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ADDI CHRONO
17 MAY 84

14 May 1984

MEMORANDUM FOR: Associate Deputy Director for Intelligence

THROUGH: Chief, Analytic Support Group
Chief, Analytic Methods Branch

FROM: [redacted] ASG/AMB STAT

SUBJECT: Request to Submit a Paper for Nonofficial Publication

1. [redacted] STAT requests permission to submit the attached paper, "A Note on Substantive Access Doctrines in the US Supreme Court: A Comparative Analysis of the Warren and Burger Courts," for publication in Western Politics Quarterly.

2. None of the material contained in the paper is classified, nor is any of it based on classified information. [redacted] STAT conducted this research prior to accepting a position with the Agency. The paper deals with a substantive political topic which is of interest to many political scientists and has received attention in the political science literature over the past few years.

3. [redacted] STAT no Agency affiliation appears on this paper. [redacted] STAT

SUBJECT: Request to Submit Paper for Nonofficial Publication

I have reviewed the attached text, to the best of my knowledge found it unclassified, and approve it for publication.

STAT

[redacted]

Chief, Analytic Support Group — 14 May 84 — Date

STAT

[redacted]

Associate Deputy Director for Intelligence — 17 May 84 — Date

A NOTE ON SUBSTANTIVE ACCESS DOCTRINES IN THE U.S. SUPREME COURT: A COMPARATIVE ANALYSIS OF THE WARREN AND BURGER COURTS

[redacted]

Washington, D.C.

STAT

ABSTRACT

This research note is concerned with the utilization of substantive access doctrines by the U.S. Supreme Court between 1953 and 1979. The purpose is to examine the regulation of access rules during the Warren and Burger Courts, and to assess their relative support in expanding accessibility to the Supreme Court. An analysis of 261 access cases reveals that the two Courts have demonstrated almost identical support for opening access to the judiciary, but that the Burger Court has done so in a larger proportion of cases. Similar patterns are discovered when controls for issue type are employed, although, since the departure of Earl Warren the Court has been slightly less inclined to expand proper forum requirements.

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A NOTE ON SUBSTANTIVE ACCESS DOCTRINES IN THE U.S. SUPREME COURT: A COMPARATIVE ANALYSIS OF THE WARREN AND BURGER COURTS

The United States Supreme Court has two mechanisms at its disposal to regulate cases appearing on its calendar. The first "gatekeeping" power is derived from the Court's discretionary authority to accept cases arising through writs of certiorari. The significance of this mechanism in structuring the annual agenda was recognized by Tanenhaus and his colleagues in their seminal work on cue theory (1963) and in several other studies which have provided us with a better grasp of the somewhat mysterious workings of the Court in reference to the "rule of four" (e.g., Ulmer et al., 1972; Ulmer, 1972, 1978; Baum 1977; Teger and Kosinski, 1980; Provine, 1980). Although important, these annual conference decisions are rather narrow in controlling access when considered in light of the Court's second gatekeeping power. This second method of case control concerns the technical requirements of jurisdiction and justiciability subsumed under Article III of the Constitution. These doctrinal rules serve to illuminate the appropriate legal paths to the federal courts by defining who will have access and determining which issues are deserving of adjudication.

The desire to better understand this second gatekeeping function has generated an outpouring of literature focusing on those technical requirements that define the avenues leading to judicial review. Many of these efforts are found in legal journals (e.g., Berger, 1969; Davis, 1970; Hoffman and McCutchen, 1976; Scharpf, 1966; Scott, 1973) but it appears that the study of substantive access doctrines is gradually moving into the interest domain of political science (Orren, 1976; Rathjen and Spaeth, 1979, 1983; Atkins and Taggart, 1982). A common theme in several of these analyses is that the Supreme Court's willingness to expand accessibility is related

to the liberal/conservative orientation of the Court and its members (e.g., Mendelson, 1976: 933; Wasby, 1976, ch. 2; Rathjen and Spaeth, 1979, 1983). This is particularly evident in doctrinal comparsions of the Warren and Burger Courts, where conjecture abounds regarding the Burger Court's retrenchment of access policies established under the liberal Warren Court. Except for taxonomic studies, however, little research has been forthcoming that systematically investigates how these two Courts have utilizied access requirements. The one empirical study of access support by members of the Warren and Burger Courts indicates that there are "more similarities than differences" in how these two Courts have reacted to questions of access (Atkins and Taggart, 1982: 377). Yet this study was primarily concerned with individual support in expanding accessibility rather than aggregate--court--support, and did not attempt to assess the reaction of these two Courts to different rules of access.

