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Introduction

At all levels of American appellate courts, judges often attempt to reach unanimous decisions to generate an image of judicial consensus. Yet, of course, they cannot always achieve unanimity. Judicial agreement is impossible at times because of differing interpretations of salient legal issues in pending cases, the application and extension of precedents, or concerns over the potential or probable impacts of new decisions on the political, legal, and economic systems. Or agreement may be unlikely for more personal reasons such as differences in attitudes and ideologies, role conceptions, competition for influence on a court, or more general forms of interpersonal friction or rivalry.

Judges therefore naturally encounter peers with whom they disagree for a variety of reasons, and such relations may become clearly conflictual in nature. Moreover, since judges do not always act as one, the existence of conflict is not necessarily a well kept secret. In a rare television interview in December, 1982, Justice Harry A. Blackmun candidly observed that most cases cause friction in the Supreme Court. Although the interview primarily focused on abortion decisions, Justice Blackmun spoke about interpersonal relations on the Burger Court generally. These relations, he noted, are "very competitive, very clashing . . . in the sense that there are opposing views in most of our cases." Blackmun added that "friendship and the mutual respect . . . continues. But if someone's going to play hardball with me, I'll play hardball back if I firmly believe in the position." He even suggested that reports of conflict on the Burger Court as portrayed in *The Brethren*[1] were not altogether false and stated that if the book promoted a more informed public understanding of how the Supreme Court actually functions, "I think maybe it served a purpose."[2]

The existence of such conflict on collegial courts at both the federal and state levels has thus been of interest to students of judicial behavior for many years.[3] Broadly speaking, the literature indicates that conflict may range from personal animus to cloaked disaccord. The occurrence of sustained disagreement also underscores and punctuates the political dynamics and implications of judicial decision-making. Sheldon Goldman expressed it well in 1968, after a painstaking and seminal study of conflict on the United States Courts of Appeals, when he concluded that "it is clear that the appeals courts are political institutions that make policy concerning '"who gets what, when, and how,"' that they "function by an interplay of institutional, personality, attitudinal, and ideological variables," and that

therefore dissent behavior on appellate courts provides "a rich mine of political data . . . to be explored."[4]

A well-known example of "acerbic battles"[5] between prominent federal judges involves Warren E. Burger and David L. Bazelon, each of whom have served since the 1950s on federal appellate courts. Burger and Bazelon sat together on the U.S. Court of Appeals for the District of Columbia circuit between 1956 and 1969, with Bazelon acting as Chief Judge of the court for the last seven years of that period. Prior to his elevation to the Suprene Court in 1969, Burger participated in an ongoing rivalry with Bazelon, and in the words of one of their colleagues, they "were at swords' point."[6]

Two principal reasons for this inability to agree were the attitudinal differences between Judges Burger and Bazelon over criminal justice issues[7] and the fact that they apparently disliked each other personally.[8] Students of background analysis would probably also add that voting conflict would be highly likely between Burger and Bazelon, the former being a Protestant Republican, the latter being a Jewish Democrat.[9] However, while some of the causes of this rivalry are known, it has never been studied in depth. Based chiefly on the research of Burton Atkins and Sheldon Goldman, political scientists are generally aware only of the existence of voting conflict between Burger and Bazelon at the macro level of analysis.[10] By contrast, this article explores at a micro level aspects of the conflict between Judges Burger and Bazelon by examining their criminal justice voting behavior on the D.C. circuit between 1956 and 1969. In promoting an understanding of the behavior of Judges Burger and Bazelon, the article demonstrates some basic ways in which students of judicial behavior may approach research on conflict and suggests how the differences between three-judge and *en banc* panels ostensibly affect conflictual interactions in courts as small groups.

