of

³³ except original jurisdiction cases

³⁴ The reference is from a Biblical parable of judging others found in John 8:7.

policy cases. While all of these are certainly not the first delineation of a policy, they are all significant policy decisions. I have already mentioned a few instances in which policy may best be clarified in this mode of disposition: administrative law cases and the retroactivity of decisions. With these limited exceptions, however, the summary judgment seems ill-equipped to explicate policy. The Justices themselves often dissented that the facts of the case were in dispute. This clamors for briefing on the merits and plenary treatment.

Moreover, the Justices in some policy decisions seem to be signaling to future litigants - a practice that comes perilously close to an advisory opinion of sorts. For instance, I would suggest that the abortion ruling discussed herein indicated the Court's willingness to accept limits to abortion laws. The decision in *Anders, Solicitor of Richland County v. Floyd* sent a strong message that the Court would tolerate a conservative estimate of "viability" (440 U.S. 445). Thus, more investigation of per curiam summary dispositions is warranted, but at the very least these results should give scholars pause. The per curiam summary disposition is not a technical or perfunctory procedure as has long been thought!

CHAPTER 8

CONCLUSION

In conclusion, then, the summary disposition, or decision rendered absent briefing on the merits and oral argument, has long been the “most puzzling mode of disposition in the Supreme Court’s repertory” (Hellman 1984: 390). Hopefully, however this work with its specific focus on one type of summary disposition – the per curiam summary disposition – has shed some light on the forms, functions, and implications of summary dispositions generally.

To begin with, a clear conception of summary dispositions has to be made. This work has used a definition of summary dispositions as those summary cases included in the plenary section, the front of the book, in the *Supreme Court Reporters*. There are also dispositions in the back of the reporters in the ORDERS section which could be considered dispositions in the broadest sense of the word because they list the Court’s denials of certiorari and appellate cases. In a fashion, then, the Court has disposed of these cases. This broad definition may explain some of the lack of interest among scholars because the back-of-the-book dispositions are typically housekeeping cases of little note.

The more narrow concept of summary dispositions allows one to explore the cases that were deemed substantive enough for inclusion with the plenary rulings. One type of these summary dispositions, per curiam summary dispositions, affords even more insight into summary decision-making because these cases are usually several pages in length. My content analysis of these types of cases over the Warren, Burger, and

Rehnquist Courts revealed a great deal of information - some of which I had anticipated, some of which I had not.

I did not find, for instance, the expected form of per curiam summary dispositions. I had anticipated a majority of them would be GVR cases. But as I explained in the preceding chapter, the percentage of GVR, GRR, and GR cases is explained by the number of state cases, not by a characteristic endemic to summary adjudication. Indeed, the form a per curiam summary disposition takes could be any form taken by a plenary opinion.

The functions of the cases were a bit more in keeping with my predictions. One will recall that several theories persisted prior to my research. One, discussed by William H. Perry suggested that the per curiam summary disposition was used to remedy egregious errors. This error correcting function included both slapping the wrist of rouge lower court judges and righting injustices to individuals. Another theory, explored by Stephen L. Wasby suggested cases that were pro-prosecutorial in their function. Finally, Arthur D. Hellman had found in his research the existence of a percentage of cases that could only be described as serving a policy function.

My research found support for all three of these theories - the most interesting result was the consistency over time of cases serving a policy function. The fact that the Court has at its disposal an instrument for adjudicating policy with no oral argument or briefing on the merits is problematic in itself. However, the implications are exponentially increased when one considers that the Court is using the per curiam summary disposition in this manner in at least 25% of the cases it adjudicates. This strongly suggests, if not loudly clamors, that the Court has a manipulable mode of

disposition at its disposal which it wields frequently and which bypasses the inclusion -- at all levels -- of the parties to the case. There is no systematic way one case access summary dispositions, and their inclusion in the Reporters is haphazard at best. To add to the confusion, the precedential weight of such cases remains murky, although the cases herein suggest that my earlier warning is well taken: the lower courts treat the per curiam summary disposition as anything less than a plenary opinion for the purposes of precedent at their own peril.

In addition to the policy cases, there were also a number of cases that Perry labeled egregious -- the injustices to individuals and the rogue lower courts. I did have difficulty with the broader concept of this as error correction, however. First of all, as Perry touches on, the concept of error correction is so broad that it commingles the very different functions of reprimanding lower courts and remedying injustices to individuals. More importantly, though, I fear that the term error correction is little more than a tautology. All cases at the Supreme Court level are error correction unless they are affirmances or original jurisdiction by virtue of Article III of the Constitution.

This criticism, notwithstanding, however, individual justice cases were at their peak in the Warren era, as would be expected, but they were also a substantial percentage of cases in later Terms as well. The slaps on the wrist were also consistent over time, and they marked the sole function of cases that were typified by unanimity in each instance. It was also one of only two examples of links between form and function - specifically the form of a writ of mandamus accompanied the proverbial slap. The sheer number of times in which lower courts defied the Supreme Court is staggering to me, and I plan to do follow-up research in this area.

Wasby's theory of per curiam summary dispositions as pro-prosecutorial tools was proven in spades. The Burger and Rehnquist Courts were heavily predisposed to use this mode of summary adjudication in this manner, but the Warren Court also evinced several rulings with policy implications.

The number of affirmances and confession of error cases were surprisingly high. The affirmance is always a curious animal, but it is a particularly interesting phenomenon given that the precedential weight to be accorded summary rulings is unclear. Nevertheless, the affirmance was used over time to drive home a policy point. The confession of error cases were not troubling on their face (as they usually sought to remedy injustice to individuals) in implicating bias in favor of the Government. However, the allowance of the government as *amicus curiae* does give one pause. More research needs to be undertaken in this area.

The expected links between form and function were not found but two links have already been mentioned. These are the links between writs of mandamus and slaps on the wrist, and the link between affirmed cases and a policy function.

Further unanticipated results came in the abrupt shift in cases with dissents. The Warren years were largely typified by unanimity in per curiam summary dispositions with dissents only 34% of the time. But the Burger years and the Rehnquist Terms evince strident dissents in the majority of cases. Moreover, the dissent was frequently not regarding the construction of the case but the mode of dispositions. That is, the minority opinion writers were objecting to the use of a per curiam summary disposition to handle the case. This internal debate, which I alluded to in the opening pages of this research was far more pervasive than I could have imagined. Clearly, the dispositions are not

examples of pro forma decision-making. The number of cases was also a surprise. I would not have expected many cases at all in the Warren years, based on Hellman's research, but that was not the case. The early prediction that this mode might be soon extinct is not demonstrated in my results.

Certainly, more work needs to be done in this fascinating area before wholesale conclusions are drawn. The per curiam summary disposition seems in some instances ideally suited to affirm cases, right wrongs against individuals, and reign in rogue judges. The broad policy role of the per curiam summary disposition, however, merits further research because it is at the least troubling. At the most it could be a reason why the so-called purple curtain has descended over summary adjudications, and why once again light must be shed on this "dark corner of Supreme Court practice"³⁵. Hopefully, this work has begun such illumination.

³⁵ From the aforementioned title of Hellman's 1984 article.

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10. *Boston and Maine Railroad, et. al. v. United States, et. al.*, 358 US 68
11. *Brotherhood of Locomotive Engineers, et. al. v. Baltimore and Ohio Railroad Co., et. al.*, 372 US 284
12. *Burden v. Zant, Warden*, 498 US 433
13. *Cage v. Louisiana*, 498 US 39
14. *California v. Beheler*, 463 US 1121
15. *Cardwell, et. al. v. Taylor*, 461 US 571
16. *Carey, State's Attorney of Cook County, Illinois v. Wynn, et. al.*, 439 US 8
17. *Chase Manhattan Bank, N.A., et. al. v. Finance Administration of City Of New York*, 440 US 447
18. *City of Meridian v. Southern Bell Telephone & Telegraph Co.*, 358 US 639

19. *City of Newport, Kentucky, et. al. v. Iacobucci, DBA Talk of the Town, et. al.*, 479 US

85

20. *Cofield v. United States*, 360 US 472

21. *Commisioner of Internal Revenue v. Asphalt Products Co., Inc.*, 482 US 117

22. *Connor et. al. v. Coleman, Judge, United States Court of Appeals, et. al.*, 440 US 612

23. *Connor, et. al. v. Johnson et.al.*, 402 US 690

24. *Connor, et. al. v. Waller, Governor of Mississippi, et. al.*, 421 US 656

25. *Cox, Former Assistant Director for Treatment, Virginia Division of Corrections*

Et. al. v. Cook, 420 US 734

26. *Daniel v. Louisiana*, 420 US 31

27. *Deen v. Hickman, Chief Justice, Supreme Court of Texas, et.al.*, 358 US 57

28. *Delo, Superintendent, Potossi Correctional Center v. Blair*, 509 US 823

29. *Delo, Superintendent, Potossi Correctional Center v. Lashley*, 507 US 272

30. *Demos v. Storrie, et. al.*, 507 US 290

31. *Dobbs v. Zant, Warden*, 506 US 357

32. *Duncan, Warden v. Henry*, 513 US 364

33. *Durham v. United States*, 401 US 481

34. *El Vocero de Puerto Rico et al. v. Puerto Rico et al.*, 508 US 147

35. *Estelle, Corrections Director v. Dorrough*, 420 US 534

36. *Ex Parte George*, 371 US 72

37. *Fornaris v. Ridge Tool Co. et al.*, 400 US 41

38. *Freeport-McMoran Inc. v. K. N. Energy, Inc.*, 498 US 426

39. *Goeke, Superintendent, Renz Correctional Center v. Branch*, 514 US 115

40. *Great Western Sugar Co. v. Nelson*, 442 US 92
41. *Green v. Georgia*, 442 US 95
42. *Griggs, et al. v. Provident Consumer Discount Co.*, 459 US 56
43. *Harlin v. Missouri*, 439 US 459
44. *Harrah Independent School District et al. v. Martin*, 440 US 194
45. *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 US 215
46. *Harrison v. Missouri Pacific Railroad Co.*, 372 US 248
47. *Hildwin v. Florida*, 490 US 638
48. *Hoffa, et al. v. United States*, 387 US 231
49. *Hunter v. Tennessee*, 403 US 711
50. *Illinois v. Batchelder*, 463 US 1112
51. *Immigration & Naturalization Service v. Hector*, 479 US 85
52. *Immigration & Naturalization Service v. Miranda*, 459 US 14
53. *In re Amendment to Rule 39*, 500 US 13
54. *In re Berger*, 498 US 233
55. *In re Disbarment of Isserman*, 348 US 1
56. *In re Demos*, 500 US 516
57. *In re McDonald*, 489 US 180
58. *In re Sindram*, 498 US 177
59. *In re Whitaker*, 513 US 1
60. *Jacobs v. New York*, 388 US 431
61. *Johnson v. Virginia*, 373 US 61

62. *Kennerly, et al. v. District Of the Ninth Judicial District of Montana, et al.* 400, US 423
63. *Keyes v. School District No. 1*, 403 US 711
64. *Kilgarlin, et al. v. Hill, Secretary of State of Texas, et al.*, 386 US 120
65. *Kitchens v. Smith, Warden*, 401 US 847
66. *Langenkamp, Successor Trustee of the Bankruptcy Estates of Republic Trust And Savings Co. et al. v. Culp et al.*, 498 US 42
67. *Lee v. Missouri*, 439 US 461
68. *Leis et al. v. Flynt et al.*, 439 US 438
69. *Lines v. Frederick et al.*, 400 US 18
70. *Loannou v. New York et al.*, 371 US 30
71. *Long Island Railroad Co. v. Aberdeen and Rockfish Railroad Co. et al.*, 439 US 1
72. *Lozado v. Deeds, Warden*, 498 US 430
73. *Maggio, Warden v. Fulford*, 462 US 111
74. *Martin v. District of Columbia Court of Appeals et al.*, 506 US 1
75. *McCulloch v. Maryland*, 17 US 316
76. *Montana v. Hall*, 481 US 400
77. *Moore v. Duckworth, Warden*, 443 US 713
78. *Moore v. Terminal Railroad Association of St. Louis*, 358 US 31
79. *Morland et al. v. Sprecher, Judge, United States Court of Appeals for the Seventh Court Et al.*, 443 US 709
80. *McLeod, Regional Director, National Labor Relations Board v. General Electric Co., et al.*, 385 US 533