The purpose of this research note is to examine how these two vastly different Courts have regulated access to the Supreme Court between 1953 and 1979. If there is indeed a relationship between a Court's propensity to expand accessibility to the federal courts and its collective ideology, then there should exist a detectible difference between the Warren and Burger Court's in their support of access claims. The analysis will examine the utilization and response of these two Courts to the following rules of access: mootness; standing; ripeness; abstention; exhaustion; political question; forum; jurisdiction; and diversity. Taken together, these standards are subsumed within the concepts of justiciability and jurisdiction. Although there is less than unanimous agreement on the strict legal meaning of each doctrine, these categories represent a fairly complete and accurate description of the major types of access rules that are invoked by the Court in regulating caseflow.

Some of the difficulty in identifying specific doctrines can be avoided by the aggregation of related issues. While this technique has its own limitations, such as assuming unidimensionality, much is to be gained in a longitudinal framework where observations at equal intervals are required and cases are relatively infrequent. We have collapsed the rules of access into three components representing jurisdiction, proper forum, and proper party requirements. Within the category of jurisdiction are those cases raising political questions, diversity issues and substantive jurisdictional issues referring to the Court's ability to settle certain types of disputes. The second category, proper forum, includes those cases raising issues of forum, abstention and exhaustion, and deals with the authority of the Supreme Court to undertake review. The last area, proper party, is composed of those cases dealing with questions of standing, mootness, and ripeness, and pertains to the importance and timeliness of cases to receive judicial review.

Whether a substantive access rule was presented in a specific case was determined by examining all formal opinions to assess if a question of federal access was related to the disposition of the case. In order to minimize coding errors, cases were only classified when the access issue was clearly labelled by the Court and not by a disgruntled, dissenting justice. In those cases where more than one issues of access was debated, the coding was based on the relative amount of attention given to each doctrine. We add the following qualifiers: (1) cases in which writs were dismissed as improvidently granted were not examined; (2) cases with multiple docket numbers were only counted once; (3) cases invoking original jurisdiction were excluded; and (4) where the vote was indeterminate on the access issue the case was not included in the analysis. This procedure produced a total

of 261 access cases.[1] For each case individual votes on the access question were coded using a dichotomous classification scheme of pro- and anti-access, where a pro-vote by a justice is a vote to expand access to the Supreme Court. Table 1 summarizes the number and types of access cases appearing in our final data set.

(Table 1 about here)

Admittedly the subsequent analysis is not meant to replace the need for investigations of these technical requirements in a less collective manner. To future litigants the implications of specific cases are of prime concern. Notwithstanding this, a legal summarization of cases suggesting, for example, that the degree of accessibility provided by the Warren Court is being slowly attenuated by the Burger Court, cannot serve as a substitute for a more comprehensive method, utilizing a broader data base. In order to more accurately determine if the Burger Court is "shutting the door left ajar by the Warren Court" (Rathjen and Spaeth, 1979: 363) necessitates that we move beyond specific cases and examine the overall patterns displayed by the two Courts.

ACCESS ACTIVITY IN THE SUPREME COURT

Among students of the Supreme Court it is readily acknowledged that the institution is accepting and resolving more disputes today than it did thirty years ago. What is not understood are the relationships, if any, between the increasing demands being placed upon the Court, the utilization of substantive access doctrines, and changes in formal leadership. Table 2 summarizes the distribution of access cases between 1953 and 1979 as (1) a percentage of total access issues, and (2) a percentage of all cases settled

by the Court. The former frequencies are useful in describing the amount of attention given to access issues at any point in time, whereas the latter are indicative of the relationship between caseload and the employment of access rules. The time dimension is partitioned into equal lengths representing two-term periods.[2]

(Table 2 about here)

There is some variation in the amount of case time given to access questions between 1953 and 1979, but in general the Court has not been overly preoccupied with these issues. When the number of access cases are expressed as a percentage of all cases decided in each two-term period, the largest proportion is found to be a moderate fourteen percent. Perhaps what is more striking about this array is the slight, but abrupt increase in attention given to access requirements corresponding with the arrival of Chief Justice Burger in 1969. The mean percentage of case time devoted to access doctrines almost doubled between the first eight time periods and the remaining five. The t-test indicates that the means are significantly different ($t = 3.36$) at the .01 level.[3] The Court under Burger's leadership has been more inclined to employ rules of access.