Research Design

Judicial conflict is operationally defined here in terms of voting disagreement in nonunanimous cases, as have many prior studies.[11] Under this definition, the magnitude of judicial conflict increases in direct proportion to increases in the percentage of cases in which Judges Burger and Bazelon disagreed. This definition, if anything, tends to underestimate the actual amount of conflict between Burger and Bazelon since dissensus is not measured here in unanimous decisions as has recent research by Burton Atkins, Justin Green, and Donald Songer.[12]

Four hypotheses are tested in this article. First, based on previous reports,[13] we would expect the magnitude of conflict between Judges Burger and Bazelon in criminal justice cases to be substantially greater than between Burger and his other appeals court colleagues. Second, we would anticipate that conflict between Burger and Bazelon would be most evident when the *en banc* procedure is used. This expectation reflects prior findings that the *en banc* procedure tends to increase or underscore intracircuit conflict.[14] Third, we would hypothesize that while conflict between Judges

Burger and Bazelon would be intense, it also would vary over time, somewhat as demonstrated by related Supreme Court research.[15] This is theoretically logical since there is no apparent reason to believe that highly controversial issues over which judges would virtually always disagree are necessarily appealed to collegial courts in a consistent longitudinal pattern. Finally, a related hypothesis would involve the expectation that the magnitude of voting disagreement between Judges Burger and Bazelon would grow over time because of deteriorating interpersonal relations. In other words, personal dislike should aggrevate judicial relations and be increasingly reflected at least to some extent in voting behavior.

Because of the focus on Judges Burger and Bazelon, the data base consists of the 109 nonunanimous criminal justice cases in which they jointly participated from 1956 to 1969. Reliance was placed on the "descriptive word" and "topic" methods of the *Federal Reporter, Second Series* for data collection and classification. The approach consisted of several steps. The "criminal law" category in the index of each volume was first inspected for the 14 years under consideration, and criminal justice subheadings were examined for appropriate topics. After discovering all nonunanimous cirminal justice panels on which both Burger and Bazelon sat, the size of the data base permitted the reading of each case to insure against misclassifications based on subject matter. Then other topics relating to criminal justice issues were cross-referenced to guard against the omission of pertinent cases. Regarding consolidated cases, all those causing a division on the court were considered separate cases for the universe of data. Opinions concurring in part and dissenting in part were classified either as a dissent or a concurrence, depending on the principal thrust of a judge's opinion. This determination was made only after a careful reading of all opinions and seems to be a viable alternative to assigning automatically a numerical weight to voting positions without reading the opinions themselves,[16] especially where a relatively small data base exists.

It should be noted, too, that only very elementary methods are relied on in this article. Inferential statistics and the reporting of levels of significance are unnecessary since the population is the data base, and we are not generalizing about other judges or courts. Indeed, some of the most authorative past research suggests that such generalizations to other federal courts of appeals might be rather difficult since they "differ in their rates of dissention and intracircuit conflict as well as the sources of conflict."[17]

Findings

The data in Table 1 shed light on the first hypothesis. Table 1 shows that in nonunanimous criminal justice decisions, Warren Burger maintained an obvious conflictual voting relationship between 1956 and 1969 with five judges, not just with Bazelon. Burger's highest rate of disagreement did indeed occur with David Bazelon. However, its magnitude (19.3 percent) is not that pronounced when compared to Burger's voting disagreement with

Judges J. Skelly Wright, Henry Edgerton, Spottswood Robinson, and Charles Fahy. When judges disagree in more than two-thirds of all nonunanimous cases, it is reasonable to say that a relatively strong level of conflict exists. Therefore, despite reports of conflict specifically between Burger and Bazelon, we would conclude that they are somewhat misleading since Burger also experienced substantial levels of voting conflict with four other members of the D.C. circuit.