81. *National Association for the Advancement of Colored People Inc. v. Bennett Attorney General of Arkansas, et al.*, 360 US 471
82. *National Association for the Advancement of Colored People v. Alabama Ex. Rel. Patterson*, 360 US 240
83. *National Labor Relations Board v. Baylor Medical University Medical Center*, 439 US 9
84. *National Motor Freight Traffic Association, Inc. et al. v. United States et al.*, 372 US 246
85. *O'Conner v. Ohio*, 385 US 92
86. *Odom v. United States*, 400 US 23
87. *Olden v. Kentucky*, 488 US 227
88. *Paccione v. Heritage, Warden*, 371 US 17
89. *Page v. United States* 359 US 116
90. *Palmer et al. v. BRG of Georgia, Inc., et al.*, 498 US 46
91. *Pennsylvania v. Bruder*, 488 US 9
92. *Pitchess, Sheriff v. Davis*, 421 US 482
93. *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co. et al.*, 385 US 32
94. *Powell v. Texas*, 492 US 680
95. *Presnell v. Georgia*, 439 US 14
96. *Purkett v. Elem.*, 514 US 765
97. *Rhodes et al. v. Stewart*, 488 US 1
98. *Riddell, District Director of Internal Revenue v. Monolith Portland Cement Co.* 371 US 537

- 99. *Ring v. United States*, 419 US 18
- 100. *Rodriguez v. United States*, 480 US 522
- 101. *Roe v. Wade*, 410 US 113
- 102. *Rogers, Attorney General, Successor to the Alien Property Custodians v. Calumet
National Bank of Hammond, Substituted Trustee, et al.*, 358 US 331
- 103. *Rose v. Arkansas State Police, et al.*, 479 US 1
- 104. *Sandoval v. Utah*, 388 US 463
- 105. *Sangamon Valley Corp. v. United States et al.*, 358 US 49
- 106. *Schipani v. United States*, 385 US 372
- 107. *Schneider v. Rusk, Secretary of State*, 372 US 224
- 108. *Shell v. Mississippi*, 498 US 1
- 109. *Simpson v. Florida*, 403 US 384
- 110. *Smith et al. v. Arkansas State Highway Employees Local 1315 et al*, 441 US 463
- 111. *Swenson, Warden v. Bosler*, 386 US 258
- 112. *Temple v. Synthes Corp. Ltd.*, 498 US 5
- 113. *Thurston Motor Lines, Inc. v. Jordan K. Rand., LTD* 460 US 533
- 114. *Town of Huntington et al. v. Huntington Branch, National Association for the
Advancement of Colored People, et al.*, 488 US 15
- 115. *Truesdale v. Aiken, Warden, et al.*, 480 US 527
- 116. *Tuggle v. Netherland, Warden*, 516 US 10
- 117. *Union Pacific Railroad Co. v. Sheehan*, 459 US 89
- 118. *United States et al. v. City of Chicago*, 400 US 8
- 119. *United States ex. Rel. Jennings v. Ragen, Warden*, 358 US 276

120. *United States v. American Friends Service Committee, et al.*, 419 US 7
121. *United States v. Haley*, 371 US 18
122. *United States v. Maryland Savings-Share Insurance Corp.*, 400 US 4
123. *United States v. Michigan National Corp. et al.*, 419 US 1
124. *United States v. Nachtigal*, 507 US 1
125. *United States v. Saskatchewan Minerals*, 385 US 94
126. *Walton v. Arkansas*, 371 US 28
127. *Wetzel v. Ohio*, 371 US 62
128. *Whitaker v. Superior Court of California, San Francisco County (Merrill Reese Inc. Real Party in Interest)*
129. *Wilkins v. Unites States*, 441 US 468
130. *Williams v. Zuckert, Secretary of the Air Force, et al.*, 372 US 765
131. *Wrenn v. Benson et al.*, 490 US 89

Appendices

Appendix A
Justices of the Warren Court

APPENDIX A

WARREN COURT JUSTICES

1954 TERM:

Warren, E. (CJ); Black; Frankfurter; Minton; Douglas; Clark; Reed; Burton; Jackson, R.

1958 TERM:

Warren, E. (CJ); Black; Frankfurter; Brennan; Douglas; Clark; Whittaker; Stewart;
Harlan

1962 TERM:

Warren, E. (CJ); Black; Goldberg; Brennan; Douglas; Clark; White, B.; Stewart; Harlan

1966 TERM:

Warren, E. (CJ); Black; Fortas; Brennan; Douglas; Clark; White, B.; Stewart; Harlan

Appendix B
Justices of the Burger Court

APPENDIX B

BURGER COURT JUSTICES

1970 TERM:

Burger, W. (CJ); Black; Blackmun; Brennan; Douglas; Marshall, T.; White, B.;
Stewart; Rehnquist

1974 TERM:

Burger, W. (CJ); Powell; Blackmun; Brennan; Douglas; Marshall, T.; White, B.;
Stewart; Rehnquist

1978 TERM:

Burger, W. (CJ); Powell; Blackmun; Brennan; Stevens; Marshall, T.; White, B.;
Stewart; Rehnquist

1982 TERM:

Burger, W. (CJ); Powell; Blackmun; Brennan; Stevens; Marshall, T.; White, B.;
O'Connor; Rehnquist

Appendix C
Justices of the Rehnquist Court

APPENDIX C

REHNQUIST COURT JUSTICES

1986 TERM:

Rehnquist, W. (CJ); Powell; Blackmun; Brennan; Stevens; Marshall, T.; White, B.;
O'Connor; Scalia

1988 TERM:

Rehnquist, W. (CJ); Kennedy; Blackmun; Brennan; Stevens; Marshall, T.; White, B.;
O'Connor; Scalia

1990 TERM:

Rehnquist, W. (CJ); Kennedy; Blackmun; Souter; Stevens; Marshall, T.; White, B.;
O'Connor; Scalia

1992 TERM:

Rehnquist, W. (CJ); Kennedy; Blackmun; Souter; Stevens; Thomas; White, B.;
O'Connor; Scalia

1994 TERM:

Rehnquist, W. (CJ); Kennedy; Souter; Stevens; Thomas; Ginsburg; O'Connor; Scalia;
Breyer

Appendix D
Example of Summary Order

APPENDIX D

4 OCTOBER TERM, 1996

October 10, 1966

385 U.S.

JORDAN ET AL v. VILLAGE OF MENOMONEE
FALLS
APPEAL FROM THE SUPREME COURT OF WISCONSIN

No. 122. Decided October 10, 1966

28 Wis. 2d 608, 137 N. W. 2d 442, appeal dismissed.

PER CURIAM.

The motion to dismiss is granted and the appeal is
dismissed for want of a substantial federal question.

Appendix E
Example of Summary Statement

APPENDIX E

48 OCTOBER TERM, 1958

Per Curiam

358 U.S.

GRANIERI v. CALIFORNIA

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 117, Misc. Decided October 13, 1958

PER CURIAM.

The appeal is dismissed. Treating the papers whereon
the appeal was taken as a petition for a writ of certiorari,
certiorari is denied.

UNITED STATES EX REL. FARNSWORTH v.
MURPHY, WARDEN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 82, Misc. Decided October 13, 1958

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and
the petition for writ of certiorari are granted. The judgment
of the United States Court of Appeals for the Second Circuit
is vacated and the case is remanded to the
District Court for a hearing.

Appendix F
Example of Summary Memorandum

APPENDIX F

CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES
AT
OCTOBER TERM, 1954.

IN RE DISBARMENT OF ISSERMAN

ON PETITION FOR REHEARING

NO. 5, Misc., October Term, 1952. Decided October 14, 1954

PER CURIAM.

April 6, 1953, an order was entered disbaring Isserman from the practice of law in this Court pursuant to Rule 2, par. 5, of this Court's Rules then in effect. See *In re Isserman*, 345 U.S. 286. The order of disbarment is now before us on a petition for rehearing. Rule 8 of our present rules provides that "no order of disbarment will be entered except with the concurrence of a majority of the justices participating." The petition for rehearing is granted. A majority of the justices participating do not find ground for disbarment for Isserman. Accordingly, the former order of disbarment is set aside and the rule against Isserman to show cause is discharged.

Mr. Justice Burton, with whom Mr. Justice Reed
and Mr. Justice Minton join, dissents for the reasons...

(Continued)

2 OCTOBER TERM, 1954

Opinion of the Court. 348 U.S.

...stated in the opinion announced by Mr. Chief Justice Vinson, April 6, 1953, in *In re Isserman*, 345 U.S. 286.

Mr. Justice Reed also call attention to his dissent in *Scaher v. Association of the Bar*, 347 U.S. 388, 390.

The Chief Justice and Mr. Justice Clark did not Participate in the consideratio or decision of this matter.

Appendix G
Example of Per Curiam Summary Disposition

APPENDIX G

684 OCTOBER TERM, 1964

Per Curiam

379 U.S.

BLOW ET AL. V. NORTH CAROLINA

ON PETITION FOR WHIT OF CERTIORARI TO THE SUPREME
COURT OF NORTH CAROLINA.

No. 387. Decided February 1, 1965.

PER CURIAM.

Petitioners, two Negroes, approached the Plantation Restaurant in the company of 35 to 40 other Negroes. This restaurant served whites only and carried a sign To that effect on its front door. Pursuant to this policy The owner of the restaurant locked the door against the Negroes, though from time to time he would open the Door to admit white customers and relock it after they Had entered. The restaurant was some 60 feet from the Highway, the property between the restaurant and the highway being owned by the restaurant proprietor. The Negroes waited outside the door, some on a shrubbery Box six to eight feet away, others up to 15 feet distant. The owner asked the Negroes to leave; but they continued To wait quietly outside until they were arrested.

(Continued)

BLOW v. NORTH CAROLINA

685

684

Per Curiam

For this conduct petitioners were indicted and convicted
For violation of 14-134 of the North Carolina General
Statutes, making it an offense to "go or enter upon the lands
Of another, without a license therefor" and "after being
Forbidden to do so." The Supreme Court of North
Carolina affirmed petitioners' convictions on March 18, 1964.
261 N.C. 463, 135 S. E. 2d 14; 261 N. C. 467, 135 S.E. 2d 17
The Plantation Restaurant is situated on Interstate Highway
301 in the town of Enfield, North Carolina.
Adjoining the restaurant and owned by the same person is
The Enfield Motel. The restaurant's menu and other
Advertising are posted in the rooms of this motel. The
Plantation Restaurant and Enfield Motel are advertised
On billboards for some miles up and down Highway 301.
They are further advertised on the radio and in the newspapers.
Since these facts make it clear that the Plantation Restaurant
"serves or offers to serve interstate travelers," it
must be held that the restaurant is a "place of public
accommodation" within the meaning of 201 (b)(2)

and (c) (2) of the Civil Rights Act of 1964.
"The Civil Rights Act of 1964 forbids discrimination
in places of public accommodation and removes peaceful
attempts to be served on an equal basis from the category
of punishable activities. Although the conduct in the
present cases occurred prior to the enactment of the Act,
the still-pending convictions are abated by its passage."
Hamm v. City of Rock Hill, ante, at 308. Accordingly...

(Continued)

686 OCTOBER TERM, 1964

Per Curiam

379 U.S.

The writ of certiorari is granted, the judgments are
Vacated, and the cause remanded for dismissal of the
indictments.

It is so ordered.

Mr. Justice Black, Mr. Justice Harlan, and Mr.
Justice White would affirm the judgments of the
Supreme Court of North Carolina for the reasons stated
In their dissenting opinions in *Hamm v. City of Rock Hill*,
Ante, at 318, 322, 327.

