

1966

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Recommended Citation

Nathan Hakman, *Lobbying the Supreme Court—An Appraisal of "Political Science Folklore"*, 35 Fordham L. Rev. 15 (1966).

Available at: <https://ir.lawnet.fordham.edu/flr/vol35/iss1/2>

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Lobbying the Supreme Court—An Appraisal of "Political Science Folklore"

Cover Page Footnote

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LOBBYING THE SUPREME COURT—AN APPRAISAL OF “POLITICAL SCIENCE FOLKLORE”

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I. INTRODUCTION

IN traditional legal theory, Supreme Court cases arise accidentally, and judicial holdings emerge from the fortuitous circumstances of private and governmental litigation. Political scientists and other writers, on the other hand, have embraced in varying degrees a view that the adversary theory of the law is largely a myth. This author has himself entertained this belief without being clear about the suppositions which support it. After investigating the Supreme Court litigation process, this belief has been seriously shaken.

Two basic kinds of empirical research support a “political” view of Supreme Court action. Both approaches rely upon behavioral data and eschew, or at least minimize, the relevance of legal doctrine and procedure. In one approach judges are perceived as political actors and behavior is observed within psychological or sociological “models” or “systems.” For example, the United States Supreme Court, stripped of its surrounding legal paraphernalia, is sometimes conceptualized as a small social group. Members of this group are observed behaving in relationships of power, bargaining, and leadership.¹ Other psychological models are created to analyze judicial opinions in terms of their “stimuli and responses,” “votes,” “attitudes,” “values,” or “strategies.”² The evidence gathered in some of these highly technical inquiries is supposed to provide convincing demonstration that judges, like other human beings, respond to stimuli other than legal norms, and that their public acts follow “laws” of psychology at least as often as they do the law of *stare decisis*.³

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1. E.g., Murphy, *Courts as Small Groups*, 79 Harv. L. Rev. 1565 (1966).

2. A current symposium on this subject contains several articles which attempt to construct such models. Symposium—*Social Science Approaches to the Judicial Process*, 79 Harv. L. Rev. 1551 (1966). One method even goes so far as to assign relative values to the factors influencing judicial decisions. Tanenhaus, *The Cumulative Scaling of Judicial Decisions*, 79 Harv. L. Rev. 1583 (1966).

3. Professor Glendon Schubert of Michigan State University is a leading pioneer and scholar in a field of study known as jurimetrics or polimetrics. His two major collections contain a comprehensive sampling of the work in this field. Schubert, *Judicial Behavior* (1964); Schubert, *Judicial Decision-Making* (1963). In the former book, Schubert attempts to fit this kind of work into the main body of political science and jurisprudential literature. An earlier book brings together his attempts to use various tools developed by social psychologists and workers in other social science disciplines, e.g., factor analysis, game theory, scalogram analysis, etc. Schubert, *Quantitative Analysis of Judicial Behavior* (1961). Less technical writings make use of models and other conceptual apparatuses. E.g., Danelski,

One must sympathize with and admire this new generation of writers who seek and find "hard data" by the use of narrowly circumscribed abstract frameworks and ingenious measuring instruments. However, "political" knowledge of this type is usually confined to the study of judges as actors. Judicial realists have long suspected that judicial holdings are derived from inarticulate premises or socially developed value orientations. If political scientists can demonstrate the validity of their unique suppositions along these lines, they will have produced a remarkable advance in our knowledge of judicial behavior.

To many of us, however, there are other perhaps more important challenges to a political understanding of judicial processes. The political process approach attempts to put litigation and constitutional law into the mainstream of political life. Instead of focusing exclusively on Supreme Court justices and their opinions, an effort is made to tie in other relevant social action. A litigation, wherever and whenever possible, is related to the activities of litigants, their supporters, and ultimately to "attentive publics" arrayed on all sides of a litigation controversy. The present essay contributes to this kind of "political" inquiry.

The "natural history" stage of this kind of research is illustrated by the collections of case histories and depth studies carried out and collected by Professor Alan Westin and others.⁴ However, Professor Glendon Schubert correctly observed that most of this work has been simply empirical and there has been no particular emphasis upon theory beyond the elementary notion that it might be interesting to investigate the activities of organized groups seeking to influence the judicial process.⁵

It is true, of course, that findings from these case studies, and other similar reports, have not been the result of explicit abstract models and theories. Nevertheless, political scientists and others who work in this way do generalize, and their writings have resulted in a body of proposi-

A Supreme Court Justice Is Appointed (1964); Murphy, *Elements of Judicial Strategy* (1964). For more modest efforts to apply simple statistical techniques, see Nagel, *Testing Relations Between Judicial Characteristics and Judicial Decision-Making*, 15 *Western Political Q.* 425 (1962); Nagel, *Ethnic Affiliations and Judicial Propensities*, 24 *J. Politics* 92 (1962); Nagel, *Political Party Affiliation and Judges' Decisions*, 55 *Am. Pol. Sci. Rev.* 843 (1961). Other leading workers in this field include Sidney Ulmer, Joseph Tanenhaus and Fred Kort. See Schubert, *Judicial Decision-Making* (1963), for samples of their work.

4. E.g., Barker & Barker, *Freedoms, Courts, Politics: Studies in Civil Liberties* (1965); Prettyman, *Death and the Supreme Court* (1961); Pritchett & Westin, *The Third Branch of Government—8 Cases in Constitutional Politics* (1963); McKean, *The Integrated Bar* (1963); Tresolini, *Justice and the Supreme Court* (1963); Wildavsky, *Dixon-Yates; A Study in Power Politics* (1963). For indications of other research in this field, see Schubert, *Behavioral Research in Public Law*, 57 *Am. Pol. Sci. Rev.* 433 (1963).

5. Schubert, *supra* note 4.

tions less rigorous but similar to a theory of judicial politics. This "theory" relies heavily on a study of "lobbies," "pressure groups," and "potential groups" contributing to the process of litigation. The underlying assumption is that courts, like legislatures and administrative agencies, are political institutions in which managed influence is brought to bear on political choice.⁶

By one definition judicial holdings are political because they have characteristics similar to other political decisions—such as their legitimacy and their binding effect on all members of society.⁷ Though it does not necessarily follow, it is also assumed that political decisions in the judicial process are reached in a manner similar to that which obtains in other political arenas. Differences in form and technique are allowed, but all political activity is assumed to have basic ingredients of group pressure.

Still another authoritative view holds that "private" decisions become "political" only when groups or important segments of the "public" become involved in a particular decision-making process. This explains why so many persons, including lawyers, spend much of their time trying to keep certain decisions "out of politics."⁸

6. Literature emphasizing this "process" approach is growing. E.g., Jacob, *Justice in America* (1965); Krislov, *The Supreme Court in the Political Process* (1965); Peltason, *Federal Courts in the Political Process* (1955); Vose, *Litigation as a Form of Pressure Group Activity*, 319 *Annals* 20 (1958). Legal scholars and writers sometimes employ a similar approach in analyzing the judicial process. E.g., H. Jones, *The Courts, the Public and the Law Explosion* (1965); Ginger, *Litigation as a Form of Political Action*, 9 *Wayne L. Rev.* 458 (1963). While legal writers and scholars do not carry around the same kind of conceptual luggage as the political scientist, many of them seem to be observing and generalizing about the same phenomena in the judicial process.

7. David Easton defines politics as the "authoritative allocations of values in a society." By "authoritative" he means that the decisions have legitimacy and are binding on all members of society. "Legitimacy" presumably refers to a "feeling" on the part of the constituency that they ought to obey. Easton, *The Political System* (1953).

"Political behavior" is assumed to exist, and such behavior manifested in different political contexts can be assumed to have at least some common characteristics. Many political scientists believe that there is a unique kind of social behavior called "political," though its central characteristics have thus far escaped systematic demonstration. For example, persons who identify with larger causes, participate in demonstrations, vote for political officers, contribute money to causes, or perform similar acts can be identified as political actors.

8. Schattschneider, *The Semi-Sovereign People: A Realistic View of Democracy in America* (1960). In chapters I and II he discusses the ingredients of a "political" as distinguished from a "private" conflict. It is important to note, however, that Schattschneider demonstrates that organized groups or "lobbies" play a marginal role in the political process. The political process he studied was the electoral process. His general thesis, however, seems applicable to other phases of the political process.

This essay will examine some of the leading propositions which build upon this political "theory," particularly as they describe the activities of litigating parties, supporters, and attentive publics in Supreme Court proceedings, and then evaluate these notions in the light of evidence emerging from the author's investigations of some Supreme Court cases. Since many of these assertions now qualify merely as "assumptions" or "working hypotheses" a reappraisal of them in the light of these findings may put them in sharper perspective.

A Theory of the Judicial Lobby

Lobbying in judicial affairs refers to the organization and management of influence by persons and groups who are not necessarily the principals in a litigation. These parties differ from the ordinary litigant in terms of their interest in developing long range policy rather than merely winning a given case.

While lobbying or pressure in the judicial process is believed to be widespread, writers are usually careful to note important differences in the ways lobbyists behave in the judicial and legislative arenas.⁹ Judges are ordinarily not contacted directly, correspondence is definitely discouraged, and picketing, demonstrations, and even milder forms of outside pressure seldom accompany pending cases. All forms of persuasion are pursued with a maximum regard for judicial dignity and protocol.

The tactics of judicial lobbying are assumed to be of a different order, and they are frequently listed as follows: (1) the "class action" replacing individual litigants; (2) the test case; (3) amicus curiae participation; (4) the granting by an outsider (usually an organization) of advice, information, and service; (5) the providing of expert testimony and research assistance by a non-principal; (6) the granting of financial assistance by a non-principal; (7) the outsider assuming control of a litigation.

Besides describing these techniques, commentators on Supreme Court litigation also describe the use of other strategies and tactics. These include: (1) bringing alternative litigations in different judicial forums;

9. Lobbying should be distinguished from barratry, the persistent incitement of litigation, and champerty, the support of litigation purely for monetary gain. See *NAACP v. Button*, 371 U.S. 415 (1963). Barratry would be considered private until public sanctions are imposed. Champerty is presumably "political" but outside the range of the present inquiry.

For discussions of lobbying in the judicial process, see Beth, *Politics, the Constitution and the Supreme Court* (1962); Scigliano, *The Courts; A Reader in the Judicial Process* 176-77 (1962); Hakman, *Business Influence in the Judicial Process*, 1 *Western Bus. Rev.* 124 (1957); Robison, *Organizations Promoting Civil Rights and Liberties*, 275 *Annals* 18 (1951).