TABLE 1

Voting Agreement Between Judge Burger and His Colleagues
In Nonunanimous Criminal Justice Cases, 1956–1969*

Judge	Percentage of Agreement	Judge	Percentage of Agreement
Bastian	75.4 (43/57)	Miller	63.0 (46/73)
Bazelon	19.3 (21/109)	Prettyman	86.3 (44/51)
Danaher	87.7 (57/65)	Robinson	22.2 (2/9)
Edgerton	26.6 (17/64)	Tamm	94.7 (18/19)
Fahy	32.5 (26/80)	Washington	51.7 (30/58)
Leventhal	50.0 (6/12)	Wright	25.0 (10/40)
McGowan	47.6 (10/21)		

*Data in this table include all joint participations between Burger and his D. C. circuit colleagues from 1956–1969, not just panels on which both Burger and Bazelon served.

Table 2 permits the testing of the other three hypotheses by presenting data, disaggregated into three-judge and *en banc* panels, for all nonunanimous criminal justice cases in which Judges Burger and Bazelon jointly participated. Clearly, the second hypothesis also is not substantiated by the data. Burger and Bazelon agreed in just 5.4 percent of all nonunanimous three-judge panels but in 34 percent of all nonunanimous *en banc* panels. Thus, while conflict is generally more evident on a court of appeals when it decides cases *en banc*, these findings suggest that judges who are regularly in disagreement may exhibit a higher magnitude of conflict in three-judge than *en banc* panels. This is undoubtedly explained in part by small group dynamics as more judges must be bargained with in an *en banc* setting.[18] This, in turn, may make decision-making more complicated given the larger group and deflate the magnitude of voting conflict between particular judges. Obviously it is easier to dissent in a three-judge panel which contains a rival judge than where there is a total of nine judges, as on the D.C. circuit during these years, seeking to hammer out an agreement. Conflict between individual judges may therefore be suppressed in the process of majority coalition building in *en banc* panels.

TABLE 2

Voting Agreement Between Judges Burger and Bazelon in Nonunanimous Three-Judge and *En Banc* Criminal Justice Cases, 1956–1969

Year	Three-Judge Panels	*En Banc* Panels
1956	0/10	0/2
1957	0/2	2/4
1958	2/9	3/4
1959	1/2	2/5
1960	0/2	0/2
1961	0/1	2/6
1962	0/4	4/6
1963	0/3	0/5
1964	0/3	4/5
1965	0/5	0/8
1966	0/5	1/1
1967	0/3	0/3
1968	0/4	0/1
1969	0/3	0/1
Totals	3/56	18/53

With respect to the third hypothesis, we would again conclude that it should be discarded for three-judge panels, based on the data in Table 2. Judges Burger and Bazelon disagreed from the outset in three-judge panels, and the magnitude of conflict between them did not vary substantially over time. Additionally, when Bazelon became Chief Judge of the court in 1963 and oversaw rotation assignments in three-judge panels, he apparently did not shy away from conflict with Burger. With the exception of 1956 and 1958, Burger and Bazelon tended to serve together on a slightly higher number of three-judge panels beginning in 1963 than before Bazelon became Chief Judge of the circuit. The third hypothesis does, however, receive some modicum of support regarding *en banc* panels. Conflict was highest in 1956, 1960, 1963, 1965, and 1967–1969, while being more moderate in the remaining seven years. Yet, once more, small group interactions within the *en banc* setting, such as those mentioned regarding the second hypothesis, may well account for most or all of this longitudinal variation in conflict magnitude.

Nor is the fourth hypothesis supported by the data in Table 2. There is no clear relationship between magnitude of voting conflict and time even though Judges Burger and Bazelon apparently became more personally alienated as the years passed. They disagreed in a large majority of nonunanimous three-judge and *en banc* criminal justice cases as soon as they became colleagues in 1956, and no dramatic variation in disagreement is evident longitudinally. As some have suggested,[19] perhaps interpersonal friction is reflected to some extent in the data because the degree of conflict is very intense. However, by examining their behavior in three-judge and *en*

banc panels, we certainly cannot demonstrate empirically that interpersonal friction contributed to an increase in the magnitude of voting conflict over time. Therefore, if Burger and Bazelon experienced a growth in personal animosity toward each other, it does not surface in this particular analysis. Apparently, despite any dislike which may have existed, factors such as role constraints or samll group interactions may have camouflaged any growth in personal animus that might otherwise be detected in voting patterns.