Mr. Justice Stewart would vacate the judgments of
The Supreme Court of North Carolina and remand the
case to that court for the reasons stated in his dissenting
opinion in *Hamm v. City of Rock Hill*, ante, at 326.

Appendix H
Issues of the Warren Court Cases

Term	Case #	Issue
1954	1	disbarment
1958	1	liability under Federal Employee Liability Act
	2	testimony allowed even though not in appeal
	3	same as #1 above
	4	ICC power v. District Court
	5	confession coerced
	6	State cannot review Attorney General of US
	7	fed. ct. cannot pre-emptively strike st. law
	8	right to appeal in forma pauperis
	9	NAACP not forced to reveal membership lists
	10	state construction in fed. ct.
	11	prisoner can withdraw plea

1962 1 petitioner allowed oral presentation
 of merits
 2 District Court defied Supreme Court
 3 right to counsel
 4 NY denied estate to Czech citizen
 5 wife can maintain appeal of dead
 husband
 6 picketing is protected under NLRA
 7 D Ct. granted extension; Ct. of App.
 denied
 8 Sunday closing laws
 9 mining allowance of IR Code of 1939
10 case required 3 Judge panel
11 standing to sue under ICC
12 Appeals Ct. cannot override jury
13 govt. role in Railway Labor Act ltd.
14 military; petitioner may have
 witnesses
15 sitting in wt. only section of court
16 Pres. authority to send military
 to Alab.

1966 1 wiretapping of attny call = new trial
 2 begin ltd. time for appeals
 3 silence of defendant not issue
 for pros.
 4 D Ct. vs. ICC
 5 SG call for rehearing
 6 wrong construction of NLRB
 7 apportionment disallows gross
 disparity
 8 right to counsel not require request
 9 wiretapping of attny call = ltd.
 retrial
 10 suspended sent. = moot appeals
 11 juveniles entitled to transcripts

Appendix I
Issues of the Burger Court Cases

Term	#	Issue
1970	1	IR Code
	2	ICC Act not require note of discontinuance
	3	right to file pauperis petition
	4	vacation pay not property under bankruptcy
	5	retroactivity
	6	USC Title 28 not include Puerto Rico
	7	Comptroller relief for travel agents
	8	jurisdiction of Indian reservation
	9	does death abate cause
	10	Gideon is retroactive
	11	apportionment extended filing date
	12	bills of exception are not limited
	13	double estoppel = double jeopardy
	14	stay vacated
1974	1	Bank Merger Act
	2	conscientious opposition to taxes
	3	conviction exchanged for testimony
	4	representative jury not retroactive
	5	automatic appeal dismiss. if escape
	6	retroactivity
	7	no fed route if state is not exhausted

	8	Miss. must comply with Voting Rts. Act
1978	1	continuing educ. not violate due process
	2	out of state attorney privilege
	3	Ct. of Appeals exercised too much power
	4	S Ct. cannot review 3 judge panel
	5	NLRB non-solicitation rule
	6	sentencing enhancement
	7	Railroad Adjustment Board vs. D Ct.
	8	women included in jury is retroactive
	9	all judgments excluding women vacated
	10	wrong construction of a case
	11	taxing state bank
	12	grievance filed by union not individual
	13	lawyer said filed but lied
	14	arbitration above Ct. of Appeals
	15	testimony in punishment phas
	16	D Ct. wrong to enjoin abortion
	17	enjoin publication
	18	insanity pleas
	19	reapportionment
	20	" "
1982	1	habeaus not exhausted

2 INS not negligent in allowing
deportation
3 no need to re-read rights
4 untimely petitions- Rules amendment
5 motor freight charges
6 fed ct. not review state 4th
Amend. claims
7 last minute appeal
8 Ct. of Appeal not override Louisiana st.
9 not Miranda unless custodial
10 reasonable cause in vehicle stop

Appendix J
Issues of the Rehnquist Court Cases

Term	#	Issue
1986	1	widow benefits not ltd. by state
	2	INS consideration of hardship
	3	nude dancing where alcohol sold
	4	sentencing authority
	5	retroactivity
	6	ex post facto doesn't bar related pros.
	7	Tax Code
1988	1	does declaratory mean party prevails
	2	roadside Miranda
	3	zoning for minority housing OK
	4	petitioner can confront witnesses
	5	frivolous in forma pauperis petitions
	6	" "
	7	jury does not specify aggravating factors
	8	right to be silent before psych exam
1990	1	Rule 39.8
	2	" "
	3	aggravating factors
	4	named defendants in tortfeasor cases
	5	grave uncertainty violates reasonable doubt

6 creditors' trial
7 antitrust
8 Rule 39.8
9 lawyers not forced to file frivolous
10 diversity jurisdiction
11 ineffective counsel
12 1 lawyer, two defendants=conflict
of int.

1992 1 Rule 39.8
2 ineffective counsel
3 DUI petty
4 mitigating not obligatory
5 Rule 39.8
6 private hearings in Puerto Rico uncon.
7 stay of execution = egregious

1994 1 Rule 39.8
2 lawyer penalty
3 petitioner must raise fed. claim at
st. lev.
4 due process error
5 can strike black juror
6 death by gas still valid
7 Rule 39.8

Appendix K
Warren Court Cases

1954 Cases (Case 1)

1954 - CASE 1	
CASE	In Re Disbarment of Isserman
CITE	348 US 1
FORM	order of disbarment set aside
FUNCTION	justice
TOPIC	disbarment-not justified
RELEVANT CONCURRENCES/ DISSENTS	3 dissent

Reference To Case Above

This case is problematic because while the total N of the Warren Court comports with the other eras, this case could show the results as an outlier. Accordingly, the findings chapter will present the overall number of case both including 1954, and excluding it. This is particularly relevant in computing the average number of cases per term.

Essentially, this disbarment is a case that is currently disposed of in the Orders section at the conclusion of the U.S. Reports. In point of fact, this term lacks any of the per curiam summary disposition that typify future terms. However, this is an interesting finding in and of itself.

1958 Cases (Cases 1 - 2)

1958 - CASE 1	
CASE	Moore v. Terminal Railroad Association of St. Louis
CITE	358 US 31
FORM	Cert GRR
FUNCTION	justice error correction policy
TOPIC	interpretation of liability under Federal Employers' Liability Act more lenient than S.C. of Missouri
RELEVANT CONCURRENCES/ DISSENTS	Whittaker joined by Burton in dissent: if facts are not disputed and no fault then did create liability without fault p34 "The FELA does not create liability without fault." Says maj. is saying "a railroad is an insurer of its employees." p35 2 dissents

1958 - CASE 2	
CASE	Sangamon Valley Corp. v. United States et. al.
CITE	358 US 49
FORM	cert. GVR
FUNCTION	confession of error by S.G.
TOPIC	testimony given by Subcommittee of Legislative Oversight of the House Committee on Interstate and Foreign Commerce-is relevant as per S.G.
RELEVANT CONCURRENCES/ DISSENTS	Clark and Harlan dissent : " matters referred to the Court were not presented in the Courts of Appeals and are not presented by these petitions" p 50 2 dissents

Reference To Case Above

As indicated in the methodology chapter, the function of confession of error was not one that I anticipated. I originally coded this and similar cases under the other category.

An interesting component of this case was that the confession of error, as noted by the dissent, revealed facts not included in the petition for certiorari. This certainly gives the Court-follower pause, and was the cause of the dissents.

1958 Cases (Case 3)

(continued from previous)

Another interesting facet of this case is that it marks the first of many cases with a link to either the Solicitor General or Attorney General (or both). Of course, a confession of error case by definition involves such a link, but many cases which were not confession of error involved either a request by the S.G. or A.G. (or both) or an amicus by the S.G. or A.G.

1958 - CASE 3	
CASE	Deen v. Hickman, Chief Justice, Supreme Court of Texas, Et. al.
CITE	358 US 57
FORM	Leave to file a petition for a writ of mandamus is granted; but the writ is not issued
FUNCTION	error correction: slap on wrist, justice
TOPIC	former case above regarding Federal Employer's Liability Act more lenient standard
RELEVANT CONCURRENCES/ DISSENTS	"In Deen v. Gulf, Colorado & Santa Fe R. Co. 353 US 925, this Court, having held that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury," reversed the judgment of the Texas Court of Appeals. On Remand, that court held that the question of negligence was foreclosed by the Court's decision and affirmed a judgement in favor of the petitioner on condition that the petitioner accept a remittitur. On review, the Texas Supreme Court remanded the case... with directions to...'adjudicate upon its own independent evaluation of the evidence and wholly apart from the judgment of the United States Supreme Court of the United States' P57 The motion for leave to file a petition requesting this Court to mandamus the Texas Supreme Court to conform its decision to our mandate in that case is granted. Assuming as we do that the Supreme Court of Texas will of course conform to the disposition we now make, we do not issue the writ of mandamus." p58 - No dissent

Reference To Case Above

This case is the first of an entire subset of cases that are seen over time - the slap on the wrist (to borrow from Perry's terminology). I was shocked to find a lower court suggesting that a case be adjudicated "wholly apart from the judgement" of the Supreme Court.

1958 Cases (Cases 4 - 6)

1958 - CASE 4	
CASE	Boston and Maine Railroad et al. v. United States et. al.
CITE	358 US 68
FORM	appeal dismissed
FUNCTION	policy
TOPIC	ICC power District Court erred in setting aside order of ICC.
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1958 - CASE 5	
CASE	United States ex. Rel. Jennings v. Ragen, Warden
CITE	358 US 276
FORM	cert GVR
FUNCTION	error correction of lower court, justice issue for individual
TOPIC	Prisoner sought writ of habeas corpus claiming a confession was coerced and he was physically mistreated
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1958 - CASE 6	
CASE	Rogers, Attorney General, Successor to the Alien Property Custodians, v. Calumet National Bank of Hammond, Substituted Trustee, et al.
CITE	358 US 331
FORM	cert. GRR
FUNCTION	policy: error correction
TOPIC	whether a state court can review the discretion exercised by the Attorney General under federal law inconnection to Trading with the Enemy Act. P331 - SC says No.
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1958 Cases (Cases 7 - 8)

1958 - CASE 7	
CASE	City of Meridian v. Southern Bell Telephone & Telegraph Co.
CITE	358 US 639
FORM	appeal : judgment vacated and remanded
FUNCTION	policy error correction
TOPIC	whether Federal court can hold state law in conflict with Constitution prior to state resolution cannot do so - federalism
RELEVANT CONCURRENCES/ DISSENTS	No dissent

Reference To Case Above

While the cases are unanimous, the fact that the Supreme Court is adjudicating policy issues with per curiam summary dispositions is significant.

1958 - CASE 8	
CASE	Page v. United States
CITE	359 US 116
FORM	cert GVR
FUNCTION	error correction of lower court , S.G. confession of error, individual justice
TOPIC	petitioner's right to appeal in forma pauperis
RELEVANT CONCURRENCES/ DISSENTS	Solicitor General's memo suggesting that prisoner has right to appeal in forma pauperis No dissent

1958 Cases (Cases 9 - 10)

1958 - CASE 9	
CASE	National Association for the Advancement of Colored People v. Alabama Ex. Rel. Patterson
CITE	360 US 240
FORM	cert. granted reversed / writ of mandamus denied * see below
FUNCTION	error correction slap on wrist; justice issue for NAACP membership lists
TOPIC	whether NAACP can be held in contempt for failing to produce membership rolists in court
RELEVANT CONCURRENCES/DISSENTS	Supreme Court had already reversed a contempt ruling state court again affirmed conviction per curiam 357 US 449 had remanded for "proceedings not inconsistent with " our decision. Had reviewed before. Supreme Court of Alabama again affirmed contempt adjudication p241 and concluded that this Court was 'mistaken'...p 242 In these circumstances the Alabama Supreme Court is foreclosed from re-examining the grounds of our disposition. ' Whatever was before the Court, and is disposed of, is considered as finally settled.' .. We assume that the State Supreme Court,thus advised,will not fail to proceed promptly with the disposition of the matters ... and therefore, deny petitioner's application ... for a writ of mandamus" p 244-245 - No dissents

Reference To Case Above

Again, note the bravado with which the lower court defied the Supreme Court, calling it "mistaken".

