Florida State University Law Review

Volume 3 | Issue 3 Article 1

Summer 1975

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FLORIDA STATE UNIVERSITY LAW REVIEW

VOLUME 3 SUMMER 1975 NUMBER 3

# NIXON'S LEGACY TO THE SUPREME COURT: A STATISTICAL ANALYSIS OF JUDICIAL BEHAVIOR

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## I. INTRODUCTION

Although the Nixon Presidency came to a halt in 1974, Richard Nixon's legacy to the Supreme Court continues. With the appointment of William Rehnquist and Lewis Powell to the Supreme Court in 1971, President Nixon had made four appointments to the Court in the relatively short period of three years.[1] This unusually large turnover in Justices and the fact that candidate Nixon had made such a major issue of the need for a more conservative Court during his 1968 campaign combined to heighten interest in the impact that these new Justices would have upon the output of the Court. While the greatest interest in an appointee's impact is likely to manifest itself in the early part of a Justice's tenure, lifetime appointment assures that the influence of the appointee on Court decisions is long lasting. This article represents an attempt to derive some initial inferences regarding the Nixon legacy by examining the behavior of his appointees in selected cases. The cases used are those involving conflicts between the government and an individual decided during the 1971, 1972, and 1973 terms. Data on other Justices and from other cases are introduced for comparative purposes and for use in formulating a theoretical context for understanding decision-making at the level of the individual Justice.

After the 1968 election, President Nixon explained one of his campaign pledges as follows:

> [D]uring my campaign for the Presidency, I pledged to nominate to the Supreme Court individuals who shared my judicial philosophy

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1. Over the 185-year history of the Supreme Court, a Justice has been appointed to the Court on the average of once every two years. Thus Nixon should have had to wait eight years to make four appointments, rather than only three years.

> which is basically a conservative philosophy. . . .
>
> . . . .
>
> As a judicial conservative, I believe some Court decisions in the past have gone too far in weakening the peace forces as against the criminal forces in our society.[2]

Thus Nixon equated judicial conservatism with support of the government in criminal cases.[3] Such a definition is congruent with the concept of conservatism employed by political scientists who study judicial behavior. In the literature, criminal cases are considered as one type of civil liberties case. In criminal cases as well as all other civil liberties cases, a conservative vote is operationalized as a vote which upholds the claim of the government as against the individual.[4] Thus there is little difference between Nixon's concept of conservatism and that used in the professional literature, except that the latter is broader in scope. Therefore, at a very simplistic operational level, we can conclude that Nixon's desire to appoint "conservative" Justices was a desire to appoint Justices who would support the government to a statistically significant degree in criminal cases.

In a recent book on the Supreme Court, James Simon concluded that "Richard Nixon . . . has succeeded in dissolving a Warren Court that was the nation's premier symbol for progressive leadership for more than a decade."[5] An alternative hypothesis from a Nixonian perspective might be that Richard Nixon succeeded in building a Court that is strengthening the "peace forces" and weakening the "criminal forces" in American society. Those who are strong civil libertarians might be expected to associate with the first proposition. Those who stress efficient suppression of crime would likely opt for the second.[6] While both statements suggest that President Nixon, through his Supreme Court appointments, brought change to the policymaking of the Court, neither is an explanation of that change. Simon suggests that the Court's recent performance in the criminal justice field is explained by the formula, $4N + X = LAO$,[7] *i.e.* four

2. New York Times, Oct. 22, 1971, at 24, col. 4.

3. For further indication of President Nixon's equation of judicial conservativism and support of the government in criminal cases, see New York Times, Nov. 3, 1968, § 1, at 79, col. 3.

4. *See, e.g.*, G. SCHUBERT, THE JUDICIAL MIND 125-58 (1965).

5. J. SIMON, IN HIS OWN IMAGE 288 (1973).

6. The ramifications of these conflicting views of the criminal process are considered in H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968). Packer constructs a "crime control model" and a "due process model" of the criminal process, and attempts to ascertain where our present criminal process falls on the spectrum between those models.