Conclusions

Given previously reported relations between Judges Warren E. Burger and David L. Bazelon, this article provides a case study of two prominent federal judges and indicates some ways in which conflict may be analyzed by students of judicial behavior. Specifically, it has tested four hypotheses based on the 109 nonunanimously decided criminal justice cases in which Burger and Bazelon jointly participated on the D.C. circuit between 1956 and 1969. Contrary to our four hypotheses, it was found that the magnitude of voting conflict between Burger and Bazelon was not substantially greater than Burger's rate of disagreement with four other D.C. circuit judges, that Burger and Bazelon were more likely to disagree in three-judge than in *en banc* panels, and that the magnitude of their voting conflict did not significantly vary or increase over time regardless of reported interpersonal friction. Certainly voting conflict does not necessarily, or even in a sizable minority of cases, mean that "personal dislike" is being exhibited. Reasonable men can indeed agree to disagree—a simple fact that must always be kept in mind when exploring patterns of judicial voting conflict. As Sheldon Goldman observed after interviewing 27 appeals court judges, interpersonal dislike is rare on the courts of appeals, and "[t]he frequent shifting of panel membership, it would seem, deters the development or aggrevations of personality conflicts."[20]

These findings suggest that future research could profitably examine in depth the relationships between other appellate court judges, both federal and state, to determine if past generalizations about their conflictual *or* consensual relations are in fact quantitatively verifiable. Beyond attitudinal, interpersonal, and background differences that may exist between appellate court judges, such research should also draw upon some of the basic theory and findings of small group analysis, as this article suggests. In terms of small group theory, it seems clear that Judges Burger and Bazelon were essentially using sanctions against each other by consistently voting on the opposite sides of issues, not being concerned about alienating each other for purposes of future coalition building.[21] Sanctions were also occasionally used via strongly worded dissents authored by both judges when the other wrote majority opinions for the court.[22] Eclectic approaches exploring conflict on American appellate courts, using a combination of traditional and behavioral analysis, will significantly assist political scientists in better understanding judicial conflict in the future.

NOTES

*I wish to thank Sheldon Goldman, Justin J. Green, Donald R. Songer, and S. Sidney Ulmer for their comments on an earlier version of this article which was originally presented as part of a longer paper at the Annual Meeting of the Southern Political Science Association, Atlanta, October 28–30, 1982.

[1]Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979).

[2]Justice Blackmun quoted in Fred Barbash, "Blackmun Says Abortion Slurs Hurt Him," *Washington Post*, December 5, 1982, p. A7. Other justices have suggested the type of conflict that emerges on the Supreme Court. See, e.g., William J. Brennan, "Inside View of the High Court," *New York Times Magazine*, October 6, 1963, p. 100; Tom C. Clark, "Internal Operation of the United States Supreme Court," *American Judicature Society Journal* 43 (1959), p. 51.

[3]See, e.g., David J. Danelski, "Conflict and Its Resolution in the Supreme Court," *Journal of Conflict Resolution* 11 (1967), pp. 71–86; Henry Robert Glick and Kenneth N. Vines, *State Court Systems* (Englewood Cliffs, N.J.: Prentice-Hall, 1973), pp. 77–82; Sheldon Goldman, "Conflict and Consensus in the United States Courts of Appeals," *Wisconsin Law Review* (1968), pp. 461–482; Sheldon Goldman, "Conflict on the U.S. Courts of Appeals 1965–1971: A Quantitative Analysis," *University of Cincinnati Law Review* (1973), pp. 635–658; J. Woodford Howard, Jr., *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits* (Princeton, N.J.: Princeton University Press, 1981), chap. 7; Steven A. Peterson, "Dissent in American Courts," *Journal of Politics* 43 (1981), pp. 412–434; C. Herman Pritchett, *The Roosevelt Court: A Study of Judicial Politics and Values 1937–1947* (New York: Macmillan, 1948); Richard J. Richardson and Kenneth N. Vines, *The Politics of Federal Courts: Lower Courts in the United States* (Boston: Little, Brown, 1970), pp. 135–141. See also Sheldon Goldman and Charles M. Lamb, eds., *Judicial Conflict and Consensus: Behavioral Essays on American Appellate Courts* (Lexington, Ky.: University of Kentucky Press, forthcoming, 1985).