(2) "broadening the issues" through research and publication; (3) engaging in other kinds of litigation planning.

In the published literature the bringing of alternative litigations is reported to be used to achieve the following objectives: (1) achieving the most favorable forum; (2) emphasizing issues differently in different courts; (3) taking advantage of the differences in procedure and rulings in state and federal courts; (4) dropping or compromising cases with unfavorable records; (5) stalling some cases, and pushing others to ensure that the "good ones" reach the Supreme Court first; (6) creating conflicts among courts in order to encourage assumption of jurisdiction by the Supreme Court.¹⁰

According to this kind of political folklore the judicial lobbyist reinforces conventional legal argument by broadening the issues through a "Brandeis" or "sociological" brief, or includes policy arguments in his briefs or oral presentations. Participants in Supreme Court cases are expected to secure the help of research organizations and similar groups in presenting new social theories before the highest court. Since courts do not decide cases in a vacuum, a large dose of planned publicity is sometimes deemed desirable. This publicity is occasionally secured by "flooding" law reviews with articles presenting an interest group's general point of view.¹¹ In consequence of this and other complex litigation tasks, it is also assumed that the planning of Supreme Court litigation is too great a task for the "small" or moderate-sized law firm. Success in the Supreme Court, it is argued, "is no longer the result of a fortuitous series of

10. For detailed illustrations of litigation strategy and tactics reported to have been used in Supreme Court cases, see Peltason, *op. cit. supra* note 6, at 43-54; Zeigler, *Interest Groups in American Society* 315-26 (1964). Zeigler's illustrations rely heavily upon the work of Will Maslow and Clement E. Vose. Vose, *supra* note 6; Maslow, *In the Defense of Religious Liberty—The Strategy and Tactics of the American Jewish Congress*, paper presented before the Annual Meeting of the American Political Science Association, September 6-9, 1961; see also Murphy & Pritchett, *Courts, Judges and Politics* (1961). Clement Vose studied closely the litigation work of the NAACP Legal Defense and Education Fund, Inc.

The "political" litigation activity discussed above can, perhaps, be distinguished from "multiple," "repetitive" and "reactive" litigation which are used by private parties for harassment and other technically "private" purposes. Vestal, *Reactive Litigation*, 47 *Iowa L. Rev.* 11 (1961); Vestal, *Repetitive Litigation*, 45 *Iowa L. Rev.* 525 (1960).

11. Vose discusses the flooding of law reviews by the NAACP and other organizations. Vose, *Caucasians Only* (1959); Vose, *supra* note 6. Although Vose and other writers point out that many of these articles were produced independently, the stress he places upon coordinating conferences and similar activities suggests a more or less concerted effort. The influential effect of law reviews is, of course, a separate matter. A sobering appraisal of their effect upon Supreme Court decisions is presented in Newland, *Legal Periodicals and the United States Supreme Court*, 3 *Midwest J. Political Science* 58 (1959).

accidents."¹² Instead "groups plan their forays into litigation just as meticulously as they do in other political areas."¹³

As a result of these strategies and tactics some students of the Court believe that its selection of cases through its certiorari jurisdiction can be explained as the consequence of political activities. Though the rules provide that only "important" cases and those involving conflicting opinions among lower courts are to be given priority, political scientists have found a statistical partiality toward "business" and "civil rights" cases.¹⁴ Thus, among academic political scientists and others, judicial rationales and the explanations given for the choice of cases are minimized in favor of "deeper" *political* explanations.

One widespread explanation holds that "importance" arises not in the legal or philosophical significance of a case but in terms of its "group interests." Thus, a case is assumed to be important because it affects a number of attentive publics. This hypothesis is difficult to examine because it is not clear whether the interests affected include parties immediately affected by the case holding, parties in pending litigations, organized interest groups or potential interests in the general public.

If Supreme Court cases are assumed to involve broad social interests, then it is easy to understand why some writers emphasize the importance of organizations among the affected group interests. Though little empirical information about organizational influence is available, political scientists would probably agree that "organizations support legal action because individuals lack the necessary time, money, and skill"¹⁵ and that the high cost of litigation and the required bureaucratic sophistication

12. Krislov, *op. cit. supra* note 6; Vose, *op. cit. supra* note 11; Vose, *supra* note 6. The organizational or bureaucratic conduct of Supreme Court litigation is accepted by some political scientists as a fact of political life. At least one legal commentator, however, does not see organizations as highly significant in the process of Supreme Court litigation. Hazard, *After the Trial Court—The Realities of Appellate Review*, in H. Jones, *op. cit. supra* note 6, at 62. Hazard asserts that organizational litigation is still comparatively exceptional.

13. Murphy & Pritchett, *op. cit. supra* note 10, at 275.

14. Tanenhaus, *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in Schubert, *Judicial Decision-Making* 114-17 (1963). The author reviews other explanations but finds them unacceptable because they have not been made "operational" and amenable to scientific (statistical) tests. Some of these explanations are as follows: (1) a large number of persons is affected by the decision; (2) a substantial amount of related litigation is pending or anticipated; (3) the decision below is incorrect and unjust; (4) a severe penalty is involved; (5) the adequacy of court records (criminal cases); (6) preference for federal as opposed to state courts; (7) a dissent by a respected judge in a lower court; (8) a "highly rated" or prestigious set of attorneys prepared the case; (9) a policy interest of four judges is involved; (10) the lower court opinion was rendered by a divided court. From a behavioral point of view, support for these explanations must be derived from demonstrations beyond the explanations given by the judges themselves.

15. Vose, *op. cit. supra* note 6, at 22.

cause individual litigations to give way to the representational type.¹⁶ Academic writers are probably comfortable with a "representational" view of judicial proceedings because it socializes proceedings which are otherwise explained by technical legal rules.

Other by-products of this political view of litigation are the inferences drawn from the allegedly high costs of conducting litigation. Political scientists are not alone in believing that "cases involving small amounts of money rarely get to the Supreme Court even though important principles of law are involved."¹⁷ There is little doubt that Supreme Court litigation, or any other litigation, is regarded as expensive. In cases with substantial records, printing costs alone can run into the thousands of dollars, and when other costs are added the total cost can reach exorbitant levels. Legal costs in important antitrust and public utility regulation cases have been reported to be in the millions of dollars. However, in commercial cases one would expect that the parties litigate only when they have money or a good possibility of getting it by winning the case.

In any event cost figures tend to be misleading. High litigation costs may be a by-product of continuing litigations that go back and forth in the courts. These cases are not the equivalent of those requiring only one trip to Washington. Also, breakdowns of litigation costs have never been made available. There is little doubt that house counsel, retained counsel and consulting counsel perform a variety of tasks which have different price tags. Also costs vary with the complexity of the issues, the size and composition of transcripts and briefs, witness fees, and other accoutrements of litigation. F. Bernays Wiener, an experienced Supreme Court attorney, has made more sobering estimates, but the assumed connection between high costs and the kinds of cases receiving Supreme Court review is by no means established.¹⁸

16. Murphy & Pritchett, *op. cit. supra* note 10, at 274.

17. H. Jones, *op. cit. supra* note 6, at 67. Professor Jones noted that government agencies appeal cases raising issues of general interest even though such cases may be individually inconsequential. He also suggested that private action groups like the ACLU or the NAACP also push litigation of this kind, although such cases are relatively rare. The present investigation produced empirical evidence supporting this view, but no conclusive information is available regarding the costs of litigation, and some evidence was found indicating that Supreme Court litigation is occasionally available without cost or on an economical basis.

18. The cost of Supreme Court litigation is largely an unexplored subject. However, political science literature, especially that supplied to undergraduates, is replete with unverified and undocumented gossip. E.g., Barker & Barker, *op. cit. supra* note 4; Krislov, *op. cit. supra* note 6; Westin, *The Uses of Power* 160-63 (1962); Wiener, *The Conduct of an American Appeal*, 46 *A.B.A.J.* 829-34 (1960). The following examples give some indication of the type of information currently available to professional political scientists on the subject of these costs:

a. commercial cases. Westin reports that duPont is estimated to have spent \$20 million resisting the divestiture of its General Motors stock. Westin, *op. cit. supra*, at 161. In

Though the connection between litigation costs, the parties and the subject matter of the litigation is in the realm of *terra incognita*, academics have not hesitated to further assume that the parties represented in Supreme Court cases are frequently not the "real" antagonists. In its extreme form this view is stated as follows: "The individual (or private

another case, which went no further than the district court, it is reported that senior counsel drew \$1,000 per day and that junior associates drew \$500 to \$750. Total costs were estimated at between \$2 and \$3 million. *Ibid.* Wiener states that a bill of \$12,500 for printing of the record in a regulatory case is "about par for the course." Wiener, *supra* at 833. He then discusses counsel fees and concludes that a "rural" lawyer usually charges about \$500 to take an appeal to the Supreme Court while the fees of "big city" attorneys range anywhere from \$1,150 to \$3,500 and in exceptional cases are in five figures. He reports that the highest fee paid for a single argument was the \$100,000 to \$125,000 paid to the lawyers in the 1952 steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Wiener, *supra* at 833; see Note, *Small Business Before the Federal Trade Commission*, 75 *Yale L.J.* 487, 500 n.70 (1966) (costs estimated to range from an average of \$175,000 into the millions).

b. criminal cases. Wiener reports that when a record was drastically compressed so as to present only practical issues the printing cost was \$2,750. Wiener, *supra* at 833. Westin states that the landmark wiretapping case, *Irvine v. California*, 347 U.S. 128 (1954), only cost the defendant \$2,500 because the record did not have to be printed, the legal fees were modest, there were no witnesses to pay and there were no exhibits to prepare at trial. Westin, *op. cit. supra* at 161.

c. civil liberties cases. Westin reports that the ACLU budgets from \$1,500 to \$2,500 for each case it sponsors from trial to Supreme Court; that Frank Costello spent \$50,000 in connection with the legal difficulties surrounding his naturalization; and Joseph Burstyn spent \$55,000 in a movie censorship case, *Burstyn v. Wilson*, 343 U.S. 495 (1952). Westin, *op. cit. supra* at 161-62. Krislov states that a naturalization case, *Schneider v. Rusk*, 377 U.S. 163 (1964), cost \$6,500 even though there was no counsel fee. Krislov, *op. cit. supra* note 6, at 41. The public school prayer case, *Engel v. Vitale*, 370 U.S. 421 (1962), is estimated to have cost the ACLU \$6,000. *Barker & Barker*, *op. cit. supra* note 4, at 5. Testimony by an attorney indicated that the NAACP in Virginia spends, on the average, \$10,000 per case but that run of the mill Supreme Court cases are litigated for \$2,000 or less. *Record*, *Harrison v. NAACP*, 360 U.S. 167 (1959). *Time* magazine has reported that NAACP Fund cases cost up to \$50,000. *Time*, June 5, 1964, p. 66.