7. J. SIMON, *supra* note 5, at 253.

TABLE I
VOTING PATTERNS OF 15 SUPREME COURT JUSTICES IN GRANTING CERTIORARI REVIEW OF STATE CRIMINAL CASES: VARYING PERIODS (1947-56 TERMS)

| *Justice* | *Period* | *Number of Applications for Review of Government Victory Below* | *% Decisions Favorable to Criminal Suspect (Cert. Granted)* |
|---|---|---|---|
| Murphy | 1947-48 | 29 | 57.63 |
| Whittaker | 1956 | 12 | 50.00 |
| Douglas | 1947-56 | 198 | 48.49 |
| Rutledge | 1947-48 | 32 | 43.75 |
| Black | 1947-56 | 212 | 38.68 |
| Brennan | 1956 | 22 | 36.37 |
| Warren* | 1953-56 | 88 | 27.28 |
| Frankfurter | 1947-56 | 217 | 21.66 |
| Harlan | 1955-56 | 72 | 20.84 |
| Burton | 1947-56 | 218 | 20.65 |
| Clark | 1949-56 | 184 | 17.40 |
| Vinson* | 1947-52 | 126 | 15.88 |
| Jackson | 1947-53 | 135 | 14.85 |
| Reed | 1947-56 | 205 | 13.18 |
| Minton | 1949-55 | 160 | 10.00 |

* Chief Justices

Nixon appointees plus the unknown (Justice White or Stewart) equals law and order decisions favorable to prosecutors or police.[8] While this formula may contain an element of truth, it is atheoretical at all but the least sophisticated level. This article explores empirically the question of behavioral antecedents and delineates a theoretical framework in which the voting behavior of Supreme Court Justices can be understood. While our analysis is more general in nature than that of Simon, it will suggest that the theoretical reasons for the behavior of the Nixon appointees to the Court are more complex than the peapod implications of the Simon formula.

## II. DIFFERENCES AMONG SUPREME COURT JUSTICES

While references to the "Nixon Justices" are commonplace, it is certainly possible that the four Nixon appointees are not equally in Nixon's image, but differ among themselves. Behavior disparities among Justices are not unusual. For example, as Tables I and II reveal, Justices are not equally inclined to grant certiorari applications

8. *Id.*

TABLE II
VOTING PATTERNS OF 15 SUPREME COURT JUSTICES IN GRANTING CERTIORARI REVIEW OF FEDERAL CRIMINAL CASES: VARYING PERIODS (1947-56 TERMS)

| *Justice* | *Period* | *Number of Applications for Review of Government Victory Below* | *% Decisions Favorable to Criminal Suspect (Cert. Granted)* |
|---|---|---|---|
| Black | 1947-56 | 142 | 50.70 |
| Douglas | 1947-56 | 141 | 50.06 |
| Murphy | 1947-48 | 6 | 50.00 |
| Rutledge | 1947-48 | 6 | 50.00 |
| Frankfurter | 1947-56 | 141 | 34.75 |
| Brennan | 1956 | 18 | 33.34 |
| Warren* | 1953-56 | 88 | 27.27 |
| Harlan | 1955-56 | 76 | 26.31 |
| Jackson | 1947-53 | 59 | 25.40 |
| Reed | 1947-56 | 132 | 20.96 |
| Clark | 1949-56 | 129 | 18.60 |
| Burton | 1947-56 | 142 | 16.90 |
| Whittaker | 1956 | 6 | 16.67 |
| Vinson* | 1947-52 | 50 | 16.00 |
| Minton | 1949-55 | 84 | 13.67 |

* Chief Justices

of criminal defendants.[9] Justices also differ in the frequency with which they find for the criminal defendant in those cases where certiorari is granted. To take extreme examples, in the 1947-56 terms, Justice Minton found for the criminal defendant 22.6 percent of the time in federal criminal cases and 22.4 percent of the time in state cases. Douglas, on the other hand, found for the defendant at a level of 75.1 percent in federal cases and 88.1 percent in state cases. The Court as a body, during this same period, held for the defendant 46.1 percent of the time in federal criminal proceedings and 56.6 percent of the time in state criminal proceedings.

Chief Justices also differ in their support of criminal defendants. This is evident from a comparison between Chief Justices Warren and Vinson in Tables I and II and also from the following comparison between Chief Justices Warren and Burger. In his entire tenure, Earl Warren decided in favor of the criminal defendant in 81 percent of the criminal cases in which he participated. From his appointment in

9. Further discussion of these phenomena may be found in Ulmer, *Supreme Court Justices as Strict and Not-So-Strict Constructionists: Some Implications*, 8 LAW & SOC'Y REV. 13 (1973).