When expressing the number of access cases within each time period as a percent of all access cases, we find that there has been a gradual, almost monotonic increase in the discussion of access doctrines over the twenty-seven year period. The utilization of these requirements increases at a slight rate during the Warren era and into the early Burger Court, but subsequently declines or at least levels off during the remaining years. The cumulative effect of this process is that in eleven years the Burger Court has been responsible for approximately sixty percent of all the access

issues adjudicated during the last twenty-seven years. The Court under Warren Burger has been more likely to employ threshold standards, and has done so in a larger proportion of cases.

Do these differences between the Warren and Burger Courts still appear if we control for types of access issues? Table 3 displays the distribution of access cases by the trichotomy of issue areas discussed previously. In this table access is expressed as the proportion of total access cases in any two year period. While each category is composed of a limited number of cases, the frequencies suggest that the Burger Court has been more willing to deal with substantive access rules regardless of their nature. This trend of greater attention is especially true of proper party and proper forum requirements.

(Table 3 about here)

Table 4 is similar to Table 3 except that access is now measured as a proportion of all cases. Three general impressions are obtained when looking at the distributions presented in Table 4. First, there are no appreciable differences between the Warren and Burger Courts in the amount of time given to different types of access rules, although one could argue that the Burger Court has been slightly more disposed to formally debate issues of proper party and proper forum. Secondly, both courts are less inclined to use jurisdictional rules as compared to forum and party requirements. Lastly, a noticeable increase in the percentage of time devoted to issues of proper forum can be detected accompanying the arrival of Warren Burger in 1969. Yet the series appears to be returning to the level established during Warren's membership on the Court.

(Table 4 about here)

ACCESS SUPPORT BY THE WARREN AND BURGER COURTS

The formal discussion of access rules by the Court reveals little about how its members collectively resolve these issues. In Table 5 we cannot find a significant difference between how the two Courts rendered decisions concerning limiting or expanding access. Where during Warren's tenure the Court voted to expand accessibility in thirty-eight percent of the cases in which these issues were raised, the Burger Court has been supportive forty percent of the time. We do not find that the Burger Court has exhibited a tendency to be more restrictive than the Warren Court in granting access to the Supreme Court.

(Table 5 about here)

In Table 6 we adjusted the time periods so that they are at equal eleven year lengths. Coincidently, the eleven year span for the Warren Court represents a period during which it had a clear majority of liberal justices.[4] Here again we cannot discern any difference between the two Courts with respect to pro- and anti-access decisions; both Courts have displayed the same level of openness. At this level of aggregation it thus appears as if the Burger Court has continued to maintain a degree of accessibility inherited from its more liberal ancestor.

(Table 6 about here)

When looking at the column figures reported in Table 7 we find evidence once again suggesting that the Burger Court has addressed a greater proportion of access issues than its predecessor. However, most importantly, in terms of all cases that expanded access to the Supreme Court, the Burger Court voted in twice as many cases as the Court between

1958 and 1968. But before one jumps to any conclusions, the Burger Court has also produced twice as many decisions closing access to the courts.

(Table 7 about here)

Similar breakdowns are presented in Table 8 for the three categories of access issues. In terms of proper party requirements it appears that while the two Courts were not drastically different in supporting access claims, the Burger Court has been somewhat more willing to lessen proper party standards, and has clearly decided a greater percentage of cases to both enlarge and restrict access. The same type of occurrence is discovered when looking at jurisdictional requirements--similar levels of support coupled with a tremendous increase in the volume of decisions both in opening and closing avenues to the courts.