d. political offender cases. Westin reports that the national leadership of the Communist Party spent \$100,000 to defend a case brought by the government, and that the ACLU spent \$3,900 to fight Frank Wilkinson's conviction for contempt of Congress, *Wilkinson v. United States*, 365 U.S. 399 (1961). Westin, *op. cit. supra* at 161-62. Krislov states that the NAACP estimated that it cost well over \$200,000 to get to the Supreme Court in *Brown v. Board of Educ.*, 347 U.S. 483 (1954); that the average cost of Supreme Court cases testing compliance with the *Brown* ruling runs between \$50,000 and \$100,000; and that the cost of a single trial in the district court with appeal to the court of appeals and application to the Supreme Court runs between \$15,000 and \$18,000. Krislov, *op. cit. supra* note 6, at 41-42. The defense of Rudolph Abel on espionage charges, *Abel v. United States*, 362 U.S. 217 (1960), incurred the following costs: printing and stenographic records, \$13,227.20; court fine, \$3,000; and attorney's "token" fee, \$10,000. *Donovan, Strangers on a Bridge* (1964).

parties) whose cases reach the Supreme Court are usually sponsored by or are merely fronts for organized groups with particular axes to grind."¹⁹

This skepticism about the real adversaries seems to encourage fruitful empirical inquires into judicial processes. However, a more careful examination of the kinds of formal party litigants can perhaps suggest whether or not the hypothesis is generally applicable. Some data relating to this issue will be presented later.

More confident observations appear possible in assessing the role of amici curiae in Supreme Court cases. Since the amicus curiae procedure is the most visible form of group representation, its increasing use in Supreme Court cases has been frequently noted. The historical origins and development of this procedure have been studied by a careful scholar who has concluded that the amicus is now an advocate rather than an interested bystander. In the past members of the Court were concerned with the "lobbying" aspects of amicus curiae activity but observers now agree that even though blatant lobbying efforts have been curbed, the Supreme Court has become more liberal in allowing participation both by brief and by oral argument.²⁰

Additional systematic inquiry into amici activity is still needed because there are no empirical statistics on the manner in which the procedure is used, or the kinds of parties who use it.²¹ At one time the Court was allegedly deluged with lay briefs including many which were heavily laden with political propaganda. Criticism of this kind of "lobbying" is presumably moot because the preparation of and the responsibility for these briefs is now under the exclusive control of qualified attorneys.²² However, there is little analysis available for determining whether these briefs deal with policy issues or are limited to specific legal arguments raised by third party beneficiaries. In its more limited role, the amicus curiae stresses legal points and factual circumstances that the principal attorneys overlook or stress differently. It may also be assumed that the device is used to secure representation for litigants in other pending cases. Without such amicus representation such a litigant would, in effect, have

19. Schubert, *Constitutional Politics* 71 (1960), quoting Vose, *supra* note 6; accord, Pritchett & Westin, *op. cit.* *supra* note 4.

20. Krislov, *The Amicus Curiae Brief; From Friendship to Advocacy*, 72 *Yale L.J.* 694 (1963). The first political scientist to discuss the political significance of lobbying activity in the judicial process was probably Professor Vose. His seminal article has been included in several anthologies and his preliminary notions about the judicial process are part of the intellectual diet served up in most undergraduate courses in American government and politics. Vose, *supra* note 6. Statistics on the incidence of amicus curiae activity are collected in Schubert, *Quantitative Analysis of Judicial Behavior* 73-75 (1961).

21. See table 3, *infra*.

22. Krislov, *supra* note 20.

his case disposed of without an opportunity for being heard. Thus, the *amicus curiae* procedure, thought extremely vital in many instances, may fall far short of the lobbying significance attributed to it in political science literature.

More recently, Martin Shapiro and a few other political scientists have questioned the political scientist's preoccupation with constitutional issues. He noted that non-lawyer scholars gave considerably less emphasis to anti-trust litigation and cases in administrative law.²³ Critics like Marion and James Blawie note that even the combined constitutional and administrative dockets of the Supreme Court have limited impact on the total political-legal system. Their analysis further suggests that most litigations are not "political" in the sense in which the word is used here.²⁴

Professor Shapiro argues that constitutional preoccupation by political scientists stunts even a realistic vision of the Supreme Court itself. Since judges are political actors they have "the most intimate and continuous interaction both cooperative and competitive" with other agencies of government.²⁵ However, Shapiro's view is more circumscribed than the one taken here. Constant interaction with the government, or even conflict, does not necessarily make behavior political. Also, the fact that judges may decide these cases on extra-legal grounds is politically less significant than the social context in which the decision is made. If decisions are made with the participation of large social groups, they are more likely to be politically significant.

Constitutional emphasis by political scientists might be justified if it can be shown that supporters and attentive publics are more frequently active participants in these cases. It is occasionally argued that serious political issues involving business, labor, and agriculture have already been settled—at least on the symbolic level²⁶—and that remaining political battles are confined to issues like civil rights and civil liberties. The kind of publicity these latter issues receive in the mass media and the more visible forms of organized activity in connection with them tend to support this widespread belief.

Contrariwise, political scientists, emending the view of Thurman Arnold,²⁷ have observed that organizations make their greatest pitch

23. Shapiro, *Law and Politics in the Supreme Court* 1-6 (1964).

24. Blawie & Blawie, *The Judicial Decision: A Second Look at Certain Assumptions of Behavioral Research*, 18 *Western Political Q.* 579 (1965).

25. Shapiro, *op. cit. supra* note 23, at 4.

26. See, e.g., Galbraith, *Economics and the Art of Controversy* (1955).

27. Arnold, *The Folklore of Capitalism* 212, 215-16 (1937). These views are developed by Edelman, *Symbols and Political Quiescence*, 54 *Am. Pol. Sci. Rev.* 695, 703 (1961).

after conflicts over symbols or ideological conflicts have been reshaped into practical concrete issues. The absence of widespread publicity and visibility may lead observers to ignore manifestations of political infighting that the mass media overlook. In any case, the incidence of political activity in non-constitutional cases is a matter for observation and cannot be assumed.

II. SOURCES AND METHODS OF INVESTIGATION

A great deal of information about parties, attorneys, amici curiae, and arguments, are matters of public record. Until now, these records have not been used to study these data and to challenge important assumptions about Supreme Court litigation. One must go beyond the records, however, to get information about litigation finance, sponsorship, cooperation, research, coordination, planned publicity, and other litigation strategies. The political theories herein reviewed may in fact be structured on faulty assumptions but the observations based upon them can provide direction for a more fruitful understanding of judicial processes than that produced by more formal legal categories.

To "test" the propositions within the gloss of political theory, information was gathered in 837 cases in which the Supreme Court rendered signed or per curiam opinions. The cases, covering seven Supreme Court terms from 1958 to 1964, were classified both in terms of their basic subject matter and the clientele interests involved. Commercial litigations included antitrust, public utilities, transportation, public lands, tax, labor relations, government law suits (private property transactions), private litigations, and private personal injury cases. Non-commercial cases included criminal cases (involving serious anti-social crimes), civil liberties cases (governmental or government supported infringements of individual liberties), cases involving political offenders (communist and internal security cases) and cases involving race relations. The survey provided data about the types of formal parties, the amici curiae involved, and in many instances the reasons given for participating as amici curiae.

For more detailed information about litigation support and strategies in Supreme Court cases questionnaires were sent to more than 500 attorneys who participated in 127 opinion cases during the 1960-1961 Supreme Court Term.²⁸ Many of the attorneys contributed very little to

28. Information about litigation management, however, is not confined to the sample of cases surveyed. It is frequently difficult to tell which attorneys control a given case. Names of attorneys or law firms making little or no contribution sometimes appear in the appellate briefs. Attorneys who argue cases before the Supreme Court occasionally assume control after other attorneys have borne most of the preparation burdens. This is especially true in a situation when there is a voluminous transcript and record. The attorney of record,

TABLE 1
 PARTICIPATION AS PRINCIPALS AND AMICI CURIAE
 in
 SUPREME COURT LITIGATIONS
 1958-1964

Type of Litigant	Commercial Cases (499 cases)		Non-Commercial Cases (349 cases)	
	Principal	Amicus	Principal	Amicus
United States Government & Administrative Agencies	273	38	137	23
States, Agencies, and Their Political Subdivisions	82	26	203	18
Private Companies and Corporations	375	30	13	1
Trade and Business Associations	20	69	—	—
Professions	—	17	—	28
Labor Unions	81	32	1	2
Social Defense Organizations	—	—	13	65
Individuals	117	22	310	5
TOTAL	948	234	677	142

the survey because their participation was confined to giving general advice or merely commenting on the legal briefs. However, a definitive reply was received from attorneys in 78 cases. The comments that follow are essentially the author's own interpretations derived from responses to questionnaires, unstructured interviews, and exact tabulations.²⁰

more frequently than not, accompanies the attorney at the time of Supreme Court oral arguments, and participates significantly in the preparation of the briefs.

Appellate attorneys interviewed were frequently proud of their ability to "give the record a broader perspective," but this claim was often disputed by the trial attorneys interviewed.

In this study, "control" of a case, insofar as strategy and tactics was concerned, was assumed to be in the hands of the law firm or attorney who answered the letter of inquiry. Information about litigation strategy was gathered by letters as well as from interviews. Occasionally, an attorney referred the request to another attorney "who did most of the work," but in most cases, especially commercial cases, the responding attorney or interviewer answered as spokesman for the law firm. While demonstrable proof is difficult the investigator did not feel that lack of candor or evasion affected the validity of the responses.

29. The author has prepared more elaborate tables classifying verbalizations by respondents and lawyers interviewed. However, the limited sample made such classifications seem misleading. The general empirical results are replicable through generally equivalent procedures even though precision in method is difficult to obtain in studies of this kind.