TABLE III

PERCENTAGE OF CRIMINAL CASES IN WHICH THE COURT HELD IN FAVOR OF THE CRIMINAL DEFENDANT

| *Court* | *Term* | *All Criminal Cases Decided* | *% of Decisions Pro-Defendant* | *Total Federal Criminal Cases Decided* | *% of Decisions Pro-Defendant* | *Total State Criminal Cases Decided* | *% of Decisions Pro-Defendant* |
|---|---|---|---|---|---|---|---|
| Vinson | 1947-52 | 141 | 36.8 | 77 | 28.5 | 64 | 46.8 |
| Warren | 1953-68 | 579 | 67.7 | 302 | 60.6 | 277 | 75.4 |
| Burger | 1971-73* | 116 | 46.5 | 45 | 35.5 | 71 | 52.1 |

* For the Burger Court, only those cases in which all four Nixon appointees participated have been used.

1969 through June 1974, Warren Burger supported the defendant in only 20 percent of the criminal cases decided.

Courts as a body also differ. Table III provides a comparison of the decisions in favor of the criminal defendants in the Vinson (1947-1952), Warren (1953-1968) and Burger (1971-1973) courts. The table reveals the extent to which the Warren Court differed from the Courts preceding and following it in supporting the claims of criminal defendants. In general, the criminal defendant had a one-third chance that the Vinson Court would find in his favor, a two-thirds chance with the Warren Court, and, to date, has less than a one-half chance with the Burger Court. In all three Courts it was statistically less likely that the defendant would win a case against the federal government than against a state. However, the difference is less in the Warren Court than in Courts of the other two Chief Justices.

A comparison of the Warren and Burger Courts reveals that the Burger Court has found for defendants at a rate of about 21 percent below that of the Warren Court. The Burger Court appears to be moving back to the pre-Warren Court rate of holdings for the defendant. While it has not yet regressed that far, it is much closer to the Vinson Court than to the Warren Court. The figures may be somewhat misleading, however, given the far-reaching decisions in the criminal justice area in the 1953-69 period. The Burger Court, while showing a willingness to slow the expansion of rights and nibble at the basic precedents of the Warren era, has not shown any drive to undo completely all the change brought about by the previous Court.

## III. The Burger Court: Theoretical Considerations

The fact that Justices, Chief Justices, and Courts differ in their inclination to find for the criminal defendant suggests the possibility that the four Nixon appointees may also differ in spite of Nixon's attempt to appoint Justices who would help each other to reduce the Court's inclination to find for criminal defendants. Moreover, even if one or more of the Nixon Justices is found to vote in favor of the government in criminal cases to a statistically significant degree, we cannot necessarily explain that voting pattern as reflecting solely the Justice's attitude toward criminal defendants. It is possible that support of the government in criminal cases is only one manifestation of a more fundamental attitudinal dimension: support of institutionalized governmental authority. In other words, it may be hypothesized that the attitude which leads a Justice to vote to expand the scope of institutionalized governmental authority in the context of criminal law

10. *Id.*

will lead to a similar result in noncriminal areas. One of the authors has suggested as much in a different context.[10] He determined that during the 1947-1956 terms of the Court, those Justices who supported the government on certiorari applications also supported the government in deciding criminal cases.

L. L. Thurstone, who pioneered the psychological study of attitudinal structure, defines an attitude as the "degree of positive or negative effect associated with some psychological object."[11] He defines a psychological object as "any symbol, phrase, slogan, person, institution, ideal, or idea toward which people can differ with respect to positive or negative effect."[12] For the data analyzed here, the major attitude object (AO)[13] is conceptualized as conflict between individual and government. External behavior, however, is not merely a function of attitudes toward objects. It is also the function of the situation in which the object is located. This is referred to as the attitude situation (AS).[14] With respect to conflict between individuals and institutionalized governmental authority, criminal and noncriminal cases are separate categories of situational variables in which a Justice is forced to respond to the question of governmental authority. In other words, there are at least two different situations in which government and individual may be involved in legal conflict. These different situational variables (criminal cases, and noncriminal cases in which the government is a litigant) may cause the Justice to react differently to the attitude object (government-individual conflict), or the situational variables may be dominated by the Justice's attitudes toward the object. In the latter case, the decisional propensities toward the attitude object would be consistent in both attitude situations. The question in its simplest form is, when a Justice finds for the

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11. Thurstone, *Comment,* 51 AM. J. SOC. 52 (1946).