(Table 8 about here)

The resolution of proper forum requirements provides an interesting twist to the patterns already detected. There seems to be a difference in how the two Courts have reacted to these doctrines. The Burger Court has tended to be more restrained in using the federal courts as a forum to entertain legal disputes. Likewise, it is that area where the Court showed the greatest increased attentiveness after the retirement of Earl Warren (see Tables 3 and 4). These two pieces of information suggest that the Burger Court's unwillingness to enlarge access in this area might represent a reaction to the doctrinal posture developed by the more liberal Warren Court.

SUMMARY AND CONCLUSION

We find little evidence to support the contention that the Burger

Court has been more restrictive than the Warren Court with respect to expanding accessibility to the Supreme Court. Overall, the two Courts show very similar patterns of opening access to the judiciary. The significant difference between the two is the propensity to formally debate rules of access, where the Burger Court has been much more likely to entertain such issues. Perhaps it is for this reason that the Burger Court has its conservative image regarding access; after all, it has closed the "door" in a substantial number of cases. Yet there is another side to this coin, the Court under Warren Burger's leadership has also done its share of enlarging pathways to the Supreme Court.

The only noticable difference discovered between the two Courts concerns support for proper forum requirements. In this area the Warren Court appears to have been more willing to exercise the Court's authority to resolve legal conflicts. Conversely, the Burger Court has been more inclined to abstain from cases brought before it, impose exhaustion requirements, and compel litigants to seek remedies in other forums. In short, the Burger Court has been more restrained in expanding its power of judicial review.

Substantive access issues encompass the types of cases the courts will accept, who may apply to the courts, and which issues are germane. Thus, they allow the Supreme Court not only to clear the path leading to the courts but also to erect barriers to issues they choose not to confront. Indeed, these technical requirements can represent either the first thrust of an attack on a specific constitutional issue, or the first line of defense from encountering a issue when uncertain of the legal, political, or social implications of the outcome.

The almost intuitive notion that a liberal court will exhibit a propensity to open access while a conservative court will seek to close access is much too simplistic. It would be extremely disadvantageous for a court to immediately close access and thereby surrender the opportunity to examine recent legal-policy issues. Rather it would be to a court's advantage to open the door, thus allowing them a greater volume of cases with which to shape constitutional doctrine.

This seems to be what the Burger Court is presently doing in all areas of access. Our data indicate that since the departure of Earl Warren and the arrival of Warren Burger, the Court has provided the same level of openness to the federal courts. More importantly, the Burger Court has resolved a much greater volume of cases related to jurisdiction and justiciability. It would seem that the Burger Court is wisely "leaving the door wide open". When the Court feels it has accomplished its specific goals, then perhaps it will begin to restrict accessibility as it is doing in the area of proper forum.

FOOTNOTES

[1]Opinions were taken from the Supreme Court Reporter for the 27 year period.

[2]The series is divided into thirteen, two-term periods beginning in 1953. While there are some difficulties associated with this procedure, such as being less able to examine the relationship between general membership change and access, the advantages are quite attractive. In part, by breaking down the data this way it distributes the access cases more evenly, and thereby facilitates our ability to discern patterns of access activity. An examination of natural courts -- periods of no membership change -- was also conducted and produced similar findings, although the examination required the use of averages.

[3]The 1979 term was not included in this, or any other calculations of the t-statistic.

[4]During this period, the Court was represented by Chief Justice Warren, and Justices Brennen, Douglas, Fortas, Goldberg, and Marshall. It is clear according to Schubert's analysis (1974) that these six possess a liberal judicial ideology.

TABLE 1

FREQUENCY OF ACCESS ISSUES, 1953-1979

Access Issue	N	As a Percent of all Access cases	As a Percent of all cases*
proper forum	98	37.5%	2.98%
proper party	113	43.3%	3.44%
jurisdiction	50	19.2%	1.52%
TOTAL	261	100.0%	7.94%

*n= 3286. This is the total number of cases decided during the 27 year period. See text for a description of cases not included.