III. THE FINDINGS

A. *Formal Parties—The Role of Governments in Supreme Court Litigation*

Before commenting on activity in support of litigation, a few remarks about the role of governments and government attorneys seem appropriate. Although the fact is seldom stressed in the political science literature, the United States Department of Justice and attorneys from other federal agencies, primarily the ICC, NLRB, FPC, and FTC, participate in well over half the cases on the Supreme Court's opinion docket. In their prescribed supervisory roles in the Federal legal system, the Supreme Court and administrative agencies are preoccupied with settling technical questions in administrative law. Occasionally substantive policy issues emerge, and the implications of these on inter-agency and Court-agency relationships have been explored elsewhere.³⁰

In administrative law cases, especially those involving the regulatory processes, state and local governments often appear among the formal legal adversaries. Intergovernmental conflict is also involved in constitutional cases where issues surrounding the limits of state taxation, state regulation of labor, problems of intergovernmental tax immunity, and national-state confrontations concerning private property transactions (e.g., bankruptcy proceedings in which questions of national supremacy or priority arise) are involved. Information about Court-state and other federal relationships growing out of litigations remains largely unexplored by political scientists.³¹

In its *amicus curiae* activity, the federal government behaves very much like a private litigant. Most of its participation in commercial cases is designed to promote narrow proprietary or operational interests that would otherwise be pursued in government litigations. For example, the Antitrust Division of the Department of Justice may instruct the Court on how a statute or patent should be construed because of the way it affects the Department's patent enforcement program. Other regulatory agencies use the device to maximize their administrative efficiency. State Department views are interposed in state and private litigation to avoid embarrassing the Federal government. Sometimes the government participates as *amicus curiae* to pursue even narrower

30. Shapiro, *op. cit.* supra note 23.

31. R. L. Stern has done some work in this field. See Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A.J. 154 (1960); Stern, "Inconsistency" in Government Litigation, 64 Harv. L. Rev. 759 (1951). However, his work analyzing governmental interests in Supreme Court litigation needs to be brought up to date and "generalized." Much of the raw material for further inquiry lies hidden in the annual reports of the Attorney General and the other agency solicitors. Another interesting view is stated in Brennan, *State Court Decisions and the Supreme Court*, 31 Pa. B.A.Q. 393 (1960).

proprietary interests. In personal injury cases, for example, the government's role as land owner, shipper, or banker comes in conflict with other private claims.³²

The participation of state and local governments in Supreme Court cases differs from that of the federal government in the role of both principal and amicus. When its activity is viewed in relation to other states, each state can be observed pursuing independent interests though degrees of cooperation among them are sometimes achieved in specific cases. In commercial cases, for example, states having "right to work" laws have occasionally cooperated in joining or supporting another state's amicus brief. Similar cooperation was achieved in "off-shore oil cases," cases involving agricultural regulation, and in public utility cases. This cooperation is, on very rare occasions, facilitated through the National Association of Attorneys General, but more frequently through informal exchanges of briefs and correspondence.³³

The Supreme Court litigation activities of political subdivisions within states approach in complexity those of corporations and other private business groups. Though state Attorneys General function as the equivalent of "house counsel," they do not always coordinate the litigation work of the state administrative agencies, and they have little or no control of commercial litigation activity of the political subdivisions.

B. *Other Formal Parties in Commercial Cases*

Court records reveal little or nothing about litigation costs in commercial cases, but a study of the formal parties involved casts doubt on widely held views about the "representational character" of Supreme Court cases. This doubt is further strengthened by questionnaires and interview responses indicating that the costs in almost every commercial case were "borne exclusively by the clients."

Self-financing is to be expected among the types of corporations or public utilities that get involved in business regulation cases—e.g., anti-trust, public utility, securities and exchange cases, etc. However, in cases involving taxation, government law suits, private law suits, and personal injury cases the client is more likely to be an individual with limited financial resources. The breakdown of principals classified as "individuals" in Table 2 shows that they appear as parties most frequently in commercial cases involving taxation, government law suits, private law

32. Letter From Oscar H. Davis, Member of the Staff of the Solicitor General of the United States, April 4, 1962. This author, however, assumes responsibility for characterizing a great many governmental litigation interests as "narrow" or "proprietary" (involving ownership or property rights).

33. Letter From Mitchell Wendell, Executive Secretary, National Association of Attorneys General, March 7, 1966.

TABLE 2
PARTICIPATION AS PRINCIPALS IN SUPREME COURT LITIGATION
1958-1964

Type of Litigation	No. of Cases	Social Defense Organizations	United States Governments	Trade Associations	Professional Organizations (including Bar Associations)	State and Local Governments	Labor Unions	Private Companies and Corporations	Individual and Ad Hoc Groups
<i>Commercial</i>									
Labor Relations	100	—	54	—	—	7	72	77	8
Trade & Business Regulation	38	—	35	3	—	11	—	39	4
Taxation	93	—	68	1	—	28	1	62	21
Torts, Public Contracts & Other Civil Actions Involving Governments	33	—	24	1	—	9	—	8	15
Power-Utility Regulations	22	—	21	—	—	9	1	20	—
Transportation	36	—	31	6	—	4	3	32	—
Anti-Trust	43	—	26	2	—	—	4	38	—
Public Lands	21	—	14	—	—	14	—	8	9
Private Law Suits	48	—	—	—	—	—	—	39	14
Personal Injury	55	—	—	—	—	—	—	52	46
Total Commercial	499	—	273	13	—	82	81	375	117
<i>Non-Commercial</i>									
Civil Liberties	98	—	24	2	—	76	—	9	84
Political Offender Cases	57	5	34	—	—	15	1	—	46
Race Relations	60	8	10	—	—	47	—	4	46
Criminal	134	—	69	—	—	65	—	—	134
Total Non-Commercial	349	13	137	2	—	203	1	13	310
TOTAL	848	13	410	15	—	285	82	388	427

suits, and personal injury cases. Though the results and implications of these cases are watched by claimant's attorneys, and attorneys from insurance companies, banks, and specialized bar associations, none of the participating attorneys reported any direct financial help from any of these sources. In most of the commercial cases in which individuals, or small business interests, participated, the stakes were sufficiently inviting to justify clients "going all the way." Some of the attorneys noted the availability of "contingent fee" arrangements and economies which aided them in getting their cases to the Supreme Court as cheaply as possible.³⁴ Trial records in most Supreme Court cases are short with the legal or constitutional issues clearly defined. By keeping records short, or by having the government assume the printing costs, the expense of appellate litigation can be made economically feasible to a broader spectrum of social and economic interests.

The so-called big commercial cases usually involved, as party principals, a plethora of governments, utilities, corporations, and private companies. The complexity of the formal party interests³⁵ is usually too great to be unravelled meaningfully. Yet a casual glance at transcripts and records shows that interests are combined and consolidated through various formal and informal procedures. Few of the attorneys listed in the records participate significantly at the trial, administrative, or appellate levels though usually all the principals involved in a litigation are at one stage or another represented by counsel. As a matter of common practice locally retained attorneys begin the work, and they are subsequently joined by corporation "house counsel," and finally by "outside counsel" brought in from the major law firms. The lawyers in the sample reported

34. The questions pertaining to financial sponsorship and support included in the questionnaires and interviews were as follows:

"Was the litigation in this case financed by your client exclusively, or was additional financial support secured from other interested parties?"

"If the litigation was financially supported by other persons or organizations, do such persons or organizations maintain a legal fund to defray legal expenses in test cases in which they take an interest?"

"If the litigation was financially supported by others, apart from your client, at what stages of the proceeding was the support given?"

Among sixty commercial litigations investigated, information was secured in only forty cases. Attorneys in only two cases reported that they had solicited financial aid from a national trade association. In another case an attorney reported receiving financial aid from "another party who was a competitor and a direct beneficiary of the law suit." Those who reported such aid gave the desire to "broaden the issues" as their reason.

35. A recent administrative proceeding involving regulation of the rates charged by the American Telephone and Telegraph Co. involved a great many parties. "At last count on Friday, some 27 companies, six trade associations, 23 states, 2 cities, one county and the General Services Administration had signified their intentions of joining in the hearings." *N.Y. Times*, Jan. 30, 1966, § 3, p. 1, col. 8. FCC Commissioner Lee Loevinger was reported to have commented that everybody except the public was represented.

that the preparation of briefs and other legal materials is carried on by correspondence, conferences, and consultations. These kinds of arrangements, it was noted, are familiar procedure in all kinds of litigation.³⁶

1. Private Companies and Corporations

The largest group of principals participating in commercial cases are private companies and corporations. Even though information about the size and wealth of these parties has not been gathered, the prominence of many of the companies involved, and the amounts of money in controversy, should convince anyone that cost is not a controlling factor in the planning of most Supreme Court cases.

Attorneys in only two cases indicated that they had solicited trade associations for financial support in behalf of their clients, and there were only four occasions reported in which the United States Solicitor General was asked to participate in behalf of a litigating party. Those who requested such aid gave as their reasons a desire to "broaden the issues," "make a show of strength," or "educate the court on related aspects of public policy." Several attorneys mentioned "the preferred status that government attorneys deservedly enjoy" with the Supreme Court.

2. Trade and Business Associations

In political life, trade associations can be expected to represent their members in a variety of ways. Some are in a position to control the standards and practices of an industry or trade. Truckers, railroads, banks, and others have associations which behave in this way. Others like insurance underwriters, stock exchanges, industrial information bureaus and similar agencies specialize in providing advice, information and service to their members and other interested parties. Finally, there is a type of association that gives the business or industrial viewpoint on a variety of broader business issues. The Chamber of Commerce and the National Association of Manufacturers seem to fit this pattern. While these organizations on rare occasions participate as principals it is the

36. The questions pertaining to participation by "extra" attorneys were as follows:

"Were you or your law firm the original attorney of record?"

"If not, how and when did your law firm begin to participate in the case?"

"Did you consult with other attorneys or other interests who were not parties or participants in the litigation?"

"If so, what contribution did these persons or attorneys make toward the preparation of the case? At what stages of the proceedings did they make their contributions?"

"Who played the most important part in pressing the litigation forward?"

Attorneys participating in 37 commercial cases responded "meaningfully" to these questions. Attorneys and law firms in 13 cases reported cooperation with other attorneys consisting of conferences, exchanges of briefs, consultations, or having other attorneys read the briefs. Some of these attorneys noted that this was common practice even though it did not occur in the particular case about which they were reporting.

amicus role of these groups that is of greater concern to the political observer.