12. *Id. See* A. EDWARDS, TECHNIQUES OF ATTITUDE SCALE CONSTRUCTION 2 (1957).

13. *See generally* M. ROKEACH, *The Nature of Attitudes,* in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 449 (1968).

14. *Id.* Rokeach discusses the importance of the distinction between AO and AS and argues that behavior is a function of both of these factors. The logic of this distinction can be seen in a simple example. It is not sufficient to know merely a person's feelings toward blacks (the AO). It is also necessary to know the situation (AS) in which the black is encountered in order to predict behavior. For example, a person's attitude toward a black may be very different in a situation where the black is a fellow worker ($AS_1$), from his attitude in a situation where the black is moving into the neighborhood ($AS_2$). For a further discussion of this distinction and its importance in predicting behavior, see M. ROKEACH, BELIEFS, ATTITUDES AND VALUES 126-29 (1968).

This idea has been adapted to the study of the judiciary in H. Spaeth, A Theory and Methodology for the Explanation and Prediction of Supreme Court Decisions (unpublished manuscript). *See also* Spaeth, Meltz, Rathjen, & Haselswerdt, *Is Justice Blind: An Empirical Investigation of a Normative Ideal,* 7 LAW & SOC'Y REV. 119 (1972).

government in a criminal case, is he doing so because of a tendency to favor the government whenever it is a litigant opposing an individual or only when a criminal defendant is involved?

### *A. Operationalization*

At the operational level, the preceding discussion suggests that by appointing Justices who support the government to a significant degree in criminal cases, Nixon also appointed men whose bias toward institutionalized authority would cause them to support government in other areas. More generally, we hypothesize that all Justices who support the government at a statistically significant level in criminal cases ($AS_1$) will support the government at a statistically significant level in noncriminal cases ($AS_2$).[15] Our hypothesis refers only to cases involving the attitude object specified above—those cases involving conflict between individual and government. At first blush, this theory appears to conflict with the psychometric theory of judicial decision-making. By scaling civil liberties (C) and economic enterprise (E) as two distinct attitude situations,[16] some authors have concluded that the Justices do not have a single attitude that dominates both attitudinal situations.[17] Conversely, we hypothesize that the attitude situations of criminal cases, which are part of the civil liberties (C) scale, and those of noncriminal cases, which include cases from both the economic enterprise (E) and civil liberties (C) scales, are dominated by a single attitude toward the object of conflict between institutionalized governmental authority and individuals.

The government cases which constitute the universe of cases for the theory here do not constitute all of the cases which make up the C and E scales. The C and E scales also include cases solely between private litigants. Therefore, studies which show that the C and E scales do not form a unidimensional array are not necessarily disconfirming. The array of cases selected for presence of the attitude object that we hypothesize has not been tested for dimensionality. In short, the presence of nongovernment cases in C and E scales possibly

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15. For two earlier studies dealing with support of the federal government by the Justices, see Canon & Giles, *Recurring Litigants: Federal Agencies Before the Supreme Court*, 25 W. POL. Q. 183 (1972); Tanenhaus, *Supreme Court Attitudes Toward Federal Administrative Agencies: 1947-1956—An Application of Social Science Methods to the Study of the Judicial Process*, 14 VAND. L. REV. 473, 482-502 (1961).

16. For an interesting and nontechnical overview of the concept of C and E scales, see S. GOLDMAN & T. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM 159-67 (1971).

17. *See* Ulmer, *The Dimensionality of Judicial Voting Behavior*, 13 M.W.J. POL. SCI. 471 (1969).

obscures the unidimensionality present in conflicts only between the government and private individuals.

### *B. Data Analysis*

In qualitative terms, the direction of the movement in constitutional law which the Nixon Justices seek is clear: they seem determined to reduce the pre-trial rights of criminal defendants and have already moved more than a few steps in that direction. For example, policemen have been given greater freedom of action in stop and frisk cases.[18] The latitude of the policemen to conduct a search incident to a valid arrest has been expanded.[19] And the Court held in 1972 that the right to presence of counsel at police lineups is limited to lineups conducted after indictment.[20] While such examples are easily multiplied, a clearer picture will emerge from the empirical analysis to which we now turn.