1958 - CASE 10	
CASE	National Association for the Advancement of Colored People, Inc., v. Bennett, Attorney General of Arkansas, et al.
CITE	360 US 471
FORM	appeal judgment vacated and remanded in light of <u>Harrison v. NAACP</u> ante p 167
FUNCTION	policy issue in dispute, error correction in light of coterminous decision
TOPIC	"When the validity of a state statute, challenged under the United States Constitution, is properly adjudicated before a United States District Court, reference to the state courts for construction of the statute should not automatically be made. Light of <u>Harrison v. NAACP</u> ante p 167
RELEVANT CONCURRENCES/DISSENTS	Justice Douglas, Chief Justice and Brennan dissenting ..."the court should be directed to pass on the constitutional issues presented without prior reference to the state courts" p 471 3 dissents

1958 Cases (Case 11)

1958 - CASE 11	
CASE	Cofield v. United States
CITE	360 US 472
FORM	cert GVR
FUNCTION	error correction of lower court, individual justice issue
TOPIC	prisoner can withdraw plea of guilty and plea anew
RELEVANT	Solicitor General, Assistant Attorney General
CONCURRENCES/ DISSENTS	" Mr. Justice Clark and Mr. Justice Harlan dissent, believing that this case should not be disposed of without plenary consideration." p472. 2 dissents

Reference To Case Above

This case raises the spectre of partisan influences on the Court when the Supreme Court and Attorney Court are submitting amicus curial briefs. This is exarcebated by the fact that the petitioners themselves are not even being accorded the same opportunity.

All the more troubling are recent revelations by the current United States Supreme Court Chief Deputy Clerk, Frank Lorson, who has suggested that is "is not unusual to find whole paragraphs lifted from amicus by an authoring Justice" (oral symposium on C-SPAN, 5/30/98, 6:45 pm CCT).

1962 Cases (Cases 1 - 2)

1962 - CASE 1	
CASE	Paccione v. Heritage, Warden
CITE	371 US 17
FORM	cert. GVR for further proceedings according petitioner an opportunity to present oral argument on merits of appeal
FUNCTION	individual justice policy
TOPIC	petitioner is to be accorded the opportunity to present oral argument on the merits of his appeal, either personally or through counsel to the same extent as such opportunity is accorded to the United States Attorney p17
RELEVANT CONCURRENCES/ DISSENTS	SG and Assistant Attorney General for respondent No dissent

1962 - CASE 2	
CASE	United States v. Haley
CITE	371 US 18
FORM	motion for leave to petition for writ of mandamus granted / petition for writ of mandamus granted
FUNCTION	error correction sets policy role and precedential role for per curiam adjudications slap on wrist
TOPIC	District Court for the Northern District of Texas defied SC ruling
RELEVANT CONCURRENCES/ DISSENTS	The order of the District Court ..evidently rests on a misperception of the scope and effect of this Court's per curiam opinion on the Government's earlier appeal, 358 US 644. ...In light of the issues tendered in the papers filed on that appeal there can be no doubt that this Court's judgment finally established the Government's right to the relief sought in this action.... More particularly, this Court then necessarily decided (1) that it had jurisdiction over such appeal; ... The District Court erred in believing that it was not foreclosed from inquiring into this Court's jurisdiction...p 19 The District Court's error should be rectified without delay, and we think the proper means for accomplishing this is by mandamus p20

Reference To Case Above

This case betrays an underlying theme which will be revisited in the implications chapter: what is the precedential value of a per curiam summary disposition?

The Court has said these adjudications do not carry the same weight as plenary opinions. Clearly, though, the District Court in this case de-emphasized such a judgement at its own peril.

1962 Cases (Cases 3 - 4)

1962 - CASE 3	
CASE	Walton v. Arkansas
CITE	371 US 28
FORM	cert GVR in light of Hamilton v. Alabama 368 US 52
FUNCTION	error correction in light of coterminous decision; individual justice
TOPIC	involuntary confession rendered absent counsel
RELEVANT CONCURRENCES/ DISSENTS	wrote out this trad GVR 2 pages instead of 1 sentence for emphasis No dissents

1962 - CASE 4	
CASE	Loannou v. New York et al
CITE	371 US 30
FORM	appeal dismissed for want of a substantial federal question
FUNCTION	pro-prosecutorial policy anti-justice
TOPIC	whether state of NY can deny benefits to a Czech citizen. Majority holds yes over vehement dissent that state cannot fashion foreign policy
RELEVANT CONCURRENCES/ DISSENTS	Douglas and Black dissent "I think this appeal presents substantial federal questions and probable jurisdiction should be noted." p 30... "Admittedly, the several States have traditionally regulated the descent and distribution of estates within their boundaries. This does not mean, however, that their regulations must be sustained if they impair the effectiveness of the Nation's foreign policy. " P32 "Czec is a sovereign state." p30 - 2 dissent

Reference To Case Above

This is one of only a few instances in which I coded the case on the argument of the dissent as opposed to the majority. The dissent's contention did seem to be the most accurate presentation of the function the case would serve.

1962 Cases (Cases 5 - 7)

1962 - CASE 5	
CASE	Wetzel v. Ohio
CITE	371 US 62
FORM	motion to substitute the administratrix of his estate is granted and appeal is dismissed for want of a substantial federal question
FUNCTION	policy individual justice
TOPIC	whether wife of deceased appellant can be substituted and maintain appeal SC had traditionally not passed if only cost issue remains but changed policy here
RELEVANT CONCURRENCES/ DISSENTS	Clark, Harlan, Stewart dissent arguing that the appeal abated on the death of appellant 3 dissents

1962 - CASE 6	
CASE	Ex Parte George
CITE	371 US 72
FORM	cert GVR for proceedings not inconsistent with this opinion
FUNCTION	error correction of lower court individual justice
TOPIC	whether petitioner's peaceful picketing was protected under Art. 7 of the NLRA SC holds that it is
RELEVANT CONCURRENCES/ DISSENTS	essentially presented case of Texas Supreme Court and said "We disagree" p 73 No dissent

1962 - CASE 7	
CASE	Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.
CITE	371 US 215
FORM	cert GVR
FUNCTION	error correction of Court of Appeals; individual justice issue
TOPIC	District Court granted a 30-day extension, Court of Appeals ignored it and said appeal untimely
RELEVANT CONCURRENCES/ DISSENTS	Harlan dissents that case does not reach requirements for review under Rule 19 p217 1 Dissent

1962 Cases (Cases 8 - 10)

1962 - CASE 8	
CASE	Arian's Department Store of Louisville, Inc., et. al. v. Kentucky
CITE	371 US 218
FORM	appeal motion to dismiss is granted and appeal is dismissed for want of a substantial federal question
FUNCTION	pro-prosecutorial policy to uphold Sunday closing laws
TOPIC	Sunday closing laws
RELEVANT CONCURRENCES/ DISSENTS	Douglas says deprived individuals of justice and forces the faith of a majority on the minority in violation of First Amendment p218-219 1 dissent

1962 - CASE 9	
CASE	Riddell, District Director of Internal Revenue, v. Monolith Portland Cement Co.
CITE	371 US 537
FORM	cert GR
FUNCTION	reinforce policy and interpretation of IRC Code of 1939
TOPIC	mining allowance must be based on product of mining not final product (limestone mined and used in cement)
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1962 - CASE 10	
CASE	Schneider v. Rusk, Secretary of State
CITE	372 US 224
FORM	cert GVR
FUNCTION	individual justice; error correction of District Court slap on wrist
TOPIC	whether three-judge panel should be convened answer is yes since petitioner seeks injunction against act of Congress
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1962 Cases (Cases 11 - 13)

1962 - CASE 11	
CASE	National Motor Freight Traffic Association, Inc., et al v. United States et al.
CITE	372 US 246
FORM	petition for rehearing denied
FUNCTION	policy more lenient standard of establishing standing to sue, but upheld on merits of particular case justice for future petitioners
TOPIC	standing to sue ICC - made lenient for future petitioners
RELEVANT CONCURRENCES/DISSENTS	No dissent

1962 - CASE 12	
CASE	Harrison v. Missouri Pacific Railroad Co.
CITE	372 US 248
FORM	cert GRR
FUNCTION	individual justice; error correction of Appellate Court ; policy
TOPIC	whether Appellate Court can override jury answer no
RELEVANT CONCURRENCES/DISSENTS	No dissent

1962 - CASE 13	
CASE	Brotherhood of Locomotive Engineers et. al. V. Baltimore & Ohio Railroad Co. et. al.
CITE	372 US 284
FORM	cert granted and judgment affirmed
FUNCTION	clarify policy regarding Railway Labor Act
TOPIC	government role in settling labor disputes is limited
RELEVANT CONCURRENCES/DISSENTS	per curiam p 290 "No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration." No dissent

1962 Cases (Cases 14 - 16)

1962 - CASE 14	
CASE	Williams v. Zuckert, Secretary of the Air Force, et al.
CITE	372 US 765
FORM	rehearing granted; order dismissing writ of cert. vacated; judgment of Court of Appeals vacated, case remanded
FUNCTION	error correction of Court of Appeals; individual justice
TOPIC	petitioner may have witnesses unless untimely request
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1962 - CASE 15	
CASE	Johnson v. Virginia
CITE	373 US 61
FORM	cert GRR
FUNCTION	error correction and individual justice
TOPIC	convicted for contempt for sitting in white section of courtroom
RELEVANT CONCURRENCES/ DISSENTS	per curiam " Such a conviction cannot stand, for it is no longer open to question that a State may not constitutionally require segregation of public facilities." P 62 No dissents

1962 - CASE 16	
CASE	Alabama et. al. V. United States et. al.
CITE	373 US 545
FORM	motion for leave to file proposed bill of complaint, as amended, denied
FUNCTION	policy justice minorities
TOPIC	stationing of military in Birmingham area causing adverse affects on citizens answers no
RELEVANT CONCURRENCES/ DISSENTS	President has full authority under 10U.S. C. Art.333 to engage in preparatory measures.P545 no relief No dissent

1966 Cases (Cases 1 - 3)

1966 - CASE 1	
CASE	Black v. United States
CITE	385 US 26
FORM	rehearing and cert. granted
FUNCTION	policy regarding wiretapping; individual justice; not error correction because based on confession of error
TOPIC	wiretapping conversations including attorney-client discussions demands retrial
RELEVANT CONCURRENCES/ DISSENTS	Harlan and Stewart dissenting: suggests that in a case "without even briefing or argument" the Court is making new policy requiring automatic retrial if attorney conversations are heard They oppose this "sweeping innovation in the federal criminal law which "puts the cart before the horse" p31 2 dissents

1966 - CASE 2	
CASE	Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co. et al.
CITE	385 US 32
FORM	appeal dismissed
FUNCTION	pro-prosecutorial; change in policy regarding untimely appeals
TOPIC	by its own admission the SC had "been generous in excusing errors of counsel" p 32 but here states new policy of being strict "if there are to be rules, there must be some limit to our willingness to overlook their violation." p 32
RELEVANT CONCURRENCES/ DISSENTS	Black dissents, "If a pound of flesh is required because of negligence of a lawyer, why not impose the penalty on him and not his innocent client?" p 34 1 dissent

Reference To Case Above

This is the first of several changes in the procedure announced by the Court in per curiam summary dispositions.