If trade associations behaved politically one would expect more amicus curiae activity than the public records indicate. (See Table 3 *infra*). The low rate of participation is probably explained by the fact that it is difficult to achieve consensus within an important range of an association's clientele. A broad consensus is occasionally achieved in labor relations "right to work" cases and other issues where an association can unite broad segments within an industrial community. The absence of trade association participation in most commercial cases suggests, however, that the issues are too specialized for such groups to participate in a politically meaningful way. When an association is formed along narrow and specialized lines, participation is more likely, but the number of times this happens is relatively rare.

3. The Professions

If the litigation practices of trade associations do not comport with a political view of litigation, professional groups, as indicated by their formal or amicus activity, are even less political. These groups in fact are barely visible. In the seven years of litigation studied they did not appear as formal parties and they appeared as amicus curiae in only seventeen commercial cases. Most of the appearances were occasioned by professional bar groups or by individual lawyers seeking technical clarification of laws governing taxes, government contracts, or specific business regulations. To this observer it is somewhat remarkable that so few professional groups play any role in Supreme Court cases. Accountants, engineers, teachers, bankers, economists, and others may individually appear as expert witnesses but rarely provide policy appraisal to guide the Supreme Court. Apparently the issues in most commercial cases are considered too narrow or private to encourage even that kind of participation.

4. Labor Unions

Among the various participants in Supreme Court litigation, unions have one unique characteristic that other participating groups do not have. A labor union "is an instrument for the collective handling of matters relating to the employment relationship" and its existence is "made necessary by the fact that no individual employee has the resources, the knowledge, or the bargaining strength to settle the terms of the employment relationship in terms of equality with the employer." While the scope of the "employment relationship" and the labor union's exclusive right to represent the worker in many phases of this relationship is still questioned, some kind of "representative role" is usually acknowledged.³⁷

37. Feller, *Economic Groups and the Judicial Process*, Paper Presented Before the Annual Meeting of American Political Science Association, Sept. 6-9, 1961.

Despite these considerations, an examination of the unions' formal and amici appearances shows that their participation is confined almost exclusively to representing the union as an organizational entity. An individual worker having a grievance against the union or a "non-contractual" grievance against a company will usually have to go elsewhere for legal assistance. The cases involving unions concerning "unfair labor practices" under the Labor Management Relations Act included activities such as strikes, lockouts, illegal picketing, use of hiring halls, and suits against unions and companies in their representational or institutional capacities. In cases where individuals pressed grievances, personal injury cases, or other problems, the individuals had to get their legal support from other sources.

While international unions sometimes assume the litigation burdens of their local affiliates, the unions as a whole generally stick to their own knitting and rarely intervene in the litigation of others. Unions participated as amici in only 32 cases, but half of this participation was by the house counsel of the AFL-CIO Federation. Within the labor law, and in other business fields, there is specialization in the way amicus curiae activity is conducted. A so-called narrow labor relations issue, such as the specific use of a hiring hall, may bring another union into the case because the second union has a similar litigation pending. The arguing of broader policy issues, however, is generally left to the counsel of the federation.

This survey of the formal side of commercial litigation suggests a portrait of litigation activity that is quite different than the one presented in political science literature. It suggests that Supreme Court cases are not representational but narrowly focused private controversies. Companies, individuals, unions, and others pursue narrow interests confined to the immediate litigation. Although more than forty percent of the cases have amici curiae of some kind, much of this activity is conducted in pursuit of narrow private interests. If broader types of organized interests do participate in judicial processes they are more likely to be found "behind the scenes" supporting the formal party litigants.

C. *Other Supporting Activity in Commercial Cases*

To secure information about other kinds of lobbying that may be present, attorneys were asked "whether all significant social or economic interests" were adequately represented in the trial of their cases, and if not, "what significant social or economic interests were not represented?"³⁸

38. In interviews, the following additional questions were occasionally asked:

"Do you consider your client representative of a class of people similarly situated?"

"Was any effort made to get additional representation for the people represented by your client?"

Among those responding, only seven attorneys or law firms felt that "other interests" were not adequately represented.

Questions were also asked about sponsorship and finance as well as other tactics described earlier. While the purport of some of these questions may not have been fully understood by all the attorneys, the responses provided no support to a theory of judicial lobbying. Instead the response verified a not unexpected ethnocentricity or "egotism" within most of the Supreme Court's practicing bar. Attorneys participating in commercial cases frequently volunteered the comment that their litigation was a "straight out economic battle between the parties" or that the "important" or "garden variety" cases involved "solely legal or financial issues." In several instances the attorneys noted that their cases were "not a landmark in any social or economic sense" even though the case was "of great interest to lawyers." Many attorneys stressed the fact that the cases concerned only the parties and were conducted without any "behind the scenes" groups or interests.

In a number of cases attorneys representing commercial litigants were antagonistic or even hostile to *amicus curiae* participation arguing that opposing interests such as state governments, labor unions, or other opponents had adequate opportunities to participate at earlier stages of the proceeding. They indicated that they were opposed to persons or groups who stand aside at the trial or administrative stages only to appear with new arguments at the appellate level. Even where attorneys perceived an important social impact to their cases, they noted that the character of the parties and the amounts of money in controversy made the litigation stand on its own bottom. In these cases, it was argued, other interests were "too remote" from the specific issues involved.

Even in cases where smaller financial stakes were involved, the attorneys almost always regarded their cases as private fights. A few of them lamented the fact that policy issues were not developed at the trial or pleading stage, and occasionally an attorney criticized lawyer colleagues for "narrow legalistic viewpoints." Nevertheless, most responses cited technical legal requirements, the attitudes of judges, and of opposing counsel as justifications for strictly legalistic approaches to litigation. A few attorneys warned that policy considerations interposed at trial or pleading stages of litigation would make litigations unduly expensive, introduce irrelevancies, and obscure the resolution of specific issues. From a lawyer's point of view, litigation is a very private form of conflict, and from all indications they expect to keep it that way.

Notwithstanding the perceptions of attorneys, it is necessary to take note of the methodological position of behaviorists in political science and other social disciplines. They note that an actor's appraisal of his assertions or actions is less valuable than a consideration of those factors influencing behavior which can be objectively observed.³⁹ One kind of

39. See Professor Frank Pinner's statement regarding the "scientific" legitimacy of making "behavioral" assumptions in Schubert, *op. cit. supra* note 20, at viii.

"objective" demonstration would be a "content analysis" of attorney verbalizations. Such an analysis might provide a deeper "psychological" meaning to the sentiments of lawyers. In this report, however, tabulated analyses of underlying motivation are eschewed in order to report relevant activities accompanying the perceptions of the lawyers. Expert testimony of economists, for example, was found to exist in only a few antitrust, utility and business regulation cases. Accountants in two cases gave testimony about "accrual accounting." It seems clear, however, that these few instances are not enough to suggest that accountants or economists articulated a cohesive group pressure in the judicial process. Expert testimony, social science evidence, and "Brandeis briefs" are more likely to be used in commercial litigations than in other types of cases. Although civil libertarians and social defense groups favor their use, they usually lack the financial and other resources necessary to develop them. On the basis of this survey, however, I am persuaded that supporting group activity of this kind is rarely found even in commercial cases.

Further support for a private or legalistic view of litigation is also suggested by the observations of some attorneys that those affected by their litigations were too poorly organized and too isolated to be helpful. In one case an attorney, engaged in self-criticism, noted his own egotism and his failure to solicit such help from trade and business associations. "It might have helped," he said, "but I just didn't think of it." Thus, in tax cases, private litigations, personal injury cases, and other instances where concerted action may have been helpful, the attorneys gave no hint that they availed themselves of the assistance of "behind the scenes" interests.

Though evidence of lobbying in judicial process can be found occasionally in appearances and briefs contributed by amici curiae, such participations seem rare and, more often than not, the amicus has a specific and separate pecuniary interest in the litigation itself. In some of these cases, the amici are themselves parties to pending litigations. Attorneys representing trade associations, labor unions and individual taxpayers were among the most frequent amici but in this capacity they were pursuing specific institutional or individual interests and not really supporting the litigations of others.⁴⁰ (See Table 3). While occasionally

40. The questions pertaining to amici curiae activity were as follows:

"Did you or your client attempt to secure amicus curiae participation? Were you successful? If so, how and why was this participation secured?"

"Did any other parties, other than the parties you sought, participate as amici curiae? Did you approve or disapprove of such participation? Why?"

The following questions were asked of amicus curiae participants:

"Why did your client find it necessary to participate as an amicus to the proceeding?"

"What specific contributions did your brief make to the facts and issues before the court?"

TABLE 3
DISTRIBUTION OF AMICUS CURIAE INTEREST ACTIVITY IN SUPREME COURT LITIGATIONS
1958-1965

<i>Types of Litigation</i>	No. of Cases	Social Defense Organizations	United States Government	Trade Associations	Professional Organizations (including Bar Associations)	State and Local Governments	Labor Unions	Private Companies and Corporations	Individuals and <i>Ad Hoc</i> Groups
<i>Commercial</i>									
Labor Relations	100	—	7	20	4	3	28	5	1
Trade & Business Regulation	38	—	3	15	3	6	—	10	1
Taxation	93	1	4	6	3	5	—	5	13
Torts, Public Contracts & Other Civil Actions Involving Governments	33	—	10	2	1	2	—	—	1
Power-Utility Regulations	22	—	2	2	1	6	—	2	1
Transportation	36	1	1	3	2	1	4	—	—
Anti-Trust	43	—	8	—	—	—	—	2	1
Public Lands	21	—	3	4	2	3	—	1	2
Private Law Suits	48	2	—	5	1	—	—	3	1
Personal Injury	55	—	—	7	—	—	—	2	1
Total Commercial	499	4	38	64	17	26	32	30	22
<i>Non-Commercial</i>									
Civil Liberties	98	26	8	5	12	8	—	—	1
Political Offender Cases	57	13	—	—	9	1	2	—	3
Race Relations	60	5	15	—	1	5	—	1	—
Criminal	134	14	—	—	6	4	—	—	1
Total Non-Commercial	349	58	23	5	28	18	2	1	5
TOTAL	848	62	61	69	45	44	34	31	27

a policy-minded bystander would participate in a commercial case, such participation was criticized or even ridiculed as introducing irrelevant and confusing considerations.

If commercial litigants behaved politically, their attorneys, together with others representing similarly situated clients, would coordinate their activities to establish more effective litigation strategy. Multiple litigations involving similar issues were found to occur most frequently in the taxation and labor relations fields, and attorneys in these litigations sometimes reported that they managed more than one case at a time. However, even if the circumstances and mutuality of interests made coordination feasible, the situations never permitted litigants to "pick their own cases for Supreme Court review." "Even where cases are managed," said an experienced union attorney, "an unmanaged case gets there first."