In order to determine whether $AS_1$ (criminal law context) and $AS_2$ (noncriminal law cases in which the government is a litigant) are dominated by AO (conflict between government and individual) a comparison of the votes favoring the government in criminal and noncriminal cases in which government is a litigant has been made. The results are reported in Table IV. The question which the table addresses is whether the Justices have distinguished between criminal and noncriminal cases in supporting the government's position. The contingency coefficient (C), column seven, measures the degree of the association between the two dichotomized variables, support nonsupport and criminal cases noncriminal cases.[21] That association is

18. *Compare* Adams v. Williams, 407 U.S. 143 (1972), *with* Terry v. Ohio, 392 U.S. 1 (1968).

19. United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973).

20. Kirby v. Illinois, 406 U.S. 682 (1972).

21. The contingency coefficient (C) allows us to determine if an observed relationship between two variables is a function of an actual correlation between the variables or is merely due to chance. This is done by determining what frequencies would occur in each cell (Columns 2-5 in Table IV) if there were no association or correlation between the two variables. (In Table IV the two variables are support for government and type of case: criminal or noncriminal.) The larger the difference between these expected values and the observed cell values, the larger the degree of association between the two variables and thus the higher is the value of C. For a further discussion of this statistic, see H. BLALOCK, SOCIAL STATISTICS 230 (1960). *See also* Tanenhaus, *supra* note 15.

It should be noted that the C is particularly applicable in determining the association between dichotomous variables, such as those considered in this article. A dichotomous variable is one which is divided into two classes. For example, the variable sex is dichotomous in that it can be divided into two classes: male and female. Similarly, each of the variables in this paper is divided into two classes: support and non-support for government; and criminal and noncriminal cases.

statistically significant at the .05 level only for Justice Powell.[22] This indicates that Powell's support for the government is dominated by the two attitude situations rather than a general attitude toward government-individual conflict, and that the associations reported are unlikely to be chance results.

The association for Powell is not very strong. A lambda coefficient, which measures the strength of a relationship, was computed for this Justice and found to be zero.[23] Therefore the percentage of improvement in the extent to which the rate of support for government by Powell can be predicted by knowing whether the case is criminal or noncriminal is zero. Nevertheless, the weak relationship does exist and we infer initially that the AO (conflict between government and individual) is dominant over the situational variables for eight of the nine Justices.

We do not know from Table IV whether support for the government in either set of cases is significantly above the group mean for any given Justice.[24] By comparing criminal and noncriminal cases separately we can answer that question and determine whether differences in support levels occur across the two situations. This analysis reveals that in criminal cases Rehnquist, Burger, Powell, and Blackmun have supported the government to a statistically significant degree above the group mean while Marshall, Brennan, and Douglas

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22. For a comment on "chance result" or "statistical significance" see note 25, *infra*.

23. Lambda is a measure of association between two nominal variables. If one views association as a problem in guessing, then variables may be said to be associated if knowledge of one improves ability to "guess" the other. The lambda coefficient measures the extent to which such improvement occurs when knowledge of a second variable is introduced. For example, if, as in Table IV, we know that Chief Justice Burger supported government more often than not (157 to 63), the maximum error if we guess support for government in all cases is 63 or 28.6%. But if we know Burger's votes in both criminal and noncriminal cases, and "guess" support in terms of the modal (larger) category in each case, we would make 41 plus 22 for a total of 63 errors. Obviously, we cannot improve our estimate of Burger's support ratio by having knowledge of whether the votes are cast in criminal or noncriminal cases. This is another way of saying that no association was found between supporting the government and the criminal or noncriminal context of the case. For a more complete discussion of lambda as a measure of association, see L. FREEMAN, ELEMENTARY APPLIED STATISTICS FOR STUDENTS IN BEHAVIORAL SCIENCE 71-78 (1965).

24. As was discussed in note 21 *supra*, measures of association are constructed by determining the deviance of observed frequencies from those expected by chance. In this particular section we are using as the expected frequency the group mean. This mean is merely the average support rate for all of the Justices. This figure is being used as the expected frequency upon the logic that if there is no difference between the Justices' AO's and AS's, each should vote the same in all cases, and that this same voting pattern should be reflected in the group mean. Thus, to the extent that the various Justices deviate from this mean, we may conclude that there are significant differences among them.