[4]Goldman, "Conflict and Consensus in the United States Courts of Appeals," p. 482.

[5]Howard, *Court of Appeals in the Federal Judicial System*, p. 206.

[6]*Ibid.*, note i.

[7]See, e.g., Burton M. Atkins, "Decision-Making Rules and Judicial Strategy on the United States Courts of Appeals," *Western Political Quarterly* 25 (1972), pp. 632–636; Charles M. Lamb, "Exploring the Conservatism of Federal Appeals Court Judges, " *Indiana Law Journal* 51 (1976), pp. 265–277.

[8]See, e.g., Joseph C. Goulden, *The Benchwarmers: The Private World of Powerful Federal Judges* (New York: Weybright and Talley, 1974), pp. 227–228; Howard, *Courts of Appeals in the Federal Judicial System*, p. 206; James F. Simon, *In His Own Image: The Supreme Court in Richard Nixon's America* (New York: David McKay, 1973), p. 79; Woodward and Armstrong, *The Brethren*, pp. 14, 22–23, 369, 379. Some of these reports are so unusual—if not shocking—that at least one deserves quotation. A good example may be taken from Woodward and Armstrong who note comments supposedly made, and actions supposedly taken, by Bazelon when Burger was appointed Chief Justice:

> The *New York Times* . . . quoted an unnamed judge who had worked with Burger on the Court of Appeals: "[Burger] is a very emotional guy, who somehow tends to make you take the opposition position on issues. To suggest that he can bring the Court together—as hopefully a Chief Justice should—is simply a dream."
>
> Many who knew Burger's old foe, Bazelon, suspected that the comment was his. But Bazelon denied having talked to the press. "I was speechless and sick for a week," he said.
>
> Burger stayed home to avoid reporters . . . He requested that the reporters and cameramen be kept off the fifth floor at the Court of Appeals, where his office was, even though he was staying away. Later, he learned that the lobby had been filled with the press despite his request. "The only way they could have gotten in is Bazelon," Burger told his staff. "If I can prove it's true, I'll punch him in the nose."

Woodward and Armstrong, *The Brethren*, pp. 22–23. See also Fred P. Graham, "Burger's Down-to-Earth Qualities May Spur Confirmation as Chief Justice," *New York Times,* May 25, 1969, p. 55; Sidney E. Zion, "Nixon's Nominee for the Post of Chief Justice: Warren Earl Burger," *New York Times,* May 22, 1969, p. 36; "The New Chief Justice," *Nation*, June 2, 1969, p. 682. To be sure, these political journalists may exaggerate the degree of interpersonal conflict between Judges Burger and Bazelon. Yet, if only partially accurate, these accounts suggest that political scientists have not tapped the full dimensions of such conflict on collegial courts and their possible effects on decision-making.

[9]See, e.g., Sheldon Goldman, "Voting Behavior on the United States Courts of Appeals Revisited," *American Political Science Review* 69 (1975), pp. 498, 503–504; Stuart S. Nagel, *The Legal Process from a Behavioral Perspective* (Homewood, Ill.: Dorsey, 1969), pp. 227, 230; S. Sidney Ulmer, "Social Background as an Indicator to Votes of Supreme Court Justices in Criminal Cases: 1946–1956 Terms," *American Journal of Political Science* 18 (1973), pp. 624–630. More generally, see C. Neal Tate, "Personal Attribute Models of Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economic Decisions, 1946–1978," *American Political Science Review* 75 (1981), pp. 355–367.