Most attorneys reported that the case "most ripe for review" or "most advanced in the legal mill" was the one that the Supreme Court reviewed first. During the interviews, lawyers occasionally complained that "the case selected turns out, from our point of view, to be the wrong one." Counsel from international labor unions, or house counsel of large corporations, may carefully pick their own cases—they may even anticipate the probability of Supreme Court review—but it seems unlikely that any attorney can ensure that a particular case will get there.⁴¹

"Was any offer made to participate at earlier stages of the court proceeding? If so, what contributions did you make?"

"Was any effort made to coordinate your participation with that of any other persons or organizations interested in the proceedings? If so, how was this coordination achieved?"

"Did your amicus participation emphasize legal or extra-legal considerations? If extra-legal, what was the nature of these considerations?"

In 1960 *amici curiae* appeared in 15 of the 60 case situations investigated. In five other cases efforts were made to solicit amicus participation of trade associations, and in two other cases the solicitation of the Solicitor General was reported. Attorneys in six cases expressed opposition specifically, or in principle to the kind of amicus activity involved. These numbers are too small to support firm conclusions, but there is little evidence suggesting that *amicus curiae* plays a strategic role in commercial cases.

41. The questions pertaining to multiple litigation were as follows:

"Was your case one of several similar cases brought simultaneously in different judicial forums?"

"If so, was coordinative effort made in carrying on the litigations?"

"If there was coordinative effort, why was this particular case selected for appeal?"

In a few cases where coordination was reported, questions like the following were asked in interviews and questionnaire follow-ups:

"What was the nature of the coordination?"

"Did you agree to stress different issues in different cases?"

"Did you succeed in getting any litigants to drop their cases?"

"Even though your client was a defendant in a criminal case, was there an effort to present a 'united front' or coordinate the manner in which the defenses were presented?"

Multiple litigation was reported in 14 of the 60 commercial cases studied. In none of

Among the cases studied none were found in which attorneys and others planned substantial public relations campaigns in connection with a pending litigation. The usual news handouts and house organ publicity accompanied some cases, and contact with other interested parties followed the conventional pathways of correspondence and informal exchange of ideas.

In summary, attorneys representing commercial litigants seem unable or unwilling to become political actors in the judicial process. In a few instances amici curiae, expert witnesses, or conventional legal argument may broaden the issues involved, but most Supreme Court commercial litigation is conducted in a purely private manner, and public consequences apparently flow from "a series of fortuitous circumstances."

D. *Non-Commercial Cases—Formal Parties and Amici*

Though the distinction is not stressed in political science literature, it may be that the "theory of the judicial lobby" is intended to apply exclusively to non-commercial cases. In these cases, individuals representing political, cultural, religious, and social minorities are more likely to need the financial and legal backing of others. While considerations of this kind are sometimes pertinent, few of the cases clearly present this situation. Business interests are often commingled with civil liberties issues and the cases are processed in a manner similar to other private commercial litigations. In some of these cases civil liberties organizations participate, but when they do so their activity is usually confined to amicus curiae activity at the appellate level. Also, a large number of Supreme Court cases classified as "non-commercial" do not involve issues that stimulate the activity of organized civil libertarians. Thus, immigration cases, military cases, criminal cases, and others are frequently

the cases did an attorney report a successful coordinative effort to pick the right case. In many of these cases there were exchanges of briefs and other forms of cooperation.

Both government and private attorneys in commercial cases denied any experience in managing litigations so as to set up the right case, although several attorneys believed that this kind of strategy was occasionally attempted. At least a dozen attorneys representing private clients intimated that the government attorneys managed cases, and a few felt that labor unions and trade associations were able to stage test cases "in circumstances of their choosing." In the tax field an attorney described the situation as follows:

"In my principal field—taxation—a majority of the cases that reach the Supreme Court, particularly on an appeal initiated by the Government, can be classified as 'managed litigation.' A look at the percentage of opinions for certiorari granted tend to bear this out. Frequently years will be permitted to pass, even in the face of repeated adverse decisions by the Court of Appeals, before a case is selected to present to the Supreme Court. . . . Many cases which should perhaps be taken up by the taxpayer do not involve enough money to the litigant to warrant the expense. Few businessmen today can afford to fight on 'principle.' Litigations costs are too expensive. Also the Internal Revenue Service is notorious for stretching a Supreme Court announced principle to the utmost."

decided on technical procedural grounds without arousing the interest of others. Unless the litigant is affiliated with, or has some special connection with an organization, he or she is unlikely to get this type of assistance. The litigant is thus forced to finance the case himself, or enlist the aid of friends and relatives. Finally, there are some litigants who do not get financial or other legal support simply because they do not ask for it.

1. Civil Liberties Cases

In a number of cases, individuals, business, and organizations of various kinds invoke constitutional and legal principles against the actions of public officials. Though the American Civil Liberties Union is known for its work in this area, its spokesmen maintain that the group is not a legal aid society, or a general social defense organization, but an organization solely devoted to constitutional principles. As such, it sponsors only a few cases in which constitutional issues are clearly presented.⁴²

This organization, like other social defense groups,⁴³ operates with a small legal staff and a large network of "cooperating" and consulting attorneys. Local affiliates of the organization decide if and when to intervene in a case, and also decide the character and the amount of legal aid to be rendered. In the case of weaker affiliates the litigation program, if any, is augmented by assistance from the national organization. In its circulating memoranda and official statements emphasis is placed upon the organization's policy of referring prospective litigants to "cooperating attorneys" who control the cases under organization sponsorship. Even if the organization chooses not to sponsor a given case, an attorney recommended by the ACLU may decide to press the litigation forward unilaterally.⁴⁴

Though cooperating attorneys participate in an increasing number of cases, there are many more cases involving civil liberties issues in which the organizations do not participate. Even including those in which they participate as amici, the activity of organizations is visible in only one-third of the civil liberties cases.

42. Watts, *The Role of the American Civil Liberties Union—In the Courts and Thereafter*, Paper Presented Before the Annual Meeting of the American Political Science Association, Sept. 6-9, 1961.

43. "A Social Defense" organization is sometimes distinguished from a constitutional defense organization on the grounds that it defends a special group of persons rather than general constitutional principles. Ginger, *Special Purpose Defense Organizations*, 1939 *Law Guild Rev.* 141.

44. Watts, *supra* note 42. Among 11 of the 20 "Civil Liberties" cases in 1961, one was jointly sponsored by the ACLU and the American Jewish Congress, and one case was sponsored by the Planned Parenthood Federation. In two other cases, attorneys "suspected" that the cases were instigated by "negligence lawyers" and "publishers."

2. Political Offender Cases

Another somewhat different pattern of activity is found in cases involving political offenders. In these cases—especially those involving Communists or “fellow travelers”—litigations are handled by a small and decreasing number of attorneys associated with or cooperating with *ad hoc* defense committees, or small radical defense organizations.⁴⁵ Those cases are occasionally supported by civil liberties foundations,⁴⁶ and the lawyers retained are frequently associated with the National Lawyers Guild.⁴⁷

Government sources reported that cases of this kind were “well supported and financed.” However, Milner Alexander’s study of the “Right to Counsel for the Politically Unpopular” indicated that many liberal lawyers—especially during the height of the McCarthy era—refused to handle cases for fear of economic and political reprisals. Other lawyers, she found, refused to defend these clients because they disliked them, disapproved of their ideas, or because they allegedly did not follow the advice of their attorneys. Alexander received responses from other “conservative” attorneys who believed that political offenders were egotists who were not interested in court cases as law cases but as vehicles of propaganda.⁴⁸

45. Alexander, *The Right to Counsel for the Politically Unpopular*, 22 *Law in Transition* 19 (1962).

46. According to Ann Fagin Ginger, editor of *Civil Liberties Docket*, “Of the 270,000 attorneys in the United States today [Martindale-Hubbell as of 1964 estimates the total as close to 300,000] fewer than 1,000 represented either a plaintiff or defendant in constitutional litigations. Also, less than half that number instituted even one action for a plaintiff seeking vindication of ‘constitutional’ rights. In fact, fifty law firms handled the bulk of the 2,600 cases. These fifty firms included those specializing in constitutional litigation and general staff counsel for the NAACP Legal Defense and Educational Fund, Inc., the NAACP, the American Civil Liberties Union, the Emergency Civil Liberties Committee, the Committee to Assist Southern Lawyers of the National Lawyers Guild, and the Commission on Law and Social Action of American Jewish Congress.” Ginger, *supra* note 6, at 464.

If the list were confined to those who handle the trial of political offenders it would undoubtedly be considerably smaller.

47. See, e.g., Bill of Rights Fund, *A Five Year Summary of Grants, 1954-1959* (1959). Grants were given by this organization to principals involved in *Scales v. United States*, 367 U.S. 203 (1961); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *Uphaus v. Wyman*, 360 U.S. 72 (1959). Apparently, money was also provided by other social defense groups. In order to receive assistance from these groups, the case has to be a “cause celebre” which lends itself to fund raising. Social defense organizations rarely assume control of a case or provide funds merely because the individual lacks resources or happens to be indigent. See *National Lawyers Guild, Civil Rights and Liberties Handbook—Pleadings and Practice* (1963); Ginger, *supra* note 43.

48. Alexander, *supra* note 45.

Many of the attorneys who remain available to handle political offender cases are older labor lawyers who received their "baptism of fire" in the days of the New Deal and prior to that era, when labor leaders, socialists, and radicals required legal defense on account of their labor union activities. The National Lawyers Guild is the professional legal offspring of the New Deal period and these lawyers have retained membership in this small segment of the bar despite governmental and private sanctions directed against them.⁴⁹

During the period covered by this study there were several cases in which Communists, the Communist Party, Communist-front organizations, and other similar groups were still under attack. A few law firms have become highly specialized in this type of litigation, but the "more respectable" ACLU lawyers seldom participate as the principal attorneys. Although the leftist attorneys seek the cooperation and support of the American Civil Liberties Union in the conduct of their cases, this support is rarely made available at the trial level.