1966 - CASE 3	
CASE	O'Connor v. Ohio
CITE	385 US 92
FORM	Cert GR
FUNCTION	slap on wrist; error correction; individual justice
TOPIC	prosecutor's comment about defendant's refusal to testify violated his constitutional right to remain silent p92
RELEVANT CONCURRENCES/ DISSENTS	The SC had already remanded the case but the Ohio SC again upheld conviction on the basis that the defendant did not object to the comment at the time. The SC concludes, we "reverse the judgment of the SC of Ohio," p 93 No dissent

1966 Cases (Cases 4 - 6)

1966 - CASE 4	
CASE	Unites States v. Saskatchewan Minerals.
CITE	385 US 94
FORM	appeal judgment vacated and remanded
FUNCTION	error correction
TOPIC	District Court erred in setting aside ICC's dismissal of appellee's complaint and additionally barring ICC from reopening proceedings to acquire more evidence
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1966 - CASE 5	
1966 CASE	Schipani v. Unites States.
CITE	385 US 372
FORM	petition for rehearing granted; order of this Court denying cert is vacated, case remanded
FUNCTION	self error correction; individual justice
TOPIC	petitioner should get rehearing "Upon the suggestion of the Solicitor General..." p372
RELEVANT CONCURRENCES/ DISSENTS	No dissents

1966 - CASE 6	
CASE	McLeod, Regional Director, National Labor Relations Board v. General Electric Co. et al.
CITE	385 US 533
FORM	cert granted, set aside, and remanded
FUNCTION	correcting errors of both District Court and Court of Appeals
TOPIC	District Court and Court of Appeals disputing NLRB Art. 10 Sec j SC holds this debate "immaterial". Real issue is appropriateness of injunctive relief
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1966 Cases (Cases 7 - 8)

1966 - CASE 7	
CASE	Kilgarlin et al. V. Hill, Secretary of State of Texas, et. al.
CITE	386 US 120
FORM	appeal reversed in part and remanded
FUNCTION	error correction; apportionment policy; individual justice issues
TOPIC	District Court erred in part by suggesting that gross deviations were justified by respect for County lines
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1966 - CASE 8	
CASE	Swenson, Warden v. Bosler.
CITE	386 US 258
FORM	cert granted, affirmed
FUNCTION	policy
TOPIC	Court of Appeals -- "We agree with" p259 right to counsel for indigent appellees
RELEVANT CONCURRENCES/ DISSENTS	"It is now settled ' that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request'." p 260 No dissent

Reference To Case Above

Note that this case was coded policy. It became clear that several cases, though not the first instance of a policy judgement, were solely geared around reiterating, emphhasizing, or clarifying a policy.

1966 Cases (Cases 9 - 11)

1966 - CASE 9	
CASE	Hoffa et al .v. United States.
CITE	387 US 231
FORM	cert GVR
FUNCTION	further delineates policy of wiretapping; individual justice
TOPIC	retial not required if attorney-client conversations not used or not relevant to convictions
RELEVANT CONCURRENCES/ DISSENTS	"We do not accept the Solicitor General's suggestion that such an inquiry should be confined to the conviction of [only one of the defendants]" p 233. Each petitioner's conviction was ordered reviewed for relation between conviction and said conversations. 1 dissent

1966 - CASE 10	
CASE	Jacobs v. New York
CITE	388 US 431
FORM	appeal motion to dismiss granted and appeal dismissed as moot
FUNCTION	policy; pro-prosecutorial anti-justice
TOPIC	if time has expired for suspended sentences to be invoked can appeal be ruled automatically moot? - Court says yes
RELEVANT CONCURRENCES/ DISSENTS	Warren dissents says that under this policy " A State could thus keep a person under continual threat of imprisonment without review by this Court of any constitutional objections to his convictions by a continued series of convictions and suspended sentences." 432. Douglas dissents that they have no recourse to recoup property seized if no appeal is ever allowed 2 dissent

Reference To Case Above

This was the second instance in which I coded the function in accord with the dissent. Their contention regarding the impact on future petitioners is well-taken.

1966 - CASE 11	
CASE	Sandoval v. Utah
CITE	388 US 463
FORM	cert GVR
FUNCTION	error correction; individual justice policy confession of error
TOPIC	suggestion by Attorney General that petitioner in juvenile cases is entitled to transcripts at expense of County
RELEVANT CONCURRENCES/ DISSENTS	No dissent

Appendix L
Burger Court Cases

1970 Cases (Cases 1 - 3)

1970 - CASE 1	
CASE	U.S. v. Maryland Savings-Share Insurance Corp.
CITE	400 US 4
FORM	appeal reversed
FUNCTION	error correction
TOPIC	District Court decision was "error" p 6 Internal Revenue Code of 1954 exempts certain corp.-doesn't discriminate against others.
RELEVANT CONCURRENCES/ DISSENTS	Harlan "considering that the issues in this case are deserving of plenary consideration would set the case for oral argument" p7 1 dissent

1970 - CASE 2	
CASE	US et al v. City of Chicago
CITE	400 US 8
FORM	appeal reversed and remanded
FUNCTION	policy
TOPIC	does ICC Act require notice of discontinuance - no
RELEVANT CONCURRENCES/ DISSENTS	Harlan, Black joins ... " my point is simply that, without briefs and oral argument by the parties on the merits of the question, I would refrain from choosing between the conflicting constructions." p 15 "I think these cases do not lend themselves to summary disposition" p 11 2 dissent

1970 - CASE 3	
CASE	Lines v. Frederick et al
CITE	400 US 18
FORM	cert. granted and affirmed
FUNCTION	policy; individual justice
TOPIC	Courts of Appeals in conflict over whether bankrupt wage earners vacation pay is property under bankruptcy laws - SC says no
RELEVANT CONCURRENCES/ DISSENTS	Chief Justice would deny petition Harlan "In my view this case is another instance in which the pressure of an overcrowded docket has led the Court to deal summarily with an issue which, if deserving of our attention at all, is deserving of full-dress treatment. Moreover, the Court disposes of the case despite the opaqueness of the record and the uncertainty with regard to relevant California law." p 21 1 dissent

1970 Cases (Cases 4 - 5)

Reference To 1970-Case 3 (on previous page)

This dissent heralds a theme which runs throughout the remainder of the cases.

The Justices are aiming their opposition not at the construction of the case, but at the use of per curiam summary dispositions. An interesting point, though, is that the different Justices dissent at different times. It seems, then, that even those Justices who are in some or most instances vehemently opposed to the per curiam summary dispositions, will, in other instances, join such a ruling.

1970 - CASE 4	
CASE	Odom v. U.S.
CITE	400 US 23
FORM	dismissed as improvidently granted
FUNCTION	policy
TOPIC	retroactivity of North Carolina v. Pearce 395 US 711
RELEVANT CONCURRENCES/ DISSENTS	Douglas

1970 - CASE 5	
CASE	Fornaris v. Ridge Tool Co. , et al
CITE	400 US 41
FORM	Appeal dismissed; cut GRR
FUNCTION	policy
TOPIC	Title 28 USC provides for appeal from court of appeals' judgement invalidatory state statute does not include Puerto Rico
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1970 Cases (Cases 6 - 7)

1970 - CASE 6	
CASE	Arnold Tours v. Camp
CITE	400 US 45
FORM	GVR
FUNCTION	error correction for second time has already ruled and Court had affirmed its previous errant decision - slap on wrist
TOPIC	Comptroller relief for travel agents against national banks - Bank Services Corporation Act
RELEVANT CONCURRENCES/ DISSENTS	Chief Justice and Harlan would set the case for oral argument No dissent

Reference To Case Above

Note that the Justices indicate that they would prefer the case be "set for oral argument," but they did not submit separate dissents. This happenstance was rare in the Warren and burger eras, but it was typical of half of all per curiam summary dispositions in the Rehnquist era. This begs the question whether the dissent rates discussed in the implications chapter is artificially low for the Rehnquist era. Possibly, dissents were replaced over time by such statements.

1970 - CASE 7	
CASE	Kennerly, et. al v. District of the Ninth Judicial District of Montana, et. al
CITE	400 US 423
FORM	GVR
FUNCTION	policy
TOPIC	civil jurisdiction of an Indian reservation
RELEVANT CONCURRENCES/ DISSENTS	Stewart, White "Before deciding this case, the Court requested the SG to submit the views of the US, whose law the Court now interprets as controlling. I should have thought the most basic principles of fair play would dictate a like request to the Blackfeet Tribal Council before the Court strikes down this law as invalid." 2 dissent

1970 Cases (Cases 8 - 10)

1970 - CASE 8	
CASE	Durham v. U.S.
CITE	401 US 481
FORM	GVR
FUNCTION	justice / error correction
TOPIC	one court out of line with consistent lower court rulings death pending review of conviction abates "cause" p483
RELEVANT CONCURRENCES/ DISSENTS	Marshall, CJ, Stewart would dismiss as moot 1 dissent

1970 - CASE 9	
CASE	Kitchens v. Smith, Warden
CITE	401 US 847
FORM	GVR
FUNCTION	justice / error correction
TOPIC	Gideon is retroactive
RELEVANT CONCURRENCES/ DISSENTS	"as we have often noted" page 847

1970 - CASE 10	
CASE	Connor et. al v. Johnson et. al
CITE	402 US 690
FORM	stay granted
FUNCTION	policy
TOPIC	apportionment policy extends filing date for candidates preferring single-member districts
RELEVANT CONCURRENCES/ DISSENTS	Black, CJ, Harlan "plunges into an unfamiliar arena & creates utter confusion" "astounding since this Ct. has consistently approved multi-member districts." p694 3 dissents

1970 Cases (Cases 11 - 13)

1970 - CASE 11	
CASE	Hunter v. Tennessee
CITE	403 US 711
FORM	GVR
FUNCTION	justice / error correction
TOPIC	TN code in conflict with <u>Witherspoon vs. Illinois</u> 391 US 510 which does not limit bills of exception to 90 days
RELEVANT CONCURRENCES/ DISSENTS	1 dissent

1970 - CASE 12	
CASE	Simpson v. Florida
CITE	403 US 384
FORM	cert GVR
FUNCTION	individual justice; error correction, policy
TOPIC	<u>Ashe v. Swenson</u> 397 US 436 doesn't allow " double collateral estoppel-that is Double Jeopardy"
RELEVANT CONCURRENCES/ DISSENTS	2 dissent

1970 - CASE 13	
CASE	Keyes v. School District No.1
CITE	403 US 711
FORM	Stay vacated
FUNCTION	policy; individual justice
TOPIC	cases had been held pending <u>Swann</u> knew these have been announced
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1974 Cases (Cases 1 - 3)

1974 - CASE 1	
CASE	U.S. v. Michigan National Corp. et. al
CITE	419 US 1
FORM	Appeal VR
FUNCTION	policy
TOPIC	DC action was in error in interpretation of Bank Merger Act
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1974 - CASE 2	
CASE	U.S. v. American Friends Service Committee, et. al
CITE	419 US 7
FORM	appeal reversed in part.
FUNCTION	pro-prosecutorial; policy; error correction
TOPIC	conscientious objectors sought injunction against taxing their wages because profit used for military - violates Anti-Injunction Act
RELEVANT CONCURRENCES/ DISSENTS	Douglas dissents as violation of freedom of religion 1 dissent

1974 - CASE 3	
CASE	Ring v. U.S.
CITE	419 US 18
FORM	GVR
FUNCTION	confession of error SG; individual justice
TOPIC	whether conviction on 2 counts had been dropped in exchange for testimony
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1974 Cases (Cases 4 - 5)

1974 - CASE 4	
CASE	Daniel v. Louisiana
CITE	420 US 31
FORM	Appeal affirmed
FUNCTION	policy; pro-prosecutorial
TOPIC	is <u>Taylor v. Louisiana</u> 419US 522 retroactive / representative petit jury No - required representative
RELEVANT CONCURRENCES/ DISSENTS	Douglas dissents, "If we sought equal justice for all we would either make all of our constitutional decision retroactive or all of them prospective only." 1 dissent

Reference To Case Above

The topic of retroactivity was one which recurred in the Warren and Burger cases. Many policies were held retroactive, while others were not. There was seemingly no established pattern of what criterion warranted retroactive application.