[10]See, e.g., Atkins, "Decision-Making Rules and Judicial Strategy on the United States Courts of Appeals," pp. 632–637; Burton M. Atkins, "The Longitudinal Context of Judicial Behavior: The Case of Chief Justice Warren Burger," unpublished manuscript, 1973; Goldman, "Conflict on the U.S. Courts of Appeals 1965–1971," pp. 655–656.

[11]See, e.g., Glick and Vines, *State Court Systems*, p. 77; Goldman, "Conflict and Consensus in the United States Courts of Appeals," p. 463; Goldman, "Conflict on the U.S. Courts of Appeals 1965–1971," p. 637; Richardson and Vines, *The Politics of Federal Courts*, p. 138; S. Sidney Ulmer, "Exploring the Dissent Patterns of Eleven Chief Justices: John Marshall to Warren Burger," paper delivered at the Annual Meeting of the American Political Science Association, Denver, September 2–5, 1982.

[12]Burton M. Atkins and Justin J. Green, "Consensus on the United States Courts of Appeals: Illusion or Reality?" *American Journal of Political Science* 20 (1976), pp. 735–748; Donald R. Songer, "Consensual and Nonconsensual Decisions in Unanimous Opinions of the United States Courts of Appeals," *American Journal of Political Science* 26 (1982), pp. 225–239. Regarding state appellate courts, see Robert J. Sickels, "The Illusion of Judicial Consensus: Zoning Decisions in the Maryland Court of Appeals," *American Political Science Review* 59 (1965), pp. 100–104.

[13]See, e.g., Goulden, *The Benchwarmers*, pp. 227–228; Woodward and Armstrong, *The Brethren*, pp. 22–23.

[14]See, e.g., Howard, *Courts of Appeals in the Federal Judicial System*, p. 190; Richardson and Vines, *The Politics of Federal Courts*, pp. 139–141.

[15]See, e.g., Pritchett, *The Roosevelt Court*, pp. 25, 242–246; Glendon Schubert, *The Judicial Mind: Attitudes and Ideologies of Supreme Court Justices 1946–1963* (Evanston, Ill.: Northwestern University Press, 1965), pp. 45, 104–112.

[16]See, e.g., Goldman, "Voting Behavior on the United States Courts of Appeals Revisited," p. 492.

[17]Sheldon Goldman, "Voting Behavior on the United States Courts of Appeals, 1961–1964," *American Political Science Review* 60 (1966), p. 382.

[18]See, e.g., Sheldon Goldman and Austin Sarat, eds., *American Court Systems: Readings in Judicial Process and Behavior* (San Francisco: W.H. Freeman, 1978), pp. 490–522; S. Sidney Ulmer, *Courts as Small and Not So Small Groups* (New York: General Learning Press, 1971) and the research cited therein. Regarding the U.S. Courts of Appeals, see Burton M. Atkins, "Judicial Behavior and Tendencies Towards Conformity in a Three Member Group: A Case Study of Dissent Behavior on the U.S. Court of Appeals," *Social Science Quarterly* 54 (1973), pp. 41–53.

[19]See the sources cited in note 8 *supra*.

[20]Goldman, "Conflict and Consensus in the United States Courts of Appeals," p. 481. See also Howard, *Courts of Appeals in the Federal Judicial System*, p. 204.

[21]Regarding the concept of the use of sanctions on collegial courts, see Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964) pp. 54–56.

[22]See Charles M. Lamb, "Warren Burger and the Insanity Defense: Judicial Philosophy and Voting Behavior on a U.S. Court of Appeals," *American University Law Review* 24 (1974), pp. 91–128; Charles M. Lamb, "The Making of a Chief Justice: Warren Burger on Criminal Procedure, 1956–1969," *Cornell Law Review* 60 (1975), pp. 743–788.