While cooperation between leftist attorneys and ACLU staff or "co-operating" attorneys takes place, there appears to be an ideological chasm which divides them in the conduct of their litigation work. Leftists sometimes criticize the ACLU for not making a "principled" defense in certain cases, but individuals rejected or abandoned by the ACLU are sometimes able to get attorneys from other organizations, the Emergency Civil Liberties Committee, for example. These and similar lawyers who handle political offender cases usually differ from ACLU lawyers, not only in their degree of commitment to the clients they represent, but also in their litigation strategy and tactics.⁵⁰

The most common political offender cases involve naturalization and deportation proceedings, non-communist affidavit cases, employment security (loyalty), passports and travel, registration or membership

49. The National Lawyers Guild, a small professional bar association, was under continuous attack during the 1950's by the United States Department of Justice and the House Committee on Un-American Activities. In 1954, the district court held that the Guild was entitled to an administrative hearing. In 1958, after prolonged litigation, the government's attempt to list the Guild as a Communist front organization was dropped, but the House Committee on Un-American Activities has continued the harassment. House Comm. on Un-American Activities, *Communist Legal Subversion—The Role of the Communist Lawyer*, H.R. Rep. No. 41, 86th Cong., 1st Sess. 16-17 (1959).

50. Lamont, *Freedom Is As Freedom Does* (1956); House Comm. on Un-American Activities, *supra* note 49. The fear of "guilt by association," at least in the past, reduced the cooperation between attorneys in left-wing social defense organizations and attorneys cooperating with the American Civil Liberties Union. Critics of the ACLU claim that it has gone far beyond the necessary disclaimers in attempting to disassociate itself from the pro-Communist stigma. While left-wing attorneys do not volunteer this information such an impression is gained after the topic is introduced into the conversation. "Left wing" attorneys claim they take a more "principled" position in defense of civil liberties.

in the Communist Party or front organizations, contempt charges in congressional investigations, and civil disabilities imposed on Communists and other political dissenters. The ACLU sometimes sponsors cases of this kind but only if the constitutional issue is the dominant issue in the litigation.

3. Race Relations Cases

After more than a decade and a half of harassment in the southern states, the NAACP and its Legal Defense and Education Fund legal staff have established constitutional legitimacy for the main lines of its "representational" litigation activity. In a line of cases culminating in *NAACP v. Button*,⁵¹ the Supreme Court majority's dicta have sanctioned at least some forms of litigation sponsorship and management. Nevertheless, a cloud of suspicion still surrounds the manner in which these lawyers secure clients, and the degree of influence clients retain over litigations when they are once begun. Justice Harlan and others have expressed doubts about whether the NAACP and its clients are in agreement at different stages of the litigation process. As Justice Harlan suggested in his dissenting opinion,⁵² some clients may want to go all the way and are willing to accept Pyrrhic victories while others may choose to coexist rather than do battle in court.⁵³ Though Harlan's standards may overstate the normal incidents of an attorney-client relationship, these traditional beliefs among lawyers and others are likely to die hard.

At the present time the NAACP staffs and their "cooperating" attorneys control most of the race relations cases that reach the Supreme Court. Questions surrounding legal tactics may, however, become moot due to the surge of litigation connected with more recent race relations activity. Picketing, demonstrations, sit-ins, and other forms of protest have substantially changed the litigation picture.⁵⁴ The NAACP lawyers are no longer alone in defense of the movement for racial reform.⁵⁵ Their tactical approaches once characterized as "radical" by some or "slow" by

51. 371 U.S. 415 (1962). Justice Harlan's dissenting opinion discusses the NAACP's "representational" activities in detail but he did not feel that the majority's characterization of such litigation activity as "political expression," *id.* at 429-31, precluded state regulation. *Id.* at 453.

52. *Id.* at 462.

53. See Murphy & Pritchett, *op. cit. supra* note 10, at 231; Murphy, *The South Counterattacks: The Anti-NAACP Laws*, 12 *Western Political Q.* 371 (1959).

54. *Time* magazine reported that the NAACP Legal Defense and Education Fund, during the year 1963, defended 10,487 civil rights demonstrators, fought 168 separate groups of legal actions in 15 states and pushed 30 cases up to the Supreme Court. *Time*, June 5, 1964, p. 66.

55. For an appraisal by political scientists, see Birkby & Murphy, *Interest Group Conflict in the Judicial Arena: The First Amendment and Group Access to the Courts*, 42 *Texas L. Rev.* 1018, 1039 (1964).

others now compete with those being developed by attorneys representing the National Lawyers Guild, the American Bar Association, and the American Civil Liberties Union. It is not yet possible to evaluate the behavior of each of these groups of lawyers, but preliminary indications are that each set of attorneys operates more or less at arms length from the other. The ABA-sponsored attorneys operate in the tradition of legal aid societies and "of counsel" to overtaxed trial attorneys in race cases. While occasionally cooperating with the Committee to Aid Southern Lawyers of the National Lawyers Guild, it is almost certain that this kind of volunteer did not enlist to "defend the movement" or to "avoid tactics of individualized defense and litigation which will wind up in the Supreme Court three years from now." Lawyer spokesmen from the National Lawyers Guild speak the language of collective militancy though their actual legal practices may reflect more attention to conventional lawyer-client procedures.⁵⁶ Finally, if past behavior is precedent, lawyers representing the American Civil Liberties Union and affiliated groups will avoid direct identification with the Negro protest by supporting and seeking out selected constitutional cases for ultimate Supreme Court test.

4. Criminal Cases

A separate pattern of lawyer activity involving an essentially separate set of attorneys is observable in the case histories of criminal litigations which reach the Supreme Court. The largest number of cases result from prisoner applications and cases brought forward by public defenders or court appointed attorneys.⁵⁷ Most of the attorneys in these criminal

56. See, e.g., Kopkind, *New Radicals in Dixie: Those "Subversive" Civil Rights Workers*, *New Republic*, April 10, 1965, p. 13; Letter From Dean Jefferson Fordham to the *New York Times*, May 12, 1965, p. 46, col. 6; Letter From Arthur Kinoy and William M. Kunstler to the *New York Times*, May 17, 1965, p. 34, col. 5.

According to a report by the Supreme Court correspondent of the *New York Times*, the Mississippi Bar Association "welcomed" participation by volunteers from the American Bar Association's Lawyers Committee for Civil Rights Under Law. John C. Satterfield, former president of the American Bar Association, was quoted as saying that "there is a great difference in representing individuals in unpopular causes and representing paid agitators who have been sent to Mississippi to get arrested and are assured that their legal fees will be paid." *N.Y. Times*, Feb. 8, 1965, p. 1, col. 2. Mississippi lawyers refused to defend those individuals because it would amount to representing the organizations themselves.

Another volunteer group, organized under the auspices of or in cooperation with the ACLU, was known as the Lawyers Constitutional Defense Committee. A third group known as the Lawyers Committee to Aid Southern Lawyers was associated with the National Lawyers Guild was the first of these groups to be organized.

57. Information about litigation sponsorship or support was available in 20 of 28 Supreme Court "Criminal" cases (cases involving serious crimes against persons or society—robbery, narcotics, murder) decided in 1961. Court appointed attorneys, in pro-

cases had no connection with the American Civil Liberties Union or similar groups, and according to their responses, they did not request aid from that organization or any similar group. Other criminal lawyers were financed exclusively by their clients and litigated their cases in the manner that private law practice would dictate.⁵⁸ The patterns of activities described provide some degree of regularity in the Supreme Court Bar's non-commercial cases. These patterns are unlikely to be changed by subsequent events. The Vietnam protest, combined with the emergence of the "New Left," undoubtedly will produce new legislation and new litigation tests. It seems unlikely, however, that fundamental changes in legal representation are likely to occur. As radical protests are isolated, the defense of the participants will be assumed by those traditionally defending leftists though the ranks of these attorneys will probably increase.

Any taxonomy of litigation routes to the Supreme Court cannot, of course, overlook the conventional and sometimes idiosyncratic paths that some cases take. As already noted, cases classified as "non-commercial," particularly those involving civil liberties, turn out in some cases to be pocketbook actions with constitutional by-products. In other instances determined individuals press their own principles against organizational advice and at high cost to themselves. Finally, lawyers take cases for sport, and the prestige of arguing before the highest tribunal. Attorneys in all kinds of cases often state that their case was their fight in which they alone had to carry the major burden.

E. Supporting Activity in Non-Commercial Cases

One would expect that a different breed of attorney inhabits the world of non-commercial Supreme Court litigations. This belief is only partially justified because most of the non-commercial litigations involve private complaints about the use of public authority. Most of the cases that reach the Supreme Court involve the troubles of public servants, lawyers, home owners, soldiers, union officials, civilians in military posts, and a variety of other persons complaining about official actions. Though the cases are considered "important" enough for Supreme Court review, they ordinarily do not qualify for support by organized civil libertarians.

ceedings in forma pauperis, were reported in 12 cases. A "cooperating" ACLU attorney managed one case. Two cases were litigated by public defenders. One was supported "by friends and ad hoc committees," and four cases were reported to have been financed exclusively by the clients. See note 34 supra.

Legal aid and defender organizations are primarily concerned with making legal services available to specific individuals. Their concern is not with the shaping of the criminal law by lobbying litigation issues. See generally, Jacob, *Justice in America* (1965); Schmidhauser, *Constitutional Law in the Political Process* (1963).

58. *Ibid.*

In any event, the parties in civil liberties cases usually secure their own attorneys without soliciting or receiving help from any outside source. Only a few lawyers handling civil liberties cases see their cases as representing the interests of large classes of citizens.