1974 - CASE 5	
CASE	Estelle, Corrections Director v. Dorough
CITE	420 US 534
FORM	Granted cert. reversed
FUNCTION	pro-prosecutorial, policy
TOPIC	automatic dismissal of appeal for prison escapees does not violate equal protection
RELEVANT CONCURRENCES/ DISSENTS	Stewart, Brennan, Marshall: is in violation because they are punished after caught; retroactively 3 dissent

1974 Cases (Cases 6 - 8)

1974 - CASE 6	
CASE	Cox, Former Assistant Director For Treatment, Virginia Division of Corrections, et. al. V. Cook
CITE	420 US 734
FORM	Cert GR
FUNCTION	error correction; policy; pro-prosecutorial
TOPIC	Wolff v. McDonnell 418 US 539 not retroactive-notice to prisoners prior to confinement for misconduct
RELEVANT CONCURRENCES/ DISSENTS	"we expressly rejected the holding of the Court of Appeals in that case" 736 SC had already ruled on retroactive & rejected it. No dissent

1974 - CASE 7	
CASE	Pitchess, Sheriff v. Davis
CITE	421 US 482
FORM	cert. GRR
FUNCTION	policy; pro-prosecutorial; error correction
TOPIC	No relief to state convict if state route not exhausted
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1974 - CASE 8	
CASE	Conner et. al. v. Waller, Governor of Mississippi, et. al.
CITE	421 US 656
FORM	appeal reversed
FUNCTION	slap on wrist; error correction
TOPIC	Voting Rights Act
RELEVANT CONCURRENCES/ DISSENTS	Mississippi does have to submit to Voting Rights Act No dissent

1978 Cases (Cases 1 - 3)

1978 - CASE 1	
CASE	Long Island Railroad Co. v. Aberdeen and Rockfish Railroad Co. et al
CITE	439 US1
FORM	Cert granted, reversed in part and remanded
FUNCTION	error correction
TOPIC	Court of appeals exercised authority congress did "not even repose in the ICC"
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1978 - CASE 2	
CASE	Carey, State's Attorney of Cook County, Illinois v. Wynn et al
CITE	439 US 8
FORM	appeal dismissed
FUNCTION	policy/error correction
TOPIC	Supreme Court has no jurisdiction over three judge rulings appealable only to Ct. of Appeals
RELEVANT CONCURRENCES/ DISSENTS	appealable No dissent

1978 - CASE 3	
CASE	National Labor Relations Board v. Baylor University Medical Center
CITE	439 US 9
FORM	cert. granted in part, vacated in part and remanded
FUNCTION	error correction says majority
TOPIC	wrong construction of a case NLRB non-solicitation rule
RELEVANT CONCURRENCES/ DISSENTS	Brennan, White, Marshall dissent in part because the facts are in dispute so cannot in effect rule on the merits 3 dissents

1978 Cases (Cases 4 - 6)

1978 - CASE 4	
CASE	Presnell v. Georgia
CITE	439 US 14
FORM	granted in part reversed in part and remanded
FUNCTION	Justice
TOPIC	sentencing enhancement in violation of due process if based on underlying charge for which a conviction was not properly obtained
RELEVANT CONCURRENCES/ DISSENTS	Powell, Chief Justice, and Rehnquist dissent, p 23 "Because the question is substantial and was not resolved by the court below, I would remand the case for clarification." 4 dissent

1978 - CASE 5	
CASE	Union Pacific Railroad Co. v. Sheehan
CITE	459 US 89
FORM	Cert. granted and reversed
FUNCTION	error correction/ pro
TOPIC	National Railroad Adjustment board's determination that a petition was untimely is not to be disturbed by District Court or Court of Appeals
RELEVANT CONCURRENCES/ DISSENTS	Brennan Marshall concur No dissent

1978 - CASE 6	
CASE	Leis et al v. Flynt et al
CITE	439 US 438
FORM	Granted reversed and remanded
FUNCTION	pro-prosecutorial; policy
TOPIC	the Constitution did not obligate Ohio to accord out of state attorneys procedural privileges
RELEVANT CONCURRENCES/ DISSENTS	White would grant cert. and set for argument Stevens, Brennan, Marshall dissent, "Such reversals are egregiously improvident when the Court is facing a novel constitutional question." p 458 "This surely is not a case that should be decided before respondents have been given an opportunity to address the merits. Summary reversal 'should be reserved for palpably clear cases of ...error'" p 457 "Accordingly, I dissent from the Court's summary disposition of a question of great importance to the administration of justice." p 458 3 dissent

1978 Cases (Cases 7 - 8)

Reference To 1978-Case 6 (on previous page)

Marshall would frequently assert that any harm brought by per curiam summary dispositions could be mitigated by allowing the parties to submit briefs on the merits - even though oral argument would still be omitted. He could never garner support in this vane on the Court, but the leading authority on per curiam summary dispositions at the time, the aforementioned Professor Arthur D. Hellman, would also laud this remedy.

1978 - CASE 7	
CASE	Harlin v. Missouri
CITE	439 US 459
FORM	GVR
FUNCTION	justice; error correction; policy
TOPIC	retroactivity of <u>Duren v. Missouri</u> ante. p357 which disallows exclusion of women from jury selection - Yes - retroactive
RELEVANT CONCURRENCES/ DISSENTS	1 dissent

1978 - CASE 8	
CASE	Lee v. Missouri
CITE	439 US 461
FORM	GVR of several cases
FUNCTION	justice; error correction; policy
TOPIC	all judgments affirming convictions against claim of fair cross-section based on exclusion of women are vacated p 461
RELEVANT CONCURRENCES/ DISSENTS	1 dissent

1978 Cases (Cases 9 - 11)

1978 - CASE 9	
CASE	Board of Trustees of Keene State college et al v. Sweeney
CITE	439 US 24
FORM	GVR
FUNCTION	error correction; justice
TOPIC	cannot have a heavier burden of proving prima facie case of discrimination than outlined in <u>Turnco Construction Co. v. Waters</u> 438 US 567
RELEVANT CONCURRENCES/ DISSENTS	Stevens, Brennan, Marshall, Stewart dissent "such action should not be taken unless the intervening decision has shed new light on the law which might have led to a different result." p26 - 4 dissent

1978 - CASE 10	
CASE	Harrah Independent School District et al v. Martin
CITE	440 US 194
FORM	Cert. granted, reversed
FUNCTION	policy/pro-prosecutorial
TOPIC	does continuing education requirement for tenured teachers violate due process: no don't lose job, just raises
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1978 - CASE 11	
CASE	Anders, Solicitor of Richland County v. Floyd
CITE	440 US 445
FORM	appeal VR
FUNCTION	policy; pro-prosecutorial
TOPIC	District Court enjoined abortion prosecution.
RELEVANT CONCURRENCES/ DISSENTS	Per curiam <u>Roe v. Wade</u> 410 US 113 "potential, rather than actual, survival of the fetus....: p445

1978 Cases (Cases 12 - 13)

Reference To 1978-Case 11 (on previous page)

This is not the only per curiam summary disposition which adjudicated abortion policy, but it is the sole case in the Terms I am investigating. This could have been an early prophecy of future plenary limitations on Roe v. Wade for the careful Court follower.

1978 - CASE 12	
CASE	Chase Manhattan Bank, N.A. et al v. Finance Administration of City of New York
CITE	440 US 447
FORM	cert. GR
FUNCTION	policy
TOPIC	NY taxing federal bank as state bank
RELEVANT CONCURRENCES/ DISSENTS	McCulloch v. Maryland 4 Wheat 316 No dissent

1978 - CASE 13	
CASE	Smith et al v. Arkansas State Highway employees Local 1315 et al
CITE	441 US 463
FORM	Cert. granted, reversed
FUNCTION	policy/pro-prosecutorial
TOPIC	no constitutional violation by Arkansas in refusing to hear grievances filed by union instead of individual
RELEVANT CONCURRENCES/ DISSENTS	Marshall dissents, "Now this Court is deciding vital Constitutional questions without even a plenary hearing. I dissent." p 466 "I decline to join a summary reversal that so cavalierly disposes of substantial First Amendment issues." p 467 "Moreover, summary reversal seems to me an especially inappropriate means of resolving conflicts between the U.S. Courts of Appeals." 467 1 dissent

1978 Cases (Cases 14 - 15)

1978 - CASE 14	
CASE	Wilkins v. US
CITE	441 US 468
FORM	GVR
FUNCTION	justice; error correction; confession of error
TOPIC	error correction as "suggested by the SG" to allow a defendant to file claims lawyer said he had filed but did not
RELEVANT CONCURRENCES/ DISSENTS	1 dissent

1978 - CASE 15	
CASE	Great Western Sugar Co. v. Nelson
CITE	442 US 92
FORM	GVR
FUNCTION	error correction; justice
TOPIC	Court of Appeals "erred" in upholding District Court over arbitration ruling
RELEVANT CONCURRENCES/ DISSENTS	Stevens dissent, "If we have time to grant cert. for the sole purpose of correcting highly technical and totally harmless errors, one might reasonably (but incorrectly) infer that we have more than enough time to dispatch our more important business." p94 1 dissent

Reference To Case Above

Stevens here offers one of his enduring objections to per curiam summary dispositions. His objections are dual. He contends that the type of adjudication is unfair to petitioners. Additionally, though, he launches an attack on the Court itself because he feels that this is an inefficient administration of the Court's caseload.

1978 Cases (Cases 16 - 18)

1978 - CASE 16	
CASE	Green v. Georgia
CITE	442 US 95
FORM	Granted, reversed, and remanded
FUNCTION	justice; error correction
TOPIC	denial of testimony in punishment phase denies due process even if the testimony violates the state's hearsay rules of admission
RELEVANT CONCURRENCES/ DISSENTS	Rehnquist, "Nothing in the United States Constitution gives this Court any authority to supersede a state's code of evidence because its application in a peculiar situation would defeat what this Court conceives to be the ends of 'justice' ." p 98 1 dissent

1978 - CASE 17	
CASE	Morland et. al. v. Sprecher, Judge, United States Court of Appeals for the Seventh Circuit et. al.
CITE	443 US 709
FORM	leave to file writ of mandamus denied
FUNCTION	pro-prosecutorial
TOPIC	petitioners had abused time frame restrained from publishing "H-Bomb" p709
RELEVANT CONCURRENCES/ DISSENTS	2 dissent

1978 - CASE 18	
CASE	Moore v. Duckworth, Warden
CITE	443 US 713
FORM	Cert GA
FUNCTION	policy; po-prosecutorial
TOPIC	Not automatic federal appeal - due process (insanity plea)
RELEVANT CONCURRENCES/ DISSENTS	

1978 Cases (Cases 19 - 20)

1978 - CASE 19	
CASE	Connor et. al. v. Coleman, Judge, United States Court of Appeals, et. al.
CITE	440 US 612
FORM	motion for leave to file petition for wit of mandamus granted
FUNCTION	slap on wrist; error correction
TOPIC	forced reapportionment
RELEVANT CONCURRENCES/ DISSENTS	1 dissent

1978 - CASE 20	
CASE	Connor et. al. v. Coleman, Judge, United States Court of Appeals, et. al.
CITE	441 US 792
FORM	petition for wit of mandamus denied
FUNCTION	restraint
TOPIC	D.C. has forced court ordered plan
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1982 Cases (Cases 1 - 2)

1982 - CASE 1	
CASE	Anderson, Warden v. Harless
CITE	459 US 4
FORM	cert. granted reversed and remanded
FUNCTION	justice; error correction
TOPIC	Court of Appeals in error to suggest habeas relief had been exhausted
RELEVANT CONCURRENCES/ DISSENTS	Stevens, Brennan, Marshall dissent, "But even if I shared the Court's analysis of the exhaustion question in this particular case, I would nevertheless take issue with its decision to grant cert. for the sole purpose of correcting what is considered to be a technical, procedural error. It is not appropriate for this Court to expend its scarce resources crafting opinions that correct errors in cases of only local importance where the correction in no way promotes the development of the law" Footnote attached: "As Justice Rehnquist has reminded us, in 'our zeal to provide'equal justice under law" we must never forget that this Court is not a forum for the correction of errors' Boag v. MacDougall 454 US 364 at 367- 8. "To remain effective, the Supreme court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." This case illustrates how ineffectively the Court is supervising its discretionary docket." 3 dissent