TABLE IV
ANALYSIS OF VOTES (1971-73 TERMS)*

| (1) *Justice* | (2) *For Gov't in Criminal Cases* | (3) *Against Gov't in Criminal Cases* | (4) *For Gov't in Noncriminal Cases* | (5) *Against Gov't in Noncriminal Cases* | (6) *Total Cases* | (7) *Contingency Coefficient (C)* | (8) *Lambda* |
|---|---|---|---|---|---|---|---|
| Burger | 99 | 41 | 58 | 22 | 220 | .019 | 000 |
| Rehnquist | 94 | 22 | 63 | 16 | 195 | .016 | 000 |
| Blackmun | 92 | 46 | 50 | 30 | 218 | .042 | 000 |
| Powell | 83 | 35 | 44 | 35 | 197 | .148 | 000 |
| White | 80 | 59 | 40 | 40 | 219 | .072 | 000 |
| Stewart | 57 | 83 | 34 | 46 | 220 | .017 | 000 |
| Brennan | 31 | 106 | 13 | 67 | 217 | .076 | 000 |
| Marshall | 22 | 114 | 11 | 68 | 215 | .030 | 000 |
| Douglas | 12 | 128 | 7 | 73 | 220 | .003 | 000 |

* All cases here analyzed involved individuals and the government as opposing litigants.

have supported the criminal defendant at equally significant levels. Table V indicates that the four Nixon appointees have supported the government in criminal cases roughly 67 to 81 percent of the time. Three of the Warren Court holdovers—Marshall, Brennan, and Douglas—have supported the government in the same cases at levels ranging from 9 to 23 percent. The difference between the means of these two groups is statistically significant at .001. In civil cases, Table V indicates that Rehnquist, Burger, and Blackmun continue to support the government at levels significantly above the group mean while Marshall, Brennan, and Douglas do so at levels significantly below the group mean. Again the difference between the means for these two groups is significant at .001.

TABLE V
ANALYSIS OF VOTES FAVORING GOVERNMENT OVER INDIVIDUAL (1971-73 TERMS)

| *Justice* | *% for Gov't in Criminal Cases* | *Probability That This Is a Chance Result** | *% for Gov't in Noncriminal Cases* | *Probability That This Is a Chance Result** |
|---|---|---|---|---|
| Rehnquist | 81.1 | .01 | 79.7 | .01 |
| Burger | 70.8 | .01 | 72.5 | .01 |
| Blackmun | 66.7 | .01 | 62.5 | .05 |
| Powell | 70.4 | .01 | 55.6 | .20 |
| White | 57.6 | .20 | 44.4 | .50+ |
| Stewart | 60.8 | .50+ | 43.9 | .50+ |
| Brennan | 22.7 | .01 | 16.2 | .01 |
| Marshall | 16.2 | .01 | 13.9 | .01 |
| Douglas | 8.6 | .01 | 8.7 | .01 |

* By chi square using group mean percentage to calculate expected value.[25]

From the comparisons made, we may infer that attitude toward government-individual conflict dominates attitude toward situation for Rehnquist, Burger, and Blackmun (favorable) and for Brennan, Mar-

25. The columns headed "Probability That This Is a Chance Result" in Table V report the likelihood that the difference between observed and expected support for government, Justice by Justice, is a consequence of a sampling variation from a population of cases in which no such difference exists. Traditionally, a probability of less than five in a hundred leads the social scientist to infer that the difference is not due to sampling variation. In this case, the expected support is the average or mean support given government by all the Justices. Thus, for example, Rehnquist's support of government in 81.1% of the criminal cases studied is far above the average support provided by a Justice. The deviation is such that it could occur by chance less than one time in a hundred. Thus we would infer, initially, that some non-chance factor is operative in shaping Rehnquist's voting pattern in these cases. The chi square formula by which the probability coefficients in Table V are derived is $X^2 = \sum[(O-E)^2 \div E]$, where $X^2$ refers to chi square, $\sum$ is a summation sign, O is the observed frequency, and E is the expected frequency. For a more complete discussion see L. FREEMAN, *supra* note 23, at Chapter 18.

shall, and Douglas (unfavorable). We infer further that White and Stewart, in deciding cases involving the government and an individual, are influenced by considerations other than those we are considering. Table V indicates that these Justices' voting patterns are as nearly attributable to chance result as to the variables under study. Finally, we infer that for Justice Powell, the particular type of case is dominant over general attitude toward government-individual conflict. While Powell supports the government to a statistically significant degree in all cases involving conflicts between government and individuals, that support is statistically significant in criminal, but not noncriminal, cases. Our hypothesis, therefore, cannot be rejected for Rehnquist, Burger, and Blackmun. It can be rejected for Powell. Contrary to what might have been expected, this Justice, normally considered the most liberal of those appointed by President Nixon, appears to be the only one of four appointees who is allowing the criminal context of the case to influence his votes for governmental authority.[26]