In civil liberties cases involving movie censorship and church-state relationships, the litigation was primarily commercial with constitutional overtones. Though many cases were brought "simultaneously," local censorship statutes differed in detail and any important degree of coordination was not feasible. Also, litigation enthusiasm varied with different commercial litigants who brought cases of this kind.⁵⁹

Even where mutuality of interests overcomes specific circumstances, attorneys differ in the way social defense litigation should be conducted. In 1961, a prominent attorney in the American Civil Liberties Union proposed that the organization's "cooperating" attorneys coordinate all contempt of Congress litigations in which a first amendment defense was raised. The proposal was rejected because of the organization's continuing policy of confining intervention to those cases "where the issues are exclusively and predominately those of civil liberties." Participation in all similar cases, it was argued, would drain the organization's resources by getting it involved in cases clouded by evidentiary considerations. Since ACLU attorneys consider the organization a constitutional rather than a general defense organization, defendants with weak constitutional cases would have to get help elsewhere or fight their own legal battles. Attorneys in particular civil liberties cases cited examples where attorneys agreed to

59. In *The Sunday Closing Cases*, *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kasher Super Mkt., Inc.*, 366 U.S. 617 (1961); *Two Guys from Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961), business firms or businessmen were the "formal parties in interest" though religious interests were deeply involved and appeared at the trial stage of litigation. Attorneys representing some of the respondents in these cases indicated that they consulted with attorneys of the American Jewish Congress, but noted that the litigations were brought separately and involved no comprehensive coordination even on the part of the religious interests involved. The American Jewish Congress Committee and the American Jewish Congress appeared as *amicus curiae* at the Supreme Court level. An attorney in one of these organizations reported that he first learned of the case in *U.S. Law Week*, and decided that it was the kind of case in which his group was interested. He tried to enlist many other Protestant church and lay organizations to "go along with his brief." Reasons given by these other organizational spokesmen for refusing to cooperate reflect the difficulties in securing cooperation even in the signing of a brief. For example, leaders indicated that they would have to "consult their organizations," or "take a vote." Others reported that there was not enough time to achieve consensus within the organization. For another report of *The Sunday Closing Cases*, see Lund, *The Sunday Closing Cases*, in Pritchett & Westin, *The Third Branch of Government—8 Cases in Constitutional Politics* 275 (1963). Though movie censorship cases in 1961 were brought "simultaneously" in different judicial forums, there was no reported evidence of any conscious coordination. Attorneys indicated that the interests involved were too unique to invite such coordination.

focus particular issues in certain ways, but even in these cases, the facts and circumstances of the individuals concerned were controlling considerations.

In race relations and political offender cases the opportunities for control are at least more favorable. As already noted, political offenders always have had few available attorneys to appeal these types of cases. In the last seven Supreme Court terms the NAACP Legal Defense and Education Fund, Inc., controlled about two-thirds of the race relations cases, and three law firms managed more than 40 percent of the political offender cases that reached the Supreme Court. This legal monopoly, at least in principle, gives these attorneys a strategic role in channeling cases upward.

Lawyers in non-commercial cases also disagree on the use of publicity in pending cases. Some attorneys argue that the Supreme Court does not decide cases on strictly legal grounds, and publicity, when discreetly used, serves as an educational vehicle. Others point out that publicity is essential to counteract unfavorable public opinion, stimulated by government, in cases involving politically or even socially unpopular defendants. The leading organizations do not use this tactic in order to get financial support as money is available in their general funds. They confine their publicity in pending cases to house organs and standard news handouts. General publicity in pending cases is carefully avoided.⁶⁰

Though opinions differ on other techniques, there is widespread agreement among non-commercial lawyers on the value of *amicus curiae* briefs. In non-commercial cases other social defense organizations are occasionally represented, but the ACLU is far and away the most active organization. From 1958 to 1964 it participated in 20 civil liberties cases, 12 criminal cases, 11 political offender cases and 3 cases involving race relations. The distribution of *amici* activity is shown in Table 2.

60. The questions asked pertaining to the use of publicity in litigation were as follows: "Did you or your client do anything to publicize the issues involved in this case? If so, was publicity conducted while the case was pending? If not, when?"

In subsequent interviews, the following question was included:

"How do you feel about publicity in pending Supreme Court litigation?"

Only seven commercial cases had elements of publicity connected therewith, but the publicity was passive and apparently not a part of litigation strategy. In one instance where the issue in litigation involved public relations, the public relations firm reported that the matter was taken out of its hands and "placed exclusively in the hands of attorneys." A midwestern attorney in another case involving bankruptcy "suspected that the government chooses midwestern cases because midwestern lawyers do not generally solicit publicity." Some attorneys in important public utility cases voiced the opinion that most Supreme Court cases bring with them "a retinue of lawyers, experts, and a public relations counsel and even the nudging of senators and representatives." In most of the interviews conducted, this view was not volunteered—even though several attorneys granted its plausibility.

As one would expect, the forces at work in criminal cases are markedly different than those involved in civil liberties, political offender and race relations cases. Criminal cases are almost never regarded as "representative" proceedings in any sense. The ACLU over the past seven years has participated in only a dozen criminal cases which resulted in Supreme Court opinions. Attorneys handling criminal cases often regard themselves as "lone wolves" and "independent operators" who feel they are "perfectly capable" of handling their own cases. Some of the attorneys indicated that they were opposed to seeking or getting outside help, and in two interviews the attorneys complained that the "ACLU was trying to take my case away." While some criminal cases involved notorious clients and presumably large fees, a much larger number of cases involved attorneys who had "assumed a lonely burden of fighting a cause without pay and without help from any source."

IV. CONCLUSION

While this is essentially one man's portrait, the impression gained after long investigation is that the picture of Supreme Court litigation is at odds with that usually presented in political science literature. The actual judicial process appears to be a close approximation of the traditional *legal* model in which judicial policy-making emerges through *ad hoc* private controversies. The parties, attorneys, and issues in Supreme Court cases, more often than not, remain narrowly private so as to prevent irrelevancies and outside pressure.

The notion that the judicial process is part of a continuing political process is one that needs serious qualification and refinement. In each Supreme Court term many cases involve merely technical interlocutory issues and "leave other factual or legal issues open." Though litigations are occasionally followed by remedial legislative changes their connection to the political scene must be found elsewhere than through their particular attorneys, clients and active litigation supporters. Though the formal and informal channels of access are difficult to analyze, the available evidence does not support a theory of judicial lobbying or planned litigation.

The immediate result of Supreme Court litigation, or any other litigation, is, of course, the disposition of the immediate case only. The holding may, however, be far reaching and of great interest to others. In this way the "law" results from legal action, but the action, at least in point of time, is not a representative proceeding. As noted earlier, political scientists reject this view, sometimes on the ground that the lawsuit is really "symbolic" of a larger interest conflict⁶¹ or at other times because the Supreme Court is itself a "clientele group" of specific interests engaged in

61. This view is reflected in Beth, *Politics, the Constitution and the Supreme Court* (1962); see authorities cited note 6 supra.

political struggle. Some would argue, for example, that the present Supreme Court is really a clientele group for the NAACP, civil libertarians, or other groups whose viewpoint frequently prevails in the Court's judicial decisions.

The first view is a disguised restatement of legal doctrine, but the clientele view implies that groups of people, directly or indirectly, push litigation forward. This group pressure view is shared by many political scientists but they seldom provide even rudimentary clues regarding its verification. How do these broader interests get represented? Is it through the attorneys? Or by way of the described lobbying techniques?

If "lobbying" of litigation were to become widespread as "a form of political or pressure group activity," a fundamental change in thinking about judicial process would be necessary. Businessmen, companies, unions and corporations would have to abandon traditional attorney-client relationships and interpose trade associations and labor federations between themselves and their attorneys. In social and political litigations, "social defense" or defense by civil liberties organizations would have to supersede the limited functions performed by legal aid and public defender groups, and members of the organized bar would have to abandon traditional notions about the "independence of the bar" and "attorney-client relationships and privileges" in order to recognize their collective group responsibility for the making of public policy. The individual who seeks to vindicate his private rights in the Supreme Court would have to recognize that the judicial process is no place for idiosyncratic notions of public policy.

The evidence suggests, however, that neither the legalistic world of individual attorney-client relationships nor a world of organized or "managed" litigations reflects the actualities of Supreme Court litigation processes.

Almost all lower court litigations raise important issues of law and policy but few attract the participation of outside groups because the principles involved are too closely intermingled with the private interests of the litigants. As we move from the lower to the higher courts, we find that most of the judicial work has a narrower scope and that it is carried forward, beyond the trial stage, only insofar as the litigant is able to pay for it. Most of the issues that receive judicial attention in appellate court opinions are those involving technical legal matters. These issues are often interlocutory in nature, and are usually confined to the clarification of legal tasks.

The private parties involved in Supreme Court cases usually represent individual, commercial, proprietary or pecuniary interests. The "real party in interest" in these cases is the same as the formal party, and there are usually no "behind the scenes" groups intervening between the attorney

and his business client. Sponsorship of such litigation by persons other than the formal parties is rare, but it occurs most frequently in cases involving political offenders or racial discrimination.

The lawyer's role in influencing governmental policymaking is even more apparent in the judicial sphere than in connection with lobbying in the legislative and administrative processes. Large bureaucratically sophisticated commercial law firms are particularly sensitive to the possibilities of raising new issues, whether for offensive or defensive purposes, and they have the ability to bring to bear resources such as money, files, organization, and expertise, in order to respond quickly and sensitively before significant judicial decisions are made.

Criminal defense attorneys prefer to work alone and to insulate the case within the narrow confines of their client's private interests. Social defense organizations, on the other hand, participate in support of litigants whose cases provide "public relations" or "educational value." In cases involving the politically unpopular, these attributes provide the basis for the raising of funds for legal expenses and attorney's fees. Civil liberties organizations, and most private organizations supporting civil liberties causes, do not usually intervene at the trial level unless the issues are clearly focused and disentangled from other legal and evidentiary considerations.

Though coordination or management of multiple litigations is theoretically possible, there are too many intervening variables to prevent its success. Litigation management involves problems of timing, the choice of a litigant, selection of judicial forum, the strategic choice of pleadings, and the cooperation of the attorneys. Despite these obstacles, coordination is sometimes attempted. Lawyers exchange briefs and extend courtesies, but unless there is a common client, there is likely to be very little planning or coordination even among litigants who are similarly situated.

Participation in the role of *amicus curiae* is generally aimed at furthering independent pecuniary or proprietary interests, but, in commercial cases, there is evidence that the participation of the United States government is sought to strengthen the legal position of the formal party. In social and political litigations, the ACLU plays an *amicus* role similar to, but less effective than, the role assumed by the United States government in commercial cases. Other amici in social and political litigations participate primarily as advocates on behalf of the general position advanced by the party litigant. Some coordination of *amicus curiae* activity among private groups is achieved through clearance procedures which include conferences and exchanges of information and briefs. In social and political cases a great deal of effort is expended in enlisting endorsements to "strengthen" a litigant's position and in avoiding duplicative and unnecessary "me too" briefs. In the last analysis, however, *amicus curiae*

briefs reflect the independent work products of individual attorneys or law firms.

On the basis of this study, organized interest groups would appear to play a relatively minor role in Supreme Court decision-making. The political role which the courts play in adjusting private disputes to changes in social and economic policy is played in an atmosphere fundamentally insulated from the "principled" arguments, evidence and lobbying pressure that social and commercial organizations bring to bear on the judicial process.