1982 - CASE 2	
CASE	Immigration and Naturalization Services v. Miranda
CITE	459 US 14
FORM	cert. granted and reversed
FUNCTION	pro-prosecutorial; error correction
TOPIC	even if INS negligent, a court cannot stop deportation
RELEVANT CONCURRENCES/ DISSENTS	Marshall, "If the Court believes, as I do not, that this case raises issues of sufficient importance to justify the exercise of our certiorari jurisdiction ... I would at least notify the parties... so that they may have an opportunity to submit briefs on the merits" p12 Stevens concurs but notes that "I fear that the institution of such a practice would tend to regularize and expand the number of our summary dispositions." p49 1 dissent

1982 Cases (Cases 3 - 5)

1982 - CASE 3	
CASE	Wyrick, Warden, Missouri State Penitentiary v. Fields
CITE	459 US 42
FORM	cert. granted reversed and remanded
FUNCTION	pro-prosecutorial; policy
TOPIC	police do not have to re-appraise of rights after they have waived
RELEVANT CONCURRENCES/ DISSENTS	Marshall dissents, " A summary reversal is an exceptional disposition. It should be reserved for situations in which the applicable law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.' p 50* 1 dissent

1982 - CASE 4	
CASE	Griggs, et al v. Provident Consumer Discount Co
CITE	459 US 56
FORM	GVR
FUNCTION	pro-prosecutorial/ policy
TOPIC	1979 amendment to Rules of Appellate Procedure: if appeal is int timely it is as if it does not exist
RELEVANT CONCURRENCES/ DISSENTS	Marshall dissents, " I do not think this is an appropriate vehicle for making new procedural law." p66 1 dissent

1982 - CASE 5	
CASE	Thurston Motor Lines, Inc. v. Jordan K. Rand, LTD
CITE	460 US 533
FORM	granted reversed and remanded
FUNCTION	error correction; slap on wrist
TOPIC	motor freight charges under US Code Louisville & Nashville R. Co. v. Rice 247 US 201 - good law
RELEVANT CONCURRENCES/ DISSENTS	unanimous, "Needless to say, only this Court may overrule one of its precedents. Until that occurs, <u>Rice</u> is the law, and the decision below cannot be reconciled with it." p 535

1982 Cases (Cases 6 - 8)

1982 - CASE 6	
CASE	Cardwell et al v. Taylor
CITE	461 US 571
FORM	granted, reversed, and remanded
FUNCTION	pro-prosecutorial / policy
TOPIC	federal courts cannot consider Fourth amendment claims on state prisoner's habeas appeal, that is job of state court
RELEVANT CONCURRENCES/ DISSENTS	Brennan and Marshall should grant cert. No dissent

1982 - CASE 7	
CASE	Alabama v. Evans
CITE	461 US 230
FORM	application to vacate stay granted
FUNCTION	pro-prosecutorial; policy
TOPIC	eleventh hour appeal
RELEVANT CONCURRENCES/ DISSENTS	Marshall claims relevant law has changed during this appeal 1 dissent

1982 - CASE 8	
CASE	Maggio, Warden v. Fulford
CITE	462 US 111
FORM	cert granted and reversed
FUNCTION	pro-prosecutorial; error correction
TOPIC	Ct. of Appeals substituting its judgment for Louisiana's state ruling is "erroneous" credibility of witnesses
RELEVANT CONCURRENCES/ DISSENTS	Brennan, Stevens dissent, "It is entirely inappropriate to dispose of this case on nothing more than the necessarily limited briefing filed by the parties to date." p 119 Marshall dissent cites Vinson's address that the Court "never has been primarily concerned with the correction of errors in lower court decisions." p121 3 dissent

1982 Cases (Cases 9 - 10)

1982 - CASE 9	
CASE	Illinois v. Batchelder
CITE	463 US 1112
FORM	cert GRR
FUNCTION	policy; pro-prosecutorial; error correction
TOPIC	officer doesn't have to present reasonable cause to vehicle driver
RELEVANT CONCURRENCES/ DISSENTS	3 dissent

1982 - CASE 10	
CASE	California v. Beheler
CITE	463 US 1121
FORM	granted reversed and remanded
FUNCTION	pro-prosecutorial / error correction
TOPIC	Miranda warnings not required unless one is in custodial interrogation as per <u>Oregon v. Mathiason 429 US 492 - Miranda warnings</u>
RELEVANT CONCURRENCES/ DISSENTS	Stevens, Brennan, Marshall dissent "We are far too busy to review every claim of error by a prosecutor who has been unsuccessful in presenting his case to a state appellate court." p 1127 3 dissent

Reference To Case Above

This case is a benchmark in the Court's adjudication. The dissent puts its finger on the trend of "claims of error by a prosecutor". It seems that the individuals seeking review against the government which typified requests in the Warren era had now been replaced by the government seeking review against judges, juries, and defendants.

Appendix M
Rehnquist Court Cases

1986 Cases (Cases 1 - 2)

1986 - CASE 1	
CASE	Rose v. Arkansas State Police, et al
CITE	479 US 1
FORM	cert GVR
FUNCTION	justice; error correction
TOPIC	Supremacy Clause violated by Arkansas reducing widow benefits in light of federal relief
RELEVANT CONCURRENCES/ DISSENTS	Marshall thinks should be plenary decision 1 dissent

1986 - CASE 2	
CASE	Immigration & Naturalization Service v. Hector
CITE	479 US 85
FORM	Cert granted and reversed
FUNCTION	error correction; individual justice
TOPIC	Board of Immigration not required to consider hardship to third party other than spouse parent or child p 85
RELEVANT CONCURRENCES/ DISSENTS	per curiam "Our decision, of course, does not affect the possibility that Hector may be entitled to refile under the amnesty provisions of the newly enacted Immigration Reform & Control Act of 1986, supra." 1 dissent

Reference To Case Above

This case is one in which the ostensive function of the case (which reversed a lower court ruling which had afforded the petitioner judicial relief) was prosecutorial. However, the ruling inexplicably incorporated a footnote which seemed to provide a remedy for the petitioner which would pass both Congressional and judicial scrutiny.

1986 Cases (Cases 3 - 4)

1986 - CASE 3	
CASE	City of Newport, Kentucky, et al v. Iacobucci, DBA Talk of the Town, et al
CITE	479 US 92
FORM	granted reversed and remanded
FUNCTION	policy; pro-prosecutorial
TOPIC	city ordinance prohibiting nude dancing where alcohol is served is constitutional p 92
RELEVANT	Scalia would set for oral
CONCURRENCES/ DISSENTS	Stevens, Brennan dissent " I cannot concur in yet another summary disposition that gives such short shrift to these issues, without even the benefit of briefing on the merits " p103 3 dissent

Reference To Case Above

Scalia frequently indicated that he would set a case for oral argument

although he was not formally listed in dissent. I am unclear as to whether this

means he is presumed to join the per curiam or not.

1986 - CASE 4	
CASE	Rodriguez v. United States
CITE	480 US 522
FORM	Cert GR
FUNCTION	pro-prosecutorial; error correction
TOPIC	sentencing authority under 18 USC 3147
RELEVANT	0 dissent
CONCURRENCES/ DISSENTS	

1986 Cases (Cases 5 - 7)

1986 - CASE 5	
CASE	Truesdale v. Aiken, Warden, et. al.
CITE	480 US 527
FORM	Cert. GR
FUNCTION	policy
TOPIC	retroactivity
RELEVANT CONCURRENCES/ DISSENTS	3 dissent

1986 - CASE 6	
CASE	Montana v. Hall
CITE	481 US 400
FORM	Cert. GRR
FUNCTION	policy; individual justice
TOPIC	ex post facto restriction doesn't bar future related changes
RELEVANT CONCURRENCES/ DISSENTS	relevant 2 dissent

1986 - CASE 7	
CASE	Commissioner of Internal Revenue v. Asphalt Products Co., Inc.
CITE	482 US 117
FORM	Cert. GR
FUNCTION	policy
TOPIC	negligent payment under Tax Code-cut denied
RELEVANT CONCURRENCES/ DISSENTS	relevant 2 dissent

1988 Cases (Cases 1 - 2)

1988 - CASE 1	
CASE	Rhodes et. al. v. Stewart
CITE	488 US 1
FORM	Cert. GR
FUNCTION	error correction; policy; pro-prosectutorial
TOPIC	declaratory judgement automatically mean that party is prevailing
RELEVANT	Marshall, Blackmun, Brennan dissent
CONCURRENCES/ DISSENTS	p4-5 "I continue to believe that it is unfair to litigants and damaging to the integrity and accuracy of this Court's decisions to reverse a decision summarily without the benefit of full briefing on the merits of the question decided. - Relevant

Reference To Case Above

The Court's integrity in the public opinion has not been harmed because per curiam summary dispositions are little known by scholars much less an average citizen.

1988 - CASE 2	
CASE	Pennsylvania v. Bruder
CITE	488 US 9
FORM	Cert. GR
FUNCTION	error correction; pro-prosectutorial
TOPIC	have to be read <u>Miranda</u> roadside prior to custody
RELEVANT	2 dissent
CONCURRENCES/ DISSENTS	

1988 Cases (Cases 3 - 5)

1988 - CASE 3	
CASE	Town of Huntington et. al. V. Huntington Branch, National Association for the Advancement of Colored People, et. al.
CITE	488 US 15
FORM	appeal affirmed
FUNCTION	policy; amicus curial
TOPIC	zoning housing projects only in minority
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1988 - CASE 4	
CASE	Olden v. Kentucky
CITE	488 US 227
FORM	Cert. GRR
FUNCTION	error correction; individual justice
TOPIC	petition denied right to confront witnesses against him <u>Deleware v. Van Arsdall</u> 475 US 673
RELEVANT CONCURRENCES/ DISSENTS	1 dissent

1988 - CASE 5	
CASE	In Re McDonald
CITE	489 US 180
FORM	motion to leave to proceed in forma pauperis, motion denied
FUNCTION	pro-prosecutorial; policy
TOPIC	frivolous petitions
RELEVANT CONCURRENCES/ DISSENTS	4 dissent

1988 Cases (Cases 6 - 8)

1988 - CASE 6	
CASE	Wrenn v. Benson et. al
CITE	490 US 89
FORM	
FUNCTION	pro-prosecutorial
TOPIC	order entered: no future <u>informa</u> pauperis
RELEVANT CONCURRENCES/ DISSENTS	3 dissent

1988 - CASE 7	
CASE	Hildwin v. Florida
CITE	490 US 638
FORM	Cert. GA
FUNCTION	policy; pro-prosecutorial
TOPIC	"Sixth Amendment does not require jury to specify aggravating factors that permit the imposition of capital punishment" p638
RELEVANT CONCURRENCES/ DISSENTS	2 dissent

1988 - CASE 8	
CASE	Powell v. Texas
CITE	492 US 680
FORM	Cert. GR
FUNCTION	slap on wrist; error correction; individual justice
TOPIC	"cannot be submitted to psychiatric exam to evaluate future dangerousness without being informed of right to remain silent & that can be used against them" p 681
RELEVANT CONCURRENCES/ DISSENTS	The Texas Court reinstated after SC vacated. "We now... reverse judgement of the Court of Criminal Appeals. p681