The support patterns of Brennan, Marshall and Douglas are sufficiently skewed in the direction of voting against the government that Nixon was perhaps justified in pointing to their remarkable deviation from normal expectations. However, if the President read these patterns to mean some particular sympathy for criminal defendants, he may have been misled. For Douglas, Marshall, and Brennan, attitude toward government-individual conflict seems to have dominated both types of cases. These three Justices seem to have little sympathy for institutionalized authority as a litigant whether the context is a criminal or noncriminal case.

Given the relationships we have portrayed, it is legitimate to ask whether they are affected by other intervening variables. Here we look at only one such variable—whether the authority is state government or federal government. If governmental authority in conflict with the individual is the correct attitude object in our analysis, there is no particular reason to expect that differentiating such authority as between state and federal levels will affect the relationships portrayed. Analysis of criminal cases at two levels of government shows no significant association between the voting patterns and the level of governmental authority. For the noncriminal cases, of the six Justices whose attitude toward government-individual conflict was dominant, only Brennan distinguishes state and local authority from federal authority. The distinction is significant at the .01 level, with Brennan being considerably more "hostile" to state power (two votes for the

26. The inference for Powell is arguable given the weakness of the relation between his voting behavior and the context in which his votes were cast. It may be accepted as tentative until additional data and analysis clarify the situation further.

state in 51 chances) than to federal power (11 votes for the federal government in 29 chances).

There is nothing here to disturb the basic inferences that Justices Rehnquist, Burger, and Blackmun are object dominated while Powell is situation dominated, even though President Nixon might have chosen all on the belief that they were situation dominated in criminal cases. The fact that object dominance in criminal cases has provided the results Nixon sought at the practical level should not be allowed to obscure the theoretical dimensions of the behavior we are now observing in the Supreme Court.

The theory we have examined appears to explain the voting behavior of six of the nine Justices (excluding Powell, White, and Stewart). Each seems to have an attitude toward the object—conflict between institutionalized governmental authority and the individual—that dominates the two contextual situations examined and allows for consistent support for government or individual across issue areas. As a final method of testing this general proposition, consider the internal consistency of the support scores of the six Justices. It is clear that Justices Rehnquist, Burger, and Blackmun did not support the government at exactly the same level in both attitude situations. Similarly, identical levels of support for the individual were not found for Justices Marshall, Brennan and Douglas in criminal and noncriminal cases. However, if our theory is correct, we should find that deviations across situations are small enough to be attributed to chance. If the support level for a Justice across situations varies more than could be expected by chance, we would be forced to conclude that the attitude situation is having a significant effect upon his decisional propensities and that his attitude toward the object is not *completely* dominant.

The hypothesis to be tested here is that there is no significant difference between the support levels recorded in each situation by each of our six Justices. An appropriate method for testing this hypothesis is the difference of proportions test. Simply put, this test allows us to determine if the voting patterns of the various Justices vary significantly with the situations involved.[27] Table VI reports the results of this analysis.

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27. At a more sophisticated level, we may explain the difference of proportions test as follows. This test allows for the dyadic comparison of the two attitude situations for each of the six Justices and enables us to determine whether the differences in support level found are due to chance. The test permits the conversion of the dyadic deviations to Z scores, which in turn facilitate the evaluation of the differences with respect to the area under the normal curve. *See* H. BLALOCK, *supra* note 21, at 176.

TABLE VI

CONSISTENCY OF THE SIX JUSTICES WHOSE VOTES ARE SIGNIFICANTLY INFLUENCED BY ATTITUDE TOWARD GOVERNMENTAL-INDIVIDUAL CONFLICT (DIFFERENCE OF PROPORTIONS TEST) *Criminal and Noncriminal Case Situations Paired*

| *Justice* | *Z Score* | *Statistical Significance* |
|---|---|---|
| Rehnquist | .666 | >.20 |
| Burger | .269 | >.35 |
| Blackmun | .631 | >.25 |
| Marshall | .431 | >.30 |
| Brennan | 1.148 | >.10 |
| Douglas | .051 | >.30 |

As can be seen, for each Justice the statistical significance is greater than .10. This means that the deviation from our hypothesized voting behavior for each Justice across attitude situations can be attributed to chance. At the theoretical level, this lends further credence to the argument that a general attitude toward government-individual conflict is sufficiently strong to dominate the individual attitude situation for these six Justices.