TABLE 2

DISTRIBUTION OF ACCESS CASES BY TWO-TERM PERIODS, 1953-1979

Period Beginning In*	Access Cases as a Percentage of (1)Total Access Cases**		(2)Total Number Cases (N)	
1953		2.7	4.7	(148)
1955		2.7	3.4	(204)
1957		4.2	4.6	(238)
1959	(4.5[a])	4.2	5.0	(218)
1961		6.9	8.7	(207)
1963		5.7	7.1	(212)
1965		2.3	2.9	(210)
1967		7.3	7.4	(256)
1969		11.9	13.9	(223)
1971		16.5	13.6	(316)
1973	(11.6[b])	11.1	9.8	(297)
1975		13.0	10.6	(320)
1977		5.7	5.3	(281)
1979		5.7	10.3	(146)
				(3286)

(5.5[c]) (10.6[d])

*Each period represents two terms, except for the period starting with the 1979 term.

**n=261

[a]Mean for Warren Court.

[b]Mean for Burger Court. T-test for difference in means equals 4.413, $p \leq .01$.

[c]Mean for Warren Court.

[d]Mean for Burger Court. T-test for difference in means equals 3.362 $p \leq .01$

TABLE 3

DISTRIBUTION OF ACCESS CASES BY TWO TERM PERIODS, CONTROLLING FOR ISSUE TYPE

Years	Party	Forum	Jurisdiction
53-54	2.7	2.0	4.0
55-56	0.0	5.1	4.0
57-58	4.4	5.1	2.0
59-60	3.5	4.1	6.0
61-62	5.3	7.1	10.0
63-64	4.4	5.1	10.0
65-66	0.0	5.1	2.0
67-68	9.7	5.1	6.0
69-70	8.0	16.3	12.0
71-72	15.9	18.4	14.0
73-74	16.8	8.2	4.0
75-76	15.0	11.2	12.0
77-78	7.1	5.1	4.0
79	7.1	2.0	10.0
n	113	98	50

TABLE 4

PERCENTAGE OF CASELOAD DEVOTED TO ACCESS BY TWO TERM PERIODS, CONTROLLING FOR ISSUE TYPE

Years	Party	Forum	Jurisdiction
53-54	2.0	1.4	1.4
55-56	0.0	2.5	1.0
57-58	2.1	2.1	.4
59-60	1.8	1.8	1.4
61-62	2.9	3.4	2.4
63-64	2.4	2.4	2.4
65-66	0.0	2.4	.5
67-68	4.3	2.0	1.2
69-70	4.0	7.2	2.7
71-72	5.7	5.7	2.2
73-74	6.4	2.7	.7
75-76	5.3	3.4	1.9
77-78	2.8	1.8	.7
79	5.5	1.4	3.4

TABLE 5

PRO AND ANTI-ACCESS SUPPORT BY THE
WARREN AND BURGER COURTS, 1953-1979

	Pro Support	Anti Support	(n)
Warren 1953-1968	38%	62%	93
Burger 1969-1979	40%	60%	168

TABLE 6

PRO AND ANTI-ACCESS SUPPORT BY THE
WARREN AND BURGER COURTS, 1958-1979

	Pro Support	Anti Support	(n)
Warren 1958-1968	40%	60%	75
Burger 1969-1979	40%	60%	168

TABLE 7

DISTRIBUTION OF PRO AND ANTI
ACCESS DECISIONS BY COURT*

	Pro Support	Anti Support
Warren 1958-1968	31%	31%
Burger 1969-1979	69%	69%
(n)	97	146

*Difference in proportions significant at the p .01.

TABLE 8

SUPPORT FOR PROPER PARTY, JURISDICTIONAL, AND PROPER FORUM ACCESS CASES, 1958-1979

	Proper Party		Jurisdictional		Proper Forum	
	pro	anti (n)	pro	anti (n)	pro*	anti* (n)
Warren 1958-1968	42%	58% (31)	35%	65% (17)	41%	59% (27)
Burger 1969-1979	49%	51% (80)	31%	69% (29)	32%	68% (59)
	pro*	anti*	pro*	anti*	pro*	anti*
Warren 1958-1968	25%	31%	40%	35%	37%	29%
Burger 1969-1979	75%	69%	60%	65%	63%	71%
(n)	(52)	(59)	(15)	(31)	(30)	(56)

*Difference of proportions significant at $p \leq .01$.

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