1990 Cases (Cases 1 - 3)

1990 - CASE 1	
CASE	Shell v. Mississippi
CITE	498 US 1
FORM	Cert. GRR
FUNCTION	error correction; individual justice
TOPIC	To the extent that the Mississippi Supreme Court relied on the "especially heinous, atrocious or cruel" aggravating factor in affirming petitioner's death sentence, its decision reversed.
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1990 - CASE 2	
CASE	Temple v. Synthes Corp., Ltd.
CITE	498 US 5
FORM	Cert. GRR
FUNCTION	policy; individual justice; error correction
TOPIC	Court abused its discretion in ordering them joined as defendants and in dismissing the action when Temple failed to comply with the Court's order.
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1990 - CASE 3	
CASE	Cage v. Louisiana
CITE	498 US 39
FORM	Cert. GRR
FUNCTION	error correction; individual justice
TOPIC	grave uncertainty violates "reasonable doubt"
RELEVANT CONCURRENCES/ DISSENTS	

1990 Cases (Cases 4 - 6)

1990 - CASE 4	
CASE	Langenkamp, Successor Trustee of the Bankruptcy Estates of Republic Trust & Savings Co. et. al. v. Culp et. al.
CITE	498 US 42
FORM	Cert. GRR
FUNCTION	error correction; policy
TOPIC	creditors get trial unless claim under chapter 11
RELEVANT CONCURRENCES/ DISSENTS	

1990 - CASE 5	
CASE	Palmer et. al. v. BRG of Georgia, Inc. et. al.
CITE	498 US 46
FORM	Cert. GRR
FUNCTION	error correction; pro-prosecutorial
TOPIC	profit sharing in violation of anti-trust
RELEVANT CONCURRENCES/ DISSENTS	1 dissent

1990 - CASE 6	
CASE	In Re Sindram
CITE	498 US 177
FORM	Motion denied
FUNCTION	pro-prosecutorial
TOPIC	frivolous filings
RELEVANT CONCURRENCES/ DISSENTS	3 dissent

1990 Cases (Cases 7 - 9)

1990 - CASE 7	
CASE	In Re Berger
CITE	498 US 233
FORM	Motion granted
FUNCTION	policy; individual justice
TOPIC	attorney fee raised to \$5000.00
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1990 - CASE 8	
CASE	Freeport-McMoran Inc. v. K N Energy, Inc.
CITE	498 US 426
FORM	Cert. GR
FUNCTION	policy; error correction
TOPIC	diversity jurisdiction not defeated by addition of nondiverse party
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1990 - CASE 9	
CASE	Lozada v. Deeds, Warden
CITE	498 US 430
FORM	Cert. GRR
FUNCTION	error correction; individual justice
TOPIC	showing of ineffective council was met
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1990 Cases (Cases 10 - 12)

1990 - CASE 10	
CASE	Burden v. Zant, Warden
CITE	498 US 433
FORM	Cert. GRR
FUNCTION	error correction; individual justice
TOPIC	conflict of int. does exist when same lawyer 2 defendants
RELEVANT	No dissent
CONCURRENCES/ DISSENTS	

1990 - CASE 11	
CASE	In re amendment to rule 39
CITE	500 US 13
FORM	Rule amended
FUNCTION	pro-prosecutorial/ policy
TOPIC	Rule 39 amended to deny in forma pauperis motions which are frivolous
RELEVANT	Stevens, Blackmun, "cost will exceed.. Any tangible benefit"
CONCURRENCES/ DISSENTS	Marshall dissents, " We are now saying, all men and women are entitled to their day in court if they have the means and the money"p 15 3 dissent

Reference To Case Above

The dissent aptly notes that the end result of the Court amending its policies is that rather than deny a petition, the Court is granting cert., disposing of a case, and monitoring future filings. The dissent in the subsequent case may reveal the true purpose of the change - a "...penalty".

1990 - CASE 12	
CASE	In Re Demos
CITE	500 US 516
FORM	cert denied motion to proceed <u>informa pauperis</u> denied
FUNCTION	pro-prosecutorial
TOPIC	he had filed 52 filings in 2 years
RELEVANT	Marshall, Stevens, Blackmun, "portends more Draconian restrictions on the access of indigent
CONCURRENCES/ DISSENTS	litigants to this Court, " ... a "poorly disguised penalty" p 19 3 dissent

1992 Cases (Cases 1 - 3)

1992 - CASE 1	
CASE	Martin v. District of Columbia Court of Appeals et. al.
CITE	506 US 1
FORM	petitioner denied leave to proceed in forma pauperis in the instant cases, and the Clerk is directed not to accept any further petitions from him in noncriminal matters unless he pays the required fees
FUNCTION	pro-prosecutorial
TOPIC	November 1991 Rule 39.8 allows denial of frivolous petitions and bars future requests
RELEVANT CONCURRENCES/ DISSENTS	per curiam asserts "...consideration of his repetitious and frivolous petitions does not allow the Court to allocate its resources in a way that promotes the interests of justice." p1 Stevens, Blackmun dissent , "In my opinion the judicial resources of the Court could be used more effectively by simply denying Martin's petitions than be drafting, entering, and policing the order the Court enters today. The theoretical administrative benefit the Court may derive from an order of this kind is far outweighed by the shadow it casts on the great tradition of open access that characterized the Court's history prior to its unprecedented decisions ..."p 4 - 2 dissents

1992 - CASE 2	
CASE	Dobbs v. Zant, Warden
CITE	506 US 357
FORM	cert GRR
FUNCTION	error correction of Court of Appeals; individual justice
TOPIC	Court of Appeals refused to consider transcript relevant to ineffective counsel petition
RELEVANT CONCURRENCES/ DISSENTS	per curiam "The Court of Appeals erred"... p 357 The Chief Justice and Justice White would grant certiorari and give the case plenary consideration. P 361 Justice Scalia, joined by Justice Thomas concur "As a general matter, I agree with Justice Stevens' frequently recited view that '[I]t is not appropriate for this Court to expend its scarce resources crafting opinions that correct technical errors in cases of only local importance where the correction in no way promotes the development of the law." p360 No dissent

1992 - CASE 3	
CASE	United States v. Nachtigal
CITE	507 US 1
FORM	cert GR
FUNCTION	policy ; pro-prosecutorial error correction of lower court
TOPIC	DUI with 6-month maximum prison term is presumptively petty p1 "The Court of Appeals was wrong in refusing to recognize that this case was controlled by our opinion in Blanton rather than by its previous opinion in <u>Craner</u> " p 5
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1992 Cases (Cases 4 - 7)

1992 - CASE 4	
CASE	Delo, Supreintendent, Potosi Correctional Center v. Lashley
CITE	507 US 272
FORM	cert GR
FUNCTION	policy; error correction of lower court; pro-prosecutorial
TOPIC	whether state courts are obligated to give mitigating circumstances when no evidence is offered to support them; answer: no
RELEVANT CONCURRENCES/ DISSENTS	Stevens joined by Blackmun " It is doubly disturbing that the Court acts summarily in this case, thus expediting the execution of a defendant who, I firmly believe, should not be eligible for the death penalty at all." p 288-9 - 2 dissents

1992 -CASE 5	
CASE	Demos v. Storrie et. al.
CITE	507 US 290
FORM	motion for leave to proceed in forma pauperis denied and the Clerk is directed to reject all future petitions...
FUNCTION	pro-prosecutorial
TOPIC	Rule 39.8 which aims at limiting frivolous petitions
RELEVANT CONCURRENCES/ DISSENTS	Stevens Blackmun dissent "In my opinion, the administration of special procedures for disposing of repetitive and frivolous petitions is less efficient than our past practice of simply denying such petitions." p291 2 dissents

1992 -CASE 6	
CASE	El Vocero de Puerto Rico at al. V. Puerto Rico et al.
CITE	508 US 147
FORM	cert GR
FUNCTION	policy; error correction
TOPIC	Puerto Rico criminal code which provides for preliminary hearings in criminal cases to be private is held unconstitutional
RELEVANT CONCURRENCES/ DISSENTS	2 dissents

1992 -CASE 7	
CASE	Delo, Superintendent, Potosi Correctional Center v. Blair
CITE	509 US 823
FORM	Court of Appeals' stay of execution is vacated p 823
FUNCTION	pro-prosecutorial; error correction; slap on wrist
TOPIC	per curiam calls egregious interference with execution p823
RELEVANT CONCURRENCES/ DISSENTS	Blackmun Stevens dissent, "The Court errs twice in granting the State's application to vacate the Court of Appeals' stay of execution. First, it errs by affording insufficient deference to the Court of Appeals' decision. Second, it errs by letting stand the District Court's decision, which was itself erroneous." p 824 2 dissents

1994 Cases (Cases 1 - 3)

1994 - CASE 1	
CASE	In Re Whitaker
CITE	513 Us 1
FORM	denied leave to procede in forma pauperis
FUNCTION	pro-prosecutorial
TOPIC	see above - pauperis filing
RELEVANT CONCURRENCES/ DISSENTS	Stevens dissents to the "peculiar irony in the Court's reliance, on the supposed need to conserve its scarce resources so that it may achieve its goal of fairly dispensing justice" p2-4 1 dissent

1994 - CASE 2	
CASE	Austin v. US
CITE	513 US 5
FORM	leave to withdraw as counsel granted
FUNCTION	justice; policy
TOPIC	lawyer compelled to file appeal by state law but penalized by SC if frivolous
RELEVANT CONCURRENCES/ DISSENTS	SC agrees unanimously No dissent

1994 - CASE 3	
CASE	Duncan, Warden v. Henry
CITE	513 US 364
FORM	cert granted and reversed
FUNCTION	policy; pro-prosecutorial
TOPIC	it is incumbent on petitioner to raise federal claim at state level
RELEVANT CONCURRENCES/ DISSENTS	Souter, ginsburg, Breyer concur Stevens dissent, "It is unwise for the Court to announce a new rule without first hearing oral argument on the issues." 367 1 dissent

1994 Cases (Cases 4 - 7)

1994 - CASE 4	
CASE	Goeke, superintendent, Renz correctional center v. Branch
CITE	514 US 115
FORM	cert granted and reversed
FUNCTION	error correction; pro-prosecutorial
TOPIC	circuit decision that dismissal of appeal violated substantive due process is "error"
RELEVANT CONCURRENCES/ DISSENTS	No dissent

1994 - CASE 5	
CASE	Purkett v. Elem
CITE	514 US 765
FORM	granted reversed and remanded
FUNCTION	pro-prosecutorial / policy
TOPIC	Ct of Appeals finding of discrimination in striking black juror was error
RELEVANT CONCURRENCES/ DISSENTS	Stevens, Breyer "It is unwise... " see "This is the second time this term the court has abused its power in this way." 2 dissents

1994 - CASE 6	
CASE	Tuggle v. Netherland, Warden
CITE	516 US 10
FORM	Cert. GVR
FUNCTION	error correction; pro-prosecutorial
TOPIC	death sentence valid even if factor eliminated
RELEVANT CONCURRENCES/ DISSENTS	

1994 - CASE 7	
CASE	Whitaker v. Superior Court of California, San Francisco County (Merrill Reese, Inc., Real Party in Interest)
CITE	514 US 208
FORM	Motion denied
FUNCTION	pro-prosecutorial;
TOPIC	frivolous petitions
RELEVANT CONCURRENCES/ DISSENTS	1 dissent

VITA

Lori Maxwell Edgemon was born in Cookeville, Tennessee, on June 10, 1971. She is the daughter of Brenda Jones and Rick Maxwell. She has one brother, Sean Maxwell. She has two half-sisters, Melissa and Chelsey Maxwell. Lori graduated with honors from Cookeville High School in 1989. In the fall of that year, she entered Carson-Newman College in Jefferson City, Tennessee. She graduated in the spring of 1993 with honors in English. While attending Carson-Newman College, she also obtained a minor in religion from Regent's Park College of Oxford University in England. Lori entered the University of Tennessee in August 1994 and obtained the Master of Arts degree in Political Science in May, 1995. In August, 1998, she earned the Doctor of Philosophy degree in Political Science from the University of Tennessee.

She is married to Eric Edgemon of Ten Mile, Tennessee. They have one daughter, Brenna Faith Edgemon. At the time of this publication, they were expecting their second child. They presently reside in Cookeville, Tennessee.