## IV. SUMMARY AND CONCLUSIONS

It has been suggested that Supreme Court Justices often differ in the way they relate to the decisions they are required to make and that such differences cannot be explained by differences in the appointing President. For the current Court, the Justices have been found to differ among themselves in deciding criminal cases involving the individual versus the government during the 1971-73 terms. Three Justices (Douglas, Marshall and Brennan) were unusually favorable to the individual while four (Burger, Blackmun, Powell and Rehnquist) were extremely favorable to government. Since the latter group was appointed solely by President Nixon, the possibility existed that all were "in his image" or mirror images of each other. The other three Justices, however, were appointed by three different Presidents. The similarities in their voting patterns, therefore, could not be due to appointment of three fungible Justices by an ideologically calculating President. This and related knowledge about behavior variation among Justices suggested that a more refined analysis might reveal differences among the Nixon appointees.

On the assumption that the differences noted were attitudinally based, we theorized that the voting patterns of seven Justices (excluding White and Stewart) reflected their attitude toward an object (AO) and that the object was that classic conflict between institutionalized

governmental authority and the individual citizen. To test the proposition that an attitude object (AO) was responsible for the votes cast in criminal cases, we examined a second attitude situation (AS), noncriminal cases involving the individual and the government. Though the direction of the votes differed, the AO hypothesis was found explanatory for six of the seven Justices. Burger, Rehnquist, and Blackmun consistently favored government in both attitude situations. Douglas, Marshall, and Brennan were all consistent in supporting the claims of individuals in both situations. The seventh Justice, Powell, was not consistent in the two decisional contexts, leading to the inference that, for him, attitude toward situation dominated attitude toward object. Thus, the Nixon appointees were not found to be mirror images of one another.

This conclusion for the six Justices is incompatible with the notion that these Justices have merely reflected in their voting a hard or soft approach to the narrow situation of "law and order" themes or "the criminal forces" in our midst. Its theoretical significance pertains to our understanding of judicial behavior. But practical and theoretical elements are inseparably intertwined with appointing Presidents. A President who seeks to change the direction of Court decisions in a given area by judicious selection of Justices, but who limits his analysis of their background to a single dimension of behavior, may succeed insofar as that unidimensional perspective is concerned. President Nixon wanted Justices who would be more favorably inclined to support government in criminal cases and that is what he got. But if equal attention is not given to other behavioral dimensions in the pre-appointment analysis, the appointing President may experience some unnecessary surprises later. This is not to suggest that a President can ever appoint Justices who will totally reflect his philosophical position. Even if he could, changes in the Justices' positions over time may be unpredictable. The question, of course, is how to "maximize."

The answer to the problem is not obscure. The executive should first identify the behavioral dimensions likely to be of importance to his administration and, in evaluating potential nominees, conduct a thorough background analysis on each dimension. Other Presidents may have been more cognizant of this principle than was Nixon, though it is probable that none has been as systematic as we suggest here. In making such an analysis, an additional challenge is to identify correctly the dimensions on which the prospective nominee locates various types of judicial behavior. If this is not accomplished, the theoretical antecedents of approved behavior may be misunderstood. Since these antecedents are of prime importance in predicting

judicial decisionmaking in complex situations, failure here could be serious. The Nixon administration appears to have failed this challenge in three of four appointments. Seemingly, only Justice Powell has permitted the criminal law context of the case to influence appreciably the decision he will make. (While we have not investigated the matter, it is conceivable that the pro-government voting patterns in noncriminal cases of the other three appointees was neither sought nor desired by Nixon.)

Finally, our data confirms that three of the Warren Court holdovers have been unusually sympathetic to the criminal defendant as a litigant. Nixon's evaluation appears to have been accurate in this respect. But Nixon and perhaps some social scientists do not appear to have comprehended the broader theoretical explanation for the behavior observed in such cases. The failure to do so may have diluted the impact of the Nixon attack. Conceptually, the Warren Court Justices could correctly take the view that their votes in criminal cases were not a consequence of being "soft on criminals," but merely reflected an overriding concern for the rights of the individual when in conflict with his government.