THE NEW REPUBLIC

Four out of Nine Ain't Bad

Here's how the Supreme Court's left-leaning justices can fight back against the conservative majority.

Nicholas Stephanopoulos , The New Republic Published: Wednesday, June 25, 2008

Though this court term hasn't been disastrous (so far), these are not particularly happy days for the Supreme Court's left-leaning justices. On most of the big issues--abortion, school segregation, capital punishment, voting rights--Justices Breyer, Ginsburg, Souter, and Stevens are routinely outvoted by the Court's conservative majority. When they *do* win, their victories are condemned as "judicial activism" by right-wing critics. And they are, alas, none too young; while Chief Justice Roberts and Justice Alito have added fresh faces to the Court's conservative coalition, Justice Souter is, at 68, the youngest left-leaning member of the Court.

So, what are the Court's more liberal justices to do (other than await reinforcements from a President Obama)? One possibility, which has received almost no attention to date from lawyers or legal scholars, is to make better use of the Court's procedure for determining which cases to hear. Unlike the lower federal courts, which must decide all cases that are brought to them, the Supreme Court has enormous control over its docket. Under the so-called Rule of Four, which originated almost a century ago as a way to ensure that enough lower court decisions are reviewed by the Court, cases are heard if just four justices vote to grant a petition for a writ of certiorari (the technical name for an appeal to the Court).

The strategy the four left-leaning justices should consider, then, is voting as a bloc to hear more cases whose outcome is very likely to be "liberal." ("Liberal" here meaning that the criminal defendant or civil plaintiff wins, the government or corporation loses, or generally that civil liberties are vindicated.) At present, the Court decides a relatively small number of difficult and important cases. These cases (amounting to less than 1 percent of all cert petitions) typically involve disagreements among the lower courts, weighty constitutional questions that have yet to be answered by the Court, or fact patterns that do not clearly fall on one side or another of an established legal standard. Unfortunately for the Court's more liberal members, these cases are also particularly likely to be decided conservatively. Nothing prevents the Court's right-wing majority from exploiting its numerical advantage when the facts are ambiguous and the legal issues are controversial and unresolved.

But there are other cases that any reasonable jurist--even a Scalia- or Thomas-style arch-conservative--would probably decide liberally. Sometimes it is fairly obvious from a case's facts that the police arrested a suspect without probable cause (e.g., as then-Judge Alito held, when an arrest was based solely on a suspect's race and car). Sometimes no one can argue with a straight face that a particular lawyer represented a defendant effectively (e.g., when counsel slept through much of a trial); that a particular religious display is not a governmental endorsement of religion (e.g., a city-owned fifty-foot Latin cross); or that a particular refugee would not be persecuted if he returned to his home country (e.g., a Christian afraid of violence in Iraq). It is precisely these cases--which break no new legal ground, and whose liberal outcome is not in much doubt thanks to their specific facts--that the Court's left-leaning justices should vote to hear more of.

The appeal of these "easy" cases stems largely from their influence on the lower federal courts. Whenever the Supreme Court decides a case, the lower courts scour the decision for clues about the Court's thinking. They not only follow the case's holding, but also respond to its style, tone, and status as the Court's latest pronouncement on an issue. Even when the questions presented are not identical, the lower courts write opinions full of phrases like "as the Supreme Court recently explained" and "in accordance with the Supreme Court's recent decision." Easy liberal cases may lack the epic sweep of a *Brown v. Board of Education* or *Miranda v. Arizona*--but they compensate for their modesty with their large potential number and their capacity to move the lower courts (which decide hundreds of times more cases than the Supreme Court) to the left despite conservatives' current legal ascendancy.

During the last eight years, for example, the Supreme Court decided a trio of cases in which it vacated the sentences of death row inmates because their lawyers prepared so poorly for their trials' penalty phases. None of these decisions announced any new legal rule or settled any long-standing constitutional dispute. All three decisions, rather, merely applied an earlier holding that a defendant's sentence must be vacated whenever his lawyer does an unreasonably bad job at trial and he is harmed as a result. But despite their seeming insignificance, the three decisions have had a major impact on the lower courts. The decisions have collectively been cited more than 14,000 times, and lower courts across the land have found that it is

suddenly easier for them to rule in favor of poorly represented defendants.

Beyond their potential for moving lower courts to the left, easy cases are attractive for a number of non-ideological reasons. If the Court voted to grant more cert petitions each year, it would allay the criticisms of its ever-shrinking docket, which has declined by about 50 percent over the last 25 years. A larger number of Court decisions (even straightforward ones) would also help the lower courts figure out which fact patterns correspond to which legal results. It is much easier to determine whether a fuzzy legal standard has been met when the Court has provided an array of instructive examples. Lastly, more easy cases would translate into more unanimous or near-unanimous outcomes. Legal figures as disparate as Chief Justice Roberts and Professor Cass Sunstein have extolled the virtues of consensus on the Court, which generates more restrained decisions and reassures the public that the Court is exercising its power impartially.

But isn't it inappropriate for justices to cast their cert petition votes with an eye toward how the cases would likely be decided? Perhaps, but as several studies have found, strategic voting has been rife among the justices for generations. In other words, the justices already vote for or against cert petitions after consulting with their peers and based in large part on their assessments of the cases' probable outcomes. (In the 1940s, for example, liberal justices voted repeatedly to hear employer-worker disputes in which the lower court had ruled for the employer but the justices thought the worker's position was strong. More recently, Justices Brennan and Marshall allegedly agreed to vote to grant all cert petitions filed by inmates on death row.)

And what would stop conservative justices from embracing the same easy case strategy, only this time for cases almost certain to be decided conservatively? Nothing, but the incremental gain for their cause would be smaller since they, unlike the Court's center-left members, can reliably prevail in the big and contentious cases. The easy case strategy is plainly a second-best option, most useful to the justices who lack the votes to win the hard cases.

Interestingly, Justice Stevens wrote an article in 1983 attacking the Rule of Four. He argued that the Rule crowds the Court's docket with more cases than it can handle, many of them relatively trivial. One wonders whether the last 25 years have changed Justice Stevens's mind. The Court now leans further right than at any time since the 1930s, and, despite the Rule, the number of cases it hears each year has plummeted. A generation ago, then, the Rule of Four may have been an extraneous or even counterproductive procedure for a more moderate Supreme Court. But today, it may be the left-leaning justices' last, best defense against the conservative tide.

Nicholas Stephanopoulos is an attorney with the Washington D.C. office of Jenner & Block.

CLOSE WINDOW